



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**MISC. CIVIL APPLICATION NO. 507 OF 2014**

**DHL EXEL SUPPLY CHAIN KENYA LIMITED.....APPLICANT**

**VERSUS**

**TILTON INVESTMENTS LIMITED.....RESPONDENT**

**RULING**

[1] By the Chamber Summons application dated **20 August 2015**, the Respondent/Applicant herein, **Tilton Investments Limited**, moved the court for orders that leave be granted to it to enforce the Final Arbitral Award dated **13 October 2014** as a Decree of the Court, and that costs of the application be provided for. The application was filed pursuant to the provisions of **Section 36(1) of the Arbitration Act, Chapter 49 of the Laws of Kenya** and **Rule 9 of the Arbitration Rules, 1997**, and is anchored on the following grounds:

[a] That the parties entered into a contract for the transportation on **11 April 2011** by which the Applicant/Respondent, **DHL Exel Supply Chain Kenya Limited**, was to supply goods to the Respondent's customers in Kenya and Uganda;

[b] That a dispute arose between the parties, which dispute was referred to arbitration and a sole arbitrator appointed by consent of the parties herein;

[c] That the arbitral tribunal delivered its Final award on **13 August 2014** awarding the Respondent/Applicant a total sum of **Kshs. 85,228,656.55**.

[d] That the Applicant/Respondent made an application seeking to have the award set aside, which application was dismissed with costs in a ruling rendered herein on **21 July 2015**; and

[e] That it is in the interests of justice that the award be enforced.

[2] The application was supported by the affidavit annexed thereto sworn by **John Muguiyi**, in which the foregoing grounds were amplified. Attached to that affidavit are copies of the transportation contract in issue, the Arbitration Agreement entered into by the parties, the Final Arbitral Award, as well as the Ruling of the Court dated **21 July 2015**. The Respondent/Applicant thus contended that it is in the interests of justice and fairness that the arbitral award be enforced so that the Respondent can enjoy the fruits thereof.

[3] The Applicant/Respondent opposed the application and filed a Replying Affidavit to that effect, sworn by **Benedict Clay** on **12 October 2015**, in which it was averred that the Award that the Respondent/Applicant is seeking to enforce is the subject of an intended appeal, and that the intended appeal would be rendered nugatory should the enforcement of the award be effected. It was further deponed that the Applicant/Respondent is ready and willing to deposit a reasonable sum of the portion of the award as security pending the hearing and determination of the appeal, so as to shield it from suffering irreparable loss. It was therefore urged on behalf of the Applicant/Respondent that it be accorded its day in court to prosecute its appeal for a determination on merits before the award can be enforced.

[4] The Court has carefully considered the application in the light of the averments in the affidavits filed in respect thereof, including the annexures thereto. Also perused and considered are the written submissions filed herein by Learned Counsel for the parties, which submissions were orally highlighted before me on **27 July 2016**. The Respondent/Applicant's case is that the application for setting aside award having been dismissed by the court, there is no reason why the said award should not be enforced. It was further urged by the Respondent/Applicant that the representations by the Applicant/Respondent, to the effect that the enforcement should await the outcome of its intended appeal, should be disregarded for the reason that there is no application for stay pending appeal; and therefore that the conditions for such stay have not been met. The Respondent/Applicant further relied on the principle of finality in the arbitral process and urged the court to uphold the same herein. Counsel relied on the cases of **Kenya Shell vs. Karuga [1982-1988] 1 KAR 1018**, **Anne Mumbi Hinga vs. Victoria Njoki Gathara, Civil Appeal No. 8 of 2009** and **Nyutu Agrovot Limited vs. Airtel Networks Limited Civil Appeal No. 61 of 2012**.

[5] The Applicant/Respondent on the other hand argued that the Arbitral Award dated **13 October 2014** having not been recognized and/or adopted as a Judgment of the Court as required by **Section 36 of the Arbitration Act**, the application is premature; and that in any event, for the reason that it has sought leave of the Court of Appeal to appeal against the Ruling of **21 July 2015**, the application ought to be dismissed with costs. The Applicant/Respondent relied on the cases of **Blue Shield Insurance Co. Ltd. vs. Samuel Kamau Muhindi Civil Appeal No. 219 of 2009** and **Tanzania National Roads Agency vs Kandan Singh Construction Ltd** in support of its arguments.

