



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 237 OF 2014

MASINDE MULIRO UNIVERSITY OF

SCIENCE AND TECHNOLOGY.....CLAIMANT

VERSUS

ALFATECH CONTRACTORS LIMITED.....RESPONDENT

RULING

The respondent herein has filed an application dated 1st August, 2017 seeking for orders that:

1. The Respondent be granted leave to enforce the corrected Arbitral Award in its favour made on 18th July, 2017 in the amount of Kshs. 18,169,727.55.
2. The claimant does pay interest on the principal sum of Kshs. 11,064,307.37 at the rate of 11.5% per annum from 19th July, 2017 until payment in full.
3. This honourable court be pleased to make further or other orders as it may deem fit and just to grant.
4. The costs for this application be provided for.

The application is supported by the affidavit of **Kenneth Mwaura**, the managing director of the respondent. The applicant pleads that they had on the 24th August, 2017 filed with the court the original correction of the final award that was made by the arbitrator and published on the 18th July, 2017. They also plead that they have annexed a copy of the tender document and the form of agreement marked “ KM1’ in support of the application. The applicant is praying that the court grants them leave to enforce the award made by the arbitrator on the 18/7/2017.

The claimant has however filed a preliminary objection dated 5th October, 2017 objecting to the admissibility of the document marked “ KM1” on the grounds that the same is not the original arbitration agreement nor a duly certified copy of the same. That the application is incompetent in that it does not have the original arbitration agreement and the original arbitral award or certified copy of the same as required by section 36(3) of the Arbitration Act.

The claimant further says that the arbitration process between the respondent and the claimant is yet to be completed in that there are still some issues to be settled for which there is correspondence between the advocates for the claimant and the arbitrator. The claimant has annexed copies of the said correspondence with the arbitrator that are marked “ JO1’. Therefore that the application is premature and inchoate.

The respondent in reply to the averments by the claimant stated that his advocates have filed with the court the original correction of the final award vide a letter dated 2nd August, 2017. That a certified copy provided of the original arbitration agreement marked “ KM1” is in compliance with the provision of section 36 (3) of the Arbitration Act. Further that the arbitrator process was completed when the arbitrator published the corrected award made on the 18th July, 2017. That the subsequent issues that were raised by the claimant were clarified by the arbitrator after which the claimant paid the principal sum. The claimant is in the circumstances estopped from claiming that the arbitration process is incomplete.

The advocates to the parties, **Mr. Burugu** for the applicant and **Mr. Wesonga** for the claimant, made submissions in the case.

Mr. Wesonga submitted that the document marked “ KM1” has no stamp duty as required by the law. Therefore that the document is not admissible in evidence as it violates the provisions of the Stamp Duty Act and should be struck out.

That the application dated 1/8/17 is pre-mature and incompetent. That the arbitration proceedings are not complete. That they wrote a letter dated 30/8/17 to the arbitrator raising issues that the arbitrator has not addressed to date. That though the arbitrator made a reply to them the reply did not address the issues that they raised. That by a letter dated 29/9/17 they informed the arbitrator that he had not addressed the issues that they had raised. The arbitrator has not responded to their said letter. Therefore that it is premature on the part of the applicant to enforce the award.

Mr. Burugu on the other hand submitted that the arbitration proceedings ended with the publishing of the award dated 18/7/17. That they forwarded to the court the original document by their letter dated 21/8/17. That the only recourse that the claimant has is for them to file an application to set aside the award.

Further that the principal sum has been paid. That what is remaining is payment of interest on the work done. That the arbitrator has dealt with every issue that had been raised by the claimant

That the preliminary objection has no basis as they have provided the court with the original arbitral award and the original arbitral agreement. That the arbitral agreement was not liable to stamp duty. The claimant has not shown why it was subject to stamp duty. That the taxes have been withheld by the claimant. Further that the claimant has previously used the arbitral agreement when they made an application to set aside an earlier award. That the objection has been brought with the sole purpose of delaying payment.

In reply Mr. Wesonga stated that section 19 of the Stamp Duty Act states the documents that are liable for stamp duty which documents are not receivable in evidence unless stamped.

The applicant's advocates did forward to this court the original correction of the final award made and published on the 18th July, 2017 vide a letter dated 2/8/17 and received in court on 4/8/2017. The award is in the court file. The argument that the original arbitral award has not been filed is a misdirection.

The document marked "KMI" is a certified copy of the original arbitration agreement. The document is certified by **Ismene Feksi**, advocate, as a true copy of the original. " The argument that the document is not certified as a copy of the original is again a misdirection.

Section 36(3) of the Arbitration Act states as follows:-

" 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.

The provisions of section 36(3) of the Arbitration Act have been complied with by the filing of the original correction of the final arbitral award and a certified copy of the arbitration agreement.

The original correction of the final award was published on 18/7/2017 and filed with the court on the 24th August, 2017. The claimant subsequently sought clarification on some issues from the arbitrator vide letters dated 30/8/2017 and 29/9/2017. The claimant says that the issues raised with the arbitrator have not been addressed and therefore that the proceedings have not come to a close. **Mr. Burugu** for the applicant submitted that arbitration proceedings ended with the publishing of the award.

This court has limited powers to intervene in matters that are governed by the Arbitration Act. Section 10 of the Act provides that:-

" Except as provided by this Act, no court shall intervene in matters governed by this Act".

A party who is not satisfied with the decision of an arbitrator has two options – either to seek clarification from the arbitrator or to file an application with the court to set aside the award. Section 34 of the Act provides as follows:-

(1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties:

(a) a party may upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors ,any clerical or typo graphical errors or any other errors of a similar nature , and

(b) party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific points or party of the arbitral award.

(2) If the tribunal considers a request made under sub section (1) to be justified it shall after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.

The claimant did seek clarification from the arbitrator vide letters dated 30/8/2017 and 29/9/2017. The arbitrator did clarify on the issues sought. If the claimant was not satisfied with the explanation and since the award had been filed with the court, the only recourse he had was

approach the court under the provisions of section 35 to set aside the award. Section 35 provides that:

“(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under sub section(2) and (3).

(2) An arbitral ward may be set aside by the High Court only if.....

The claimant did not move to set aside the award after it was filed with the court. It is clear from the provisions of section 33 of the Act that the mandate of the tribunal terminates with the publishing of the award subject the provisions of sections 34 and 35 of the Act .Section 33 provides that:

(1) the arbitral proceedings shall be terminated by the final arbitral award or by order of the arbitral tribunal under sub section (2).

(2) not applicable to this case.

(3) Subject to sections 34 and 35, the mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings.

It is my considered view that the proceedings before the tribunal have terminated. The claimant has not filed an application to set aside the arbitral award. The preliminary objection has no merit.

The schedule to the stamp duty Act cap 480 Laws of Kenya stipulates the instruments that are liable to stamp duty. I have gone through the schedule. The schedule provides that only agreements that are accompanied with a deposit are liable to stamp duty. In this case the arbitration agreement was not accompanied with a deposit. It has not been shown that the arbitration agreement was liable to stamp duty.

In the foregoing the preliminary objection has no merit and is dismissed. The application dated 1st August, 2017 is accordingly allowed as prayed.

Delivered, dated and signed at Kakamega this 26th day of September, 2018.

J. NJAGI

JUDGE

In the presence of :

Anwar holding brief Miss Wakholifor claimant

Burugufor respondent – absent

George.....court assistant

Parties: Absent.