



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL CASE NO. 33 OF 2015

STANELY KINOTI & 15 OTHERS.....CLAIMANTS

VERSUS

SIMON GITOBU ITHIRIA.....1ST RESPONDENT

KATHERI FARMERS CO-OPERATIVE SOCIETY....2ND RESPONDENT

RULING

1. This ruling relates to a notice of motion dated 3rd December 2018, brought under article 159 (2) (a) (b) (d) and (e) of the constitution and all other enabling provisions of the law. the application seeks the following;

- a. That this honorable court be pleased to adopt the award herein dated 23rd June 1997 as its judgement for the purposes of execution of Ksh 367,200/- with interest from the same dated and costs
- b. That this honorable court do grant the applicant/ claimant leave to execute the award
- c. Cost for the application

2. The application was based on the grounds on the face of it and on the supporting affidavit, further supporting affidavit dated 21st May 2019 of Stanley Kinoti where he stated that they lodged the recovery proceedings herein on 22nd December 2005 but has been pending to date. The tribunal on 15th November 2012 directed that the matter be heard by way of an application for adoption for adoption of an award and leave to execute.

3. The application was opposed by the replying affidavit of Daniel Muriungi dated 25 February 2019. He deponed that he is the chairman of the 2nd respondent and that the application is time barred as it offends the provisions of section 4 (4) of the limitations of actions Act Cap 22 laws of Kenya. Further that there was no award issued against the 2nd respondent and also some of the claimants have passed on therefore they cannot be given the award.

4. In addition the application was also opposed by the affidavit of Simon Gitobu Ithiri dated 25th February 2019 where he said that the commissioner of co-operatives appointed an arbitrator and the matter was heard in Arbitration Case No. 3 of 1995 however, it was not decided in the applicants favor. The applicant then filed the tribunal case 38 of 2008 seeking judgement against him and the 2nd respondent for Ksh. 367,200 but the case was dismissed. 4 years after dismissal the applicants filed these proceedings seeking transfer of the case to this court and did not disclose to the court that the tribunal case had been dismissed.

5. This matter was canvassed by way of written submission where the 2nd respondent argued that the award that the applicant herein wants to enforce was issued on 23rd June 1997 nearly 22 years ago. According to section 4 (4) of the Limitations of Action Act cap 22 laws of Kenya, the prayer is not enforceable. In addition the application for leave is time barred as it was filed 21 years after the fact. The 2nd respondent was also not party to the initial proceeding where the award was issued and therefore the claimants have no cause of action.

6. The 1st respondent in his submissions also contended that the award is time barred as it was made 22 years ago and therefore it has become unenforceable in law. That even if the applicants were to argue that what they seek to enforce is not a judgement but an award would still be knocked out by the clear provisions of Section 4 (1) (c) of the Limitations of Actions Act. The 1st respondent further submitted that the applicants claim was dismissed in two different occasions. First the applicants files Case No. 38 of 2005 before the co-operative tribunal seeking recovery of the same amount of money in issue and was dismissed. The applicants then moved to this court for the transfer and again it was terminated by the dismissal order by Hon. Justice Majaja on the 30th May 2018. There is nothing to show that the proceedings were reinstated as alleged by the applicants. Therefore this application is without merit and should therefore be dismissed.

7. On the other hand the claimants in their submissions said that under section 27 of the arbitration act 1997 the winner of an arbitration award is supposed to apply to the high court through miscellaneous application to have the award enforced. However the applicants advocate had erred and filed it in the co-operatives tribunal instead of in the high court for enforcement. It remained pending in the tribunal for over 15 years before the mistake was discovered.

8. The claimants submitted that the award the applicants are seeking to enforce is not time barred because an award granted after an arbitration is final and binding and such is to be adopted as if it was a judgement and according to the limitation of actions act 'an action in a judgement cannot be brought after the end of 12 years.' The applicants filed an application to enforce the award in 2005 which was 9 years after the award was given. They further submitted that the arbitration act is a complete code and any other rules and provisions do not apply to it. Furthermore there are no express provisions as to the time limitation of when one can execute the award after arbitration.

9. I have carefully perused through the application, affidavits submissions and the record in its entirety and the issues to be determined are

a. Whether execution of the award herein is barred by the Limitation of Actions Act?

b. Whether execution should proceed against the respondents herein?

10. The respondents herein stated that this matter was dismissed by Justice Majaja and there is nothing to show that this matter was reinstated. However on perusal of the court proceedings this court on 30th July 2018 expressed itself as thus;

“If the applicant was not served with a notice to appear in any other court and as a result the matter was dismissed, that was inadvertence on the part of DR which can't be used against the applicant. The application dated 14th June 2018 is allowed. Mention on 8th October 2018 for directions on orders made.”

This court allowing the application, means that the court made an order that the case should be reinstated in accordance with the prayer of the applicants.

11. It was also the contention of the respondents that enforcement of the award given on 23rd June 1997 is time barred as it offends the provisions of section 4 of the Limitation of Action Act which provides;

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued

—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2)

(3)

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

However section 10 of the Arbitration Act provides that

“Except as provided in this Act, no court shall intervene in matters governed by this Act”

12. Also Section 36(1) Arbitration Act provide for recognition of domestic Arbitration award as follows:-

1) A domestic Arbitral Award, shall be recognized 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) If the Arbitral Award or Arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

13. The Arbitration Act provides time within which an application to challenge an Arbitral Award can be made but it does not provide time frame for filing an application for enforcement of the award. From the foregoing, it is evident that two separate limitation period will apply to Arbitral Awards set out as follows:-

1. Six year period for bringing an action for enforcement of an award provided under Section 4 (1) (c) of the Limitation of Actions Act. This is brought under Section 36(1) and 36(2) of the Arbitration Act for Domestic and Foreign Awards respectively.

2. The 12 year limitation period for enforcement and/or execution of Decree pursuant to Section 4 (4) of Limitation of Actions Act.

14. The applicants herein brought first brought a claim for recovery of the award in the year 2005 which is beyond 6 years. Guided by the above provisions I therefore find that the application is time barred and it is therefore dismissed with costs.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2019

IN THE PRESENCE OF:

CA:

Claimant:- Mr Miriti Advocate holding brief for Kiome for applicant

1ST RESPONDENT:- Mr Murango Mwenda for 1st Respondent

2ND RESPONDENT:- Mr Mutunga Advocate holding brief for Ndorongo for 2nd Respondent.

Copy of ruling to be supplied upon payment of copying charges.

HON A. ONG'INJO

JUDGE