REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC CIVIL CASE NO 762 OF 2003

DEEKAY CONTRACTORS LIMITED....….....…....…PLAINTIFF

VERSUS

***CONSTRUCTION & CONTRACTING LIMIT*ED…...DEFENDANT**

RULING

Review of Order

[1] The Motion dated 27th October 2014 is asking the court inter alia;

a. **To review or reverse the ruling and order made on 16th July 2014 granting leave to the Plaintiff to enforce the final arbitral award made by Brian Burton Esq. on 19th July 2003.**
b. **To order that costs of this application and the application presented to this court on 24th July 2014 to be paid by the Plaintiff.**

[2] The Motion is expressed to be brought under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, and Rule 10 of the Arbitration Rules 1995. The application is predicated upon the following grounds:-

a) That there was a glaring mistake or error apparent on the face of the record of the proceedings as the court had no jurisdiction to decide on an issue that had already been determined conclusively between the parties by the same court on 12th March 2004. The issue was, therefore, *res judicata*, and it was contrary to both the law and Constitution to re-litigate it again.

[3] The application was further supported by the affidavit of John MatereKeriri sworn on 14th October 2014 who reinforced the above ground. He averred that, the ruling dealt with other issues which had been already been determinedby Njagi, J (as he then was) in his determination dated 12th March 2004, and that therefore the decision by the court on 16th July 2014 was fatally defective in light of the former determination and the arbitral award dated 19th July 2003. In its submissions dated 11th March 2015, the Applicant argued that the Respondent did not appeal against the ruling of Njagi, J (as he then was) dated 12th March 2004, and as it stands, the court did not have the jurisdiction to make and or vary the decision through the Plaintiff's application.

The Respondent opposed application

[4] The Respondent opposed the application and filed Grounds of Opposition dated 17th February 2015 and 18th February 2015. They reiterated that there was no error or mistake apparent on the face of the record; that the application was misguided and an abuse of the process of the Court;, that the principle of *res judicata* was not applicable in the circumstances of the instant matter; and that the application had failed to establish factual or legal basis for the exercise of the right to review. It was further contended that the Court, even being of equivalent or corresponding jurisdiction, is not barred from making a different finding on an issue of law made by another Court provided that reasons are given for the decision and is only barred on a finding of a matter of fact.

[5] In its submissions dated 6th March 2015, the Plaintiff submitted that there was a misconstrued interpretation of the determination by Njagi, J dated 12th March 2014, in that the Plaintiff sought to rely on the learned Judge's *obiter dictum* and not the *ratio decidendi* as pronounced in the determination. It was submitted that in as much as the learned Judge stated that the matter had merit, it was nonetheless determined as preliminary issues of law, and that therefore the issues discussed were obiter. Further, it was submitted that the Defendant's application was frivolous, an abuse of the process of the court and vexatious. It was contended that the court had the right to make and is not precluded from making a different finding on an issue of law, notwithstanding that it is a court of equivalent or corresponding jurisdiction.

DETERMINATION

[6] The right of review is provided under Section 80 of the Civil Procedure Act and Order 45 Rule 1(1) of the Civil Procedure Rules. An aggrieved party who has not filed an appeal on a decision of the court may, file proceedings for a review of the decision. The scope of review is, however, circumscribed with the grounds set out in Order 45 Rule 1(1) of the Act, and the Court will only order review its decision if it is satisfied that:-

> **a) There was discovery of new and important matter or evidence that, despite due diligence, could not have been adduced before or was not within his knowledge, or**
>
> **b) There was some mistake or error apparent on the face of the record, or**
>
> **c) For any other sufficient reason.**

[7] The Defendant sought to rely on the ground that there was an error or mistake on the face of the record, the mistake being that the court considered a matter or issue that had already been conclusively determined by another court of corresponding jurisdiction. It is a typical call on the principle of *res judicata.*On my part, I take the following view of the matter.

[8] If the court finds that it did not have jurisdiction to determine the issues it did in the ruling dated 16th July 2014, it will not hesitate to set aside the decision in respect of the impugned matter *ex debito justitiae.* The ruling sought to be reviewed was delivered by this Court on 16th July 2014, on adjudication of the application by the Plaintiff dated 6th July 2014 which sought to enforce the arbitral award dated 19th July 2003. The Defendant contends that the ruling was contrary to the determination of Njagi, J dated 12th March 2004 and that the issues considered therein had been conclusively determined in that decision. *Res judicata*was also raised in that application. But the court dealt with the issue and rendered itself thus;

> **"Njagi, J (as he then was) was acutely aware of the correct position of the law and declined to determine any issues which befit an application for enforcement. Thus, I agree with counsel for the Defendant that the doctrine of res judicata does not arise in this matter. [20] The hands of the Court are now freed from these preliminary**

issues. Let me, therefore, determine the other substantive matters."

[9] The Court rightly observed that, the substantive issues before the Court were not before Njagi J. Again, Njagi, J may have made some observationsor *obiter dicta*on the substantive issues which this court determined.But that was not a determination of the issues in the sense of the law. The court, therefore, had jurisdiction to try the issues before it the time. I wish to state categorically as was stated in the case of **P. N. EswaraIyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889**, that review of decision is a serious step and should be resorted to only when glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. The error for which the court will review its decision should be readily discernible on the record without requiring much probing or copious explanations to ascertain. Such error must be so glaring and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process. See**Black's Law Dictionary Ninth Edition** at pg. 662 that:

> …**an error that is so apparent and prejudicial that an appellant court should address it despite the parties' failure to raise a proper objection at trial. A plain error is often said to be so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process…**

[10] The alleged error on the basis of *res judicata* was determined by the Court. The Court made a conscientious decision after careful and meticulous examination of all the issues raised and the law applicable and ruled that the issues were not *res judicata*. The same matters have been raised again and the Applicant is hopeful the court will reach a different conclusion. These matters do not constitute an error apparent on the face of the record.This is perfect example of a lost cause for which the aggrieved party will not be allowed a second bite of the cherry through review. The Court was clear in its mind that the issues it adjudicated upon were not *res judicata*. There is nothing which will impel the court to review its judgment lest it should act capriciously or on no basis. The application dated 27th October 2014 is an abuse of the process of this court and is dismissed with costs to the Respondent. It is so ordered.

Dated, signed and delivered in court at Nairobi this 11th day of June 2015.

F. GIKONYO

JUDGE