



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
MISC APPLICATION NO.14 OF 2018

EAGLE VET. TECH COMPANY LTD.....CLAIMANT/APPLICANT

VERSUS

ANTHONY OBIDULU.....DEFENDANT/RESPONDENT

R U L I N G

This is a ruling on the Claimant's application dated 15th January, 2018 .It seeks the following orders:-

1. That the Arbitral Award dated 24th November, 2017 made by the Korean Commercial Arbitration Board and filed herein be adopted and recognized as a judgment of this Court,
2. That the Applicant be granted leave to enforce the Arbitral Award as a decree of this Honorable Court and the Court be pleased to direct that the costs of this application be borne by the Respondent.

Grounds On The Face Of the Application

1. **THAT** the original final and binding Arbitral Award delivered on the 27th November, 2017 and a duly certified copy of the arbitration agreement contained in the Supply and Distribution Agreement dated 5th February, 2002 have been filed in this Court.
2. **THAT** no application has been made to set aside the Arbitral Award in accordance with Section 35 of the Arbitration Act, 1995.
3. **THAT** the Respondent has not challenged and or appealed against the Arbitral Award within the prescribed period.
4. **THAT** the Applicant seeks to have the Arbitral Award adopted and recognized as a judgment of this Honorable Court and consequently enforced as a decree of this Court. It is necessary that this Court grants leave in order for the Applicant to enjoy the fruits of the Arbitral Award.

The application is supported by Affidavit sworn by Seung-Hwan Chung the Managing Director of the Applicant herein sworn on 15th January, 2018. He averred that the Applicant and the Respondent entered into a supply and distribution agreement dated 5th February, 2002 ("the Contract") which provided an Arbitration Agreement as a dispute resolution mechanism in case of any dispute.

He averred that sometime in January 2017 a dispute arose which was referred to arbitration. That the dispute was heard by the Korean Commercial Arbitration Board which rendered an award on 27th November, 2017. That the Respondent was notified of the award and no application to set aside, challenge or appeal against the award has been made. That the Affidavit of Service filed confirms service of the award on the Respondent.

In response, the Defendant/Respondent filed Preliminary Objection dated 18th April, 2018 and Replying Affidavit dated the 21st March, 2018 sworn by Anthony Obidulu, the Respondent herein who is the sole proprietor of Kony Enterprises based in Nigeria.

The deponent in the Replying Affidavit averred that he was not informed of the change of name from Eagle Chemical Co. Ltd to Eagle Vet Tech Co. Ltd.

In respect of the arbitration process, the Respondent averred that he was not made aware of the arbitral process leading the award delivered on the 27th November 2017; that he was not served with a Notice to Arbitrate neither was he invited to participate in the appointment of the

Arbitrator. The Respondent contends that he was denied an opportunity to actively participate and exhaustively defend himself in the arbitral proceedings.

In response to the Respondent's averments the Applicant filed Supplementary Affidavit sworn by Seung-Hwan Chung on 6th April, 2018. He averred that the change of name is not a matter for consideration by the Honorable Court.

The Applicant contend that Secretariat of the Korean Commercial Arbitration Board notified the Respondent of the Applicants submission of request for arbitration and both parties were notified of the written award in accordance with the Board's Arbitration Rules.

CLAIMANT/ APPLICANT'S SUBMISSIONS

Mr. Kuyo Counsel for the Claimant while highlighting filed submissions argued that, Section 36 (3) of the Arbitration Act requires the original arbitration award and original Arbitration agreement for purposes of recognition and enforcement of an Arbitral Award which the Applicant has lodged with the Court.

He further submitted that notice was given to both parties on 20th February 2018 as required by Rule 5 of the Arbitration Rules.

He submitted that the Applicant has complied with Arbitration Act and that being a successful party in the arbitration process, the Applicant has a right to enforce the award.

Counsel submitted that grounds for refusal are set out in Section 37 (1) and that the section is exhaustive; that there is no further opportunity to formulate other grounds to challenge recognition of Arbitral Award.

He further submitted that section 10 of the Arbitration Act provide that arbitration proceedings are to be conducted in accordance with provisions of Arbitration Act meaning that even civil procedure rules are excluded in arbitration matters; that the Arbitration Act is a self-contained code. He cited the case of **Anne Mumbi Hinga vs Victoria Njoki Gathara [2009]eKLR** where the Court of Appeal held that any challenge of Arbitral Award must be within the four corners of Arbitration Act.

He submitted that the Respondent should point out provisions of Section 37 which they are using to challenge the award. He added that the only close challenge is that the Respondent was not invited to participate in the appointment of the arbitrator which has been answered by paragraph 10 of the Applicant's affidavit which shows that notices were issued. He further stated that the Respondent participated by filing defence as shown in Paragraph 11 and 18 of the Award.

Counsel for the Claimant cited the case of **Addison vs Babcock FATA Ltd [1987]2AllER** where the Court held that the party challenging an award has the burden of showing good cause challenging the award.

