REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Application 166 of 2009

SAMUEL KAMAU MUHINDI…………………..CLAIMANT

VERSUS

BLUESHIELD INSURANCE CO. LTD….......RESPONDENT

RULING

A dispute arose between the claimant and the respondent in regard to whether the claimant was entitled to one (1) million shares in the respondent company. The parties agreed to refer the dispute for determination by arbitration. In accordance with the agreement, the chairman of the Chartered Institute of Arbitrators, Kenya branch appointed Njeri Kariuki as the sole arbitrator to determine the said dispute. By her final award dated 6th February 2009, the arbitrator substantially found in favour of the claimant. The arbitrator found that the claimant was entitled to one (1) million shares in the respondent company. She further held that the applicant was entitled to be paid dividends in respect of the said shares for the years 2004, 2005 and 2006. She calculated the dividends that was payable to the claimant by the respondent at Kshs.20,232,293.75. She ordered the respondent to pay interest on the unpaid dividends at the rate of 20% per annum from the date the said dividends became due. The claimant was awarded costs of the arbitration.

The claimant applied to this court for the adoption of the arbitrator's award as the judgment of this court. On its part, the respondent made an application to set aside the said award of the arbitrator. The two applications are yet to be heard. On 15th May 2009, the claimant made an application under certificate of urgency purportedly under the provisions of **Section 3A** of the **Civil Procedure Act,** and **Rules 4(2)** and **11 of the Arbitration Rules** seeking orders of the court to compel the respondent to deposit, as security, the sum of kshs.44,238,548.30 awarded by the arbitrator, in court, pending the hearing and determination of the application seeking the enforcement of the arbitrator's final award as the judgment of the court. The claimant further sought orders of the court to compel the respondent to issue shares certificates in the name of the claimant in respect of one (1) million shares awarded to the respondent in the final award. The claimant further prayed for an order of the court restraining the defendant, by its directors or employees from disposing off, charging or pledging the shares of the company in such a manner that would be adverse to the claimant's one (1) million shares in the respondent company. The application was supported by grounds stated on the face of the application and the supporting affidavit of the claimant. The main ground in support of the application was that the claimant was apprehensive that the respondent, being in a precarious financial position and on the verge

of collapse, would be unable to settle the award at the time the pending applications will be heard and disposed off and therefore defeat and render nugatory the said award made in favour of the claimant.

When the advocate for the claimant appeared before the court, the court granted the claimant's application seeking to compel the respondent to issue in the name of the claimant a share certificate or share certificates in respect of the one (1) million shares in the respondent company awarded to the claimant by the arbitrator. The respondent was further restrained from dealing with the shares of the company in a manner that would adversely affect the claimant's one (1) million shares in the company. The orders were issued *exparte* pending the hearing and determination of the application.

When the respondent was served with the order, it filed an application under **Rules 4** and **11** of the **Arbitration Rules, 2007, Section 80** of the **Civil Procedure Act** and **Order XLIV Rule 1** of the **Civil Procedure Rules** seeking to review and the setting aside of the *exparte* order issued in favour of the claimant directing the respondent to deposit in court the shares certificate in the name of the claimant in respect of one (1) million shares. The respondent claimed that important matters of evidence were not brought to the attention of the court at the time the order was issued, namely that there was no share certificate in existence that had been issued in the name of the claimant. The respondent contends that the issuance of the said share certificate would have to be effected by other persons and the same registered. The respondent took issue with the fact that the claimant had failed to disclose this fact to the court at the time he sought the *exparte* order. It was for these reasons that the respondent sought to review the said order of the court so that the current *status quo* may be maintained pending the hearing and determination of the substantive applications in regard to the fate of the arbitrator's award.

The respondent's managing director Patrick Kulova Wanjala swore a replying affidavit in response to the claimant's application. The respondent further filed notice of preliminary objection to the claimant's application. In response to the respondent's application, the claimant filed a replying affidavit. The counsel for the claimant, Mr. Njoroge Regeru and the counsel for the respondent Mr. Nowrojee agreed by consent for the two applications to be heard at the same time. Prior to the hearing of the two applications, the said learned counsel agreed to file written submissions in support of their respective opposing clients' cases. The said submissions were duly filed. I will give a brief summary of what I understood to be the gravamen of the claimant's application. According to the claimant, the arbitrator has made a final award in his favour. The claimant was apprehensive that before the said final award by the arbitrator is enforced as the judgment of this court, the respondent company would have gone under and thereby render the award made in his favour worthless. The claimant cited a litany of events that have transpired in the recent past, which in his view, pointed to the respondent's precarious financial position. The claimant annexed copies of newspaper articles which suggested that the respondent was on the verge of collapse due to its financial liquidity problems. He gave instances where advocates had issued notices to wind up the respondent on account of its failure to settle insurance claims.

