



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO.7 OF 2018

M/S PATHOLOGIST LANCET KENYA LIMITED.....APPLICANT

VERSUS

CHRISTAMARIANNE MISSION HOSPITAL.....RESPONDENT

RULING

1. This ruling determines the Notice of motion dated 24th January 2020. The application seeks the following orders;

1. Spent

2. That this honourable court be pleased to issue a decree in terms of the final arbitral award dated 21st January, 2020.

3. That this honourable court be pleased to grant the applicant leave to enforce the final Arbitral award dated 21st January, 2020.

4. That this honourable court be pleased to grant any other orders it deems fit and just in order to achieve the enforcement of the final arbitral award.

2. The applicant and respondent entered into a contract on 22nd April 2014 and the applicant was required to provide laboratory services to hospitals operated by the respondent. It was a term of the agreement that in the event of a dispute, the matter would be referred to arbitration. Arbitral proceedings commenced before Kamau Karori Arbitrator and an award in the sum of Kshs 49,084,170.50/- was made in favor of the applicant on 21st January 2020. Despite the award entered in favor of the applicant, the respondent failed to comply with the terms of the award. The applicant contends that it cannot enforce the final award unless it is adopted as a decree of the court and thus requires leave to enforce the final Arbitral Award.

3. The respondent in his replying affidavit dated 9th July 2020 contends that the agreement between parties amounted to a direct acquisition of the respondent's business by the applicant as it took control over part of the respondent's business as consequence of the purchase of the respondent's laboratory assets. It was averred that in essence the transaction could only have amounted to a takeover and amalgamation of the respondent's and applicant's laboratory testing business. The respondent faulted the applicant for failing to seek authorization from the Competition Authority in respect of the arrangement contained in the Letter of Intent for Heads of Agreement dated 16th January 2014 and the Contract for Outsourcing of Laboratory Operations dated 22nd April 2014.

4. It was averred that the Letter of Intent for Heads of Agreement dated 16th January 2014, the Contract for Outsourcing of Laboratory Operations dated 22nd April 2014 and the Arbitral award dated 21st January 2020 did not have any legal effect pursuant to **section 42 (3) of the Competition Act, Chapter 504**. According to the respondent the Arbitral Award is in conflict with the public policy of Kenya.

5. Before the application was heard the respondent filed an originating summons seeking an order for enlargement of time to challenge the award. The application was dismissed vides this court's ruling of 24th September 2020.

6. The respondent subsequently filed an application seeking leave to file appeal against the ruling. The application was unopposed and leave to file an appeal was granted.

7. Each party made oral submissions in support of its case when the application came up for hearing on 16th December 2020.

SUBMISSIONS

8. Ms Wambugu, Counsel for the applicant, submitted that the application in question was brought under **section 37 of the Arbitration Act** ('the Act') and that this court had jurisdiction to entertain the application. She argued that upon considering the respondent's replying affidavit, it is clear that the facts as stated in the applicant's supporting affidavit have not been controverted. She urged the court to recognize the award as binding. Although the application was by way of Notice of Motion instead of Chamber Summons they urged the court to invoke and apply the provisions of **Article 159 (2) (d) of the Constitution** to cure the defect.

9. Counsel for the respondent, Mr. Omollo, submitted that the application is bad in law. He explained that **section 36(3) (a) & (b) of the Arbitration Act** requires a party to annex the original arbitral or a certified copy of the award. He pointed out that the appellant failed to comply with this mandatory requirement. Although a further affidavit was filed on the 21st September 2020 in a bid to cure the defect, the copy of the agreement annexed thereto was certified by Mr. J.K. Mwangi who was not the arbitrator. They also contend that the applicant did not obtain leave to file the further affidavit and the same should be stuck off from the record.

10. It was further submitted that under **Rule 6 of the Arbitration Rules** the instant application can only be made 3 months after the award is issued and therefore when the application was made it was premature. It was advanced that the arbitration agreement was not valid under the laws of Kenya and thus the dispute between the respondent and applicant was not capable of being settled. They opposed the enforcement of the award arguing that it was contrary to public policy in Kenya and **section 37 (b) (i) & (ii) of the Arbitration Act**.

11. Mr. Omollo argued that the applicant having acquired a material business in the respondent's lab business, it failed to seek authorization to the acquisition and merger as required by **section 42(2) (a) of the Competition Act**. He further argued that the applicant acquired a controlling right in the respondent's business and the businesses were amalgamated within **section 41(2) (h) of the Competition Act**. It was therefore mandatory to get authorization. Mr. Omollo advanced that the agreement as proposed by the applicant to the respondent was in violation of various aspects of the Competition Act and could not be the foundation of any cause of action in any court in Kenya. He submitted that the arbitration process and the award similarly suffer the same illegality and urged that this court should not be used as an avenue to enforce illegal agreements prohibited by law.