He submitted that there is no evidence showing that enforcement of the award will be contrary to public policy.

In respect of Preliminary Objection Mr. Kuyo Counsel for the Claimant submitted that it does not refer to any point of law; that no Section of the law is cited giving basis for argument of the objection. He argued that the objection raises factual matters. He submitted that there was a resolution that they represent the Claimant but there is no requirement for an Advocate to provide a corporation authorization before it can represent the corporation but even if that is a requirement the Court can call for it to be provided. He submitted that the objection cannot be considered as objection according to the case of **Mugisa Biscuits**. He added that all authorities relied on by the Respondent relate to civil proceedings which are of different standard compared to the arbitration herein. He added that even in civil proceedings an Advocate is allowed to ratify the authority. He stated that Mr. Seung-Hwan Chung who swore affidavit on behalf of the Claimant has provided power of Attorney that it does not require registration as per Section 4 of Registration of Documents Act.

Counsel submitted that the Preliminary Objection raises technical objection which do not raise circumstances raised in Section 37 of Arbitration Act; and that all the issues raised are aimed at distracting the Court.

In response Ms. Sheik and Mr. Sebule submitted on preliminary objection and application respectively.

Ms. Sheikh submitted that Section 36 and 37 are provisions of law applicable in this case. She submitted that Section 37(1)(b)(2) refer to award being contrary to public policy and that it gives a large blanket which enable the court to introduce or ratify issues pertaining to other statutory laws in the republic of Kenya. She submitted that the Civil Procedure and the Constitution of Kenya does apply in this situation. She submitted that a party who comes to Court must be heard on related issues. She submitted that application by the Claimant is not properly before Court as the Advocate has failed to attach the Board of Directors resolution. She referred to the case of **E. A. Portland Cement**. Where the Court held that in the absence of board resolution the company is not before Court.

She submitted that he firm of Coulson Harney had no authority to commence this suit and that they have had sufficient time to ratify. She submitted that the purported director had no authority to swear affidavit as no proceedings of minutes have been annexed.

She further submitted that the Claimant has refereed to 24th November 2017 and 27th November 2017 as the dates of award; further that the award does not bear the impression of Korean authority. She argued that the foreign ministry of the country where the award emanate was required to verify the authenticity of the notary public and that no stamp of verification has been annexed to notary public. She submitted cannot go to Korea to investigate whether Seung-Hwan Chung is entitled to swear such affidavit as notary public.

Mr. Sebula submitted on the application. He submitted that Section 35(2) provide that an arbitration can be refused on ground of public

policy. He cited the case of Kenya Shell Limited. He submitted that while it has been submitted that the Arbitration Act is self-contained, it has to conform to the Constitution of Kenya. He submitted that the Respondent was not invited to appoint an arbitrator. He stated there is no proof that the Respondent received the courier allegedly sent to him. He said there is no return of service. He submitted that appointment of an Arbitrator is important because of the issue of impartiality and denying the Respondent that opportunity is against the principles of natural justice.

On the issue of date he submitted that the Claimant in an attempt to clarify used the word rather in the further affidavit. He said it would be against public policy to adopt an award without clarity.

In a rejoinder, Mr. Kuyo Counsel for the Claimant submitted that under principles of permitted trade law, it is not allowed to import other laws to challenge an Arbitral Award and that challenge of an Arbitral Award is only allowed under strict confines of the domestic Arbitration Act. He said the Respondent has not cited any article of the Constitution that will have been impugned if this Court recognizes and enforces the Arbitral Award. He submitted that there is no legal requirement for an Arbitral Award to be certified by the Ministry of Korea as submitted by Ms. Sheik. He concluded that the Claimant has provided an original award and a certified arbitration agreement; that the Respondent was granted an opportunity to be heard and an award has been issued.

He submitted that appointment of an arbitrator was to be done by the board and that party having agreed to submit to arbitration cannot refuse enforcement.

On the issue of public policy he submitted that public policy cannot be anything. He argued that it must be pointed out, its principles and how it has been breached.

ANALYSIS AND DETERMINATION

I have considered arguments by Counsels for the parties herein on both the Preliminary Objection and the application.

Section 10 of the Arbitration Act provides a limit to which the Court can intervene in arbitration proceedings. It provides as follows:-

“except as provided by this Act, no Court shall intervene in matters governed by this Act.”

I believe the intention of Parliament in limiting the Courts' power in so far as arbitration is concerned, is to give finality to the arbitration process and promote party autonomy. Arbitration gives parties an option of resolving disputes in a mechanism other than formal litigation, which is seen to be less flexible, slow and riddled with unnecessary technicalities which slow the wheels of justice. Arbitration gives parties an opportunity to construct their own dispute resolution mechanism by agreeing on how to appoint an arbitrator, the law/rules applicable, venue among other requirements intended to make the process flexible and efficient.

Sections 35 and 37 of the Arbitration Act provide for grounds to challenge the enforcement of an Arbitral Award.

