REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 506 OF 2016

IN THE MATTER OF THE ARBITRATION ACT (NO. 4 OF 1995) AS AMENDED BY THE ARBITRATION (AMENDMENT ACT (NO. 11 OF 2009)

AND

IN THE MATTER OF ARBITRATION BETWEEN

NDIRITU MUCHEMI MICHAEL.....1ST CLAIMANT

JULIUS IRUNGU NGIGI.....2ND CLAIMANT

WANGOMBE HUMPHREY.....3RD CLAIMANT

AND

ASHBELL MACHARIA WACHIRA.....1ST RESPONDENT

GITHUI MURIITHI PETER.....2ND RESPONDENT

R U L I N G

1. This ruling relates to two Notice of Motion applications. The 1st is dated 29th September, 2016 and it is brought under the provisions of Order 22, of the Civil Procedure Rules, 2010, Section 36 of the Arbitration Act, 1995 as amended, and Section 3A of the Civil Procedure Act Cap 21 of the Law of Kenya and all other enabling provisions of the Law. The 2nd is dated 2nd December, 2016 brought under the provisions of Section 3A of the Civil Procedure Act and order 42 Rule 6 of the Civil Procedure Rules.

2. The Applicant in the first Application is seeking orders as here below:

> *(a) That the arbitration award dated 9th April, 2015 published by T. Wamiti Esq be and is hereby converted into a Decree of this Honourable Court.*
>
> *(b) That upon being so converted, the said Decree be executed to recover the sum of Kshs. 3,132,561.00 from the 1st Respondent and Kshs. 1,167,590 from the 2nd Respondent plus Arbitrators costs of Kshs. 286,720 making a total of Kshs. 4,586,871 further costs and interest at Courts rates from 9th April 2015 until recovery in full, such execution be an enforcement of the award under the provisions of Order 22 of the Civil Procedure Rules and Section 36 of the Arbitration Act, 1995 as amended, aforesaid.*
>
> *(c) That the Respondents do execute their resignation letters as Directors of M/S Pentapharm Limited and transfer of shares to the Claimants failing which the Deputy Registrar of this Court do execute for them.*
>
> *(d) That the costs of this Application and subsequent execution proceedings and/or incidental thereto, be paid by the Respondents/Judgment-debtor in any event.*

3. The Applicant in the second application is seeking for orders as herebelow:

> *(a) Pending the hearing and determination of the Applicants intended appeal, there be stay of further proceedings of this matter.*

(b) The costs of this application be provided for.

4. The First Application is supported by the grounds on the face of it and the Affidavit dated 29th September, 2016 sworn by Dr. Ndiritu Muchemi Michael, (the 1st Claimant herein). He deposed that the Arbitration proceedings were conducted after the Claimants filed two separate suits against the Respondents using their company M/S Pentapharm Ltd. The respondent moved the Court to have the matters determined through Arbitration as per Clause 30 of the Companies Memorandum and Articles of Association and the ruling thereon delivered on the 23rd of May 2013 by the Honourable Justice J. B. Havelock. Subsequently, the Arbitration proceedings were conducted with each party given a chance to produce evidence and file submissions and concluded by the Hon. T. Wamiti. The arbitral award was served upon the parties' Advocates on the 13th April 2015, whereupon the respondents filed a Notice of Motion on the 26th May 2015, seeking orders of stay of award and setting aside among other prayers.

5. The Application was fully heard by the Hon. Lady Justice Olga Sewe and dismissed with costs on the 14th September, 2016 and immediately after the ruling, the Applicant's Advocate wrote to the Respondents' Advocates requesting that the costs be paid to avoid further costs. The letter was acknowledged on the 19th September 2016, but no payment has been made to date and hence the application to have the arbitral award converted a decree of the Honourable Court to be executed to recover the sum of Kiss. 4,586,871 plus further costs and interest at Court rates from the 10th April 2015 until recovery in full against the two respondents.

6. However, the Application was opposed by the respondents vide a replying Affidavit dated 2nd December, 2016 sworn by Dr. Ashbell Macharia. She deposed that, the Respondents filed an Application to set aside the Arbitral Award which was dismissed by the Court. Being aggrieved with the decision, the Respondents lodged a Notice of Appeal and requested for proceedings. That the Appeal has high chances of success in that, the arbitral award violates Article 40 of the Constitution of Kenya and that some of the creditors have already given the indication that they will not hesitate to call the guarantees the issued by the Respondents.