ANALYSIS AND DETERMINATION

12. Under **section 36 (1) of the Act** a domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced. However, the enforcement is subject to both provisions of **section 36 and 37 of the Act**. Section 37 provides that;

37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes the High Court proof that;

(i) a party to the arbitration agreement was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) The party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or

(vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;

(b) If the High Court finds that;

(i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or

(ii) The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya. [Emphasis mine]

13. The applicant in this matter initially filed a plaint before this court. However, the respondent through his application filed on 17th August 2018 sought to have the dispute referred to arbitration for settlement. On 29th October 2018 the parties by consent referred the matter to arbitration pursuant to clause 14 of the contract dated 22nd April 2014.

14. The arbitration proceedings were commenced and the respondent fully participated in the process and an award was entered against it.

15. Surprisingly, the respondent now claims that the contract which it had earlier relied on is unenforceable and the whole arbitration process was thus unlawful.

16. The applicant on the other hand submitted that the respondent is estopped from arguing that the contract was unenforceable by virtue of the fact that they chose to invoke clause 14 of the contract and have the matter resolved through arbitration.

17. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. (See **Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR**). The respondent cannot invoke provisions of the contract, have the dispute proceed for arbitration and upon getting an unfavorable award, now argue on the illegality of the contract.

18. In any case, even if this court were to consider that the contract was unlawful; such consideration would in essence be setting aside the consent entered on 29th October 2018 that recognized the validity of the contract, more particularly clause 14. It is the respondent through his application dated 16th August 2018 that spearheaded the arbitration process. He has not established any ground for the setting aside of the consent order entered on 29th October 2018.

19. In **Heva Fund LLP v Katchy Kolections Limited [2018] eKLR** the court stated;

“30. In the instant application, the Applicant has not furnished the court with any proof as per Section 37 of the Arbitration Act to warrant refusal of recognition or enforcement of an arbitral award. The applicant did not demonstrate he was influenced nor coerced to agreeing to settle the matter in the terms of a consent agreement which it signed together with the Respondent herein. The Respondent proved that it was the Applicant who made proposal on how it wished to make payments to the Respondent; that proposal formed the basis of the consent agreement and its claim for ignorance of what it signed is an attempt to evade payment of the amount owed; after all there is no denial of the indebtedness.”

20. However, to enforce an arbitral award the applicant should file the duly authenticated original award or a duly certified copy of it; and the original arbitration agreement or certified copy of it. **Section 36(3) of the Act** provides in mandatory terms that these documents must be filed when seeking enforcement of an arbitration award. It provides as follows:

“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;

(b) The original arbitral agreement or a duly certified copy of it.”

21. In **Samura Engineering Limited v Don-Wood Co Ltd [2014] eKLR** the court of held as follows;

“Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed...”

22. The compliance of **section 36 (3) of the Act** is thus very critical for the applicant. The applicant argued that they filed the certified copies of the award and the agreement in its further affidavit dated 21st September 2020 in compliance with the said section. The respondent took issue with certified award on grounds that the same was certified by an advocate and not the arbiter.

23. In **Samura Engineering Limited (supra)**, an award duly signed by the arbitrator had been filed by the party seeking to enforce it but the original arbitration agreement or a certified copy of it had not been filed. The court in that case held that discretion could be exercised in accepting an exemplification or a certified or duly authenticated copy of the award, but the documents had to be present lest the court be acting on nothing. The applicant in the present case annexed certified copies of the agreement and award.

24. The certification of the award and agreement are also not in issue in this case for reasons that this court made a determination on the respondent’s application to set aside the Award under **section 35** of the **Act** vides its ruling dated 24th September 2020. In my view therefore, the contents of the arbitration award are not disputed. I have also noted that the respondent through SR BEATRICE SABATO at paragraph 4 of their replying affidavit confirmed that they were before Mr. Kamau Karori, FCI Arb on 21st January 2020 who issued the Arbitral Award annexed thereto. The annexed award is similar to the one provided by the applicant in its further affidavit dated 21st September 2020.

25. Having considered the issues raised in this application, I find no reason why this application cannot succeed.

26. The upshot of all this is that, the Notice of Motion dated 24th January 2020 is allowed and the Arbitral award herein is hereby recognized and enforced as an order of the Court.

27. The costs of the application shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF APRIL, 2021

R. E. OUGO

JUDGE

In the presence of:

Mr. Mugo h/b for Mrs. Wambugu for the Applicant

Mr. Omollo for the Respondent

Ms. Rael Court Assistant