On the Preliminary Objection to the effect that the deponent of the Supporting Affidavit is not authorized, I note that by Seung-Hwan Chung has introduced himself as the Managing Director of the Claimant. He has annexed authority to act for the Claimant marked SC-1. The authority is indicated to have been attested by a Notary Public. The name of the Notary Public and stamp are on the document. There is also indication that the law firm is authorized by the Ministry of Justice, Republic of Korea to act as Notary Public. No reasons have been advanced to raise doubt on the authenticity of the document. From the foregoing I find that the deponent of the affidavit was authorized to take all actions on behalf of the Claimant.

On authorization of Counsel to act for the Claimant I do agree with the submission that a company has to pass a resolution to instruct Counsel.

Odunga J. in his Judgment in the **Leo Investments and Republic v Registrar General** (citation) referred to the holding of **Hewett, J.** in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

Leo Investments and Republic v Registrar General cases as aforesaid.

My view is that, the necessity for authorization of Counsel is intended to avoid a situation where actions may be taken by Counsels without authority from the company leading to commitments which may not be honored due to lack of authorization by the company's key decision-making organ. As found above the Managing Director of the Plaintiff Company herein was given instruction to act on behalf of the Plaintiff and has done so through the firm of Coulson Harney.

The Respondent herein raised issues of procedural technicalities which go contrary to Article 159(d) of the Constitution which provides that justice should be administered without undue regard to procedural technicalities. My view is that the issue herein does not substantially affect

the matter herein.

In respect of refusal to recognize the award, on perusal I note that the Claimant filed the original award and certified agreement in Court as required by Section 36 (1) of the Arbitration Act.

Article 16 of the agreement provide for settlement of disputes amicably between parties but in case it fails they shall finally settle by Arbitration in Korea subject to rules of Korean commercial arbitration by whose award each party is bound.

The Respondent has not disputed the Arbitration Agreement. There is therefore no dispute that the parties herein agreed to submit issues in dispute to arbitration. **Article 17 shows that agreed that the governing law will be laws of Korea.**

On the issue of compliance with principles of natural justice, despite the Respondents assertion that the he was not granted an opportunity to be heard in the arbitration process, the award filed show that the Respondent was represented by Mr. Ikenna Okorie of the Law Firm of C. Ezeji Okorie LP in Lagos and that all correspondences were send to him as Counsel for the Respondent. Paragraph 18 shows that the Respondent filed defence to the Claimants claim on 14th September 2017 and the Claimant filed Reply to Defence on 27th September 2017 and further, parties agreed to proceed by way of written submissions instead of adducing oral evidence.

On being given an opportunity to appoint arbitrator, Paragraph 6 of the award show that the sole arbitrator was appointed by Korean Commercial Arbitration Board. Article 16 of the agreement provides that the arbitration would be conducted pursuant to rules of Korean Commercial Arbitration Board. The award indicate that the mode of service is provided in Articles 8.1 and 8.6 of the rules. From the foregoing it is evident that the parties herein gave the authority to appoint an Arbitrator to the Korean Arbitration Board.

From the foregoing it is quite clear that the allegation to the effect that the Respondent was not granted the opportunity to participate in the arbitration proceedings cannot be true.

I agree with the authors in **Russell on Arbitration, Twenty-Third Edition, Sweet & Maxwell,2007** who on ground of ***failure to give notice or inability to present a case*** stated as follows:-

“There is no definition in the Act (read Arbitration Act 1996) of “proper notice” which may vary depending, for example, on applicable law, but in the exercise of its discretion, the Court will need to be persuaded that the complaint is not only a failure to comply with some notice requirement but the party opposing enforcement really did not learn of the appointment of the arbitrator or of the arbitration proceedings.”

The award clearly shows that the Respondent was given opportunity to file defence his arguments in response to the claim were considered.

Respondent has alleged that the award is contrary to public policy.

I understand that to mean being inconsistent with the Constitution or any Kenyan law or harmful/injurious to the interest of Kenya or contrary to justice and morality.it is the duty of a party alleging the above to prove.

The above analysis clearly shows that the Respondent has failed to demonstrate that the award herein is contrary to the public policy of Kenya.

From the foregoing it is evident that the Respondent agreed to submit himself to arbitration to be conducted pursuant to laws of Korean Government and rules of Korean Commercial Arbitration. It is also evident that he participated in the proceedings. Having participated in the arbitral proceedings, the Respondent should not be allowed to plead ignorance at enforcement stage. I find no merit in the objection and refusal to recognize the award. I believe the same is intended to deny or delay the Claimant enjoyment of fruits of successful claim.

FINAL ORDER

The Arbitral Award dated 24th November, 2017 is hereby adopted as judgment of this Court. Leave is granted to enforce it as decree of this Court. Costs to Applicant.

Dated and Delivered at Nairobi this 27th day of July, 2018

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RACHEL NGETICH

JUDGE

In The Presence Of Catherine: Court Assistant

Kuyo: Counsel For Applicant Ms. Kamau H/b For Sheikh: Counsel For Respondent