



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. E502 OF 2019

IN THE MATTER OF ARBITRATION ACT, 1995

PAVANPUTRA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

KEROCHE BREWERIES LIMITED.....RESPONDENT

RULING

(1) Before this Court is the Chamber Summons dated **28th October 2019** by which the Claimant **PAVANPUTRA ENTERPRISES LIMITED** seek the following orders:-

- 1. That this Honourable Court be pleased to recognize and adopt the Final Award prepared by Steven Oundo dated 29th April, 2019 and published on 11th July 2019 as Judgment of this Honourable Court.**
- 2. That this Honourable Court be pleased to grant leave to the Applicant to enforce the said Arbitral Award as a Decree of this Honourable Court.**
- 3. That the costs of this application be payable by the Respondents.**

(2) The Application was premised upon **Section 36** of the **Arbitration Act, Chapter 49** of the **Laws of Kenya, Rules 4(1) (2) (5) and (6)** of the **Arbitration Rules 1997. Section 59** of the **Civil Procedure Act, Cap 21, Laws of Kenya** and **Order 46** of the **Civil Procedure Rules** and all enabling provisions of law and was supported by the Affidavit of even date sworn by **HARISH PATEL**.

(3) The Respondent **KEROCHE BREWERIES LIMITED** filed the Replying Affidavit dated **20th January 2020** in opposition to the application. The application was canvassed by way of written submissions. The Claimant filed its written submissions dated **10th August 2020** whilst the Respondent also filed their submissions dated **20th August 2020**.

BACKGROUND

(4) The Claimant and the Respondent entered into an Agreement dated **6th March 2013**. **Clause 45** of the said Agreement provided that any dispute arising under the contract would be referred to Arbitration.

(5) A dispute arose between the parties and the matter was duly referred to Arbitration. The Arbitrator **MR. STEVE OUNDO** after hearing the matter published the Final Award dated **29th April 2019** which award was released to the parties on **11th July 2019**. By that Award the Arbitrator found in favour of the Claimant and made an Award of **Kshs. 20,151,382.51**. It is this Award that the Claimant now seek to have recognized and adopted by the Court.

(6) As stated earlier the Respondent opposed the application for the adoption by the Court of the Award.

ANALYSIS AND DETERMINATION

(7) I have carefully considered the written submissions filed by both parties in this matter. It is common ground that the Claimant and the Respondent entered into an Agreement on **6th March 2013**. It is further not disputed that the said Agreement vide **Clause 45** provided that any dispute arising thereunder was to be referred to Arbitration.

(8) The parties both state that a dispute arose between them which dispute was referred to Arbitration under the terms of the contract. Following a hearing the Arbitral Tribunal found in favour of the Claimant and published the Final award dated **29th April 2019**. That Final Award provided inter alia as follows:-

(a) The Tribunal declares that the Respondent is in breach of the two contracts dated 31st August 2017.

(b) The Tribunal Orders the Respondent to pay to the Claimant the total sum of Kshs. 20,151,382.51 within 30 days of collection of the Final Award. Simple interest calculated at 10.0% per annum shall accrue, on any amount outstanding thereafter until the same is paid in full.

(9) The Claimants have filed this Summons seeking to have that Final Award recognized and adopted by the Court. **Section 32A** of the **Arbitration Act** provides that an Arbitral Award is final and is binding upon the parties. No recourse is provided against a Final Award otherwise than in the manner provided for in the **Act** itself.

(10) **Section 36(1)** of the **Arbitration Act** provides as follows:-

“36. (1) A domestic arbitral award, shall be recognised 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)”

(11) The Claimant has annexed to the Summons copies of the Agreement in question (Annexure **‘HP-1’**) as well as certified copy of the Final Arbitral Award (Annexure **‘HP-2’**). From the material available I am satisfied that the Claimant has met the conditions requisite for the recognition of the Arbitral Award.

(12) **Section 37** of the **Arbitration Act** provides for the circumstances in which a Court may decline to recognize an Arbitral Award. In opposing this Summons the Respondent has not raised any of the grounds set out by **Section 37** for the rejection of an Arbitral Award. Indeed the Respondents have not challenged the Final Award dated **29th April 2019** nor have they taken any issue with the manner in which the Arbitral Tribunal conducted its proceedings.

(13) In the Replying Affidavit dated **20th January 2020** the Respondents object to the application on grounds that the costs of the Arbitration are yet to be ascertained. However the Respondents appear to have abandoned this line in their written submissions, and instead resort to pleading for time to settle the amount due under the Award.

(14) It transpires that on **3rd March 2020**, the parties entered into a consent which required the Respondent to settle the sum awarded in four (4) equal instalments. The Respondent only paid the 1st instalment of **Kshs. 5,037,845.63**. They plead that due to the interruption of the Respondents business arising from the COVID Pandemic they have been unable to adhere to the terms of the consent. The Respondent in their submissions pray that the consent be varied to enable them clear the amount due.

(15) A Court can only vary and / or set aside a consent upon a specific application being made in Court. The Respondent has made no such application in Court. As such this Court cannot grant the request being made by the Respondent through their submissions.

(16) It is manifest that the Claimants have met the conditions for recognition and adoption of the Final Arbitral Award. On the other hand, the Respondents have failed to demonstrate why the Final Award ought to be rejected by the Court.

(17) Finally I find that the Claimants application is merited. Accordingly I do grant prayer (1) and (2) of the Chamber Summons dated **28th October 2019** and makes the following orders:-

(a) That the Final Award prepared by Mr. Steven Oundo dated 29th April, 2019 be and is hereby recognized and adopted as a Judgement of this Court.

(b) That leave is granted to the Applicant to enforce the award as a Decree of this Court.

(c) Costs are awarded to the Claimant.

Dated in **Nairobi** this **21ST** day of **MAY, 2021**.

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MAUREEN A. ODERO

JUDGE