The claimant further deponed that the respondent's offices across the country had been "*infested with auctioneers who are attaching the properties and assets of the respondent*" presumably in satisfaction of decrees issued by the court in favour of claimants whose insurance claims had remained unsettled or unsatisfied. It was the claimant's case that the respondent was in dire financial straits on account of the fact that the cheques it had issued to claimants had been dishonoured. The claimant annexed copies of cheques which were issued by the respondent to various claimants but were returned unpaid. The claimant deponed that the respondent was no longer unable to pay claims within the statutory ninety (90) day period as is provided under the **Insurance Act**. The claimant pointed out that the respondent was transferring its assets to its sister companies with a view to frustrating any recovery process that may be commenced against its assets.

It was in light of the above incidences that the claimant was of the view that unless his claim as contain in the final award of arbitrator is secured, by the time the court grants his application seeking the enforcement of the award, the respondent would no longer be in a position to settle his claim. He therefore urged the court to direct the respondent to deposit the said sum in court pending the hearing and determination of the outstanding applications.

In response to the claimant's application, it was the respondent's case that it was financially sound and had indeed paid claims exceeding the sum of Kshs.1 billion. The respondent brushed off the assertion by the claimant which was the effect that the various attachments of its assets was evidence of its financial illiquidity. The respondent explained its current cash flow problems to be on account of the unfavourable economic growth and multiplicity of claims filed by claimants. The respondent explained away the issue of bounced cheques by stating that their bankers had unpaid the cheques due to a computer glitch. The respondent denied that it had engaged in activities that evidenced its precarious financial situation by allegedly transferring some of its assets to third parties. The respondent explained that the said transfers were effected to enable the respondent satisfy its liabilities to the transferees and did not have anything to do with whether or not the respondent was in financial difficulty. The respondent was of the view that the claimant had relied on unrelated information in a desperate attempt to paint the respondent as being at the verge of collapse due to the alleged financial difficulty.

I have carefully evaluated the rival positions taken by the parties to this application. I will first deal with an issue that was raised by Mr. Nowrojee in regard to the competence of the claimant's application. According to Mr. Nowrojee, although **Section 37(2)** of the **Arbitration Act, 1995** grants this court jurisdiction to order that appropriate security be provided, he submitted that since the claimant had failed to invoke the correct procedure his application should be disallowed. **Section 37(2)** of the **Arbitration Act, 1995** provides as follows:

"*If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security*."

Under the above section, this court has discretion to require any party to arbitral proceedings whose award is pending enforcement in court to provide appropriate security. The circumstances under which the court can order a party to provide security was set out by the Court of Appeal in the case of **Messina & Anor vs Stallion Insurance Co. Ltd [2005] 1KLR 431.** In the case, it was held that security should not normally be ordered on grounds of poverty. Any litigant, however poor, should be permitted to bring proceedings without hindrance and have his case decided. This applies to individuals and not to limited liability companies. In the case of limited liability companies, under **Section 401** of the **Companies Act**, the court has discretion, where good grounds are established, to order that security be provided pending the hearing and disposal of any issue that may have arisen prior to the enforcement of the arbitrator's award as the judgment of the court.

In the present application, I was not persuaded by the procedural objection raised by Mr. Nowrojee to the claimant's application. Although the claimant did not specifically state the applicable section of the **Arbitration Act, 1995** in his application, I hold that this court has jurisdiction to hear and determine the application whether the respondent should provide security pending the hearing and determination of the outstanding applications. I hold that failure by the claimant to specify the applicable section of the law does not deprive this court of jurisdiction and discretion to determine the matters in issue on its merit.

It was clear to this court that the claimant has a case when it alleges that the respondent appears to be in financial difficulty and therefore unlikely to be in a position to satisfy the decree that may emanate from this court if the arbitrator's award is adopted. Under **Section 67C(1)(e)** of **Insurance Act**, an insurance company is required to pay to the insured any amount due in a judgment entered into in an action in Kenya arising out of a policy of insurance issued by the said insurance company. In the present application, it was evident that the respondent has been unable, in the several instances pointed out by the claimant, to meet its obligations arising out of judgments of the court in relation to its policies of insurance.

