



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS APPLICATION NO 445 OF 2013**  
**IN THE MATTER OF ARBITRATION ACT (NO 4 OF 1995)**  
**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**MESHACK OCHIENG**

**T/A MECKO ENTERPRISES.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT**

**CHAIRMAN BOARD OF GOVERNORS**

**NG'YA GIRLS HIGH SCHOOL.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**SECRETARY CORDINATOR ECONOMIC STIMULUS PROGRAMME**

**PUBLIC WORKS.....4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY.....5<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. A brief background of this case is that pursuant to an arbitration reference in respect of the dispute between the parties herein, the Applicant was awarded a sum of Kshs 31,873,133.80. On 16<sup>th</sup> October

2013, he filed a Notice of Motion application that was dated 15<sup>th</sup> October 2013 in which he had sought to have the Final Award recognised and enforced as a judgment of this court. The 3<sup>rd</sup> Respondent subsequently filed its Notice of Motion application dated 10<sup>th</sup> December 2013 and filed on 11<sup>th</sup> December 2013 seeking orders that the Final Award be set aside. The court dismissed the same as it did not find any ground under Section 35 of the Arbitration Act Cap 49 that would have persuaded it to set aside the said Final Award. The 3<sup>rd</sup> Respondent, the Honourable the Attorney General who was acting on behalf of all the Respondents, opposed the said application. On 18<sup>th</sup> March 2013, both the Applicant and the 3<sup>rd</sup> Respondent recorded a consent in which the Applicant was to be paid the aforesaid amount within thirty (30) days from that date.

2. Thereafter, the 2<sup>nd</sup> Respondent instructed the firm of M/S Otieno Ragot & Co Advocates to take over the matter from the 3<sup>rd</sup> Respondent with a view to setting aside the decree that had been issued by the court on 19<sup>th</sup> March 2013.

3. The said advocates filed the 2<sup>nd</sup> Respondent's Notice of Motion application dated and filed on 24<sup>th</sup> April 2014. The same was brought pursuant to the provisions of Order 9 Rule 9 and Order 45 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya Articles 22, 50 and 159 of the Constitution of Kenya and all other enabling provisions of the law. Prayer No (1) of the application is spent. It sought the following remaining prayers:-

**1. Spent**

**2. Leave be granted to M/S Otieno Ragot & Company Advocates to come on record for the 2<sup>nd</sup> Respondent in this matter in place of the Attorney General.**

**3. Pending the hearing and determination of this application, there be a stay of execution of the decree issued herein.**

**4. An interim order of stay of execution in terms of prayer (3) foregoing do issue *ex-parte* in the first instance.**

**5. The decree issued in this suit on 19<sup>th</sup> March 2014 be set aside.**

**6. The consent order recorded in this suit on 18<sup>th</sup> March 2014 and the judgment and decree emanating therefrom be reviewed and set aside.**

**7. The costs of this application be provided for.**

4. As the issue of representation of the 2<sup>nd</sup> Defendant went to the root of the application herein, the court deemed it prudent to determine the question of whether or not the said advocates could take over the matter on behalf of the 2<sup>nd</sup> Respondent from the 3<sup>rd</sup> Respondent as they had sought in the first instance. The court did also address the fate of Prayer Nos (3), (4), (5), (6) and (7) of the said application later on in this ruling.

5. Although on 17<sup>th</sup> June 2014 the court directed both the Applicant and the 3<sup>rd</sup> Respondent to file their responses to the 2<sup>nd</sup> Respondent's application, they did not do so. It was only Mr Kiarie appearing of the 3<sup>rd</sup> Respondent who gave brief oral submissions to the court in respect of the issue of representation of the 2<sup>nd</sup> Respondent herein. The ruling in respect of Prayer No (2) herein was therefore based on the affidavit evidence that was adduced by the 2<sup>nd</sup> Respondent.

## **2<sup>ND</sup> RESPONDENT'S CASE**

6. The 2<sup>nd</sup> Respondent's application was supported the Affidavit of David Oketch, who was the Chairman of Ng'iya Girls High School. It was its argument that that the consent that was recorded by the Applicant and the 3<sup>rd</sup> Respondent on 18<sup>th</sup> March 2014 was done without its knowledge or authority and that there was an error apparent on the face of the record that warranted review and setting aside of the order of the court.

7. It was categorical that it had not issued any instructions to the 3<sup>rd</sup> Respondent to act on its behalf and neither had they consented nor authorised the aforesaid 3<sup>rd</sup> Respondent to record any consent on its behalf.

## **THE 3<sup>RD</sup> RESPONDENT'S CASE**

8. Through its counsel, Mr Kiarie, the 3<sup>rd</sup> Respondent stated that it had neither received any communication from the 2<sup>nd</sup> Respondent regarding its intention to change of advocates nor had the 2<sup>nd</sup> Defendant filed a memorandum of appearance. It was its contention that it were still on record as the legal representatives of the 2<sup>nd</sup> Respondent.