7. It was averred that the Claimants are guilty of not fulfilling any of the matters that the parties ever agreed on including securing legitimate and valid discharges to discharge the Respondent of liabilities as Directors of Pentapharm Limited and the Respondents still remain liable for the debts incurred and for continuing ones.

8. The second Application is based on the on the grounds on the face of it and an Affidavit sworn by Dr. Ashbell Macharia in which she deposes that the five Parties to this suit are the Founder/Shareholders/Directors of the Company known as Pentapharm Ltd, a private pharmaceutical Retail Company.

9. That all the Directors and Shareholders participated in affairs of the Company from its inception and contributed both in terms of finance and sweat capital until the year 2011 when irreconcilable differences arose and compelled them to go different ways. In the midst of this stalemate, the company at the behest of the Respondents filed a suit; HCCC 726 of 2012 Pentapharm Ltd. Vs Ashbell Macharia Wachira & Another. However, the suit was stayed and the matter referred to Arbitration. On the 9th of April, 2015, the Arbitrator published the award. After the application to set aside the award was dismissed by the Court, the Respondent moved and lodged the Appeal as aforesaid. That unless the Court stays these proceedings, the Claimants will seek to enforce the Award and the Respondents will lose their properties which are shares in the company and Kshs. 4,300,151/-.

10. The Applicants argue that the Respondent will not be in a position to refund the money if the intended appeal were to succeed. The Applicants are also apprehensive as some of the creditors have given an indication that they will not hesitate to call the guarantees they had given.

11. However, the Application was opposed by the Respondents based on the grounds of "objection" which states that the Application is frivolous and a waste of Court's time. That once there is an Arbitral Award and a high Court ruling, no appeal can be heard in this or any other Court.

12. The parties agreed to dispose off the Applications by filing submissions thereto which I have considered in this ruling. The Applicant in the first a-Application submitted that, Section 32A of the Arbitration Act provides specifically that; an Arbitration Award is final and abiding on the parties while Section 10 of the Act, excludes the Court form interfering with an Arbitral Award except in circumstances set out in the Act and in particular, Section 35.

13. The Applicant made reference to the case of; *Nyutu Agrovet Ltd Vs Airtel Ltd Civil App. No. 61 Of 2012* and argued that based on this decision, the ruling by the Hon. Lady Justice Olga Sewe, is final. The purported appeal is therefore a non-starter and the Court cannot grant the orders sought for in the Application dated 2nd December, 2016. It was submitted that litigation must come to an end. Reference was made to the case of; *Benda Vs St. John Mildway [1938]* where the House of Lords held that; it is a sacred duty of the Court to uphold contracts, and that parties are bound by terms of their contracts. A Court should not overrule any clear intent of a party.

14. However, the Applicant in the Second Application filed opposing submissions and termed the application dated 29th September, 2016 as incurably defective, in so far as, it is expressed to be brought under several provisions of the Law, the most pertinent one being Section 36 of the Arbitration Act. That the Application does not invoke the Arbitration Rules to properly invoke the jurisdiction of the Court. Reference was made to Rule 4 and 5 of the Arbitration Rules of 1997.

15. It was also argued that the Application has been filed prematurely as the Applicants were required to first file the Award as per the guidelines of Rule 4 and 5 of the Arbitrations Rules of 1997. First, before the Applicant, further that the Court is being asked to enforce "something" which it has not been shown as the original or certified copy thereof has not been provided. Thus the Court is being asked to assume that the original award exists somewhere. Reference was made to Section 36 of the Act and the case of; *Primka Debucon Construction Ltd. Vs Manyota Limited And Another [2017] eKLR and Iris Properties Ltd. & Anotehr Vs Nairobi City Council [2002] eKLR.*

16. Finally, it was argued that the proceedings herein should be stayed as the Notice of Appeal has been lodged and one of the key complaints in the appeal, is that the Applicants are being compelled to cede ownership of their shares to the Respondents without compensation which is an upfront to Article 40 of the Constitution of Kenya 2010. Further, to require the Applicants to pay the amounts that the Respondents are calling for, would prejudice them as it is uncontrovertible by the Respondents that they will not refund the money if the Appeal succeeds.

17. I have considered the Applications and the submissions and I raise the following issues for determination:

(a) Whether the Applications filed before the Court are competent and/or incurable defective.

(b) Whether the Applications have merit.

(c) *Whether the orders sought for can be granted*.

18. The first Application is faulted on the ground that it does not comply with the provisions of Section 36 of the Arbitration Act and Rules 4 and 5 of the Arbitration Rules 1997. The provisions of Section 36 of the Act states as follows:

"*Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall furnish:-*

a. The duly authenticated original arbitral award or a duly certified copy of it and;

b. The original arbitration agreement or a duly certified copy of it.

