Arbitration award

- *Delay in entering Judgment in terms of the Award*
- *Dismembering the GORDIAN KNOT*

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 177 OF 2017 (FORMERLY HCC NO.120 OF 1998)

LAWRENCE KINYUA MWAI.....PLAINTIFF

VERSUS

NYARIGINU FARMERS CO. LTD.....1ST DEFENDANT

PATRICK MWORIA.....2ND DEFENDANT

CONSOLIDATED WITH

FORMERLY HCC NO. 141 OF 1988)

LAWRENCE KINYUA MWAI.....PLAINTIFF

VERSUS

NYARIGINU FARMERS CO. LTD.....1ST DEFENDANT

PATRICK MWORIA.....2ND DEFENDANT

RULING

Background

1. This file holds a dubious record of being one of the oldest cases in this court and perhaps in this country, the same having been lodged over 30 years ago in 1988! The lifespan of this voluminous file is anchored on nothing else but applications and preliminary objections mainly filed by the plaintiff herein. Through these applications, the plaintiff has by being crafty managed to successfully create an intricate web, convoluting the dispute so much that whenever a Judge attempts to finalize the case, he throws in a salvo accusing the judge of one thing or another. I have not been spared and being the current Judge seized of the matter, I am the latest target of the plaintiff's accusations. Despite this not so flattery history and notwithstanding these accusations, this court has a constitutional duty to carry out its mandate without fear or favour.

2. The genesis of this dispute is rooted in the **Arbitration Award** which was filed in court on **23.7.1992**, but the same has never been implemented. Years earlier, the plaintiff had filed the two suits, case no. **120/1988** on **1.8.1988** and case no. **141 of 1988** on **31.8.1988** in Meru High Court. The two suits were later consolidated.

3. The dispute was referred for arbitration culminating in the filing of the award in this court. The award was not read in court until **30.5.2011**, a duration of 19 years from the time it was filed on **23.7.1992**. Defendant seeks to have the award entered as a judgment of the court whereas the plaintiff desires to have the award set aside.

4. This ruling is in respect of applications which are several years old, one dated **1/12/2011 (8 years old)** filed by the defendants and the other one dated **16/12/2015 (4 years old)** filed by the plaintiff respectively. The journey leading to the hearing of the two applications has been treacherous hampered by even more applications and preliminary objections all of them filed by the plaintiff thus convoluting the

matter further. In order to put this issue in a better perspective, I have found necessary to list **SOME** of the applications and preliminary objections filed by the plaintiff since year 2011 when the application to have the arbitration award adopted as a Judgment was filed. The said applications and preliminary objections are itemized as follows;

(i) Application filed on 19.12.2011 for orders not to be evicted.

(ii) Application dated 13.12.2013 for recusal of a judge.

(iii) Application filed 3.7.2012 expressing no confidence in the judicial officer.

(iv) **Application filed 16.10.2013 to set aside arbitral award.**

(v) Application filed 18.9.2014 for judge Makau to disqualify himself.

(vi) Preliminary Objection filed on 25.6.2015 to oppose application dated 1.12.2011.

(vii) **Application filed 25.6.2015 to set aside the arbitral award**.

(viii) **Application filed 29.6.2015 to set aside arbitral award**

(ix) Preliminary objection dated 29.6.2015 objecting to the mention of an application coming up on 7.7.2015.

(x) **Application dated 16.12.2015 and filed on 17.12.2015 seeking orders inter-alia to have the arbitration award expunged (one of the two applications which are the subject of this ruling).**

(xi) Application filed 10.11.2016 for judge Gikonyo to recuse himself.

(xii) Application filed 1.3.2017 to set aside the rulings of Judge Gikonyo.

(xiii) Application filed on 19.6.2017 for stay of the award.

(xiv) Application filed on 19.6.2017 for leave to appeal.

(xv) **Application filed on 5.7.2018 to set aside the arbitral award.**

(xvi) Application filed 29.6.2018 to set aside the rulings of Judge Kasango and Judge Lesiit.

(xii) **Application filed on 15.9.2018 to set aside the arbitral award**.

(xviii) Application filed on 3.7.2019 for Judge Mbugua to disqualify herself.

5. These are 18 applications and Preliminary Objections and I cannot state with certainty that they are the only applications filed since year 2011. These are the ones I could get hold of considering that the file is now very voluminous and tracing each and every document is an uphill task. It must also be noted that before the two applications, (the ones I am dealing with), there existed very many other applications which I will not high light unless they have a bearing on this ruling.

