



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. NO. 1143 OF 2020

EXPORT TRADING COMPANY LIMITED APPLICANT

VERSUS

MINISTRY OF AGRICULTURE, LIVESTOCK AND

FISHERIES 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

R U L I N G

1. Before me is a Summons in Chambers brought under **section 36 of the Arbitration Act and Rule 9 of the Arbitration Rules, 1997**. The applicant sought leave to enforce the Final Arbitral Award made and published on 4/9/2020. It also sought the costs of the application.

2. The application was grounded upon the grounds set out in the body thereof and the supporting affidavit of **Giles Lewis** sworn on 13/10/2020. These were that; there was an arbitral process that had been undertaken under the auspices of the Nairobi Centre for International Arbitration; that an Award thereof had been made and published by the sole Arbitrator on 4/9/2020. That in the premises, the applicant sought that the same be enforced as a decree of this Court.

3. The application was served upon the Attorney General on 19/10/2020. He never appeared and the application was therefore undefended.

4. I have considered the application. **Section 36 of the Arbitration Act, 2015** provides: -

“(1) A domestic arbitral award, shall be recognized as binding and, upon application in 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 original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it”.

5. On record, there is a copy of the Final Award published on 4/9/2020. The applicant did not produce the copy of the arbitral agreement in terms of **section 36 (3) (b) of the Arbitration Act, 2015**. However, this Court is of the view that the same is not necessary because, from the documents filed and presented to the Arbitral Tribunal, the contract between the parties contained an arbitral agreement in **Article 12** thereof. Accordingly, the applicant is excused for not having produced the Arbitral agreement in terms of **section 36(3)(b) of the Arbitration Act**.

6. Having considered the entire record, I am satisfied that; the parties entered into some contract in or about 2017. The contract contained an arbitral agreement. A dispute as to the performance of the said contract arose and the matter was referred to arbitration in accordance with the contract between the parties.

7. I am further satisfied that at the Arbitral Tribunal, the parties were granted an equal opportunity to present their respective cases. The respondents, in their usual callous manner and as is common knowledge of taking matters for granted, failed to present their case. The Arbitral Tribunal found as a fact that; there was a contract between the parties, the applicant performed its part, the respondents made part

payment thereof but failed to pay the entire contract sum.

8. Accordingly, by a Final Award published on 4/9/2020, the Arbitral Tribunal found for the applicant against the respondents. By that Award, the 2nd respondent is to pay the applicant an outstanding balance in the sum of Kshs. 518,561,329/50 together with interest thereon at 12% per annum from January, 2018 until payment in full. The 2nd respondent was also condemned to pay the costs of the arbitration. It is only regrettable that the public is to shoulder the unnecessary costs and interest which could have been avoided had the 2nd respondent been properly advised.

9. The Award having been made after due process and in accordance with the law, I find the application to be meritorious and I allow the same as prayed.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 20th day of **January, 2021**.

A. MABEYA, FCI Arb

JUDGE