REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 593 OF 2019

IN THE MATTER OF: THE ARBITRATION ACT, CAP. 49

AND

IN THE MATTER OF: ENFORCEMENT OF AN ARBITRAL AWARD

BETWEEN

NEWTON WANYOIKE KIRERA.............CLAIMANT/APPLICANT

-VERSUS-

ARCHER DRAMOND MORGAN LIMITED.............RESPONDENT

RULING

1. The claimant/applicant brought the Chamber Summons dated 2nd September, 2019 under the provisions of Section 36 of the Arbitration Act, Cap. 49, Laws of Kenya and Rule 9 of the Arbitration Rules, 1997 wherein he sought for an order that the final arbitral award dated 31st May, 2018 delivered by Mwaniki Gachuba (the sole arbitrator) be enforced. The applicant also prayed for costs of the Summons.

2. The Summons is supported by the grounds set out on its face and the facts deponed in the claimant's affidavit. The respondent filed Grounds of Opposition dated 14th November, 2019 to resist the Summons.

3. When the Summons came up for interparties hearing on 19th November, 2019 only the applicant's advocate was present, notwithstanding the fact that the date was taken by consent of the parties in court. *Mr. Owino* learned counsel for the applicant chose to rely on the contents of the application.

4. I have considered the grounds set out on the face of the Chamber Summons; the facts deponed in the supporting affidavit and the oral arguments made by the applicant's counsel; and the Grounds of Opposition.

5. A background of the matter in brief is that the parties entered into the sale agreement dated 4th January, 2007 in respect to Unit No. 81-Phase 1, situated at Hillcrest Park on L.R. NO. 27317 ("*the subject property*") wherein the applicant agreed to purchase the subject property from the respondent for the consideration of Kshs.3,500,000/.

6. It was a term of the agreement that any disputes arising therefrom would be referred for arbitration to be determined by a single arbitrator.

7. A dispute subsequently arose between the parties and the same was referred for arbitration. In that regard, Mr. Mwaniki Gachuba was appointed as the sole arbitrator to handle the dispute. The arbitral proceedings commenced and finally, the arbitrator made his award on 31st May, 2018 in favour of the applicant, thereby granting him an injunctive order as well as an order for specific performance.

8. It is clear that the sole issue for consideration and determination by this court is whether the aforementioned arbitral award ought to be enforced.

9. The applicant averred that despite having knowledge of the award and having been given ample time to comply with the orders set out therein, the respondent has failed to comply and the time for compliance has since lapsed. The applicant also argued that the application has been made in good faith and that the respondent does not stand to be prejudiced if the order is granted.

10. In its Grounds of Opposition, the respondent termed the application as incompetent, premature and an abuse of the court process.

11. **Section 36(1)** of the **Arbitration Act, Cap. 49** ("the Act") which the applicant is essentially riding on stipulates as follows:

> ***"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."***

12. Further to the foregoing, **Section 36(3)** of the Act is clear that:

> ***"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"***

13. I have looked at the final award annexed to the application and find that it constitutes the original award in line with the above provision.

14. The grounds under which the enforcement or recognition of an arbitral award can be refused are set out in detail under the provisions of **Section 37(1) (a)** of the Act. The provisions also express that such refusal can only be considered at the request of the complaining party and upon supplying proof.

15. In the present instance, the respondent did not lay any basis for opposing the enforcement of the arbitral award, neither did it provide any evidence to that effect. Moreover, there is nothing to indicate that the respondent has since complied with the orders made in the award or that it has sought to have the award set aside.

16. Further to the foregoing, **Part (b)** of **Section 37(1)** provides that:

> ***"if the High Court finds that—***
>
> > ***(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or***
> >
> > ***(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya."***

17. From my perusal of the arbitral award, I have not come across anything to infer that either the dispute in question or the arbitral award falls under the purview of the above proviso. In the circumstances, I see no reason to deny the order being sought.

18. Accordingly, the application is merited and is therefore allowed as prayed. The applicant shall have the costs of the application.

Dated, Signed and Delivered at Nairobi this 29th day of November, 2019.

....

J.K. SERGON

<u>JUDGE</u>

In the presence of:

………………………. for the Claimant/Applicant

………………………………. for the Respondent