



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.....1ST RESPONDENT

CHAIRMAN BOARD OF GOVERNORS

NG'YA GIRLS HIGH SCHOOL.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

SECRETARY CORDINATOR ECONOMIC STIMULUS PROGRAMME

PUBLIC WORKS.....4TH RESPONDENT

CABINET SECRETARY NATIONAL TREASURY.....5TH 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 16th October

2013, he filed a Notice of Motion application that was dated 15th October 2013 in which he had sought to have the Final Award recognised and enforced as a judgment of this court. The 3rd Respondent subsequently filed its Notice of Motion application dated 10th December 2013 and filed on 11th 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 3rd Respondent, the Honourable the Attorney General who was acting on behalf of all the Respondents, opposed the said application. On 18th March 2013, both the Applicant and the 3rd 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 2nd Respondent instructed the firm of M/S Otieno Ragot & Co Advocates to take over the matter from the 3rd Respondent with a view to setting aside the decree that had been issued by the court on 19th March 2013.

3. The said advocates filed the 2nd Respondent's Notice of Motion application dated and filed on 24th 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 2nd 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 19th March 2014 be set aside.

6. The consent order recorded in this suit on 18th 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 2nd 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 2nd Respondent from the 3rd 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 17th June 2014 the court directed both the Applicant and the 3rd Respondent to file their responses to the 2nd Respondent's application, they did not do so. It was only Mr Kiarie appearing of the 3rd Respondent who gave brief oral submissions to the court in respect of the issue of representation of the 2nd Respondent herein. The ruling in respect of Prayer No (2) herein was therefore based on the affidavit evidence that was adduced by the 2nd Respondent.

2ND RESPONDENT'S CASE

6. The 2nd 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 3rd Respondent on 18th 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 3rd Respondent to act on its behalf and neither had they consented nor authorised the aforesaid 3rd Respondent to record any consent on its behalf.

THE 3RD RESPONDENT'S CASE

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

LEGAL ANALYSIS

9. Before delving into the merits of Prayer No (2) of the 2nd 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 3rd 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 2nd 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 4th Respondent herein. This was a fact that was clearly admitted by the 2nd 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 2nd Respondent’s principal legal adviser was the 3rd Respondent as has been stipulated in Article 156 (4) (a) of the Constitution of Kenya, 2010. For all purposes and intent the 3rd Respondent therefore had the *locus standi* to represent the 2nd 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 3rd 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 2nd 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 3rd 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 2nd Respondent’s affidavit evidence, the court found that the 3rd Respondent had the sole mandate and conduct of the proceedings herein and at the arbitral tribunal to act on behalf of the 2nd Respondent herein. The firm of M/S Otieno Ragot & Co Advocates could not therefore purport to act for and on behalf of the 2nd Respondent herein unless it had obtained and received authority to represent the 2nd Respondent from the 3rd Respondent as provided by the law. The 3rd Respondent was therefore properly on record for the 2nd 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 2nd Respondent’s Notice of Motion application dated and filed on 24th April 2014 was unmeritorious and the same is hereby dismissed. There will be no order as to costs as the Applicant and the 3rd 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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