



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO. E18 OF 2021

FILEX MUHOMA OSONGA.....APPLICANT

- V E R S U S -

CIC GENERAL INSURANCE LIMITED.....RESPONDENT

R U L I N G

1. The Applicant herein **FILEX MUHOMA OSONGA** filed a chamber summons dated 28/4/2021 seeking to have an Arbitral award dated 8/2/2021 recognized, adopted and enforced by an order of this court.
2. The Applicant is also seeking leave to enforce the Arbitral Award as a decree of this court and further that costs of the Application be provided for.
3. The Application is based on the grounds on the face of it and supported by the Affidavit of Applicant dated 28/4/2021 in which it is deponed that the Applicant lodged a claim before an arbitral tribunal for breach of statutory duty against the Respondent and Diamond Trust Bank Kenya Limited, the claim ensued from a tripartite agreement for an insurance premium finance agreement with Diamond Trust Bank Kenya Limited for motor vehicle KCF 803Y and comprehensive insurance policy with the Respondent.
4. The Applicant further deponed that he was able to prosecute his claim against the Respondent before the arbitral tribunal to the required threshold and the arbitrator rendered the award dated 8/2/2021 in favour of the applicant. The Applicant was awarded a sum of Khs. 2,808,000 and interest at 14% from date of the arbitral award till payment in full.
5. The Applicant further deponed that the Respondent had not complied with the directions and order of the arbitral award and the failure to do so was aimed at denying him from enjoying the fruits of the arbitral award.
6. The Respondent filed grounds of opposition dated 13/5/2021 opposing the Application dated 28/4/2021 on the following grounds that the Applicant had not enjoined all parties in the arbitral suit and that it was vexatious and vindictive for the Applicant to lodge an application for adoption and enforcement against one party.
7. Further that the Respondent has not declined to abide by the arbitral award but has requested the Applicant to comply with the claim settlement procedures set out in the Insurance Act which included filling a claim form, supplying statements, log book and filling a motor vehicle transfer form and that the adoption and enforcement of the award will be against public policy relating to settlement of insurance claims.
8. The Respondent filed a replying affidavit dated 30/10/2021 in which it is deponed that it is standard practice in the insurance sector for the owner of a stolen vehicle is to surrender duplicate keys and log book to the insurer and initiate transfer of the stolen vehicle to the insurer before any payment of indemnity can be paid and that failure to document the claim by filing the claim form and surrendering the ownership documents to the respondent would cause it to suffer prejudice as it will not be in a position to document its claim to its re-insurer.
9. The parties filed written submissions which I have duly considered.
10. The Applicant submitted that the Applicant and Respondent were parties in an arbitral tribunal matter and the tribunal rendered its award on 8/2/2021 against the Respondent and Diamond Trust Bank Kenya Limited, the Respondent herein has failed to comply with the arbitral award and the applicant is seeking for orders that the award dated 8/2/2021 be recognized, adopted and enforced as an order of this court.
11. The Applicant submitted that Diamond Trust Bank Kenya Limited fulfilled the directives of the arbitral tribunal and as such were not enjoined in the instant suit.

12. The Applicant further submitted that the Respondent has not appealed against the award nor sought to have the award set aside. The applicant submitted that the arbitral award did not give a requirement that a claim form be filled before payment could be made to the Applicant and that the Respondent was using this as a delaying tactic.

13. The Applicant cited the case of *Dinesh Construction Limited & Another vs. Aircon Electric Services (Nairobi) Limited [2021] eKLR* where the court dismissed the application seeking to set aside an arbitral award and allowed the application for recognition and enforcement of the arbitral award.

14. The Applicant further submitted that the court adopts and enforces the award delivered by the arbitral tribunal on 8/2/2021 for purposes of execution, and that the Court awards the applicant the costs of the arbitral process, costs of the suit and damages occasioned by the delay in payment of the arbitral sum by the Respondent.

15. The Respondent submitted that it was opposed to the motion seeking adoption of the arbitral award since its adoption would be against public policy.

