



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MISC CAUSE NO. 56 OF 2015**

**JIANG NAN XIANG.....CLAIMANT/APPLICANT**

• **VERSUS -**

**COK FA-ST LIMITED.....RESPONDENT**

**RULING**

1. This Ruling is in relation to 2 applications. The said applications arise from an Arbitral Award made on 25<sup>th</sup> July 2014.
2. On the one hand, the Claimant seeks the recognition of the Award so that it may thereafter be enforced as an Order or Decree of the Court.
3. On the other hand, the Respondent asks the court to refuse to recognize or to enforce the Award.
4. It is common ground that the arbitral proceedings were initiated after the High Court had referred the dispute to arbitration.
5. The claimant, **JIAN NAN XIANG**, wishes to enforce the award, which granted to him the sum of Kshs, 42,593,468.27 with interest thereon at 12% per annum, from 25<sup>th</sup> July 2014.
6. The Arbitrator had rejected the claimants claim for damages. Similarly, the Arbitrator had rejected the Respondent's counter-claim.
7. Finally, the Arbitrator ordered that the Respondent should pay the costs of the Arbitration together with the costs of HCCC No. 431 of 2012.
8. It is significant to note that that case (Hccc No. 431 of 2012) is the one in which the High Court had given orders which referred the dispute between the 2 parties, to arbitration.
9. After the dispute was referred to arbitration, both the parties agreed that one of the issues which the arbitrator was required to determine was that which relates to the costs in the High Court case.
10. The Respondent, **COK FA-ST COMPANY LIMITED**, told this court that the Award should not be recognized by the court because of the following 3 reasons;

*“1. Mr. Jiang Nan Xiang was not a party’ to the Arbitration Agreement.*

2. *The Arbitral Award deals with a dispute involving fraud, which was not contemplated and falling beyond the scope of the reference to Arbitration.*

3. *The Arbitral Award has not yet become binding on the parties”.*

11. The Managing Director of the Respondent, Mr. Peter Gacheru Muraya, swore an affidavit stating that the Arbitration Agreement did not contemplate fraudulent dealings by the parties to the agreement, yet the tribunal found that the claimant’s claim was based on fraud.

12. The other deposition of Peter Gacheru Muraya was that;

*“7. The Applicant herein, in affidavits sworn under oath in Hccc No. 431 of 2012, stated that he was not a director or shareholder of Cok Fa-st Limited and thus was under a disability in that he was not privy to the Arbitration Agreement”.*

13. In my understanding, Muraya was saying that because the claimant was neither a shareholder nor a director of **COK FA-ST LIMITED**, he was under a disability.

14. That would imply that the only way that **JIANG NAN XIANG**, the claimant, could have had locus to pursue the claim, would have been in his capacity as either a director or a shareholder of the Respondent, **COK FA-ST LIMITED**.

15. The question as to whether or not the claimant could or could not sustain a claim against the Respondent was determined prior to the commencement of the Arbitration.

16. On 31<sup>st</sup> July 2012, Ogola J. directed that the dispute between **COK FA-ST LIMITED** and **JIANG NAN XIANG** be resolved through arbitration.

17. Thereafter, Mutava J. delimited the scope of the arbitration, so that the arbitrator could focus on determining which of the 2 parties owed the other what obligation or how much money, arising from the arrangement between them. In making the order, Mutava J. noted that the parties appeared to have had an arrangement wherein some items were being manufactured by the claimant, and thereafter, the Respondent was selling the said items.

18. In effect, the High Court had already concluded that there were disputes between the 2 parties herein. It was for that reason that the court directed that the dispute be resolved through arbitration.

19. In these circumstances, when the Respondent now contends that the Claimant was not a party to the Arbitration Agreement, I am not a loss as to what to make out of the said contention.

20. In any event, the issue about the Claimant’s alleged disability was again raised before the arbitrator, who heard and dismissed the Respondent’s argument.

21. After the Respondent’s challenge to the Claimant’s capacity had been dismissed, the Respondent participated fully in the arbitration proceedings. In those proceedings, there were only 2 parties i.e the Claimant and the Respondent.

22. If the Respondent believed that the Claimant had no capacity to be a lawful party to the arbitration proceedings, the Respondent ought to have lodged an appeal against the earlier decisions of Ogola J., Mutava., and Havelock J.

23. As no such appeal was preferred by the Respondent, the current attempt to challenge the capacity of the Claimant appears to be a belated attempt to get this court to either review the earlier decisions or an appeal calculated to upset the said decisions.

24. I have no jurisdiction to sit on appeals in respect to decisions made by Judges whose jurisdiction are at par with my own.

25. Secondly, and in any event, it was not proper that the Respondent should have participated in the arbitration process, and only thereafter try to chip away at the very foundation of that which gave rise to the whole process.

