



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**MISC. CIVIL APPLICATION NO. 378 OF 2017**  
**IN THE MATTER OF THE ARBITRATION ACT (AS AMENDED BY THE ARBITRATION**  
**(AMENDMENT) ACT NO 11 OF 2009**  
  
**AND**  
  
**IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE**  
**AN ARBITRAL AWARD IN THE ARBITRATION**  
  
**BETWEEN**  
  
**D MANJI CONSTRUCTION LIMITED.....APPLICANT**  
  
**-VERSUS-**  
  
**ASSOCIATED CONSTRUCTION COMPANY (K) LIMITED.....RESPONDENT**  
  
**RULING**

[1] The Applicant's *ex parte* application dated **20 September 2017** was filed herein on **28 September 2017** for orders that the Applicant be granted leave to enforce the Arbitral Award dated **3 August 2016** as a decree of this Court; and that the costs of the application be provide for. The application was filed pursuant to **Section 36** of the **Arbitration Act, Chapter 49** of the **Laws of Kenya**, and **Rule 6** of the **Arbitration Rules, 1997**, and it was predicated on the grounds that that, pursuant to an Arbitral Award dated **3 August 2016**, the Applicant was awarded the sum of **Kshs. 40,020,765.23** against the Respondent as well as interest of **Kshs. 14,107,319.74**. It was the contention of the Applicant that despite demand, the Respondent had refused to abide by the terms of the Arbitral Award, in respect of which the Applicant had filed the original copy; and given a notice of the filing of that Award herein to the Respondent on **7 September 2017**.

[2] The application was premised on the Supporting Affidavit of the Applicant's Managing Director, **Mr. Harji Patel**, sworn on **20 September 2017**, which was annexed to the Chamber Summons. It was deposed therein that by an agreement dated **21 October 2010** between the Applicant on the one hand and the Respondent on the other, the Respondent contracted the Applicant to carry out certain construction works, which obligation the Applicant diligently performed. Subsequently, a dispute arose between the parties, and in accordance with the terms of the Works Agreement, the dispute was referred to **Mr. Stanley Kebathi** for arbitration. The Arbitrator eventually made and published his Final Award dated **3**

**August 2016** in which the Applicant was awarded the sum of **54,128,084.97** to be paid within 21 days after receipt of the Award in full and final settlement of all the matters that had been referred to arbitration. It was therefore the averment of the Applicant that, despite demand and notice of enforcement being given, the Respondent has refused and/or neglected to comply with the terms of the Award, hence the application for leave to enforce the said Award as a decree of this Court.

[3] Nine days after the filing of the enforcement application, the Respondent filed its application dated **28 September 2017** under Certificate of Urgency. That application was brought by way of Notice of Motion under **Section 35(2) of the Arbitration Act, Rule 11 of the Arbitration Rules, 1997; Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules**, seeking the following orders:

[a] Spent

[b] Spent

[c] That pending the hearing and determination of the Originating Summons, the Court be pleased to stay the enforcement of the Award dated **3 August 2016** delivered by **Stanley Kebathi**, Sole Arbitrator.

[d] That the costs of the application be costs in the cause.

[4] The Respondent's application was supported by the affidavit of **N.S. Bansal**, annexed thereto, wherein it was averred that it was wrong and contrary to the terms of the Works Contract for the Arbitrator to award the Applicant **Kshs. 54,128,084.97**; which amount includes monies owed by the Applicant to a third party, namely **Booth Extrusion Limited**, since the said entity was not a party to the main contract. It was further averred by the Respondent that the Arbitrator failed to appreciate the concerns raised by the Respondent in its response to the Claim and in its Counterclaim and thereby ended up with a one-sided decision that cannot withstand the test of fairness and justice. Accordingly, the Court was urged to stay the enforcement of the Final Award pending the hearing and determination of a Notice of Motion and Originating Summons application filed by it in **High Court Civil Suit No. 520 of 2016 (OS)**, which the Court ruled to have been filed prematurely.

[5] These two applications were urged simultaneously by way of written submissions, following the directions issued herein on **3 November 2017**. Thus, the Applicant's Replying Affidavit to the Respondent's application, written submissions, a Notice of Preliminary Objection, as well as a List and Bundle of Authorities were filed on **13 November 2017**. The Respondent thereafter filed its written submissions on **22 November, 2017**.

