REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: M'INOTI, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 81 OF 2016

SYNERGY INDUSTRIAL CREDIT LTD.....APPELLANT

VERSUS

CAPE HOLDINGS LTD.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kariuki,

J.) dated 11th March 2016

in

HC MISC CAUSE NO. 114 of 2015

(consolidated with HC MISC C NO. 126 of 2015))

RULING OF THE COURT

This ruling determines the Motion on Notice dated 25th September 2020, taken out by the ***Respondent, Cape Holdings Ltd.*** The respondent prays for review or rescission of the order of this Court dated 22nd July 2020 which dismissed its application for adjournment of the hearing of the substantive appeal scheduled for that date and directed the same be heard and determined on the basis of written submissions filed by both parties. The respondent seeks a further order that upon review and rescission of the order of 22nd July 2020, it be granted an opportunity to highlight its written submissions.

The background to the application is shortly as follows. On 30th January 2015 an arbitral tribunal awarded ***the appellant, Synergy Industrial Credit Ltd,*** substantial amounts of money against the respondent for breach of contract. The respondent applied to the High Court under ***section 35*** of the

Arbitration Act to set aside the award and by a ruling dated 11th March 2016, the High Court set aside the award, holding that the arbitral tribunal had exceeded the scope of its mandate.

The appellant was aggrieved and lodged an appeal in this Court, but the same was struck off on the basis that there was no right of appeal and therefore the Court did not have jurisdiction to entertain the appeal. Undeterred, the appellant proceeded to the Supreme Court, and by a judgment dated 6th December 2016, the Supreme Court reversed the decision of this Court and directed it to hear and determine the appellant's appeal. Part of the order of the Supreme Court directed as follows:

> ***"(c) An order is hereby issued directed at the Court of Appeal to expeditiously and on a priority basis proceed to determine on merits the Petitioner's appeal in Civil Appeal No. 81 of 2016." (Emphasis added).***

Back to this Court, the parties were directed to file written submissions, and they duly complied. The appeal was listed for highlighting of the submissions on 17th June 2020 before a bench comprising ***Ouko (P)., Gatembu*** and ***Sichale, JJ.A***. On the morning of the hearing, the respondent applied for the President of the Court to recuse himself on the basis that the arbitrator had acted for him some ten years previously. Although the appellant strongly opposed the application for recusal as a belated attempt to further delay disposal of the appeal, the court granted the respondent's wish and the President recused himself. The Court then directed as follows:

> *"It is for this reason that this appeal is taken out with the order that it be re-listed in the month of July on account of its age and the next bench to exclude Ouko, P."*

The appeal was next listed for highlighting of the submissions before us on 15th July 2020. When the appeal was called out, ***Mr. Mwangi***, learned counsel for the respondent, applied for further adjournment on the basis that he was unwell and needed to consult a doctor, fearing that he may have contracted Covid-19. The appellant, once more vigorously opposed the application for adjournment, and urged us to determine the appeal on the basis of the written submission, if the respondent was not ready to highlight the same. Nevertheless, we granted the respondent one more chance to highlight its submissions and directed as follows:

> *"Taking all the foregoing into account, we shall adjourn the hearing of this appeal to Wednesday, 22nd July 2020 at 2.30 pm to enable counsel for the respondent seek medical attention. In the event that any of the parties is not ready to proceed on that day, we shall determine the appeal on the basis of the written submissions on record. It is so ordered.*

On 22nd July 2020, ***Mr. Makori,*** learned counsel appeared before us and informed us that Mr. Mwangi had taken a Covid-19 test and was awaiting the results. Two members of staff in their office had however tested positive and the firm was working on lean staff. He accordingly applied for further adjournment of the appeal. Again, the appellant vehemently opposed the application as a delaying tactic. Having considered the application for adjournment, the period the appeal had been in court, the order of the Supreme Court and the order that we had made on 15th July in the presence of counsel for the parties, we dismissed the application for adjournment and directed that the appeal would be determined on the basis of the written submissions filed by the parties, and judgment rendered on 6th November, 2020. We made a further order as follows:

> *"We shall further give both parties an opportunity to file any further written points to enhance their submissions, if any. That should be done within the next 30 days from today. Such written points shall not exceed five pages. It is so ordered."*

The record shows that both parties took advantage of the above order and filed further submissions. On 25th September 2020, slightly more than a month later, the respondent filed the present application, which we directed to be heard and determined on the basis of written submissions only.

The respondent contends that it was denied an opportunity to highlight its submissions which is a curtailment of is right to defend the appeal and a violation of the right to a fair hearing under ***Article 50(1)*** of the Constitution. It also argues that the appeal involves substantial sums of money, the appellant stands to suffer no prejudice, and that these are good reasons to review the order of 22nd July 2020.

The respondent relies on ***Njeru Njau alias Kamaga v Mburia Kugereka*** & ***3 Others [2014] eKLR*** and ***Philip Muchiri Mugo v Mbeu Kithakwa [2013] e KLR*** where the Court reinstated appeals dismissed for want of attendance by counsel on the basis that there was good reason why counsel was unable to attend. It also cites ***Mugachia v. Mwakibindu [1984] eKLR*** and submits that though the Court should discourage unnecessary adjournments it should ensure fairness to all the parties.

The appellant opposes the application, which it deems vexatious and unmerited, and yet another attempt by the respondent to ensure that the appeal is not heard and determined expeditiously.

Having considered the application, we are not persuaded that there is any good reason to vacate the order of 22nd July 2020. The Court did not shut out the respondent, or the appellant for that matter, from being heard. Both parties had filed their comprehensive submissions and have filed further submissions. Indeed, although the order of 22nd July 2020 directed that the supplementary submissions should not exceed 5 pages, the respondent filed 20 pages of supplementary submissions, longer than its initial submissions.

The purpose of highlighting the written submissions, as the word suggests, is to focus or emphasise aspects of the written submission. The appeal was listed for highlighting of the submissions, and twice the highlighting could not take place, at the instance of the respondent. There is no reason why the respondent's counsel, who was present in court on 15th July when the order was made, could not arrange for another counsel to highlight the submissions. We note further that the Court did not give counsel for the appellant, who was ready to highlight his submissions on 20th July 2020, any preference by allowing him to highlight his submissions, which he was entitled to. The Court reiterated the order it had made on 15th July that the appeal would be heard and determined on the basis of the written submissions, and granted the parties a further opportunity to add to those submissions, if they deemed it fit. As we have stated the respondent has even gone overboard with its supplementary submissions. In the circumstances of this application, the cases on dismissal of appeals for non-attendance by counsel that the respondent relies on are clearly distinguishable.

The right to a fair ***opportunity*** to be heard, whether orally or in writing, is an important constitutional value and principle. So too is the principle that justice shall not be delayed and as applied in this Court, that appeals must be heard and determined expeditiously. We are satisfied that the Court afforded the respondent the opportunity for oral highlighting of the written submissions which the respondent did not take up, thus leaving the Court with no other option but to determine the appeal on the basis of the parties' written submissions.

We find no merit in the application which is hereby dismissed with costs to the appellant.

Dated and delivered at Nairobi this 6th day of November, 2020.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR