REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 130 of 2002

1. DR. JOSEPH W. KARANJA

2. MARTHA WANGUI KARANJA ...…….....……. APPELLANTS

AND

GEOFFREY NGARI KUIRA …….....
……...RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at

Nairobi, Milimani Commercial Courts (Mr. Justice Onyango Otieno) dated 15th February, 2002

In

H.C. MISC. APPLICATION NO. 65 OF 1999)

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JUDGMENT OF THE COURT

This is an appeal from the Ruling of the *Honourable Mr. Justice Onyango Otieno J.*, (as he then was), delivered on the 15th February 2000 (hereinafter "*the Second Ruling"*) in Miscellaneous Civil Application No 65 of 1999. The Second Ruling arose from an application for review of the Judge's decision dated 2nd December 1999 (hereinafter "*the First Ruling*").

The First Ruling was on an application to set aside an arbitral award dated 4th January 1999 (hereinafter "*the Award"*) given by an arbitral tribunal consisting of J.B. Havelock, J.M. Mutungi, (as he then was), and Njeri Kariuki. This arbitral tribunal was set up by an Arbitration Agreement (the "*Agreement"*) under the Arbitration Act 1995 between Mr. Kuira (who was the claimant in the arbitration and is the respondent to this appeal), (hereinafter "*the Respondent"*), and Dr. Joseph Karanja and Martha W. Karanja who were the respondents in the arbitration and are the appellants in this appeal (hereinafter "*the Appellants"*), in which they agreed to submit to arbitration the dispute arising between them in respect of their shareholding and division of profits relating to Busara Forest View Academy Limited *("the Company").*

In the First Ruling the superior court granted the application and set aside the Award. It did so on the basis of a single ground out of the several grounds raised by the respondent, the claimant in the

arbitration. This ground was that the arbitral procedure was not adhered to in that "*the tribunal did not keep record of the proceedings.....*" Clause 8.7 of the arbitration agreement executed by all parties' states:-

"*The Tribunal shall keep a record of all its proceedings and decisions, and a verbatim record of all evidence, whether from experts or witnesses of fact, at oral hearings.*"

The superior court dealt with this ground in the following passage in the First Ruling:-

"***The Chairman of the Tribunal, Mr. Havelock, when asked for the proceedings wrote back to the learned counsel for the applicant and stated as follows:-***

"*Dear Sirs,*

Thank you for your letter dated 18th May 1999. For ease of reference we enclose a letter dated 8th March to your clerk. There are no typed proceedings for the arbitration, merely the handwritten notes of the writer and presumably the other two arbitrators, Mr. J. M. Mutungi and Njiri Kariuki.

Yours Faithfully,

.B. Havelock"

The respondent does not dispute the contents of the arbitration agreement, particularly the part I have quoted above. The respondent does not dispute the contents of Mr. Havelock's letter, I have quoted above. That letter shows to my mind that no record was kept of the proceedings of the Tribunal for Mr. Havelock is according to that letter, not even clear whether the other arbitrators had their handwritten notes, and only notes, while what the agreement directed to be kept were a record of all the Tribunal's proceedings and decision. Mr. Muteithia, learned counsel for the respondent says the award itself is enough to enable the applicant know the entire reasoning. With respect I do not agree. In order to appreciate the reasoning one must first see the evidence and relate it to the award. Without the written evidence the very source of the evidence is missing and hence one cannot effectively challenge the award.

Section (35)(2)(v) states that the arbitral award can be set aside if the arbitral procedure was not in accordance with the agreement of the parties. In this matter the parties agreed that the all (sic) record of the proceedings and verbatim record of all evidence shall be kept, and apparently the same were not kept as agreed.

I am satisfied that the applicant has furnished proof that the arbitral procedure was not in accordance with the agreement of the parties. I have no alternative but to set aside the award. The arbitral award dated 4th January 1999 is hereby set aside. No order as to costs."

By an application dated 10th August 2000 the appellants applied to the superior court by Notice of Motion citing ***section 80*** of the Civil Procedure Act, Cap 21 and ***Order XLIV Rules I*** and ***2*** of the Civil Procedure Rules seeking an order that :

"***The Ruling/or Order made herein on the 2nd December 1999 be reviewed, varied or and set aside.***

The single ground for the application was stated to be:-

(i) That no disclosure was made to the court that the Arbitration Agreement dated 11th June 1997 between the parties hereto had been subsequently substantially altered at clause 8.7 thereof by the consent of the parties herein on the 17th June 1997 and the court would not have made the Ruling and/or Order it made had this important fact been disclosed.