## **LEGAL ANALYSIS**

9. Before delving into the merits of Prayer No (2) of the 2<sup>nd</sup> Respondent's application, the court felt that it was necessary to consider the competence and validity of the said entire application herein for the reason that the court noted that the copy of the Supporting Affidavit in the court file was undated. This was clearly in breach of the provisions of Section 5 of Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) that provides as follows:-

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the Jurat or attestation at what place and on what date (emphasis court) the oath or affidavit is taken or made.”**

10. Although neither the Applicant nor the 3<sup>rd</sup> Respondent raised this issue and their copies may very well have been dated, the copy in the court file is the one that the court considers while determining matters. As the same was not dated, the court finds that the 2<sup>nd</sup> Respondent's application was incompetent *ab initio* and lends to its dismissal in the first instance.

11. However, assuming the said Supporting Affidavit was properly dated and the fact that the court is enjoined to administer justice without undue regard to technicalities as is provided under Article 159 (2) (d) of the Constitution, the court deemed it fit to determine the application on merit.

12. The Board of Governors of Ng'iya High School was a body corporate with capacity to sue and to be sued. It was constituted under Part III of the Education Act Cap 211 (Laws of Kenya) Its constitution was pursuant to Section 6 (b) of the Education Act provides as follows:-

**“every maintained or assisted school other than a primary school maintained by a local authority shall be managed by a Board of Governors, or as the Minister may otherwise direct.”**

13. The project that was undertaken at Ng'iya High School by the Applicant herein was through a government funded programme, namely the Economic Stimulus Programme Public Works, the 4<sup>th</sup> Respondent herein. This was a fact that was clearly admitted by the 2<sup>nd</sup> Respondent in Paragraph 56 of

its Supporting Affidavit where it stated as follows:-

**“THAT the school is a public Girls (sic) boarding National School that offers secondary school education to over 1,000 girls from all over the Republic of Kenya and depends by and large on subsidised school fees and grants from the Government for specific projects such as the one the subject of this dispute...”**

14. This clearly put the school under the control of the Ministry of Education. Being a government entity or department, the 2<sup>nd</sup> Respondent’s principal legal adviser was the 3<sup>rd</sup> Respondent as has been stipulated in Article 156 (4) (a) of the Constitution of Kenya, 2010. For all purposes and intent the 3<sup>rd</sup> Respondent therefore had the *locus standi* to represent the 2<sup>nd</sup> Respondent herein in the proceedings herein and those that were before the arbitral tribunal. The question of *locus standi* of the Honourable the Attorney General to represent public schools was well captured in the case of **BOG Moi Girls Secondary vs Stephen Oketch [2013] eKLR** which this court fully associates itself with.

15. Evidently, Section 17(1) of the Office of the Attorney- General Act Cap 199 (Laws of Kenya) provides instances when legal services can be offered to a ministry by another party other than by the 3<sup>rd</sup> Respondent herein. The same provides that:-

**“No Ministry or Department shall engage the services of a consultant to render any legal services relating to the functions of the Attorney-General without the approval of the Attorney-General.”** (emphasis court).

16. The 2<sup>nd</sup> Respondent did not present to this court any evidence to show that it had referred the issue of appointment and engagement of the legal services of a private lawyer to the 3<sup>rd</sup> Respondent and that such referral was approved by the office of the Attorney General in accordance with the provision of Section 17(1) of the Office of Attorney- General Act. It did not also demonstrate any reason why that position ought to be changed after the entry of judgment particularly because judgment herein was entered pursuant to arbitral proceedings between the parties after the court found that no reasons had been advanced to satisfy the court to set aside the said Final Award.

17. Having considered the 2<sup>nd</sup> Respondent’s affidavit evidence, the court found that the 3<sup>rd</sup> Respondent had the sole mandate and conduct of the proceedings herein and at the arbitral tribunal to act on behalf of the 2<sup>nd</sup> Respondent herein. The firm of M/S Otieno Ragot & Co Advocates could not therefore purport to act for and on behalf of the 2<sup>nd</sup> Respondent herein unless it had obtained and received authority to represent the 2<sup>nd</sup> Respondent from the 3<sup>rd</sup> Respondent as provided by the law. The 3<sup>rd</sup> Respondent was therefore properly on record for the 2<sup>nd</sup> Respondent, a public institution.

18. It therefore also follows that Prayer Nos (3), (4), (5), (6) and (7) of the said application would have no limb to stand on and only lends the same to being dismissed.

## **DISPOSITION**

19. For the foregoing reasons, the upshot of this court’s ruling was that the 2<sup>nd</sup> Respondent’s Notice of Motion application dated and filed on 24<sup>th</sup> April 2014 was unmeritorious and the same is hereby dismissed. There will be no order as to costs as the Applicant and the 3<sup>rd</sup> Respondent did not file any response.

20. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 19TH day of DECEMBER, 2014

**J. KAMAU**

**JUDGE**



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