26. The parties filed their respective pleadings before the arbitrator.

27. As the arbitrator noted at paragraph 13 of the Final Award, the claimant had, in his pleadings, asserted that the Respondent and its directors had committed fraud on the claimant.

28. Arising from that claim, the claimants had prayed for, *inter-alia* a Declaration that the Respondent and its Board of Directors acted fraudulently, maliciously and illegally in failing to pay to the Claimant consideration for the goods which the Claimant had supplied to the Respondent's agents.

29. In its Defence and Counter-claim, the Respondent stated, *inter-alia*, that the dispute between the 2 parties herein began in March 2012, which was a time when the Claimant had stayed in Kenya for only 3 months.

30. Effectively therefore, the Respondent must be deemed to have acknowledged the existence of a dispute between the 2 parties. Those parties were **COK FA-ST LIMITED** and **JIANG NAN XIANG**.

31. According to the Respondent's pleadings, the relationship between the 2 parties fell apart completely on 4<sup>th</sup> July 2012. At that time, the Claimant attempted to dismantle the factory which he had put up. It is from that factory that the Claimant used to obtain the items which the Respondent then sold in the East African region. So, when the Claimant wanted to dismantle the factory, the Respondent rushed to court. Ultimately, the court referred the dispute to arbitration.

32. The Arbitrator's records show that the Preliminary Meeting was held on 19<sup>th</sup> March 2014. At that meeting, the 2 parties agreed that the Statement of Issues prepared by the Claimant would be treated as the Statement of Agreed Issues for Determination.

33. The following is the said List of Issues;

- “1) *Whether the respondent and its Board of Directors acted fraudulently, maliciously and illegally in failing to pay the claimant consideration of goods supplied and delivered by its agents and other expenses incurred.*
- 2) *Whether the respondent and its directors owed the claimant any obligation pursuant to the agreement dated 12<sup>th</sup> July 2011.*
- 3) *Whether the claimant supplied the respondent with goods.*
- 4) *Whether the respondent paid the claimant/his company consideration of the goods supplied.*
- 5) *Whether the claimant incurred the expenses and losses pleaded in the Statement of Claim.*
- 6) *Whether the claimant is entitled to special damages as pleaded in the Statement of Claim.*
- 7) *Whether the Respondent is entitled to general damages as pleaded in the Statement of Claim.*

8) Which party should bear the costs of Hccc No. 431 of 2012 and the current arbitration proceedings?

9) If the answer in 7, 8 and 9 are in the affirmative, whether the Hon. Arbitrator can fix a period within which the claimant shall satisfy the said Orders”.

34. I have set out the List of Issues in *extenso*, as that clearly demonstrates that the parties had agreed that the first issue which the Arbitrator was required to determine, was in relation to the allegations of fraud, malice and illegality.

35. I therefore find that the allegations of fraud were not only contemplated by both parties, but the same were consciously set down as one of the issues which the parties wished to have the arbitrator determine.

36. In the event, the arbitrator acted well within his jurisdiction when he determined the issue touching on the fraud allegedly committed by the Respondent.

37. In the case of **MAHICAN INVESTMENTS LIMITED & 3 OTHERS VS. GIOVANNI GAIDA & 80 OTHERS, MISC CIV. APPL. NO. 792 OF 2004**, P.J. Ransley J. made it clear that;

*“Whether the decision of the arbitrator went outside the reference depends on what issues the parties raised in their pleadings.*

*In order to succeed the applicant must show beyond doubt that the arbitrator has gone on a frolic of his or her own to deal with matters not related to the subject matter of the dispute”.*

38. In the case before me, I have come to the conclusion that the issues dealt with by the arbitrator were related to the subject matter of the dispute. Indeed, the parties fully appreciated that fact and therefore incorporated the issue into the list of those which they wished to have the arbitrator determine.

39. I find no reason, in law, for refusing to recognize the Final Arbitral Award dated 25<sup>th</sup> July 2014. Therefore, the Respondent’s application dated 27<sup>th</sup> February 2015 is without merit. It is dismissed, with costs to the Claimant.

40. Having rejected the Respondent’s application, there is no reason that stands in the path leading to the recognition of the award.

41. I do therefore recognize the Arbitral Award made on 25<sup>th</sup> July 2014 and direct that it adopted as an Order of this court. Following the adoption of the award as an order of the court, it follows that the award may now be extracted as a Decree of the court.

42. The costs of the application dated 2<sup>nd</sup> February 2015 are awarded to the Claimant.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of April 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Kiche for Abidha for the Claimant/Applicant

Otieno for Wandago for the Respondent

Collins Odhiambo – Court clerk.