



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**MISC. APPLICATION NO. E747 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE**

**AN ARBITRAL AWARD**

**BETWEEN**

**MOEISH CONSULT LIMITED .....APPLICANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**RULING NO. 2**

1. The application for consideration is the Applicant's Chamber Summons dated 20<sup>th</sup> November 2020 made under **section 36(1)** of the **Arbitration Act, 1995** ("the **Act**") and **Rule 9** of the **Arbitration Rules** seeking an order that the final arbitral award dated 11<sup>th</sup> October 2019 and published on 6<sup>th</sup> March 2020 by Mr Collins O. Adipo, the Arbitrator ("the Final Award") be recognised and enforced as a decree of this court.

2. The application is supported by the affidavit of the Applicant's Managing Director, Isha Kasule, sworn on 20<sup>th</sup> November 2020. The Respondent ("the Bank") opposed the application through grounds of opposition. The application was urged orally by counsel for the parties.

3. Under **section 32(A)** of the **Act**, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the **Act**. The High Court, under **section 36** of the **Act**, has the power to recognise and enforce domestic arbitral award in the following terms:

36 (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.

(4) .....

(5) .....

4. The Applicant's case is that it has met all the pre-conditions for enforcement of an award as it has provided the certified copies of the

Transaction and Fee Agreement dated 4<sup>th</sup> January 2014 (“the Agreement”) which contains the arbitration clause and a certified copy of the Final Award. The Agreement and Final Award are not in dispute as this court has already determined the Bank’s application to set aside the Award under **section 35** of the **Act** and dismissed it by a ruling dated 20<sup>th</sup> November 2020. The only question then is whether the grounds of opposition raised by the Bank are valid.

5. The Bank has argued that the application is premature as the Final Award is not yet binding as the arbitral tribunal has not concluded the issue of costs pursuant to direction number 5 of the Final Award. I think, and without belabouring the point, this objection is answered by **section 3(1)** of the **Act** which states:

“arbitral award” means any award of an arbitral tribunal and includes an interim arbitral award

This means that any award whether interim or otherwise is an award and may be enforced as it is an award within the provisions of **section 36(1)** of the **Act**. Further, **section 36** does not qualify what kind of award may or may not be enforced.

6. The Bank also contends that it has filed a Notice of Appeal against the ruling dated 20<sup>th</sup> November 2020 dismissing its application to set aside the Final Award. It is trite law that a Notice of Appeal does not operate as a stay of proceedings and or indeed a stay of enforcement of an arbitral award. This is the import of the applicable law stipulated at **Rule 6 of Order 42(1)** of the **Civil Procedure Rules** which states in part that, “*No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except insofar as the Court appealed from may order .....*” The fact that the Bank seeks to pursue its appeal does not affect the Applicant’s right to enforce the award unless there is an affirmative order of stay.

### **Disposition**

7. I allow the Chamber Summons dated 20<sup>th</sup> November 2020 on the following terms:

a. The final arbitral award dated 11<sup>th</sup> October 2019 and published on 6<sup>th</sup> March 2020 by Mr Collins O. Adipo, the Arbitrator (“the Final Award”) be and is hereby recognised and shall be enforced as a decree of this court.

b. The Respondent shall bear the costs of the application.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of JANUARY 2021**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Onyambu instructed by Nyaundi and Tuiyott Advocates for the Applicant.

Mr Mutua instructed by Mutua and Molo Advocates for the Respondent.