The application dated 1/12/2011

6. This Notice of Motion is brought pursuant to provisions of ***Order 46 Rule 18 (1) & (2) of the Civil Procedure Rules, Section 1A & 1B of CAP 21 and Article 159 (2) of the Constitution***. The applicant/defendant seeks orders that the arbitration award filed on **23/07/1992** and read in court on **30/05/2011** be entered as a judgment of the court.

7. The grounds in support of the application are that the arbitration award was read on **30.5. 2011**. However, the plaintiff filed an application to set the award aside which application was dismissed on **19.10.2011**. The 2nd defendant, Mwebia Nkaabu also filed a supporting affidavit sworn on sworn on 1/12/2011, where he reiterates the averments set out in the application. Defendant contends that the award ought to be entered as a judgment of the court.

8. The plaintiff, Lawrence Kinyua Mwai, through his replying affidavit sworn on 2/05/2012 deponed that the application to enter judgment should be dismissed as it lacks merits. He stated that the Civil Procedure Rules were not followed as all the required parties concerned were not served before the application was heard in court, that is Nyariginu Farmers Company and Kabaragu Muita. The plaintiff desires that Mr. Mwebia and or his advocate should strictly prove that all parties were aware of the reading of the award.

The application dated 16.12.2015

9. The second application dated 16/12/2015 filed by the plaintiff seeks the following orders:

a) **The court be pleased to grant leave for the applicant to file a further affidavit of objection to enter the award as a judgment.**

b) **The court be pleased to summon former Rift Valley Commissioner, P. C Mr. Yusuf Haji, the arbitrator of the award and Rift Valley Province Chairman Mr. R. K Mabil.**

c) **The plaintiff to be supplied with the court instituted court order and its forwarding summons.**

d) **TO EXPUNGE THE ARBITRATION AWARD.**

e) **Costs be provided for.**

10. Although the plaintiff has combined many other prayers in this application, it must be noted that he has also sought to have the arbitration award expunged and this is actually what he has been seeking all along.

11. The grounds in support of this application are in its body and the supporting affidavit of the applicant sworn on 16/12/2015. It is contended that the award should be expunged as it had no date, official headlines, seal, rubber stamp, signature of arbitrator or minutes to show the recording. That his witness was chased away and was not allowed to enter the board room where the elders were sitting. There was no appointed arbitrator as directed by the court and agreed venue was changed against the order. That the chairman was very drunk with alcohol and he could not manage the arbitration process. The arbitration elders were related directors of Nyariginu Farmers Co. Limited and thus he did not get justice since they were bribed making the award a forgery. The court never instituted any order for the arbitration to PC Rift Valley province in respect of the two cases Meru **HCC Case No. 120 of 1998** and **Meru HCC Case No. 141 of 1988** to prepare the award.

12. Both applications were canvassed by way of written submissions. The defendant in their submissions submitted that by consent on **29/12/1989** the suits were consolidated and the parties referred to arbitration. That the application dated 16/12/2015 is defective as it does not state under what provisions of the law it is grounded upon. What's more the application cannot be said to be a review of earlier court orders since the same issues have been canvassed and determined by the court in the plaintiff's application dated 17.6.2010 in the ruling dated **19/10/2011** by **Lesiit J**. Thus this application is an afterthought only meant to delay the suit. The only remedy is to appeal and not in filling numerous applications. Thus, the application dated 1.12.2011 should be allowed.

13. The plaintiff submitted by firmly reiterating what he had stated of which this court has taken due consideration of. He urged the court to set aside the arbitral award and allow the case to continue and dismiss the application of 1/12/2011.

Analysis and Determination

14. The issues for determination are: ***whether to expunge the arbitral award*** or ***whether to enter the award as a judgment of the court.***

15. The first issue is whether to expunge the arbitral award. According to the plaintiff, the making of the award was flawed by irregularities and illegalities that is why he seeks to have it expunged. However, I find that these faults are the same ones he raised in his prior applications for instance the one dated 17.6.2010 which was dealt with by **Lesiit J** where in her ruling delivered on **19/10/2011** she addressed and determined all the issues raised by the plaintiff. The plaintiff thereafter filed a similar application on **14.10.2013**, whereby in a ruling by **Judge Makau** delivered on **9.4.2014**, the application was dismissed. In particular, page 8 of the said ruling captures reasons as to why the application was not merited where it is stated that; **"the applicant is guilty of laches and he cannot blame any other person for the delay save himself".**

