THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL APPLICATION NO. 102 OF 2019

SUMMIT COVE LINES CO LTD.....PLAINTIFF

-VERSUS-

UAP INSURANCE CO LTD.....DEFENDANT

RULING

1. I have in this file two applications for determination on the question of whether an arbitral award dated the 14.8.2018 should recognised and adopted for enforcement or should be set aside. The first to be filed was that by the applicant dated 29.01 2019 seeking recognition and adoption. The reasons given to ground the application are that parties went to arbitration pursuant to a consent recorded before the court in CMCC 609 of 2017, arbitral proceedings progressed to conclusion leading to a final award to which no challenge had been made and therefore it was only right that the award be recognised and adopted. The application was supported by the Affidavit of the applicant which exhibited to court the pleadings before the lower court together with a copy of the award. It was pointed out that that the award had become due for recognition because no challenge had been made to it pursuant to section 35(1) of the Act.

2. The second application was that dated 8.2.2019 but filed on the 11.02.2019 by the respondent and praying for an order that the award be set aside on the sole reason that it was made contrary to public policy on the basis that the arbitrator had ignored the rule on how to deal with communication made on a without prejudice basis. There was simultaneously filed with the application a Notice Of Preliminary Objection seeking the dismissal of the applicant's summons on the grounds that; having failed to exhibit the original award, it affronted S.6 of the Arbitration Act and that it equally flew in the face of S. 6 Civil procedure Act because there was pending an application of same effect before the chief magistrates court. In the affidavit in support of that application there is an answer to the question on timely filling of the challenge, it being asserted that time did not run between 21st December and 13th January hence there was no delay.

3. On the 21.5.2019, the court in giving directions that the two applications be heard together, also directed parties to file and exchange supplementary affidavits and written submissions. Pursuant to that order the applicant filed a supplementary Affidavit sworn on the 19.8.2019 while the defendant's is dated 20.8.2019.

4. In the applicant's supplementary affidavit, which I view to have large purposed to exhibit the original award and order of reference, the lateness in challenging the award was stressed together with the fact that the application to set aside was made in bad faith. For the respondent lateness was explained that the delay was explained to have been caused by the former advocate who refused to take instruction during December and later refused to avail to the respondent documents used in arbitration a fact which forced the current advocates to obtain such documents from the arbitrator. The need to file the original or certified copy of the award and arbitration agreement was underscored as well as the need to pay filling fees and that failure to so comply render the application incompetent an amenable to being dismissed.

Submissions by the parties

5. In their submissions filed the applicant relied on the provisions of section 36(1) Arbitration Act and the decision in **Lalji Meghji patel & co ltd vs Nature Green Holdings Ltd (2017) eklr** citing **Tanzania national Roads Agecy vs Kundan Singh Construction Co ltd** for the position that recognition and adoption of an award is automatic unless the conditions in section 37 be met. The applicant takes the position that his application complies with the law and the requirements of section 37 have not been met to merit setting aside. On the application for setting aside, submissions were made to the effect that the same was filed out of time and that even on the merits the requirements for setting aside had not been met. Order 50 Rule 4 was said to be inapplicable and subsidiary to the provisions of The Arbitration Act based on the decision in **Ann Mumbi Hinga vs Victoria Njoki Gatha (2009)eklr.** Help was sought from different dictionaries on what constitutes public policy and position taken that no breach of public policy has been demonstrated.

6. For the respondent submissions were made that the application for enforcement was incompetent for failure to conform with the requirements of section 36(3) and Rule 10 of the ARBITRATION Act and Rules and ought to be dismissed. The decisions **indavid Chabeda vs francis Ingaji (2007)eklr, Nderitu Muchemi Michael vs Ashbel Macharia Machira (2018)eklr and Prinka Debucon construction**

ltd vs Manyota Ltd (2017) were all cited for the finding that failure to exhibit the original award and the arbitration agreement or their certified copies renders the application incompetent.

7. On why the recognition should be refused and award set aside, section 37(b)ii of the arbitration Act, 23 of the Evidence Act and the decision in **Mumias sugar co Ltd vs Gladys Omari (2016) eklr** were relied upon that public policy dictate that negotiations between the parties need to be encouraged to proceed freely and without fear by parties that what is said during such negotiations may be laid before court at trial as evidence. The invitation of that position was taken on the allegation that the arbitrator admitted communication made without prejudice as evidence and relied on same as a basis of his final award. The counsel then cited to court the decisions in **Apa Insurance Co Ltd vs Chrysanthus okemo (2005)eklr** and **Evangelical Mission for Africa vs kimani Gichui (2015)eklr** for the proposition of the law that an award made contrary to public ought to be set aside because to sustain it visits upon the respondent great injustice.

