REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

ORIGINATING MOTION NO E. 827 OF 2020

BETWEEN

THE PEARL RESIDENCE LIMITED....APPLICANT

AND

WILLIAM JOHN OLUANDE.....RESPONDENT

(Being an application for recognition and enforcement of a final award dated 29/7/2019 and an additional Award on quantum of costs dated 5/11/2019 delivered by Hon.W.A. Mutubwa FCI Arb Sole Arbitrator)

RULING

1. Before me is a Motion on Notice made under ***sections 10 & 36 Arbitration Act, 1995*** by the applicant. In it, the applicant seeks for the recognition and enforcement of the final arbitral award dated 19/7/2019 and an additional award on quantum on costs dated 5/11/2019 made by a sole arbitrator **Hon. W. A. Mutua, FCIArb**.

2. The application was supported by the affidavit of **Sunita Patel** sworn on 7/7/2019. It was deponed that the arbitral proceedings were commenced under ***clause 14*** of the agreement for sale dated 11/11/2016. That under the said agreement, any dispute arising therefrom was to be referred to arbitration whereby, **Mr W. A. Mutubwa** was appointed to superitend over the dispute between the parties.

3. The arbitral proceedings culminated in the two awards aforesaid originals of which were produced as SP 1 and SP 2, respectively. The applicant therefore prayed that since the award had not been set aside or challenged, the application should be allowed.

4. The application was opposed vide the respondent's replying affidavit sworn on 3/8/2020. He deponed that the application was fatally defective for failing to comply with the requirements of law. He admitted that the arbitral proceedings were initiated by him pursuant to an arbitral clause in an agreement between him and the applicant.

5. That he had believed that the arbitration would provide a quick and cost effective mechanism to resolve the dispute between him and the applicant in respect of the latter's withholding of **Ksh 3.2million** following the collapse of a sale of some property to him. That however, due to the huge cost of arbitration, there was delay in the issuance of the final award.

6. He contested the costs of **Ksh 869,758.34** that were awarded by the arbitrator. He contended that the same were punitive, unreasonable and excessive and therefore contrary to the public policy of kenya of promoting alternative form of dispute resolution ***under artcle 159*** of the Constitution. He complained that having retired from formal employment in 2014, he was struggling to meet his financial obligations and it will not be proper for him to be subjected to paying the astraunomical costs awarded.

7. The parties filed their respective submissions which I have carefully considered. ***Section 36 of the Arbitration Act*** provides:

> **36. "(1) A domestic arbitral award, shall be recognized as binding and, upon application 1A writing to the High Court, shall be enforced subject to this section and section 37.**
>
> **(2).....**
>
> **(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish:-**

a) The duly authenticated original award a duly certified copy of it; and

b) The original arbitration agreement or certified copy of it."

8. In **Samura Engineering Ltd vs Don-woods Company Ltd [2014] eKLR** Gikonyo J held:

> **"I do not even think the discretion given to the court under section 36 (2) of hte Act would include excusing a party from filing any or all the documents required under that section, because those are the primary document which form the basis of the recognition and enforcement of the award as the order of the court. Perhaps, the discretion would only entitle the court to accept the award irrespective of the state in which it was made in which case the court will accept and exemplification or a certified or duly authenticated copy thereof, but the document must be present lest the court should be acting on nothing or anything which is never an acceptable judicial practice. To say the least, any practice to the contrary of what I have stated would be the most awful and extravagant exercise of discretion."**

9. I am in agreement with the said proposition of the law. The requirement for the production of the original or certified copies of the arbitral agreement and the original award, is to place before the court, the evidence of the existence and veracity of the two items which are important in the arbitral process.

10. Firstly, the court has to satisfy itself that the parties had entered into a lawful agreement to divest themselves of their right to approach the national courts in settlement of their dispute.

11. In that regard, the court will have to satisfy itself that the subject agreement is not only lawful but that it is not contrary to the public policy of Kenya. It will also satisfy the court that the arbitral tribunal had the jurisdiction to undertake the exercise it had undertaken.

12. Secondly, the court has to satisfy itself that the proceedings culminated in a decision by way of an award that is sought to be enforced as a decree of the court. That is why the production of the two documents is crucial.

13. While the court has discretion under that section, the same is one to be exercised sparingly. For example it may be exercised where there is no objection to the enforcement of the award, or where there is a reasonable explanation as to why the said documents cannot be produced.

14. In the present case, whilst the applicant produced original copies of the award, it failed to produce the agreement or the certified copy thereof. That is the agreement that founded the arbitral proceedings. Although the respondent raised that issue in paragraph 3 of his replying affidavit, the applicant did not see any reason to either respond thereto or give any explanation by way of a supplementary affidavit.

15. That being the case the application is fatally defective. There is no reason to consider the issues raised either in the application or replying affidavit as doing so would be acting in futility.

16. For the reason that the application offends the mandatory requirements of S36(3) of the Act as set out above, I am satisfied that the same is fatally defective and I strike it out with costs to the respondent. This does not however, mean that the award has been set aside. The applicant should comply with the law if it still desires to enforce the same.

DATED and **DELIVERED at Nairobi this 21st day of January, 2021.**

A. MABEYA, FCIArb

JUDGE