



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS CIVIL APPL. NO. 379 OF 2014**

**BETWEEN**

**NJUCA CONSOLIDATED CO. LTD.....APPLICANT**

**VERSUS**

**NYAYO TEA ZONES DEVELOPMENT CORPORATION.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Application before this Court is the Applicant's Chamber Summons dated **21<sup>st</sup> August 2014** and filed in Court on **22<sup>nd</sup> August 2014**. It is expressed to be brought under **Section 36(1)** of the **Arbitration Act 1995**, and **Rules 6 and 9** of the **Arbitration Rules, 1997**.

2. The Application is based on the grounds stated in the application and is supported by the Affidavit of SAMSON WACHIRA NJOROGE, a director of the Applicant and sworn on 21<sup>st</sup> August 2014. It is seeking for the following orders:-

1. *That this Honourable Court be pleased to recognise and adopt the amended final award prepared by QS. Onesimus Mwangi Gichuri on the 23<sup>rd</sup> day of October 2012 as a Judgment of this honourable court.*
2. *That the Honourable court be pleased to grant leave to the Applicant to enforce the said award as a decree of this Honourable Court.*
3. *That the costs of this application be payable by the Respondents.*

**THE APPLICANT'S CASE**

3. The Applicant avers that the Respondent is truly indebted to them as per the amended final award dated the 23<sup>rd</sup> day of October 2012. It is further averred that the Respondent's application to set aside the award in Misc. Civil application NO. 711 of 2012 was dismissed. However, as is contended by the Applicant, the Respondent has adamantly refused to settle the amounts specified in the award and/or has made no effort whatsoever to settle the same. It is therefore the applicant's case that they are desirous of enforcing the award and it is necessary that this Honourable court first recognises and adopts the same.

**THE RESPONDENT'S CASE**

4. In opposition to the application, the Respondent filed a Replying affidavit sworn on 2<sup>nd</sup> October 2014 by PETER K. KORIR, described as the Managing Director of the Respondent.

5. The Respondent's case was that it faulted the Arbitrator's findings in the Amended Final Award dated 23/10/2012 and made an application seeking to set aside the aforesaid Award in Misc. Civil application NO. 711 of 2012. In the said application, the Respondent raised *inter alia*, grounds that the Award was fundamentally flawed and contrary to public policy having been grounded on matters that were beyond the scope of reference to arbitration. However, as already stated above the said application was dismissed.

6. It is the Respondent's contention that the trial judge in the said application failed to address the issues raised. Having been dissatisfied with the said ruling they lodged a Notice of Appeal at the Court of Appeal pursuant to Rule 75(4) of the Court of Appeal Rules, 2010 expressing its intention to appeal against the ruling. *Annexed to the Respondent's affidavit and marked "PKK-3" is a copy of the Notice of Appeal dated 24/07/2014.* The Respondent also filed applications seeking leave to appeal against the said ruling and stay of any proceedings. At the time of filing its affidavit the Respondent averred that the said applications were due for hearing on 4/11/2014.

7. It was therefore the Respondent's case that it was not true that they had refused to settle the amounts specified in the award or made no effort whatsoever to settle the same as alleged by the Applicant. The Respondent contended that it would be premature and a waste of judicial time to entertain the Applicant's application when already there was a pending application in the Court of Appeal seeking to stay the instant proceedings pending hearing and determination of the intended appeal.

8. Therefore, the Respondent urged the court to exercise its discretion and allow them to pursue the pending applications in the Court of Appeal.

## **ANALYSIS**

9. The Applicant filed its submissions dated 22<sup>nd</sup> October 2014 on eve date while the Respondent filed its submissions dated 23<sup>rd</sup> October 2014 on 24<sup>th</sup> October 2014.

10. I have considered the application, the affidavits in support and opposition to the application as well as the written submissions filed by both parties. Having done so, I take the following view of the matter.

11. It is worthy to note that before this Court could render its ruling, it was informed that the application by the Respondent for leave to file an appeal at the Court of appeal had been dismissed. It therefore means that the ruling rendered by Honourable Justice Havelock is final.

12. The recognition and enforcement of arbitral awards is provided for under sections 36 and 37 of the Arbitration Act, Cap 49 Laws of Kenya. This Court is therefore alive to the said provisions on recognition and enforcement of awards and the grounds for refusal of recognition or enforcement. Section 36 (3) requires that the party applying for the enforcement of the award to furnish the original arbitral award and the original arbitration agreement or duly certified copies of the same.

13. It was the Respondent's submission that the Applicant did not comply with section 36 (3) of the Arbitration Act as it did not attach the original award or a certified copy of the same. I have perused a copy of the award attached to the Applicant's application and it seems not to be certified. It is however duly signed by the arbitrator. The Respondent has not contended that the said award is a different one from the one they sought to challenge. Therefore it is unlikely that the Defendant will be prejudiced on grounds that the copy of the award attached was not certified.

14. Section 37 of the Arbitration Act provides the grounds upon which the Court may refuse to recognise an arbitral award. The Court may refuse to recognise the award at the request of the party against whom the award is made if the party proves that: a party to the agreement was under some incapacity; the arbitration agreement is not valid under the applicable law; the proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given to the party or that the party was otherwise unable

to present his case; that the award does not fall within the terms of reference of the arbitration; the composition of the arbitral tribunal was not in accordance with the arbitration agreement; that the arbitral award has not yet become binding or has been set aside; that the making of the award was induced or affected by fraud, bribery, corruption or undue influence. ***See section 37 (1) (a) of the Arbitration Act.***

15. The Respondent's application for setting aside the award was dismissed. The Court found that the award was not inconsistent with the constitution or any other laws of Kenya. The award was also not contrary to justice or morality. According to the Judge the arbitrator made his findings based solely on the contract entered into between the parties and did not go outside the parameters set by both parties. Therefore, the Respondent has failed to provide proof of any of the ingredients set out in section 37 of the Arbitration Act to warrant the Court to refuse to recognise and enforce the award herein.

### **DISPOSITION**

16. In the upshot, I hereby allow the Applicant's Chamber Summons dated **21<sup>st</sup> August 2014** and filed in Court on **22<sup>nd</sup> August 2014** as prayed and with costs to the Applicant.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 30TH DAY OF APRIL 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Areri holding brief for Nyaaga for the Applicant

Mr. Odoyo for the Respondent

Teresia – Court Clerk