



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2018

WALTRAUD MELICHAR.....APPLICANT

VERSUS

JACOB M.NGUTHU T/A KASHESHE CONSTRUCTION COMPANY...RESPONDENT

IN THE MATTER OF: THE ARBITRATION ACT 1995 (AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT NO. 11 OF 2009) AND IN THE MATTER OF AN ARBITRATION.

JACOB M. NGUTHU T/A KASHESHE CONSTRUCTION COMPANY.....CLAIMANT

VERSUS

WALTRAUD MELICHAR.....RESPONDENT

RULING

1. The application for consideration is the Respondent's Chamber Application dated **24.7. 2019**. It was filed pursuant to **Sections 36 and 37(2)** of the **Arbitration Act, 1995**, as amended by **Arbitration (Amendment) Act, No. 11 of 2009**, and **Rules 6 and 9** of the **Arbitration Rules, 1997** for Orders that:

a. That this Honourable Court adopts and enforces the final arbitral award made on the 16.3.2018 by Mr. Eric Nyongesa Wafula, the sole Arbitrator, as a Decree of this Court.

b. Pending the hearing and determination of the Application, this Honourable Court be pleased to direct the applicant to deposit the entire Award sum of Kshs. 622,000/= in an interest earning account in the joint names of the parties or in Court as the Applicant herein is a foreigner with no known assets.

c. The Costs of the application be paid by the Applicant.

2. The application is premised on the Supporting Affidavit sworn by **Mr. Jacob M. Nguthu** on **24.7.2019** to which the Respondent annexed certified true copies of the Final Award and the Arbitral Agreement. The grounds raised in support of the application are that

(a) a Final Award dated 16.3. 2018 by the Sole Arbitrator, Mr. Eric Nyongesa Wafula, had been made against the Respondent

(b) currently, no order has been made staying the enforcement of that Award as the applicants Application dated 18.6.2018 seeking to set aside the award was dismissed with costs and,

(c) the notice of Appeal filed on the 31.1.2019 does not operate as a stay.

3. It was further the contention of the Respondent that the Award is yet to be settled; and that it would therefore be in the interest of justice and expediency for the Application to be allowed and since the Applicant is a foreigner, with no known asset in Kenya save for the house built for her by the Respondent, which house may be disposed of at will, it would be proper for the arbitral amount to be deposited in a joint interest earning account.

4. The Respondent/Applicant opposed the Application for enforcement by filing its grounds of opposition dated 28.10.2019 and a Replying

Affidavit sworn by the Respondent /Applicant on the 4.11.2019. It is averred that it would be unfair for the award to be enforced bearing in mind that he was not heard in his Application for setting aside which was dismissed purely on a procedural ground that it was filed out of time yet the substantive issues therein remain in adjudicated and an Applicant should not be made to suffer the mistakes of its advocate who filed it case out of time.

5. The deponent further states that there is no need for him to deposit security in Court as he is always in Kenya. He has even obtained a work permit and has absolutely no intention of selling his house as he has already lodged an Appeal to the Court of Appeal .

DETERMINATION

6. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence. I take the following view of the matter. The issue for determination is whether the Applicant has met the threshold for the enforcement of an arbitral award.

7. **Section 37 of the Arbitration Act** provides the grounds upon which the Court may refuse to recognize an arbitral award. The Court may refuse to recognize the award at the request of the party against whom the award is made if the party proves that:

- (a) a party to the agreement was under some incapacity;
- (b) the arbitration agreement is not valid under the applicable law;
- (c) the proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given to the party or that the party was otherwise unable to present his case;
- (d) that the award does not fall within the terms of reference of the arbitration;
- (e) the composition of the arbitral tribunal was not in accordance with the arbitration agreement;
- (f) that the arbitral award has not yet become binding or has been set aside; that the making of the award was induced or affected by fraud, bribery, corruption or undue influence. **See section 37 (1) (a) of the Arbitration Act.**

8. Having dismissed the Respondent/Applicant's Application for setting aside the arbitral award on the 29.11.2018 on the grounds that this Court did not have jurisdiction to entertain the same as it was Statute barred and could not be entertained even for a valid reason, it would follow that the Final Award stands and ought to be accordingly enforced as sought by the Applicant/ Respondent. Since the Respondent/Applicant has filed a Notice of Appeal, in my view, this Court is not the avenue for such discourse as raised in the Respondent/Applicant's Affidavit as this Court is already functus officio and the said issues are purely a preserve of the Court of Appeal.

9. In the grounds of opposition by the Respondent/Applicant, it is stated that the Applicant/Respondent Application is misconceived, irregular, incompetent, and fatally defective, as it has not complied with Rule 4(3) as enforcement of the arbitral award should have been filed as an independent cause with its own serial number in the Civil Division's register.

10. Rule 4 of the arbitration rules provides as follows:

- (1) Any party may file an award in the High Court.
- (2) All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.
- (3) If an application in respect of the arbitration has been made under rule 3(1) the award shall be filed in the same cause; otherwise the award shall be given its own serial number in the civil register.

11. Odunga, J in **Kenya Airports Authority vs. Nairobi Flying Services Limited [2012] eKLR**, that:

"...the applicant herein should have filed the award, obtained a serial number for the award and then proceeded to make the instant application. In my view, it is the award, in the circumstances of this case that gives the court jurisdiction. That omission, in my view, is not a technicality but is a rule of substantive procedure that cannot be wished away ignobly. In the result, it is my view and I so hold, that the Chamber Summons dated 16th November 2011 is incompetent having been instituted prematurely as the award the subject of challenge herein has not been filed in accordance with the foregoing provisions..."

12. In the result, it is my view and I so hold, that the Chamber Summons dated 24.7.2019 is incompetent having been instituted prematurely as the award the subject of challenge herein has not been filed in accordance with the foregoing provisions and the same is struck out with no orders as to costs.

Dated, delivered & signed at Mombasa this 10th day of March, 2020.

D.O CHEPKWONY

JUDGE