8. On the challenge that the application to set aside the award was filed out of time, it was submitted that when computation of time under Order 50 Rule 4 is taken regard of the matter was filed within time. On the challenge that provision of Civil Procedure Rules could not be invited I this matter, reliance was sought on Rule 11 of the Arbitration Rule which allow invocation of civil procedure Rule in appropriate cases. The decision in **Kamconsult Ltd vs Telcom Kenya Ltd (2001)eklr** was cited for the holding that applications for setting aside an award is an appropriate one to invite application of civil procedure Rules.

Analysis and determination

9. In directing that the two applications be heard together, the court took into account the fact that the goals of the two applications are symmetrically opposed. I do consider that a decision on one will obviously impact on the other. For that appreciation, I will treat the respondent's application, having being the latter one in time, as an opposition to the applicants application that came earlier. Accordingly I take the view that there are only two issues for determination. The issues are; first, whether the application to enforce the award is competent and secondly, whether the award should be enforced or set aside.

Competence of the enforcement application

10. The challenge on the competence of the application is grounded on the failure to exhibit on the application, the original award and the arbitration agreement. It is not in doubt that the statute mandates that the two be exhibited. What has not been canvassed by the respondent is the rational for the law and the mischief it was aimed against. By nature, arbitration is consensual and the court ought to be satisfied that indeed the two contestants were at an *ad idem* that their dispute be resolved by arbitration. That is the rationale for demanding that the agreement be exhibited to court. On the other hand the need to exhibit the original or certified copy of the award is purely for aunthentification that there is a genuine award made in terms of the agreement by the parties. In my view, the need for those documents in the original or certified form is made unnecessary if the two parties agree that they agreed to go to arbitration, arbitration proceeding took place and a final award was made in terms of a copy, even if not certified , exhibited to court and agreed by both to be the award.

11. In this matter, there was, before the supplementary affidavit was filed by the applicant, a copy of the award exhibited in the two affidavits in support of the rival applications. My reading of the two copies, tell me that both are copies of one document with no variations. In fact, neither of the parties challenges the accuracy of the copy filed by the other. They thus agree that the copies exhibited are those of the award notified to them. In those circumstances, I think the intension of the act has been fully met and to refuse the application on that basis would be to sacrifice the substantial justice of the case for a procedural requirement. That would not be fair and just.

12. However, for this case, by the supplementary affidavit of the applicant sworn on the 21.8.2019, there was annexed a consent order recorded before court and referring the matter to arbitration as well as the award. In my view the two are original and therefore fully satisfy the requirements of the statute. That objection and challenge was improperly taken and it is dismissed. I find that the application is competent and properly before the court.

Should the award be recognised or set aside on the grounds advanced by the respondent

13. One of strongest arguments put forth for preference of arbitration over litigation is the fact that it is consensual and thus propelled by party autonomy. For that reason the law binds parties to their contracts on choice of forum, hesitates to interfere in such contract and respects the decision reached by the chosen forum. That is the object to be achieved by shielding arbitration proceedings from interference by the court. The window provided is narrow one under section 37 of the Act and no more. Recognition should thus be granted as of right unless the court be satisfied that there is a ground for refusal.

14. In this matter the respondent has attacked the award on the basis that it was influenced by the arbitrator relying upon and accepting as evidence communication made on a *without prejudice* basis and therefore contrary to the law and public policy. Whether or not the award was grounded on privileged and protected communication forbidden from being led in evidence is a matter of fact to be derived from the award. For that reason it is important to reproduce how the finding on liability was reached at by the arbitrator. I find that in paragraph 12 c where the award says in part:-

"There was no evidence led that the claimant concealed the fact that the containers were used containers and their value was kshs 200,000 at the time of issuing the cover. The claimant testified that the insurance send(sic) a representative to view the containers before the cover was issued. In any event the defendant was obligated to assess and evaluate the risk they were placing on cover before issuing the cover. Having issued the insurance cover and accepted premiums at the value of Kshs 200,000, the defendant cannot again go back and claim that they were not aware of the value of the insured risk. In any event, the defendant had offered to settle the claim at Kshs27,778, without alleging misrepresentation of(sic) concealment of any facts…" (emphasis added)

15. I have underlined the words I consider to found the claim that inadmissible evidence was employed to reach the final award. Looking at the excerpt for what is, I do find that by the time the arbitrator started his sentence with the words *in any event,* he had made a determination

that the respondent had no valid reason to decline the claim. I therefore find that no inadmissible evidence was relied upon to qualify the decision as being contrary to public policy.

16. Having so found, I do hold that the respondent's application is wholly devoid of merits, the same cannot succeed but is dismissed with costs. That finding therefore leads me to find that there is no basis to refuse recognition with the consequence that the final award dated the 6.8.2018 and notified to parties on the 18.8.2018 remains unchallenged. Being unchallenged, it is hereby recognised and adopted as a judgment of the court and may that be enforced accordingly. I award to the applicant the costs of both applications.

Dated, signed and delivered at Mombasa this 30th day of April 2020.

P J O Otieno

Judge