[6] In its further submissions filed on **13 January 2016**, the Respondent/Applicant posited that the issue of recognition/adoption of the award does not arise, as that is only a requirement in the case of foreign awards, which the subject award is not. Counsel for the Respondent/Applicant thus urged the court to find that the authorities cited by the Applicant/Respondent's Counsel are distinguishable from the facts herein and allow the application dated **20 August 2015** as prayed because there exists a valid arbitral award whose validity has successfully withstood challenge as per the Court Ruling of **21 July 2015**; that there is no stay order in place, the oral application for stay having been dismissed on **21 July 2015**; and that there are no immediate threats of execution.

[7] From the foregoing therefore, it is evident that the facts are, in the main, not in dispute, namely, that the parties herein entered into a contract for transportation of the Respondent/Applicants goods to its customers in Kenya and Uganda. In addition thereto, the parties entered into an arbitration agreement dated **24 April 2014**, covenanting to have disputes arising in respect of their Agreement for Transport Services dated **1 April 2011** to arbitration. There is further no controversy that a dispute did arise, which was referred to arbitration and a Final Award dated **13 October 2014** made. An attempt to have that Award set aside was dismissed on **21 July 2015** when the Court dismissed the Applicant/Respondent's application dated **22 October 2014**. Thus, the issues in contest, in my view are only two:

[a] Whether the Final Award is ripe for enforcement, notwithstanding that it has not been recognized or adopted as a judgment of the Court; and

[b] Whether a good case has been made by the Applicant/Respondent for stay pending their intended appeal.

[8] Starting with the last issue, it is noteworthy that thus far, there is no application for stay of execution.

Moreover, the issue of stay is *res judicata*, in that on **21 July 2015** a similar request was made by the Applicant/Respondent and the Court made a Ruling dismissing it. The Court expressed itself thus:

**"...the Court of Appeal has stated in Nyutu Agrovet vs Airtel Networks Ltd [2015] eKLR that there can never be an appeal against the decision of the High Court in an application for setting aside. It would be futile for the Applicant to hinge its application for a stay when clearly the Court of Appeal has in a five (5) bench settled the question of appeals from the High Court under Section 35 of the Arbitration Act. Accordingly, I decline to grant a stay of the Ruling on this ground also... Until the Nyutu Agrovet vs. Airtel Networks Ltd is overturned, it remains good law that is binding on this court..."**

In the premises, I have no hesitation in holding that it is misconceived for the Applicant/Respondent to raise this same point as a ground for opposing the instant application.

[9] As to whether the Final Award is ripe for enforcement, the Applicant/Respondent pitched the argument that the instant application is premature in the sense that it seeks enforcement of the Arbitral Award before its recognition and adoption as judgment of the Court as required by **Section 36(1) of the Arbitration Act**. That provision reads as follows:

**"A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37."**

[10] Pursuant to the provision aforesaid, **Rule 6 of the Arbitration Rules** provides that:

**"If no application to set aside an arbitral award has been made in accordance with Section 35 of the Act, the party filing the award may apply ex parte by summons for leave to enforce the award as a decree."**

Clearly therefore, the Respondent/Applicant was under no obligation to serve the instant application on the Applicant/Respondent in the first place. Secondly, the application for setting aside having been dismissed, the next step was for the Respondent/Applicant to move the Court for leave to **'...enforce the award as a decree of the court...'** There is nothing in **Rule 6** to suggest that the award must first be recognized and adopted as an order of the court before enforcement. To my mind, recognition of a domestic award for purposes of **Section 36** is in respect of acknowledging its binding nature and enforceability as a decree of the court, and not in the sense that it requires any further validation from the Court, unlike a foreign award.

[11] In any event, **Article 159(2)(d) of the Constitution** mandates the Court to administer justice without undue regard to procedural technicalities. Accordingly, it is still open, in an application for enforcement for an order of recognition to be made if indeed such is a requirement, granted that the two aspects are provided for under **Section 36(1) of the Arbitration Act**. It would hardly be economical use of judicial resources for the court to have the instant application dismissed merely on the ground that it has not been preceded by an application and order of recognition.

[12] For the foregoing reasons, I would allow the application dated **20 August 2015** by the Respondent/Applicant and grant orders as hereunder for the avoidance of any doubt:

**[a] That the Final Arbitral Award dated 13 October 2014 be and is hereby recognized and adopted as a Decree of the Court;**

**[b] That the Respondent/Applicant is accordingly granted leave to enforce that Final Arbitral Award as a Decree of the Court as prayed.**

**[c] That costs of the application be paid by the Applicant/Respondent.**

**Orders accordingly.**

**DATED AND DELIVERED AT NAIROBI THIS 14th DAY OF OCTOBER, 2016**

**OLGA SEWE**

**JUDGE**