REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC CIVIL APPLICATION No 518 of 2014

FRANCIS STEPHEN KAHURA IRUNGU....1ST CLAIMANT/RESPONDENT

JANET KAHURA.....2ND CLAIMANT/RESPONDENT

VERSUS

VENTURE HOLDINGS LTD ..... RESPONDENT/APLICANT

KIRIIYU MERCHANTS AUCTIONEERS ..... INTERESTED PARTY

R U L I N G

1. This Matter first came before the Court as a Chambers Summons filed on 31st October 2014 for orders that the Court adopts the Arbitral Award of Prof Paul Musila Wambua made on 29th January 2014 and gives leave to enforce that award. The current Application is brought by the Respondent to set aside the Decree and recall the Warrant.

2. By way of background it is not necessary to set out the facts of the dispute as they are ably dealt with the in Award. It is however necessary to record that both Parties participated fully with the Arbitration notwithstanding the replacement of the first Arbitrator by Prof. Wambua.

3. The Respondent did at first seek to set aside the award but then withdrew that objection. The Application was granted on 21st November 2014 to recognize the withdrawal of the Application to Set Aside. On 24th November I made the Order adopting the Award.

4. On 5th December 2014, the Deputy Registrar Hon Nyambu issued the Decree as set out in the "Conclusion" section of the Award. This included the following orders:-

1. That the Respondent to pay the Claimant the sum of KShs877,565.76 together with interest on that amount from 3rd October 2011 until payment.

2. That the Respondent pay to the Claimants the sum of KShs1,570,000/= together with interest from 3rd October 2011 until payment in full.

3. That the Respondent do bear the costs of the Arbitration assessed at KShs696,000 inclusive of VAT at 16%.

5. Of the two amounts of “damages” outstanding, it is accepted that the sum of KShs877,365.76 was paid (Supporting Affidavit, Paragraph 8). It seems to be asserted on behalf of the Plaintiff by its Advocates that the payment was made on 20th May 2014 (see Application for Execution dated 21 January 2015). This is surprising as that was 5 days before the Respondent’s Application to set aside the Award. However, the calculation of interest suggested the payment was made on 21st January 2015. Again that date cannot be correct as the Applicants swore in the Supporting Affidavit that payment had already been received by 21st November 2014, that is at least 3 months previously.

6. In relation to the Award of KShs1,570,000, it seems that it is still unpaid thereby giving rise to the need for execution. Again the Application for Execution seems to suggest that the payment was received on 21st January 2015, as that is when it is said interest stops accruing.

7. As to the costs of the Arbitration, it was expressed to be KShs696,000 including VAT. The Respondent asserts that sum was paid to the Arbitrator. Although the evidence setting out payment has not been conclusively placed before the Court, it was asserted in argument. However, at the very least the Parties are noted at Paragraph 133 of the Award as having paid a deposit. That suggests that the full amount of KShs696,000/= was not due and payable. In any event at the date of the Decree, the Deputy Registrar has further added VAT to this amount.

8. The Application for Execution of the Decree was prepared by the Plaintiffs’ Advocates, Messrs Sichange & Partners. They correctly set out that the sums payable are KShs877,365.76/= and KShs1,570,000/= and that KShs877,365.76 was not paid. It then goes on to calculate figures for interest on the principal sums that cannot be verified.

9. In addition the Application for Execution sets out costs as follows:-

1. Costs	KShs696,000.00
2. Court fees on this suit	KShs 10,495.00
3. Court fees on this application	KShs 950.00
4. Court fees issuing Decree	KShs 150.00
5. Certificate of Costs	KShs 100.00
Total Costs	**KShs707,695.00**

10. What is set out there as being a true position to the best of Sichangi & Partners Advocates’ beliefs gives rise to serious concern. There are elements included which the Applicant could not honestly believe to be due. Firstly, although it is correct that the Respondent was ordered to pay the costs of the Arbitration, there is no credit given for, at the very least, any payments that may have been made. That creates a misleading impression. Secondly, there is a claim for the “Costs of the Suit”. A separate item for the costs was not awarded or ordered. The original application that preceded the Arbitration was in 2012 and was clearly misconceived. No order for costs or certificate of costs was attached to either the Application for Execution nor the Affidavit in support of the Application. I did not order costs to be paid to the Applicant on first Mention. In fact the Application filed on 30th October 2014 does not contain a prayer for “costs of the suit”. There was no suit properly brought, and no order for costs was given. The Applicant was awarded costs on 24th November 2014. That item does not appear on the Application for Execution. Paragraph 3 of the Prayer in the Notice of Motion asked only for the “costs of the Application

be awarded to the Claimant/Applicant". Therefore the Decree is based on a false item of costs.

11. The inter partes hearing of the Respondent's Application did not take place until 23rd February 2015 after the Defendant/Respondent issued an Application for stay of execution on the grounds that the Claimants deliberately misled the Court. They (the Claimants) knew or ought to have known, it is said, that the items claimed had been satisfied or were not yet due.

12. It should be remembered that the Decree was issued on 5th December 2014. The Application for the Warrant for Attachment was made by a Letter dated 20th January 2015 and received on 21st January 2015. The Respondent did not attend nor was it represented at the hearing on 24th November 2014 , that is, on the day when the Arbitrator's Award was adopted as an Order. On that day Mr Litano holding brief for Mr Githenji for the Applicant undertook to serve the Order upon the Respondent. There is no evidence before the Court that the Order of 24th November was in fact served on the Respondent. Again there is no evidence before the Court that the Decree was served on the Respondent. The only Affidavit of Service after November 2014 relates to service of the Hearing Notice on 20th February 2015. That was for service upon the Claimants of the Application for a Stay of Execution. ***Order 22 Rule 6 of the Civil Procedure Rules 2010*** applies mutatis mutandis.

13. The Respondent's Application can be summarised thus:-

1. The Respondent has already paid (before 24th November 2014) the sum of KShs877,365.76. Again, no date for payment is given;

2. The sum of K|Shs1,570,000 has not been paid because the Claimants to the Arbitration admitted that the expense had not been incurred. The sum is not due;

3. The costs of the Reference were paid and satisfied by the payment of KShs696,000/= to the Arbitrator before the publication of the Award;

4. The Application for execution contains items that are not due not receivable including:

i. Costs of the Suit;

ii. Not giving credit for payments made;

iii. VAT on KShs696,000/= of KShs111,360 was not due and therefore double counting.

14. In Paragraph 18 of the Supporting Affidavit the Respondent to the Arbitration states that no decree for money is due and owing to the Claimants. That suggests that the Decree issued on 5th December was not served. The Respondent asserts that the Application for a Warrant of Execution is an abuse of the process of Court made in malice etc. There is no evidence of malice.

15. Dealing with each item in turn. Firstly, the Arbitrator's Award is clear and unambiguous, (apart from paragraph 133 and paragraph K of the conclusion). Conclusion C is clear. The Respondent was to pay the sum of KShs877,365.76 being the cost of repairs undertaken. Then there is provision for interest. The Respondent understood and accepted that part of the Award and made payment by cheque under cover of its Letter dated 20th May 2014. Therefore only interest from 3rd October 2011 to 20th May 2014 is payable at the Court rate (12%).

16. Paragraph D of the conclusion is couched in the same terms and is equally clear and the sums

equally payable. The Respondent's argument as to delay are disingenuous and without foundation. The sums payable were described as the cost of repairing outstanding defects. It is clear that the Arbitrator was aware the work had not been done. He considered the Reports and made an assessment of the costs of repair and ordered those sums to be paid. This is a direct award and not conditional as a future event. That interpretation is supported by the application of interest from 3rd October 2011. The Respondent did not pursue an application for clarification or review or setting aside therefore it stands and the Respondent should pay it. The Respondent's arguments seek to go behind the award.

17. As for conclusion K, it is clear KShs696,000/= should have been paid by the Respondent.

18. Unless the Respondent paid that sum, the award would not have been published. Therefore, I find on a balance of probabilities that it was paid. The costs section of the Application gives rise to some serious concerns and clearly points to an attempt by the Claimant's execution to obtain payment to which they were not entitled.

19. Firstly, if the Referral costs have indeed been paid, that item should not be included. Secondly, there was no order for court fees on the suit. That item is unjustified and therefore misleading. Thirdly, the Claimants were not awarded the costs claimed. Fourthly there had been no taxation so the item for Certificate of Costs cannot have been received and so is misleading.

20. Further there is no evidence that the Decree was served on the Respondent notwithstanding the undertaking. This goes against the spirit of ***Order 22 Rule 6***.

21. The Application for Decree therefore contains three types of incorrect information. Firstly, no credit is given for sums received. Secondly, costs which were not awarded are included and thirdly, costs are claimed which could not, on a balance of probability, have been incurred.

22. For the reasons set out above, I have no hesitation in finding that the Decree and Warrant were obtained on false and/or incorrect information. Further, in the absence of service, the Application for execution is an abuse of the process. In addition, the Deputy Registrar also included VAT which was not payable. On the Application for Execution, the inclusion of the items of costs and double counting of the VAT demonstrates that the Plaintiffs/Claimants were seeking to obtain monies to which they were not entitled and which they knew they could not be entitled. I therefore recall the Warrant.

23. This Ruling was delayed due to the lack of Secretarial Support. For that I apologise. The Plaintiff's Advocates wrote to the Court asking for a Ruling date, however when the matter was listed for a Mention (on 9th July 2015) to take a date, they failed to attend

24. Moving onto dealing with the Prayers in the Application sought by the Respondent to the Application:-

1. Prayer 1: that the Application be certified as urgent etc – Spent

2. Prayer 2: that there be a stay of execution of the decree pending hearing of the Application – Order was made on an interim basis and now spent

3. Prayer 3: that the Warrants of Attachment and Sale issued to the Interested Party Auctioneers be recalled – allowed, Order made

4. Prayer 4: that a declaration be made that the Respondent Applicant has satisfied paragraph 3 of the

Decree by paying KShs877,365.76 to the Claimants – prayer dismissed. Although the Applicant had paid the principal, is has not paid the interest accrued and payable between 3rd October 2011 and 20th May 2014, therefore the declaration sought is not justified

5. Prayer 5: that a declaration be made that the sum of KShs1,570,000 under paragraph 4 of the decree is not yet due or payable – prayer dismissed. Both the Award and the Decree are clear. The sum of KShs1,570,000/= being found to be a fair estimate of the works necessary on the Plaintiffs' taking possession became due and payable on that day. The Defendant/Applicant was aware of the Award in January 2014. No challenge has/was made and or maintained against the Award.

25. For the Reasons set out above, I further Order:

1. Warrants be recalled and discharged;

2. Matter be referred to the Hon Deputy Registrar to recalculate the amounts of interest and/or VAT due and the correct amount outstanding

3. The Respondent to file conclusive evidence of the payment of the Referral Fee/Arbitration Costs within 14 days

4. List for Mention after 28 days

5. The Respondent to the Arbitration to make payment of the sums found to be due within 28 days of notification

6. Claimants to the Arbitration to pay the costs of this Application.

Order accordingly,

FARAH S. M. AMIN

JUDGE

On this 30th day of July 2015

Coram:

Hon Lady Justice Farah S M Amin J

Hannah – Clerk

Neither Party Attended.