



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC CIVIL E.L.C. 43 OF 2014

WAMATHU GICHOYA.....APPLICANT

VERSUS

MARY WAINOI MAGU.....1st DEFENDANT

RULING

Introduction

Mrs Wamathu Gichoya has applied to this court to transfer civil case number 105 of 1984 to the High Court, which is pending before the court of the Chief Magistrate at Embu, under sections 17, 18 and 3A of the Civil Procedure Act. The applicant has also sought an order for costs to be made in respect of this application. She relies on the grounds on the face of the notice of motion and on the annexed affidavit.

The respondent has opposed the application. She has not filed any replying affidavit. Instead, she relies on the grounds of objection which are set out in her objection dated 28th March, 2013.

The Case for the Applicant

According to the applicant, the tribunal made an award which was entered as a judgement of the magisterial court in the above mentioned civil case. Furthermore, the applicant states that the award as adopted is ambiguous and is impossible to execute. In addition to the foregoing, the applicant states that the subordinate magisterial court has no powers to alter the award. This is what has necessitated this application. Finally, the applicant has stated that no party will suffer prejudice if the order of transfer to the High Court is granted.

The Case for the Respondent

The respondent has filed the grounds of objection in respect of the order sought. According to her, there are no sufficient grounds and reasons to warrant the transfer of the case to the High Court. She also states that the High Court has no powers to alter, amend or rectify the award as adopted. Additionally, she has also pointed out that the award, which is alleged to be ambiguous has not been annexed to this application. Finally, she states that this application is frivolous, vexatious and an abuse of the court process. For these reasons, she urges the court to dismiss it with costs. Her counsel has submitted that once a court has adopted an award as its judgement, the adopting court becomes *functus officio*. According to the counsel, the applicant could only have approached the High Court through an appeal under **Section 65 of the Civil Procedure Act**.

Furthermore, counsel further submitted that the parties had an opportunity and a number of options open

to them before the award was adopted as a judgement of the court. He has pointed out that under **Order 46 Rule 14**, the adopting court has discretionary power to modify or correct an award if the following conditions are met:

- a. *where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred;*
- b. *where the award is imperfect in form, or contains an obvious error which can be amended without affecting such decision; or*
- c. *where the award contains a clerical mistake or an error arising from an accidental slip or omission.*

Furthermore, the adopting court also has discretionary power to remit the award to the arbitrator or umpire for reconsideration in any of the following circumstances in terms of **Order 15 rule 1**:

- a. *Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;*
- b. *where the award is so indefinite as to be incapable of taking effect; or*
- c. *where an objection to the legality of the award is apparent on the face of it.*

Finally, under Order 16 the adopting court may set aside an award on the following grounds only:

- a. *corruption or misconduct of the arbitrator or umpire; or*
- b. *that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.*

Finally, counsel has also submitted that where a party has not taken any action from the date the award is filed until it is adopted as a judgement of the court, a decree shall follow and no appeal shall lie from such decree. However, there are two exceptions to this restriction on the right of appeal. First the aggrieved party is allowed to appeal if the decree is in excess of the award. Second the aggrieved party is allowed to appeal if the decree is not in accordance with the award. This is clear from Order 46 Rule 18.

In terms of Order 18, the parties are given an opportunity to request the court to enter judgement according to the award after due notice. Counsel for the applicant has submitted that the order of transfer of the magisterial court judgement is to enable the parties to make submissions under **Order 46 of the 2010 Civil Procedure Rules**. He further points out that this court has power to alter or amend the award. According to him, the award is ambiguous to the extent that it is incapable of being executed.

In his view, **Order 46 Rule 14 (b) (c)** forms the basis of his request for transfer to the High Court of the award that was adopted as the judgement of the court. He also says that the transfer sought is an alternative method of approaching the High Court. In reply to the submissions of counsel for the respondent, he submits that the submissions of counsel for the respondent only dealt with the merits of the application, which in his view has not been reached. And for these reasons, he has urged the court to grant the order of transfer and award costs to the applicant.

The Applicable Law:

The law that governs this application is found in **Order 46 Rules 14, 15, 16 and 18 of the 2010 Civil Procedure Rules**. It is also important to consider the provisions of **Sections 17 and 18 of the Civil Procedure Act**, which have been relied upon by the applicant in support of the application for transfer. Both the provisions of **Order 46 and Sections 18, of the 2010 Civil Procedure Rules and of the Civil**

Procedure Act, respectively have been interpreted and judicially approved by the courts..

According to the case of **Re Arbitration between Muljibhai Madhavani & Co. Ltd and I. H Lakhani & Co (E.A) Ltd (1957) EA 268** a party that is objecting to an award that has been filed may file the objection within eight weeks from the date of service of the notice of filing of the award, apply that the award be set aside and to lodge an objection in that regard. This statement of law was based on the rule 7 of the Arbitration Rules of Uganda at that time.

