



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**COMMERCIAL & TAX DIVISION**

**HIGH COURT MISC CIVIL CASE 295 OF 2018**

**FAULU MICROFINANCE BANK LTD....PLAINTIFF**

**-VERSUS-**

**JOHN MWARA KIBOCHI.....DEFENDANT**

**RULING (2)**

**BACKGROUND**

The Applicant/Respondent vide application filed on 29<sup>th</sup> June 2018, applied to stay enforcement of the Arbitral Award of 14<sup>th</sup> November 2016 and Further Arbitral Award of 29<sup>th</sup> March 2018.

The Claimant/Applicant vide application of 20<sup>th</sup> July 2018 sought enforcement of the Arbitral Award of 14<sup>th</sup> November 2016 and Further Arbitral Award of 29<sup>th</sup> March 2018.

After extensive submissions by respective Counsel for the Parties, this Court granted the following orders vide Ruling delivered on 29<sup>th</sup> July 2019;

- 1. The Final Award of 14<sup>th</sup> November 2016 and Further Award of 29<sup>th</sup> March 2018 are hereby recognized and enforceable SUBJECT to the following condition(s)**
- 2. The Claimant and Respondent through their respective Counsel shall jointly approach Kenya Revenue Authority (KRA) within 30 days of this decision and consult their respective positions with regard to tax computation in enforcement of the Arbitral awards. This is with a view to assessment of tax on Claimant's gains and profits from Respondent in accordance with provisions of Income Tax Act and Kenya Revenue Authority 's Employers Guide on PAYE and/or any other relevant law in force.**
- 3. In default of assessment and deduction of tax in accordance with the law as outlined above each /any party may invoke Section 39 of Arbitration Act and raise the question of law for the Court to determine.**

**APPLICATION**

By Certificate of Urgency filed on 26<sup>th</sup> November 2019 the Claimant /Applicant sought orders;

- a. That Pending hearing and determination of the instant application stay of execution is granted of Kenya Revenue Authority computation contained in its letter of 8<sup>th</sup> November 2019 pending *inter partes* hearing.
- b. That Kenya Revenue Authority computation contained in its letter of 8<sup>th</sup> November 2019 be declared invalid, null and void and of no legal effect.
- c. That an order be issued directing the Kenya Revenue Authority to use the sum of Ksh 46,210,348.00 as awarded in the Final Award dated 14<sup>th</sup> November 2016 and Further Award of 29<sup>th</sup> March 2018 to compute the tax payable.

d. The Court to issue any other or further remedy it deems fit to grant.

The application was based on the following grounds;

- a. By the Ruling delivered on 29<sup>th</sup> July 2019, the Court ordered computation of tax withheld and/or payable ought to have been computed from the sum of Ksh 46,210,348/- as contained in the Final Award & Further Award.
- b. On 11<sup>th</sup> November, 2019, the Applicant received an erroneous computation from KRA contained in letter of 8<sup>th</sup> November 2019 which calculated tax from the sum of Ksh 76,058,998 and Ksh 46,210,348/- as per the Court order.
- c. KRA determined that Ksh 27,666,458 is payable as tax by the Applicant and Ksh 570,894 is payable by the Applicant to the Respondent.
- d. The effect of KRA computation reviews the Final Award and Further Award Ruling & Court Order herein.
- e. The effect of KRA computation offends the Arbitration Act specifically **Section 32A of Arbitration Act** which recognizes the principle of finality of Arbitral Awards as the Final & Further Arbitral Awards.

On 26<sup>th</sup> November 2019 by application of the parties, stay of execution of Kenya Revenue Authority computation contained in its letter of 8<sup>th</sup> November 2019 was granted pending hearing and determination of the instant application.