In his affidavit sworn on 10th August 2000 Dr. Joseph W. Karanja deponed in paragraphs 5 and 6 inter alia that:-

5. THAT I was personally at a preliminary meeting called by the Arbitrators on 11th June 1997 or thereabouts when it was agreed by the parties that as hiring a stenographer to keep a full record of the proceedings as originally envisaged by the parties would be an expensive undertaking it was agreed by them that their spouses would attend the proceedings and take notes. Minutes of the said preliminary meeting were written and signed by all the arbitrators as a true record a photo copy whereof is annexed hereto marked "JWK 2". Consequently my wife and Mrs. Kuira, the respondent's wife, and indeed the respondent and I sat through out the proceedings and took notes. I am surprised that the respondent who was at all times aware of these matters failed to disclose the same in his application to the court and presumably not even to his advocate, who in any case was not involved in the arbitration proceedings."

6. THAT on my part I had instructed M/S SICHANGI & CO., ADVOCATES of Nyeri to represent me in the application and had fully briefed Mr. George Sichangi of the said firm about these matters. However and without consulting me, Mr. George Sichangi briefed another advocate, a Mr. S. Muteithia Kibira to appear for me before the High Court. Mr. George Sichangi later informed me that he decided not to act for me as he was the Company secretary of Busara Forest View Academy Ltd., ownership of which was the subject of the dispute before the Arbitrators, as he was afraid of being accused of having a conflict of interest. In the event the respondent did accuse him of this as is evident from "JWK 3" hereto. *(dated 10th December 1999).*

The superior court considered the application for review of the first ruling and on 15th February 2002 delivered the second ruling in which his final conclusion was set out in these terms:-

"***I am satisfied as I have stated that there are sufficient reasons for reviewing the order I have made on 2nd December 1999. I will not vary it at this juncture as I feel the parties may need to address the court fully on the basis of all facts now before the court. I will set my order of 2nd December 1999 aside and order that the Notice of Motion dated 9th June 1999 be heard afresh. Because of what happened in this matter to which I have alluded above, each party will bear its own costs."***

Mr. Nagpal, learned counsel for the appellants, stressed that the part of the superior court ruling to which the appellants objected was the superior court's decision not to vary the orders previously made despite there being sufficient reasons for reviewing the first ruling and instead to order that the Notice of Motion dated 9th June 1999 be heard afresh.

Mr. Nagpal said great prejudice would be suffered by the appellants by the delay which would result from such a course. The company had been in limbo since 1999 and yet arbitration is supposed to be the faster route to justice. What the appellants wanted was the setting aside of the order made and the resuscitation of the award.

Mr. Amolo, learned counsel for the respondents, submitted that the superior court was wrong in deciding that the application to review should be allowed. His main argument was that the Minute, if it existed, which recorded agreement of the parties at a preliminary meeting that "*the parties do not require a full transcript of the proceedings*" was insufficient to amend the Arbitration Agreement which provided at paragraph 8.7 that: "*The Tribunal shall keep a record of all its proceedings and decisions, and a verbatim record of all evidence....".*

We do not find this submission to be necessarily conclusive. Matters of procedure such as this are often dealt with by agreement at preliminary meetings of the Arbitrators and we do not consider that every such matter necessarily needs to be incorporated in a formal amendment to the Arbitration agreement.

In this context ***section 20 (1)*** of the Arbitration Act, 1995 is relevant. It provides:-

(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.

(2) Failing an agreement under sub section (1) the arbitral tribunal may, subject to this Act, conduct the arbitration in the manner it considers appropriate.

More importantly, it is clear from the ruling of the superior court that what led to the Judge's decision that there should be a review was the fact that the existence of the Minute was not revealed to him. There was in his view a significant non disclosure relevant to an aspect which he had based his decision upon. This made a review necessary. We further consider that the Judge was right in exercising his discretion and ruling that in the circumstances it was necessary for the original application to be reargued before the court in the light of the new information which had not been available to him at the previous hearing. It is unfortunate that this will result in further delay made longer by the fact that, due to the elevation of the Judge to the Court of Appeal the matter will have to come before another judge of the High Court.

It will be clear from the above that we are for the dismissal of the appeal. We accordingly order that the appeal be dismissed with costs.

Dated and delivered at Nairobi this 14th day of July, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

……

JUDGE OF APPEAL

W. S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR