REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 571 OF 2011

BELLEVUE DEVELOPMENT COMPANY LIMITED……PLAINTIFF/APPLICANT

Versus

VINAYAK BUILDERS LIMITED ….....1ST DEFENDANT/RESPONDENT

NORMAN MURURU ……..……2ND DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK ……..……INTERESTED PARTY

RULING

1. This is a ruling in the 2 applications, one dated 13.6.2014 and the second one dated 13.5.2015.
2. The application dated 13.6.2014 seeks review of Orders of Judge Gikonyo of 8.4.2014 which held the appointment of the Arbitrator to be proper inter alia.
3. It has multiplicity of other prayer related to the arbitration subject herein. The second application dated 13.5.2015 seeks orders for recognition of the award and enforcement of the same inter alia.
4. The parties canvassed the applications together after the court directed the same two applications be heard together.
5. The Court will determine the first in time application as the same if successful would render the later application moot and spent.
6. The Notice of Motion dated 13th June 2014 is an omnibus kind of application seeking multiple and diverse prayers in terms of paragraphs 1-14 of the Notice of Motion dated 13.6.2016. It is based on grounds 1-28 on the face of the motion. It is predicated on the provisions Articles 1(3) (c) 2,3,10 159 (2) (c) Constitution of Kenya, Section 1A (3) 1 B (1)(a) and (b) section 3A, 63 and 80 CPR, Order 45 Rules 1(1) and 2(1) order 51 R. and 1 and 3 CPR 2010.
7. The Applicant/Plaintiff lodged suit to challenge a decision of the second Defendant for refusing to terminate the arbitral proceedings before him and a judgment was delivered in Plaintiffs favour on 21.3.2012.
8. There was a subsequent motion dated 13.8.2013 in which Gikonyo J ruled that proceedings before second Defendant were terminated on 21.3.2012 and the subsequent appointment of Gachoka as an arbitrator was proper in accordance with the Arbitration Act, No.4 of 1995 (Cap

49).

9. The ruling of Gikonyo J is being impugned as Odunga J judgement of 21.3.2014 held that the only thing the 2nd Defendant could do, was terminate Arbitrator proceedings pursuant to section 26(a) of Arbitration Act. Further Gikonyo J is faulted for holding that the appointment of Gachoka as arbitrator was proper. The Applicant thus seeks the prayers sought on those grounds.
10. To oppose the application, the 1st Defendant has filed a Preliminary Objection dated 25.6.2014 which raises the issues to the effect that, the application is an abuse of court process and court is functus officio. The orders sought are also said to be contrary to the provisions of S.14(8) of Arbitration Act and also that the court is being asked to sit on appeal of its own decision.
11. The issue of resjudicata is also raised. Further the application seeks orders against a person who is not a party contrary to Article 50 of the Constitution of Kenya. Further the Plaintiff is stated to have commenced an appeal and at the same time is seeking review. The Court has no jurisdiction to grant the Orders sought. The Order/ruling sought to be reviewed is final and cannot be reviewed under the provisions of S.14(6) Arbitration Act 1995. In any event the 1st Defendant contend, that Applicant had acquiesced in the progression of the Arbitration cause and even attended meeting of 4.6.2014 and sought extension of time to file pleadings which request was granted thus Applicant estopped by its own conduct and operation of the law from reneging from its participation in arbitral proceedings. The 1st Respondent seeks the striking out of the application with costs.
12. The 2nd Defendant did not participate in the proceedings herein as he had passed on. The interested party did not file any reply to the instant application to oppose the same. The Plaintiff and the 1st Defendants filed and exchanged written submissions to canvass the application.
13. The 1st Defendant argued the Preliminary Objection in reply to the application first submitting that the application was res judicata under the provisions of S.7 CPR and also cited **MUMBE KISILU VS. EXPRESS KENYA LTD (2015) KLR** to support the submission that resjudicata applies to applications as court applies to suits.
14. The application is inviting court to set an appeal on Gikonyo J decision of 8.4.2014. The cited provisions do not confer jurisdiction to the court. The determination as to the propriety of the constitution of tribunal was in finality and cannot be revisited as it is res judicata on jurisdiction. See **owner of Motor Vessel LILIAN 'S' VS. CALTEX OIL (K) Ltd (1989)** and also on materialnon-disclosure.
15. The Applicant has not disclosed that it had filed on 13.6.2014 similar application before the tribunal and same was heard on merit and dismissed.
16. The tribunal ruling of 8.7.2014 rendered instant application res judicata. The jurisdiction of court to make orders during the pendency of arbitral proceedings is concurrent jurisdiction under S.7 and 18 of Arbitration Act 1995 which is enjoyed by both Tribunal and the Court. It is to the election of the party. One cannot move the court and tribunal at the same time. By failure to disclose that similar application had been made prior to coming to this court and the same was dismissed by the Arbitral Tribunal on 8.7.2013 amounts to no disclosure thus equity cannot find favour for him. The arbitrator having determined the same the instant application is res judicata.
17. The Applicant also filed a notice of appeal after delivery of Gikonyo J. ruling of 8.4.2014 and under Order 42 Rule 6(4) CPR a notice is deemed to an appeal thus a party cannot seek to appeal and review at the same time. Thus the Applicant cannot get a review relief. See **DISHON MAREKO NGIRE & OTHERS VS. FOUSTINO NJERU NJOKA & ANOTHER (2014) eKLR.**
18. S.14(6) Arbitration Act stipulates that a decision appointing an arbitrator is final and not subject to appeal. Gikonyo J determined the Gachoka arbitrator appointment was proper, thus such decision cannot be impugned in an appeal thus it cannot be impugned in a review.
19. In any event the Applicant participated in the proceedings and thus estopped from disowning the same.
20. The 1st Defendant contend that the application has been overtaken by events as the arbitration

proceedings sought to be stayed was concluded and the award filed in court awaiting adoption and enforcement and applicant has not sought to set aside the same award. Court cannot stop what has already happened. See **STANLEY KIRUI VS. WESTLAND PRIDE LTD** (2004) eKLR.

21. On application of Civil Procedure Act to seek the orders sought herein, the Applicant fails to appreciate that Arbitration Act is complete code of law with its own statute and rules which does not invite the importation or transportation of Civil Procedure Rules. See **ANNE MUMBI HINGA VS. VICTORIA NJOKI GITHARA(**2009) eKLR. The review jurisdiction does not exist under Arbitration Act. This is to limit High Court jurisdiction in line with S.10 of Arbitration Act.
22. The 1st Defendant contend that, in any event the ruling impugned is final under S.14(6) Arbitration Act and cannot be reviewed or appealed against.
23. In any event the elements which ought to be established to warrant review have not been demonstrated by the Applicant. There are no new and important matters. Further Arbitrator ought to have been joined as a party as he will be condemned unheard if not joined contrary to Articles 50 of the Constitution.
24. The parties highlighted the submissions orally. After going through the materials before the court and parties advocates submissions, I find following issues for determination;

1. **Whether the provisions of law cited are applicable in the instant matter"**
2. **If the above is in affirmative; is the application resjudicata"**
3. **If above 1 and 2 are in affirmative,**
4. **Has the thresh hold for review been established"**

25. Prayers No.1 is spent. In the motion prayers 3,4,5,6,7,10 have been overtaken by events as Arbitral proceedings were concluded and award filed. Prayers No.8,9,11,12,13, and 14 depends with outcome of prayer No.2 which seeks review.
26. The provisions which form the base of the court jurisdiction are order 45 CPR.Under the authority of **owner of Motor Vehicle Lilian "S"** Case Supra, jurisdiction is everything and court cannot make any step if it has no jurisdiction. It has to down its tools. In the case of **ANNE MUMBI HINGA** , Supra the court of appeal held;

"the provisions of Arbitration Act make it clear that it is a complete code except as regards the enforcement of an award/or decree where the Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate in our view rules, line, hook and sinker to regulate arbitrations under the Act, it is clear to us that no application of Civil Procedure Rules would be regarded as appropriate if its effect would be to deny any awards speedy enforcement both of which are major objectives of arbitration. If follows that all the provisions invoked except S.35 and 37 do not apply to give jurisdiction to the superior court to intervene and all the application filed against the award in the superior court should have been struck out by the court suo moto"

27. The aforesaid authority is binding to this court .Under Arbitration Act the review does not exist. S.10 of Arbitration Act states that "*except as provided in this Act, no court shall intervene in matters governed by this Act*". The instant matter is governed by the Arbitration Act. The provision of order 45 of the CPR is not among the rules imported to the Arbitration act nor is the provision of S.80 of Cap 21.
28. The court thus cannot invoke the provisions of the CPA/CPR to entertain review as sought in the instant application.
29. Having determined the 1st issue which renders application incompetent, I need not determine the other issues. The Notice of Motion dated 13.6.2014 is therefore found incompetent and struck out accordingly. Costs to the 1st Defendant who filed reply and opposed the same.

MOTION DATED 13/5/2015

30. On the second application dated 13.5.2015, the same seeksprayers No.1-7 of the Notice of Motion dated 13.5.2015.
31. The application is based on the provisions of S1A, 1B, 3A, 63 (c) and E, 98, CPA order 40 Rule 1 (1)(a) and order 22 Rule 48 CPR Section 36 of Arbitration Act and Rules 6 and 11 of Arbitration Act Rules 1997 and all enabling provisions of the law.
32. The application is based on grounds 1-13 on the face of the motion which are to the effect that an award was made in the instant dispute and the Plaintiff was ordered to pay 1st Defendant Ksh.75,288 703/67 plus costs inter alia. No application to set aside the same within the stipulated time has been made. The time to impugn award has lapsed and thus same is final and binding on parties. The application thus seeks to enforce the same.
33. The entire decretal amount as at the time of filing the matter was amounting to Ksh.86,667,391.77/= and counting/growing. The 1st Defendant is apprehensive that unless the interested party who has a charge on suit property is restrained, it is likely to exercise power of sale and sell Plaintiff's property and thus defeat Defendant No.1 the realization of its award proceeds. The same is charge for Ksh.100 million by the interested party.
34. The Applicant/1st Defendant prays for orders as it avers that it has established the thresh hold of being granted the orders sought. |The 1st Defendant has filed an affidavit sworn by Premji Vekana on 13.5.2015 which reiterates the content of the grounds. The 1st Defendant thus prays for Orders sought in the application.
35. The Interested Party has filed Grounds of Opposition dated 1.7.2015 and replying affidavit sworn by Felix Sakeja on 1.7.2015 to oppose the application. The Interested Party avers that it granted the Plaintiff financial accommodation in the sum of Ksh.100 million and a charge created thereof over Plaintiff's LR No.209/111424/2 and guarantees were executed thereof.
36. The Plaintiff defaulted payment of loan and on 23.4.2015 statutory notice was issued with a view of realising security by way of sale of charged property.
37. The Interested Party avers that it is entitled to realise security and thus the application is misconceived and speculative as the award has not been enforced by court. In any event the award amount will be paid from the sale process of the attached property. Thus the Applicant has not established thresh hold for grant of interim orders sought.
38. In the Grounds of Opposition the Interested Party contend that the application is bad in law and totally defective as Civil Procedure Rules have no application herein in view of the binding decisions of **ANNE MUMBI HING Supra and NYUTU AGROVET LTS VS. AIRTEL NETWORKS LTD (2015) eKRL**.
39. The parties agreed and filed and exchanged written submissions. The Plaintiff has not filed any reply to oppose the instant application thus same deemed unopposed by the Plaintiff.
40. The Defendant NO.1 submits that the provisions of CPR on enforcement of the award are applicable vide S.36 and 37 of the arbitration Act. The application being for enforcement of the ward, the CPR provisions can apply thereof. See Rule 11 of Arbitration Act allows court to intervene in arbitration in specified instances. These are such as in adoption and enforcement of the awards S.36 and 37 of Arbitration Act and interim order/measures/injunctions under S.7 and 18 of the Act.
41. Clearly the court has powers using CPR instruments such as injunctions and order of protection so as to secure in arbitration under appropriate circumstances. See also **SETTLING DISPUTES THROGH ARBITRTION IN KENYS BY DR. KARIUKI MUIGUA 2012 GLENWOOD NRB 2nd Edition.**
42. The Defendant No.1 therefore submit that the injunction sought is targeted at preserving the only known asset of the Respondent a special purpose vehicle, which is known assets of the Respondent/Plaintiff within the jurisdiction of the court thus the sought orders are justified. Dr.

Muigua Supra at page 74 elucidates as follows;

43. *"in essence, section 10 must, further be construed as allowing the courts the lee way to intervene in arbitration in the public interest even where it is no expressly provided by the Act. The Act cannot reasonably be interpreted as ousting the inherent powers of the court of justice…"*
44. The Applicant/1st Defendant thus seeks for grant of orders to preserve subject property as prayed.On merit of the orders sought for adoption and enforcement of the award, the 1st Defendant/applicant submit that the Arbitration agreement clause No.45.10 stipulated that the award is final and binding save where it is challenged under S.35 of the Arbitration Act 1995 through an application to set aside the award.
45. The Plaintiff/Respondent has not filed any reply to oppose adoption and enforcement of the award. The consequence of such omission is set out in the case of **CHEVRON KENYA Ltd Supra by Ogola J.**
46. The award was published on 17.12.2014. Notice to the parties was sent out under S.33 (1) Arbitration Act 1995. Under S.35 (3) of the Act,a challenge of an award by aggrieved party should be filed within 3 months of the publication of the award that is by 17.12.2014. There is no challenge prescribed above. The award was filed in court on 5.5.2015. The 1st Defendant/Applicant thus contends that in absence of the challenge of award, same is for adoption and enforcement.
47. The Applicant/1st Defendant submit that the provision of order 22 Rule 48 on attachment of the property ought to be granted to enable Plaintiff's property be charged by the interested party to be attached and preserve same for benefit of 1st Defendant and Interested Party.
48. Attachment of moveable property is levied via issuance of a prohibitory order which is recognised as mode of execution of court and tribunal orders. Under CPR same is the modes permissible in execution of decrees/judgments.
49. The 1st Defendant also contend that in replying affidavit by Felix Sakaja of the Interested Party, it is conceded that Interested Party is not averse to the orders of sale so long as their interest is secured. The interest of the bank was at the time of swearing of Sakaja's affidavit Kshs.44,891,526.95/=. The 1st Defendant also submits that the value of the asset herein exceeds indebtedness thus it will take care of the Interested Party interest and satisfy the award.
50. The Applicant thus prays for the orders sought.
51. The Interested Party submit that the Applicant 1st Defendant has not met the thresh hold of granting an injunction as set out the case of **GIELA VS. CASSMAN BROWN & CO. LTD (1973) EA 358.** The Interested Party submit that the 3 conditions set out are to be applied as separate distinct and logically. See **KENYA COMMERCIAL FINANCE CO. LTD VS. AFRICAN EDUCATION SOCIETY (2001) EA** 86. The KCB contend that prima facie case as defined in **MRAO VS. FIRST AMERICAN BANK (K) LTD & 2 OTHERS (2003)K**LR 125 has not been established. See also **NGURUMAN LTD VS. JAN BONDE NIELSEN Vs. 2 OTHES CA 77/2002** which adopted MRAO Supra holding on definition of prima facie case.
52. The bank further submits that the award though not challenged, is yet to be recognised and be enforced as a decree of the Court. |The award intended to be enforced is neither original nor duly certified as stipulated under S.36(3) of the Arbitration Act.
53. In the case of **SAFARICOM LTD VS. OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS Civil Case No.51/2009** application first recognition and enforcement of the award was struck out for failure by the Applicant to furnish duly certified copies of award or agreement. The Interested Party thus submits that the instant application is incompetent and ought to be struck out.
54. Additionally the Applicant application is premised on Sections 1A, 1B, 3A 63(c) & E and 98 CPR as well as order 40 and 22 CPR. The Interested Party contend that Arbitration Act 1995 is a complete code and provisions of Cap 21 do not apply in matters governed by S.10 of the Act. That Rule 11 of the Arbitration Rules allows applicability of CPR as appropriate. See also **ANNE MUMBI HINGA** Supra, which held that "*Civil Procedure Act Rules do not apply to arbitral*

proceedings because S.10 of Arbitral Act makes the Act a complete code and Rule 11 of Arbitration Rules cannot override S.10 of Arbitration Act…" See also **ERAD SUPPLIERS & GENERAL CONTRACTORS LTD VS. NCPB MISC. CA 636/2009. NYUTU AGROVET LTD Vs. AIRTEL NETWORK LTD CA 61/2012.**

55. The Interested Party content that in terms of the **HINGACase** Supra, CPR applies only in enforcement of the award or decree. See also **EQUITY BANK VS. ADOPT A. LIGHT LTD (2015) eKLR.** Thus the Interested Party submit that, the cited provisions together with orders 40 R.(1) a, and Order 22 Rule 48 CPR 2010 have no application herein.
56. In any event the award has not been adopted and decree issued thereto thus CPR not applicable at this juncture. Arbitration Act and Rules has no provisions for issuance of prohibitory order and injunction after publication of the award. Thus the court has no jurisdiction to issue the orders of injunction and prohibitory orders sought and thus court ought to lay down its tools in terms of **OWNER of Motor Vehicle Vessel 'LILIAN S" Case Supra.**
57. **See also RE CONTINENTAL CREDIT FINANCE (2003) 2 EA 399 citing SEIF VS. SHATRY (1940) 19(1) KLR 9.** On the second limb of GIELA Case Supra, the 1st Defendant claim is liquidated. **NGURUMANI LTD c**ase Supra defines;
58. *"what constitutes irreparable injury as a claim where there is no standard by which their amount can be measured with reasonable accuracy or injury or harm is such nature that monetary compensation of whatever amount will never be adequate remedy".* The Interested Party thus contends that the 1st Defendant claim is quantifiable.
59. On the limb of balance of convenience, the Interested Party submits that, the balance tilts in its favour as it is entitled to exercise its power of sale of the property subject herein. At the time of issuance of the statutory notice, the Interested Party was owed Ksh.44,891,526.95/= and holds a charge over the same property and the right to sell has accrued whereas that of the Applicant is yet to accrue.
60. The Interested Party argues that if it does sell the charged property, the 1st Defendant amount can be offset from the proceeds of sale of the property by the Interested Party as provided by S.101 of Law Act.
61. After going through the application, the affidavits and the parties advocates submissions I find the following issues arise;-

    1. Whether the court ought to recognise and enforce the arbitral award herein"
    2. Whether the Court should issue injunctive and prohibitive reliefs sought and go ahead to set terms for sale of LR No.209.1424/2 South C Nairobi"
    3. What is the order as to costs"

62. On the 1st issue; whether the award ought to be recognised and enforced, the Applicant submit that same award has not been challenged by the Plaintiff and the period of doing so has lapsed way back on 17.12.2014. Proper Procedure was followed in lodging the award in court and filing instant application within the stipulated time lines under the Act. The award thus ought to be recognised and enforced.
63. The Plaintiff/Respondent never filed any reply to the application neither has it filed an application to impugn the award. The party is deemed to have let the award be recognised and enforced unchallenged. This is understandable as the Plaintiff's application dated 13.6.2014 sought review orders which could have rendered award a nullity but same has already been struck out.
64. The Interested Party opposes the recognition and enforcement of the award on the ground that the application violates the provisions of S.36(3) of the Act and the holding of **SAFARICOM LTD** case Supra; where the court uphold the provisions above on the ground that the award filed in court is neither original or certified copy. The award titled as the FINAL AWARD is found on pages 249 to 300 of the 1st Defendant applicant Bundle. The award has a stamp with inscription

that ***"certified that this is a true copy of the original"***and signed by Mwaniki Gachoka Advocate who was the sole arbitrator.