### **REPLYING AFFIDAVIT**

The Respondent by Replying Affidavit filed on 10<sup>th</sup> December 2019, opposed the Applicant's application on the following grounds;

- a. The Court Ruling of 29<sup>th</sup> July 2019 directed that the Final Award & Further Award were recognized and enforceable.
- b. The Awards were subject to the Claimant and Respondent through their respective Counsel jointly approach[ing] Kenya Revenue Authority (KRA) within 30 days of this decision and consult their respective positions with regard to tax computation in enforcement of the Arbitral awards
- c. The purpose of the reference to KRA was identified by the Court, with a view to assessment of tax on Claimant's gains and profits from Respondent in accordance with provisions of **Income Tax Act** and **Kenya Revenue Authority's Employers Guide on PAYE** and/or any other relevant law in force.
- d. The Applicant's position in paragraphs 3 & 5 of Supporting Affidavit is that the starting point of enforcement of the awards should be of Ksh 46,210,348/-. This same point/issue the Applicant raised in the Application of 20<sup>th</sup> July 2018 which the Court gave the Ruling.
- e. If the Applicant's argument above was granted, the Ruling would have recognized and enforced the Awards without subjecting the Applicant's gains and profits from further assessment and computation of tax by KRA.
- f. **Section 37 (1) of Income Tax** mandates the Respondent to deduct the correct amount of tax and account for the tax deducted in line with its obligations to KRA.
- g. The Respondent did not believe that the Court directing that KRA to assess the Tax payable from the Applicant's gains and profits did not contemplate in anyway an enforcement that would violate the **Income Tax Act & KRA Employers Guide on PAYE**

On 20<sup>th</sup> May 2020, parties through respective Counsel submitted on the instant application.

### **DETERMINATION**

The issue that presents itself for determination is what jurisdiction the court has and therefore what orders commend themselves to be granted at this stage in light of the emerging events.

### **ANALYSIS**

1. The Settlement Agreement of 8<sup>th</sup> August 2014 provided as follows;

**“4.6.1 Any dispute arising out of or in connection with this shall be referred to arbitration by a single Arbitrator being a practising lawyer of not less than fifteen years standing to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.”**

2. The Agreement Referring Dispute & References to Single Arbitrator of 6<sup>th</sup> March 2015 provides;

**“(c) Dispute or differences have arisen and are pending between the parties hereto with regard to the interpretation of the Settlement Agreement.”**

3. The Final Award of 14<sup>th</sup> November 2016 in part reads; paragraphs 1,3, & 4 Pg 49.

**“...1. Declared that the Claimant shall participate in the Employee Share Ownership Plan and be allotted shares in Faulu ESOP Limited in accordance with his entitlement as at 8<sup>th</sup> August 2014.**

**3. The Respondent shall pay to the Claimant the sum of Ksh 46,210,367 less any tax liabilities.**

**4. The said sum of Ksh 46, 210,367 or the net balance thereof shall carry simple interest at 15.8% per annum from 1<sup>st</sup> September 2014 until payment in full.”**

4. The Further Award of 29<sup>th</sup> March 2018, which was from the Respondent’s letter of 9<sup>th</sup> December 2016 seeking clarification of the Orders 1, 3 and 4 of Final Award, the Arbitrator only changed **paragraph 22, 34,35 & 40** at page 77 -80 in the Further Award.

The Ruling of the Court considered the Respondent’s basis for setting aside the Awards as being contrary to public policy. The Court found;

**“The parties did not contest the jurisdiction of the Arbitrator nor the legality of the award and therefore in light of submissions above on the Court’s role, before me is a narrow dispute on how the tax element of the arbitral award is to be settled based on divergent views and computations/ calculations by Counsel on behalf of the Parties.”**

The parties vide the Settlement Agreement agreed on their choice of forum for dispute resolution, Arbitration. They participated in Arbitration proceedings that culminated to the Final & Further Awards.

The Court’s role was to consider setting aside these awards on the basis of being against public policy under **Section 35 of the Arbitration Act**. It found the issue one of computation of tax deductible and not evasion of tax payment as the Arbitrator recognized the award amount(s) would be subject to tax remittance.

**The Arbitrator declined to compute tax payments because of lack of jurisdiction, the parties did not include tax issue as one of the issues for determination.**

Similarly, as considered extensively by case-law submitted by parties and provisions of **Arbitration Act** in the Ruling the Court found;

**“Since the court’s jurisdiction to interfere with the computation of tax liability in matters resolved through arbitration is ousted by the parties’ arbitration clause and the Arbitration Act, the court is therefore guided by Section 39 of the Arbitration Act which offers a party an opportunity to file an application to the High Court with regard to any question of law which consequently invokes this court’s jurisdiction.”**