16. It is quite apparent that the issues raised by the plaintiff in this application dated 16.12.2015 were determined by previous judges who have handled this matter. **Section 7 of the Civil Procedure Act** stipulates that;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

17. In the case of **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others Nairobi CA Civil Appeal No. 105/2017 (2017) eKLR,** the court of appeal explained the doctrine of res judicata as follows;

> "***The rule of doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice".***

18. If this court was to determine the merits of the application filed on **16.12.2015**, it would amount to sitting in an appellate platform, clothing this court with attires which it does not have! It is not lost to this court that even after filing the application of **16.12.2015**, the plaintiff has filed similar applications which can be seen in bold markings in the list in **paragraph 4 herein**. What the applicant does is to slightly change the wordings or to add more prayers in an application but the common thread running in these applications is that he wants

the arbitral award to be set aside.

19. However, litigation has to come to an end one way or the other however painful it may be. In the case of **Benson Ngugi vs Francis Kinyanjui and others CA no. 1/1986 Nakuru the court** held that;

> ***"In law any litigation has to come to an end. Once a decision has been reached by a competent court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. It can only be challenged on appeal"***

20. It is clear from the foregoing analysis that the issues raised by the plaintiff in the application dated 16.12.2015 are res judicata and therefore the application is not merited.

21. The second issue is whether the arbitral award should be entered as a judgment of the court. This matter began way back in 1988 and yet it is still in court, marking time over thirty (30) years later. The filing of this application dated **1.12.2011** by the defendant appears to have triggered a new wave of applications by the plaintiff fervently seeking disqualification of judges (including myself), setting aside of the award, stay of execution and also stay to file appeal out of time.

22. In exercising its judicial authority this court has a duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our constitution is "**the expeditious delivery of justice" –see Article 159 (2) (b) of the Constitution of Kenya,** which in effect codifies the 17th century maxim **"Justice delayed is justice denied**". This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide.

23. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print **"Sustaining Judiciary Transformation** - (**SJT 2017 - 2021)"** where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases which had clogged the justice system for many years. The matters identified as falling under this category were cases which were five years old and/or older by the year 2017 - 2018. The Meru ELC court was one of the hardest hit stations with a huge back log of old cases. Against this background, the station undertook the exercise of clearing the backlog very seriously where service weeks were conducted by visiting Judges throughout the year 2018. That is why this matter was presented before a visiting Judge, Honorable Justice Mwangi Njoroge (ELC - KITALE) who on **22. 6.2018** identified the two applications, the one of **1.12.11** and the one of **16.12.2015** as the only pending issues in this file**.** This is what formed the basis of my directions that these were the only applications to be considered by this court.

24. The circumstances of this case where the dispute has been in the legal arena for decades demand that this court imposes **Active Case Management** in order to achieve the overriding Objective set out under **section 1A** and **1B** of the **Civil Procedure Act** even if it appears to be rather late in the day to do so, in order to have a closure in this file. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the **overriding objective** is achieved.

25. Active Case management enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.

26. Active Case management is also the effort by courts to handle cases in such a manner that they are resolved fairly and as promptly and economically as is reasonable in the circumstances of the case. The fairness part can be found within the notion of **procedural justice** while the promptness and economics part of the case management can be found within the notion of the **efficiency of justice**. Efficiency of justice implies that justice is done at reasonable costs to the parties and the court and within a reasonable time, that is without an abnormal delay. Procedural justice concerns the fairness, consistency and the transparency of the processes by which progress in a case is made.

27. It is rather astounding that the plaintiff chose to litigate in this court for all these years without challenging the various rulings and orders in the Court of Appeal, particularly the ruling of **30.5.2011** where the award was read in court.

28. In light of the foregoing analysis, and taking into account the Active Case Management principles and techniques, I will now proceed to forcefully dismember the **GORDIAN KNOT** which has choked this file for decades by not only allowing the application dated 1.12.2011, but by giving other directions geared towards bringing a closure to this matter.

29. **Final orders**

1) The application dated 16.12.2015 is hereby dismissed.

2) The application dated 1.12.2011 is hereby allowed and Judgment is entered as prayed in terms of the Arbitration Award read in court on 30.5.2011.

3) All other pending applications in this file are hereby DISMISSED.

4) This court will not entertain any other applications in this suit UNLESS such applications are geared towards the implementation of the judgment of this court.

5) The applicant is to blame for the inordinate delay in the finalization of this matter. He is therefore condemned to pay the

costs of the two applications and the entire suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutunga for 2nd defendant

HON. LUCY. N. MBUGUA

ELC JUDGE