19. Whereas the provisions of Rule 4 states as follows:

i. Any party may file an award in the High Court.

ii. All Applications subsequent to filing an award shall be by summons in the cause in which the award has been filed and shall be served upon all parties at least seven days before the hearing date;

iii. If an Application in respect to the Arbitration has been made under rule 3(1), the award shall be filed in the same cause, otherwise the award shall be given its own serial number in the civil register.

Rule 5 states as follows:

"*The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an Affidavit of service."*

20. It is noteworthy that, Rule 4(1) above is couched in a discretionally manner by use of the word "may". In that regard, the failure to file an award in the High Court may not be prejudicial to the Respondent. The rationale is that, both parties have been served with the Final Award and therefore the Respondent is not prejudiced, if the same is not filed in Court, prior to the filing of the Application for recognition and adoption of the award.

21. Be it as it were, the provisions of Section 36 (3) of the Act make it mandatory that the original Arbitral Award or a duly certified copy of it must be furnished by the Applicant making an application under the Section. The Respondent faults the Application on the grounds that the original and/or certified copy of the Award has not been provided.

22. I have gone through the documents annexed to the Affidavit sworn by Dr. Ndiritu and I note that she states at Paragraph 2 thereof that: *"the arbitral awards was served upon the Applicants advocates on 13th April, 2015. Annexed herein and marked "NMN 1" is a true copy of the said award*." That annexture is attached. The only clear thing is that the said annexed Award is not the "original" copy and is not certified. Yet the provisions are very clear, the copy that should be annexed to the Application must be a "duly certified copy." Similarly, Section 36(3)(b) states that "in addition to provision of the original certified copy of the Arbitral Award, the original Arbitration Agreement or a duly certified copy thereof must be provided." That has not been done herein.

23. In that regard, the Applicants in their Application dated 29th September, 2016 have not fully complied with the mandatory provisions of order 36 (3) of the Arbitration Act. Therefore, there is no competent Application before the Court for consideration. The Application is consequently struck out and all the prayers therein fall by the way. As regards the Application dated 2nd December, 2016, the Respondent argued that it is frivolous and a waste of Court's time. That no Appeal can lie against the decision of the High Court. I note that these grounds do not fault the "competence" of the Application. In that case, I consider the merits of the Application thereof.

24. In that regard, I find that there is no dispute that the parties herein subjected their dispute to the Arbitral process and the Final Award rendered as herein stated. Subsequently, the Application to set aside the Award was heard and dismissed. The Applicants allege that they intend to Appeal against the decision and have lodged a Notice of Appeal. Hence, the proceedings herein be stayed. The questions that arise are:-

(a) Whether there are any proceedings herein which can be stayed.

(b) Whether the Court has jurisdiction to entertain any proceedings relating to the dispute between the parties outside the armpit of the law.

(c) Whether there is any positive order which should be stayed in view of the fact that the application to set aside the award was dismissed.

(d) Whether in view of the fact that the intended appeal lies to the Court of appeal, the order of stay if any, should be made in that Court.

25. In answer to all these questions, I find that Section 10 of the Arbitration Act, prohibits the Court from interfering with any matters that are subject of Arbitral Proceedings. The only circumstances that the Court may interfere after the Award is only when the Court is either called upon to set aside the Award under Section 35 of the Act or to recognize and enforce the Award under Section 36 and 37. The Applicants herein have already exhausted their rights under Section 35 of the Act. If they are aggrieved with the decision of the Court, they should move to the Court of appeal and seek for whatever interim measures of protection and/or orders that will preserve the subject matter of appeal. The Court of Appeal will be in a better position to consider the Application for stay on merit, based on the grounds of Appeal.

26. In that regard, I find that the Court has no jurisdiction to entertain this Application. Even if it had, there is no positive order given that can be stayed. This is because the Court is not called upon to stay the Final Award but the order resulting from setting aside Application. Even then, the Application for recognition and adoption of the award has fallen by the roadside and there are no proceedings to stay. In conclusion, I find that the application dated 2nd December 2016, has no merit and I dismiss it and in view of the fact that both parties have lost their Applications, I make no orders as to cost.

27. Those then are the orders of the Court.

Dated, delivered and signed on this 20th day of June, 2018 in Open Court, Nairobi.

G. L. NZIOKA

JUDGE

In The Presence Of:

Macharia for J.M. Mwangi for the Applicants

Mr. Bundotich for Mr. Kabugu for the Respondents

Fred : Court Assistance