



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. APPLICATION NO. 195 OF 2013
IN THE MATTER OF THE ARBITRATION ACT, 1995 LAWS OF KENYA
AND
IN THE MATTER OF AN ARBITRATION
BETWEEN
ARCH KAMAU NJENDU T/A GITUTHO ASSOCIATES CLAIMANT
V E R S U S
CONSOLIDATED BANK OF KENYA LTD RESPONDENT

RULING

1. The Court is considering the Applicant's Notice of Motion dated 13th September 2013. By that application the Applicant seeks an order that this Court do enlarge and or extend the time within which the Applicant may file an appeal against an Arbitrators Ruling that was delivered on 20th June 2013. By that application the Applicant does also seek the stay of the arbitration.

BACKGROUND

2. The Arbitrator namely Ali A. Mandhary delivered a ruling on 20th June 2013 whereby he ruled against the Applicant's application to withdraw from the Arbitration proceedings. The arbitrator accepted his appointment on 2nd July 2010. That appointment was by Chairman of Architectural Association of Kenya. Having accepted his appointment he proceeded to have preliminary meetings with the parties and parties finally filed their pleadings before him. The Respondent however by its letter of 12th March 2013 to the Arbitrator stated-
 - a. **That the Applicant's bank never entered an agreement to the subject matter of the claim with the Claimant.**
 - b. **That Arbitration being a voluntary process the Applicant did not wish to continue to involve itself with their arbitration.**

The essence of that communication was that the Applicant withdrew participation in the Arbitration process. The gravamen of the Applicant's withdrawal was that since it was of the view that it never entered into an agreement with the Respondent there was therefore no jurisdiction for

the arbitrator to proceed with the Arbitration. It is the ruling of the arbitrator that he had jurisdiction which is the subject of the proposed appeal.

3. Section 17(6) of the Arbitration Act Cap 49 provides that an appeal against an Arbitrator's Ruling should be filed within thirty (30) days. The Applicant by the present application seeks the court to extend the period of filing an appeal having delayed in filing such an appeal for close to three months.

APPLICANT'S ARGUMENT

4. The Applicant's explanation for the delay was that it's Learned Counsel sent an e-mail to it to inform it of the outcome of the Ruling but in so doing used the wrong address. That it was because of that that the Applicant failed to file its appeal within time. From the e-mail annexed to the application it is clear that the e-mail with the wrong address was sent on 25th July 2013. That obviously was more than 30 days provided by the law. There is no other explanation given why the Applicant failed to file its appeal within time.

THE RESPONDENT'S ARGUMENT

5. The Respondent in its Replying Affidavit set out the process which was began by the Arbitrator with a view to hearing the dispute. It is the Respondent's argument that the Applicant has failed to give proper explanation for the delay in filing its proposed appeal. In the Respondent's view the Applicant by the present application is intending to delay the matter.

ANALYSIS

6. Respondent in opposition to Applicant's application correctly rely on the case **GICHANA GATHUKU –Vs- DAVID KOMU & 3 OTHERS [2007]eKLR** where the Court of Appeal set out the considerations that the Court should have when considering an application to file an appeal out of time. The Court in that case had this to say in respect of an application before it-

“The principles upon which an application under rule 4 is considered are now fairly well settled. I take it from this Court’s decision in Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appl. No. NAI. 332/04 (UR) which was a reference to the full Court-

‘The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003]KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000(UR) and Murai v Wainaina (No 4) [1982]KLR 38.’

7. The Respondent also in opposition to the application relied on paragraph A7 of the Fourth Schedule of the Architects and Quantity Surveyors Act. In so doing Respondent argued that that paragraph provides that where disputes arise and the charges payable to an Architect cannot be determined that such disputes should be referred to an Arbitrator.
8. The principles set out in the case of **GICHANA** (supra) relate to the provisions of The Court of Appeal Rules. They have indeed been applied in the cases before other Courts. As rightly stated by the Respondent the Applicant has failed to prove proper reasons for the reasons for the delay for a period close to three months. It has not however escaped my mind that the issue raised by

the Applicant before the Arbitrator was whether or not the Arbitrator had jurisdiction to hear the matter. Jurisdiction as stated in the case of **LILLIAN 'S'** Case is everything. The Supreme Court in the case **RE: MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011]eKLR** had this to say on jurisdiction-

“[30] The Lillian ‘S’ case [Owners of Motor Vessels ‘Lillian S’ Vs. Caltex Oil (Kenya) Ltd [1989]KLR 1] case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

9. Bearing in mind what the Courts have often held in regard to jurisdiction I am of the view that the delay caused by the Applicant in filing its proposed appeal can be excused to enable this Court determine whether the Arbitrator has jurisdiction to entertain the parties alleged dispute.

10. I have looked at paragraph A7 of the Architects and Surveyors Act and in my view an Arbitrator would be appointed to arbitrate on a matter where there is a dispute arising out of the condition of engagement. In this case, as I understand the Applicant's submissions, it is that the parties had no engagement at all and it is on that basis that the Applicant argued before the Arbitrator that the Arbitrator lacked jurisdiction. In the interest of justice it is important for this Court to be given an opportunity to determine whether indeed the Arbitrator has jurisdiction or otherwise over the dispute between the parties.

11. It is for the above reasons that I grant the following orders-

- a. **The Applicant is granted fourteen (14) days from the date of this Ruling to file an appeal against the Ruling of an Arbitrator delivered on 20th June 2013.**
- b. **There shall be stay of arbitration proceedings pending the determination of the proposed appeal or pending further orders of this Court. For the avoidance of doubt if the Applicant does not file an appeal within the period stated in (a) above the stay granted herein shall be automatically lifted.**
- c. **The Applicant shall pay the costs to the Respondent of the Notice of Motion dated 13th September 2013.**

DATED and DELIVERED at MOMBASA this 9TH day of OCTOBER, 2014.

MARY KASANGO

JUDGE