65. In view of the aforesaid observation, the court upholds the submissions that the award in court is certified copy in terms of the provision of S.36(3) of the Act; and thus goes ahead to recognise the same and adopts the same for enforcement by the Court.
66. On whether the injunctive and prohibitory reliefs sought ought to be issued and court proceed to set terms of sale of property owned by Plaintiff, the Applicant submit that the reliefs sought are to preserve the property which is the only known to belong to the Plaintiff to avoid the decree arising from the award being rendered hollow and useless. The Applicant submits that the court has inherent powers to preserve the same property to be available to satisfy the decree.
67. The Interested Party opposes the grant of the orders sought on the grounds that first the thresh hold of grant of injunction under **GIELLA CASE** Supra has not been met as the application for attachment is premature and no decree has been made and that the Interested Party is exercising power of sale which has accrued to recover amount outstanding arising from the secured loan granted to the Plaintiff.
68. Further the Defendant No.1 claim is quantifiable thus no irreparable damage to be suffered and that the injunctive exercise of power of sale will inconvenience Bank more that the Applicant. Secondly, the bank opposes the issuance of prohibitory order on the grounds that same is premature and in any event the provisions cited in to support both reliefs for injunction and prohibitory orders and subsequent setting out terms for sale are not applicable in the Arbitration proceedings. They have not been imported to the Arbitration Act and Rules for them to apply.See the case of HINGA supra.
69. In any event there is no decree to be executed. The Applicant can always get a set off under S.101 of Land Act in event the Bank sells the charged property. Section 101 of Land Act stipulates that;

Section 100 "the purchase money received by a charge who has exercised the power of sale shall be applied in the following order of priority –(e) ..in payment of any subsequent charges in order of priority ,and the residue if any of the money so received shall be paid to the person who, immediately before the sale was entitled to discharge the charge"

70. The court notes that the bank was not party to the arbitration proceedings which gave birth to the arbitral award sought to be recognised and enforced.
71. The bank advanced loan and charged the Plaintiff's property prior to the proceedings herein and it is a secured creditor. It holds the title documents and the right of sale has accrued. This is undisputed facts. The Applicant award is yet to be converted to a decree and process of enforcement commence.
72. There is elaborate procedure of enforcement of decree by way of attachment of the immovable property. The same is yet to be undertaken. What the Applicant is saying, is that the Bank to withhold exercise of its statutory right of sale to await Applicant to undergo the process of attachment, and then they undertake the sale process together and share the proceeds thereof. Is the court mandated and or party to such arrangement"
73. The provisions cited over the relief of injunction, prohibitory order and setting terms of sale are contested to be excluded from the applicability in the Arbitration proceedings. In the **HINGA CASE** Supra, the provisions of Civil Procedure Act save for execution process are inapplicable in the Arbitration proceedings.
74. In the instant case the injunction sought to stop exercise of statutory powers is untenable in law and fact and same is denied.
75. The prohibitory Order under Order 22 Rule 48 CPR has its elaborate process to be followed to attach immovable property. The decree is yet to be extracted. The award cannot be used to

clog the right of the Bank to exercise Power of Sale. It is premature. The bank is a secured Creditor whose right to recover debt has accrued.

76. The provisions of S.101 Land Act will come to play once power of sale is exercised and proceeds thereof be used to offset Applicants debt. What the Applicant can do is to expedite the process of execution of decree now that the Court has allowed the application for recognition and enforcement.
77. As the bank is not averse to the sale of the charged property, same can be sold so that once the bank recovers its debt the Applicant can set off its debt and in case of any surplus, the same be passed to the Plaintiff.
78. The court thus makes the following orders;

a. The arbitral award herein is recognised and adopted for enforcement by the court.
b. The other orders sought in the Motion dated 13th May 2015 are rejected.
c. Parties bear their own costs.

Dated, Signed and Delivered in Court at Nairobi this 8th day of April, 2016.

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C. KARIUKI

JUDGE