



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 520 OF 2016 (O.S)
IN THE MATTER OF AN ARBITRATION ACT, CHAPTER 49 OF THE LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD
BETWEEN
ASSOCIATED CONSTRUCTION COMPANY (K) LTD..APPLICANT
VERSUS
D. MANJI CONSTRUCTION COMPANY (K) LTD.....DEFENDANT
RULING

[1] The Applicant, **Associated Construction Company (K) Ltd** filed this suit on **22 December 2016** by way of the Originating Summons of even date seeking the setting aside of the Final Arbitral Award issued on **3 August 2016** by **Stanley Kebathi**. Along with the Originating Summons, the Applicant filed an application dated **22 December 2016** pursuant to **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**. The orders prayed for therein are:

[a] Spent

[b] Spent

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

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

[2] The grounds relied on by the Applicant was that, on the **3 August 2016**, the Arbitral Tribunal delivered its Final Award in the arbitration between the parties hereto in favour of the Respondent in the sum of **Kshs. 54,128,084.97** together with costs. It was further averred that the Arbitral Tribunal had directed that the Award be paid within 21 days from the date of the Award, which lapsed on **24 August**

2016; and that the Applicant was apprehensive that the Respondent would commence execution proceedings. The Applicant contends that it has good reasons for seeking the setting aside of the Arbitral Award, hence the application.

[3] In opposition to the application, the Respondent filed the Grounds of Opposition dated **12 January 2017** contending that the application is totally incompetent, bad in law, misconceived and an abuse of the process of the Court for the reason that it is premature as the Respondent is yet to commence the process of enforcement of the Arbitral Award. It was further the contention of the Respondent that the Applicant had filed this suit against an entity that was not a party to the arbitral proceedings. Accordingly, the Respondent filed a Notice of Preliminary Objection on **13 January 2017**, raising the following points of law:

[a] That the Court lacks jurisdiction under the provisions of the Arbitration Act to grant the orders sought in the application dated **22 December 2016**;

[b] That the Applicant has not furnished the Court with the original or certified copies of the Arbitral Award and Arbitration Agreement in breach of the provisions of **Section 36** of the Arbitration Act;

[c] That the Defendant as pleaded was not a party to the arbitration that resulted in the Arbitral Award dated **3 August 2016**.

[4] In the Replying Affidavit sworn and filed herein on **10 February 2017**, the Applicant adverted to the Courts unlimited original jurisdiction as well as supervisory powers as set out in **Article 165** of the Constitution of Kenya, and urged the Court to find that the Originating Summons is properly before the Court. It was further averred that the misnaming, misquoting and/or misspelling of the name of the Respondent is not fatal, granted that a copy of the Final Award has been filed in which the correct name of the Respondent has been set out.

[5] The parties accordingly filed their written submissions herein articulating their respective positions in respect of the Preliminary Objection. The Respondent's submissions, filed herein on **2 February 2017** were to the effect that it was fatal, from the standpoint of **Section 36 of the Arbitration Act**, for the Applicant not to file the Original Award or the Arbitration Agreement. Reliance was placed on **High Court Miscellaneous Civil Application No. 914 of 2011: Kenya Airports Authority vs. Nairobi Flying Services Limited [2012] eKLR** in support of this argument; while the case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR** was cited by the Respondent to urge the posturing that the Court lacks the jurisdiction to grant the order of stay by dint of **Section 10** of the **Arbitration Act**.

[6] First and foremost is the contention that the Respondent as impleaded herein is not the same party in whose favour the Final Award dated **3 August 2016** was made. It is common ground that the party that was involved in the arbitration was **D. Manji Construction Limited** and not **D. Manji Construction Company (K) Ltd** as indicated herein. It is equally the case that there is no dispute as to the identity of the Respondent. Accordingly, in the spirit of **Article 159(2)(d)** of the **Constitution**, the misdescription aforesaid is a curable defect and can be corrected, if need be by amendment. Accordingly, I would take the same view as did the Court in **Kenya Hotels and Allied Workers union vs. Diani Sea Resort T/A Carslake Nominee Limited [2015] eKLR**; namely, that a claim cannot fail simply on the ground that the Respondent is misnamed.

[7] The second point that was taken by the Respondent was in respect of **Section 36(3)** of the **Arbitration Act**, which provides 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; and

(b) the original arbitral agreement or a duly certified copy of it."

[8] Whereas the Applicant filed a copy of the Final Award and the Contract between the parties containing the Arbitral Agreement at **Clause 45** of the main contract and **Clause 31** of the sub-contract, they are neither the original copies nor certified copies of the original. In the Applicant's written submissions, it was conceded that the aforesaid provision had not been complied with, but the argument pitched by the Applicant was that since the Originating Summons and Notice of Motion had been brought under **Section 3A** of the **Civil Procedure Act**, the rigidity of the law is accordingly remedied thereby. The Applicant also relied on the case of **Structural Construction Company Limited vs. International Islamic Relief Organization, High Court Misc. Civil Case No. 596 of 2005**. However, the question that then arises is the applicability of the **Civil Procedure Act** and **the Rules** thereunder to arbitration proceedings.

[9] In the case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR**, the Court of Appeal was of the view that:

"...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 which states:

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

In the light of the above, 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 ...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."**

[10] In view of the foregoing, it is manifest that the provisions of the Civil Procedure Act and the Rules thereunder cannot come to the aid of the Applicant. Hence, I would be of the same view as was taken by **Odunga, J** in **Kenya Airports Authority vs. Nairobi Flying Services Limited [2012] eKLR**, that:

"...the applicant herein should have filed the award, obtained a serial number for the award and then proceeded to make the instant application. In my view, it is the award, in the circumstances of this case that gives the court jurisdiction. That omission, in my view, is not a technicality but is a rule of substantive procedure that cannot be wished away ignobly. In the result, it is my view and I so hold, that the Chamber Summons dated 16th November 2011 is incompetent having been instituted prematurely as the award the subject of challenge herein has not been filed in accordance with the foregoing provisions..."

[9] Accordingly, it is my considered finding that the failure by the Applicant to comply **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.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF AUGUST, 2017

OLGA SEWE

JUDGE