16. The Respondent submitted that the applicant had refused to fill a claim form, surrender the log book and duplicate keys and that if the arbitral award is adopted and executed, the applicant would be paid the full value of the stolen vehicle and if the stolen vehicle were to be recovered the applicant could still claim it as his own despite having been indemnified by the respondent and this would translate of unjust enrichment.

17. The Respondent submitted it was against public policy for an insurer to indemnify a party who has not surrendered ownership or the property in the goods insured.

18. The Respondent submitted that section 37 of the Arbitration Act sets out grounds in which a court can decline to adopt an arbitral award and that is if the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya and the Respondent cited the case of *Glencore Grain Limited vs. TSS Grain Millers Ltd [2002] 1 KLR 606*. The Respondent further submitted that adoption of the award herein would be against public policy in relation to the procedure of insurance claim settlement. It would be morally wrong to order that the applicant be indemnified for the loss of the motor vehicle when he is still registered as the owner of the stolen car, still has the logbook and duplicate keys.

19. The respondent further submitted that the applicant failed to enjoin all parties in the instant application and that the applicant left out Diamond Trust Bank Kenya Limited without any justifiable or plausible reasons.

20. The issues for determination in this Application are as follows;

i. Whether the Arbitral Award should be adopted and enforced as an order of this court.

ii. Whether the Applicant ought to have enjoined the other party DIAMOND TRUST BANK KENYA LIMITED

iii. Whether the Applicant ought to fill a claim form before being paid the sum awarded in the Arbitral Award.

iv. Who pays the costs of the Application.

21. On the issue as to whether Arbitral award should be adopted as an order of this court, I find that the court is not a mere rubber stamp for arbitral awards.

22. The recognition and enforcement of arbitral awards is governed by Sections 36 and Section 37 of the Arbitration Act. Section 36 confirms the binding nature of domestic arbitral awards and requires a party seeking enforcement of such awards to avail to the court either the original arbitral award and the original arbitration agreement or their certified copies. Whereas section 37 of the Act sets out the grounds upon which the court can decline to recognize or to enforce an arbitral award. These grounds are similar to those that warrant the setting aside of arbitral award as provided under Section 35 (2) of the Act. In essence, Section 37 of the Act prohibits a court from recognizing or enforcing an award if the conditions stated therein are shown to be present. One of the conditions the High Court may refuse to recognize and enforce an award is if recognition and enforcement of the award is contrary to public policy.

23. In this case I find that adopting and enforcing the arbitral award before the Applicant herein fills the claim form, surrenders the log book and duplicate keys as required by the Respondent as part of its claim settling procedures and standard procedure in the insurance sector would be inimical to the interests of justice and contrary to public policy and I associate myself with the remarks of Ringera J. (as he then was) in *CHRIST FOR ALL NATIONS VS. APOLLO INSURANCE COMPANY LIMITED NRB HCC NO. 477 OF 1999* where he expressed himself as follows: “... I take the view that although public policy is a most broad concept incapable of precise definition...an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality...”

24. In the current case, the Applicant is required to fill forms and to enjoin all the parties and in the circumstances, I find that there is lack of full disclosure.

25. On the issue as to whether the Applicant ought to have enjoined the other party, I find that the answer is in the affirmative because the arbitral award ensued from a Tripartite Agreement for an insurance premium financed by Diamond Trust Bank.

26. On the issue as to whether the Applicant ought to fill forms, I find that the Respondent has not refused to pay the award amount and that the Applicant's refusal to fill necessary forms to settle the claim, surrender the log book and duplicate keys is unreasonable.

27. I accordingly find that the Applicant is responsible for the delay to settle the arbitral award.

28. I direct as follows;

i. THAT the Applicant amends the Application dated 28/4/2021 to include Diamond Trust Bank.

ii. THAT the Applicant fills the claim forms and surrenders the log book and duplicate keys as required by the Respondent for purposes of settling the claim and that the matter be mentioned in forty five (45) days to confirm compliance.

iii. The Applicant is to blame for the delay in settling the award and therefore each party to bear its own costs of this Application.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY OF DECEMBER, 2021

A. N. ONGERI

JUDGE