[6] Starting with the Respondent's application for stay of enforcement, it is manifest in its Supporting Affidavit that it was filed following the developments in **HCCC No. 520 of 2016(OS)**. That suit was filed by the Respondent on **22 December 2016**. Simultaneously with the Originating Summons, the Respondent filed an application dated **22 December 2016** in which it prayed for stay of enforcement of the subject award pending the hearing and determination of the Originating Summons. A preliminary objection was however taken by the Applicant herein in that matter on the grounds that:

[a] The Court lacked jurisdiction to hear and determine the application as well as the Originating Summons since the Arbitration Act does not provide for the filing of an application of stay of enforcement of a final award; and

[b] That the Originating Summons was fatally defective in that the Respondent did not file, prior to its filing, the original agreement containing the arbitration clause and the original award.

[7] In its ruling on the Preliminary Objection, the Court found merit in the objection and struck out the suit, including the Notice of Motion for Stay. The Ruling was exhibited as **Annexure "NSB-2"** to the Respondent's application dated **28 September 2017**; and in the List and Bundle of Authorities filed by the

Applicant on **13 November 2017**. Here is what the Court had to say:

**"...it is my considered finding that the failure by the applicant to comply [with] Section 35(3) of the Arbitration Act is fatal to the Application and the Originating Summons. It is further evident from the Hinga Case that the Court has no jurisdiction to entertain a stay Application, for the reason that such jurisdiction is not provided for in the Arbitration Act. In the premises, I would uphold the Preliminary Objection and order that both the Application and the Originating Summons dated 22 December 2016 be and are hereby struck out with costs for being incompetent."**

[8] In view of that decision, the Applicant filed a Notice of Preliminary Objection dated **10 November 2017** contending that:

[a] The Respondent's instant application is *res judicata*;

[b] The Court lacks the requisite jurisdiction to hear and determine an application for stay of enforcement of a final award since no such jurisdiction is provided for in the Arbitration Act.

[9] The Applicant cited **Section 7** of the **Civil Procedure Act** and the case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR** in support of the Preliminary Objection. Reliance was also placed on the Ruling of the Court in **HCCC No. 520 of 2016(OS)** dated **13 November 2017**. I however have no hesitation in rejecting the *res judicata* argument for two reasons. Firstly, the Originating Summons and the application therein were struck out and not dismissed after a merit hearing. They were struck out for failure to comply with the provisions of **Section 35(3)** of the **Arbitration Act**, in so far as the suit and the stay application were not preceded by the lodgement of the Final Award and the Agreement. In this instance, the Applicant filed the original copy of the Award along with a certified copy of the Works Contract and thereafter served a Notice of Filing Award on the Respondent. Thus, compliance had been had from the perspective of **Section 35(3)** of the **Arbitration Act**, thereby transforming the landscape for the Respondent's application.

[10] Secondly, the Court was of the view, following the **Hinga Case**, that the rule of the thumb is that the provisions of the **Civil Procedure Act** are inapplicable to arbitral matters; and **Section 7** is one such provision. In that case the Court of Appeal expressed itself thus:

**A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act ..."**

[11] The Applicant cannot therefore be heard to argue, that for stay purposes, the **Civil Procedure Rules** are inapplicable, and yet urge the Court to rely on **Section 7** of the **Civil Procedure Act** and hold that the Respondent's application is *res judicata*. That would be an intolerable incongruence, if not an absurdity altogether. Nevertheless, the fact remains, that an application for stay of enforcement has no place for refuge under the **Arbitration Act** or the Rules thereunder. The Court of Appeal has spoken on this in the **Hinga Case**, and it bears repeating that:

**"... the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil**

**Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court *suo motu* because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1."**

[12] Another reason why the stay is untenable is because it seeks orders pending the hearing and determination of the Respondent's Originating Summons in **HCCC No. 520 of 2016**. Any order to that effect would be an order in vain, granted that Originating Summons as well as the application filed therein were struck out on **11 August 2017**. In the premises, while I find no merit in the Applicant's Preliminary Objection to the Respondent's application **28 September 2017**, it is manifest that application is totally devoid of merit and is hereby dismissed with costs. Having disposed of the stay application, there would be no basis for not allowing the Applicant's *ex parte* Chamber Summons application dated **20 September 2017**. Accordingly, that application is hereby allowed and leave granted to the Applicant to enforce the Final Award dated **3 August 2016** as a decree of the Court; and that the costs of the application be borne by the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2018**

**OLGA SEWE**

**JUDGE**