With regard to the instant application, the parties through respective Counsel did not invoke, agree or consent as provided by **Section 39 of the Arbitration Act** that the Court may determine the question of law as follows;

**Where in the case of a domestic arbitration, the parties have agreed that-**

**(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or**

**(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.**

The Court cannot hear the matter as it is not clothed with jurisdiction to do so. **Sections 10, 35 & 37 of Arbitration Act**, spells out the Court’s jurisdiction. See: **Kenya Post Office Savings Bank & Anor vs Advertising Co Ltd Anor [2017] eKLR**; **Kenya Oil Company Ltd & Anor vs Kenya Pipeline Company [2014] eKLR**; **Anne Wambui Hinga vs Victoria Njoki Gathara [2009]eKLR** & **Cape Holdings Ltd vs Synergy Industrial Credit Limited [2016]eKLR** considered in Court’s Ruling of 29<sup>th</sup> July 2019.

Any variation, amendment or change in the Terms/Orders and/or figures contained in the Final & Further Awards would be contrary to **section 32 A of the Arbitration Act**. It would amount to the Court interfering, sitting on appeal or correcting these awards emanating from the Arbitration proceedings and the Arbitrator’s Award(s) is/are final and binding to both parties.

In light of submissions that the Arbitrator declined to compute tax for want of jurisdiction, and this Court also found itself devoid of jurisdiction, the only avenue was to invite the statutory body on tax collection under the law to step in consider the divergent views of the parties with regard to computation of tax remittance. By letter dated 8<sup>th</sup> November 2019, the Office of Commissioner of Domestic Tax computed tax payable with regard to the matter at hand. The figures drawn tamper with the figures in the Final & Further Award and to that extent, the Court cannot legally adopt the computation as it would amount to setting aside or amending the Final & Further Awards and in

place have new amounts/figures awarded.

The Final & Further awards emanate from Arbitration proceedings by the parties arising from a dispute(s) from the Settlement Agreement. The issue of tax arose from the implementation and enforcement of the Awards while ensuring that compliance of tax remittance. The dispute arose from tax calculation/payments.

The Respondent raised the issue of tax before the Arbitrator who declined due to lack of jurisdiction, and raised the issue before Court and the Court similarly lacked jurisdiction to hear and determine the issue regarding tax computation. The Court by Ruling of 29<sup>th</sup> July 2019, directed parties through Counsel to seek out the statutory body in charge of Tax, Kenya Revenue Authority (**KRA**). By the letter of 8<sup>th</sup> November 2019, KRA calculated tax from the sum of Ksh 76,058,998/- and not Ksh 46,210,348/-. The KRA Tax Computation is still contested by parties and may interfere/amend/change the figures in the Arbitral Awards.

Since the application to set aside the Arbitral Awards by virtue of **Section 35 of the Arbitration Act** was dismissed by the Court due to lack of proof of any action contrary to public policy, the Court recognizes and enforces the Final Award of 14<sup>th</sup> November 2016 and Further Award of 29<sup>th</sup> March 2018 subject to computation of tax. KRA did its computation of tax according to the Tax Laws Regime, they were/are not parties to the Arbitration process but relied on the Court's direction to compute tax remittance. The parties to the Arbitration did not find the computation agreeable. There was no consensus and the Court lacks legal mandate to impose the computation of tax on the parties. To the extent the computation as outlined by letter of 8<sup>th</sup> November 2019, changes terms/orders of the Arbitral Awards, it is hereby set aside and the application to recognize and enforce the awards is upheld. Issues regarding tax computation shall be resolved in separate proceedings and/or different forum.

### **DISPOSITION**

- 1. The Application of 26<sup>th</sup> November 2019 is granted that the computation of tax by KRA to the extent it is contrary to the Final & Further Award is set aside.**
- 2. The issue of remittance of tax is a mandatory statutory duty that shall be undertaken during enforcement of the Final & Further Awards.**
- 3. Any dispute on tax computation shall be addressed in separate proceedings and/or forum.**
- 4. Each party to bear own costs.**

**DELIVERED SIGNED DATED IN OPEN COURT ON 28<sup>TH</sup> AUGUST 2020. (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MS MWIHURI FOR THE APPLICANT**

**DALY & INAMDAR ADVOCATES FOR RESPONDENT – N/A**

**COURT ASSISTANT: TUPET**