Additionally, according to that case, the arbitration rules require that an application to remit or set aside an award has to be filed through a chamber summons supported by an affidavit and the objections. The principles in that case are applicable to the case at hand. That case makes it clear that it is the adopting court which may be requested to remit the award for reconsideration or to be set aside.

Furthermore, according to the case of **Kagenyi v. Musiramo and another (1968) EA 43 Section 18 of the Civil Procedure Act** of Uganda which is similar to the Kenyan Civil Procedure Act gives the High Court a general power to transfer suits upon application by the parties. The High Court may also transfer cases on its motion without notice to such parties. Section 18 Civil Procedure Act provides as follows:

“18 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage -

- a. **transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
- b. **withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter -**
 - i. **try or dispose of the same; or**
 - ii. **transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
 - iii. **re-transfer the same for trial or disposal to the court from which it was withdrawn.**

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

Furthermore, according to *Kagenyi v Musiramo and Another, supra*, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.

Furthermore, section 17 which has also been relied upon vests in the High Court power to transfer suits in the subordinate courts, which suits may have been filed in more than one court. In other words, it gives the High Court power to distribute cases filed in the subordinate courts among the said courts. In terms, **Section 17** provides as follows:

“17 Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed”.

Issues for Determination:

In the light of the affidavit evidence, the submissions of both counsel and the applicable law, the following are the issues for determination:

1. Whether or not the High Court has power under sections 17, 18 and 3A of the Civil Procedure Act

- to transfer to the High Court an award that has been adopted as a judgement of the magisterial court.
2. Whether or not the provisions of Order 46 apply to this application to enable the High Court to effect a transfer that is applied for.
 3. Who should pay for the costs of this application.

Evaluation of the Affidavit Evidence, Findings and the Law

In the light of the affidavit evidence, the submissions of both counsel and the applicable law, I find that the award was properly adopted as a judgement of the court as authorized by **Order 46 Rule 18 (1) of the 2010 Civil Procedure Rules**. It therefore follows that after the adoption of the award, a decree has to issue and no appeal is permitted from such a decree except in so far as the decree is in excess of or not in accordance with the award.

In the circumstances of this case, neither of the two parties took any action after the judgment was entered. Furthermore, neither of the parties complained that the award as adopted and the decree that followed from such an award was in excess of the jurisdiction of the award itself.

Finally, there was no complaint that the award as adopted was not in accordance with its terms. Section 17 gives the High Court power to distribute cases between and among the magisterial subordinate courts. Section 17 contemplates suits that have not been tried and concluded by the subordinate courts. The provisions of section 17 are clearly inapplicable to this application.

Furthermore, section 18 gives the High Court a discretionary power to transfer any suit, appeal of other proceeding pending before it for trial or to transfer it to any subordinate court that is competent to try such a case. It also gives the High Court discretionary power to withdraw any suit or other proceedings pending in a subordinate court and thereafter try it and dispose of the same.

Additionally, it also gives the High Court discretionary power to transfer any suit for trial or disposal to any subordinate court that is competent to try or to dispose of it. The High Court is also authorized by the same provisions to transfer the same suit for trial or disposal to the court from which it was withdrawn. And finally, section 18 (2) empowers the high court to give general directions in the case of an order of transfer whether to retry such a case or proceed from the point at which it was transferred or withdrawn.

It is clear from the provisions of section 18, that it also contemplates cases which are pending for trial. Like the provisions of section 17, the provisions of section 18 are clearly not applicable to this application. The reason is that the order which is said to be incapable of execution is a judgment of the court. In other words, the trial of the case has been concluded. My understanding is that, the issues in dispute as between the parties have been resolved by the process of an arbitration to finality.

It therefore follows that there is no issue in dispute to be tried by the High Court because the trial has been concluded. The court is required to execute the decree that follows the adoption of the arbitrator's award. This remains the position in law unless a party moves the court under Order 45 for a review of the decree or approaches the High Court for judicial review under Order 53 of the 2010 Civil Procedure Rules.

It is clear from the provisions of **Order 46 Rule 18** that where a judgment has been entered and a decree extracted, no appeal is allowed from such a decree. An aggrieved party is only allowed to appeal if the decree that follows from the award is in excess of such an award or it is not in accordance with the said award. Unfortunately, the decree or what the applicant calls the adopted award was not attached to the application.

In the circumstances, it is difficult to state whether the decree was in excess of the award as filed. It is equally difficult to state whether this decree was not in accordance with the award.

For the reasons which I have stated in the above paragraphs, the application for transfer is incompetent

and this court has no jurisdiction to order for the transfer of the judgment that has adopted the award as its judgment.

Verdict and Disposal Order:

In the light of the foregoing, I hereby make the following orders:

1. Application for transfer is hereby refused.
2. Costs of this application are awarded to the respondent
3. There will be interest at court rates of this costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th** day of **FEBRUARY, 2015**

In the presence of the Ms Njuguna holding brief for Mr Maina for the Respondent and in the presence of the parties in person.

Court clerk Mr Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

J.M. BWONWONGA

JUDGE