I was not persuaded by the argument advanced by the respondent that attachment of an insurance company's assets pursuant to a decree of the court is a normal hazard in the insurance industry. I think, with the greatest respect to the respondent, that such attachments of the respondent's property pursuant to warrants of attachment issued by the court, portend, and is symptomatic of the financial malaise that the

respondent is currently operating under. It is not normal for any company undertaking commercial enterprise to be confronted with winding up notices. Neither is it an every day occurrence that a reputable bank would dishonour cheques issued by a company which is not in financial distress. I am of the view that the claimant has established a case to warrant this court to grant the application for security pending disposal of the pending applications.

The respondent foisted spectre of the existence of another suit between itself and the claimant in a bid to defeat the claimant's application. I have looked at the pleadings filed by the parties in the said suit being **Nairobi HCCC No.594 of 2005 Samuel Muhindi Kamau vs Blueshield Insurance Co. Ltd**. It is evident that the thrust of the claimant's claim in the suit is compensation on account of an alleged breach of contract and defamation that arose from the claimant's termination from employment by the respondent. The claimant prayed to be awarded, *inter alia*, the sum of Kshs.44,504,854.56. In the suit, the respondent counterclaimed for the sum of Kshs.229,665,459.03 which it claims is the special damages it suffered on account of what it alleges to be the claimant's illegal, fraudulent and professionally negligent practices. It was the respondent's case that security cannot be ordered in the instant proceedings when there was a pending suit where the respondent was claiming an amount that was more than the one sought by the claimant in this case.

I think the respondent's argument is disingenuous. The claimant's claim against the respondent has crystallized in form of an arbitral award. Although the award is yet to be adopted as a judgment of this court, the claimant's position cannot be compared to that of the respondent in a suit where the respondent is yet to establish its claim. The pleadings filed by both the claimant and the respondent in that suit are but mere allegations which are yet to be proved. In any event, this court does not see any connection between the current proceedings which relate to the claimant's claim of shares in the respondent company and the pending suit which relate to the issue of the termination of the employment of the claimant and the resultant consequential fall out.

If the court were to use the analogy of a person who is preparing to eat a meal, in the present proceedings, the food is already served and what is remaining is for the grace to be said before the meal is taken. In the case of the pending suit between the claimant and the respondent, the various ingredients that will be used to prepare the meal is yet to be purchased and therefore it cannot be said that the food is at the table ready to be served. Of course, the food can be withdrawn from the table before it is eaten if the respondent succeeds in its application to set aside the arbitral award. I therefore hold that the claimant has a legitimate concern at this particular stage of the proceedings regarding whether the respondent will be in a position to satisfy the judgment and decree of this court in the event that he is successful in his bid to have the arbitrator's award adopted as the judgment of the court.

As regard whether the claimant was guilty of material non- disclosure of facts which could have influenced the court to reach an appropriate decision in regard to the application, having carefully evaluated the facts of this case, I hold that the claimant disclosed all the facts necessary to entitle the court reach an informed decision in respect of the matter that is the subject of the application. I hold that the duty to disclose all facts material to the application does not impose upon the applicant an obligation to put before the court matters which are peripheral or matters that are not germane to the application. The respondent's complaint that the claimant ought to have made certain disclosures to the court and is therefore disentitled to the orders sought in the application is without merit. I will therefore allow the claimant's application in terms of prayer 2(a) of the application dated 14th May 2009. The respondent is ordered to deposit in a joint interest earning account the sum of Kshs.44,238,548.30 in reputable bank within fourteen (14) days of today's date.

As regards the respondent's application seeking to review the *exparte* order issued by this court on 14th May 2009, I am of the view that the respondent has made a just case for the setting aside of the said order. I think the order issued by the court in regard to the deposit in court of the share certificate or share certificates in the name of the claimant in respect of the one (1) million shares that was awarded to the claimant by the arbitrator's award was prematurely issued. Such an order can only be made during the enforcement of the arbitral award. The issuance of the said order will prejudice the pending application by the respondent seeking to set aside the arbitral award. I therefore set aside the order issued by this

court on 14th May 2009 in its entirety. The prayer sought by the claimant in regard to the shares can only be granted after the arbitral award has been adopted as the judgment of this court. Costs shall be in the cause.

It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2009.

L. KIMARU

JUDGE