

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 279 OF 2019

(CONSOLIDATED WITH MISC. APPLICATION NO. 277 OF 2019)

THE COUNTY ASSEMBLY OF VIHIGA.....APPLICANT

VERSUS

KENCHUAN ARCHITECTS LIMITED.....RESPONDENT

RULING

1. The proceedings herein relate to an arbitral award made on 8th May 2019, in a dispute pitting the respondent, on one part, against the applicant and the County Government of Vihiga, on the other, for a consolidated figure of Kshs. 25, 665, 268.43, plus interest, in favour of the respondent. Kakamega HC Misc. Applic. No. 277 of 2019 was initiated by the respondent seeking to enforce the award of 8th May 2019; while Kakamega HC Misc. Applic. No. 279 of 2019 was initiated by the applicant against the respondent seeking that the said arbitral award be set aside. The two causes were consolidated vide an order made herein on 20th December 2019.

2. The application that I am called upon to determine is the Motion dated, 19th February 2020, brought at the instance of the Ethics and Anti-Corruption Commission, to be referred hereafter as the Commission, seeking the joinder of the Commission as an interested party, essentially on grounds that the Commission has been conducting investigations relating to claims that the contract the subject of the arbitral award had been awarded irregularly. Details of the alleged irregularities are given in the affidavit sworn in support of the application, by Nicholas Koech, an investigator with the Commission. He avers that the contract the subject of the suit was awarded irregularly as there was no competitive bidding, the relevant tender committee was not involved in the process, the respondent was not duly registered with the relevant authorities, among others. He has attached documents from the Office of the Auditor-General to support the Commission's case.

3. The respondent has responded to the application, through its director, David Wekesa Situma. He avers that the application is a ploy designed to delay settlement of the arbitral award. He states that the issues raised in the application, by the Commission, were canvassed by the applicant in the arbitral proceedings and fully adjudicated upon by the arbitrator. He states that the Commission was aware of the proceedings before the arbitrator, and should have presented himself before arbitrator to argue his case, saying that officers had been to the offices of the respondent making enquiries about the contract, and they recorded statements from officers of the respondent. The said officers allegedly cleared the respondent of any wrongdoing, and no charges were ever brought against the firm. He has attached copies of the statement recorded from him by the officers of the Commission, the pleadings filed before the arbitrator, the contract between the parties and other relevant documents. .

4. I have carefully perused through the file of papers before me. I have not come across a reply from the applicant.

5. The parties appeared before me on 20th July 2020. They agreed that the Motion dated 19th February 2020 be canvassed by way of written submissions. The record reflects that the Commission filed its written submissions, dated 21st July 2020, on 23rd July 2020, complete with a list of documents. The respondent's written submissions are dated 26th July 2020, and were filed on 27th July 2020, complete with a list and bundle of authorities. I have scrupulously perused through the file before me, and I have not encountered any written submissions filed by the applicant. I have read through the written submissions and the authorities cited, and I have noted the arguments made.

6. The issue before me is fairly straightforward, whether I should order the joinder of the Commission as an interested party.

7. The Commission was not party to the contract the subject of the proceedings, its interest is limited to the investigations that it claims it has been conducting into the regularity of the said contract. The applicant submitted to the arbitration, and participated in it, right up to the point that the award was published. The arguments that the Commission articulates in its application were, from the pleadings that were before the arbitrator, similar or the same as those articulated by the applicant. They are nothing new. The Commission appears to be arguing the same case that the applicant had before the arbitrator. The issues were articulated by the applicant before the arbitrator, in its statement of defence and were canvassed, and the arbitrator, from the language of the arbitral award, took them into account in the final determination.

8. Secondly, the Commission, from the material on record, had began investigations into the matter before the arbitral proceedings were initiated. It did not take any action against the respondent before then. It would appear that, again from the material placed on the record before me, especially the correspondence exhibited by the respondent, and in particular the letter dated 25th September 2018, that the Commission was aware of the arbitral proceedings. It had the option, then, of moving the court to stop the said proceedings to await completion of its investigations, or, if permissible, to seek to be joined to the arbitral proceedings, or to seek to testify or adduce evidence before the arbitrator on the issues that it is now raising. The cause before me is for enforcement of the award by the arbitrator. The court will not be conducting any hearing on the facts of the matter. That was done before the arbitrator. If the Commission was interested in participating at the actual hearing, or intervening at the trial of the facts, it should have done so when the case was active before the

arbitrator.

9. The arbitration proceedings involved the applicant and the respondent. The Commission was not party to the arbitral proceedings. Consequently, there can be no place for it at this point, when the only question before the court is enforcement of the award. Only the parties who participated in the arbitral proceedings have standing to litigate at this stage. The joinder of the Commission to these proceedings is not going to assist the court or add value to the matter in anyway. It would have been more profitable if it had joined the proceedings at the arbitration stage. The arguments that it proposes to place before the court can competently be presented and articulated by the applicant.

10. I need not say more. I find no merit in the Motion, dated 19th February 2020. The same is for dismissal, and I hereby dismiss the same, with costs.

11. Let the matter be listed for hearing, for the purpose of highlighting of the written submissions on the main application, as per the directions of 20th December 2019, or for mention for allocation of a date for ruling on the subject applications, should the parties be minded not to highlight their written submissions. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2nd DAY OF .October, 2020

W. MUSYOKA

JUDGE