REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC. NO. 213 OF 2014

TCAT LIMITED…….....CLAMANT/APPLICANT

VERSUS

JOSEPH ARTHUR KIBUTU.....RESPONDENT

RULING

1. The Applicant is seeking the leave of court to enforce the arbitral award dated 19TH December, 2013. The Applicant has also applied for adoption and enforcement of the Final Award as a Decree of this Honourable Court. The other prayers in the application relates to the cost of this Application.
2. The application was brought through a Notice of Motion dated 5th May, 2014, which is expressed to be brought under Section 36 of the Arbitration Act, 1995, Rule 6 and 9 of the Arbitration Rules 1997 and Order 51 Rule 1 of the Civil Procedure Rules 2010.The Application is based on the grounds set out in the motion, the supporting affidavit of **Joseph N. Muita**, sworn on 14th April, 2014, the further affidavit of **Jillian Muthoni Ndirangu** sworn on 24th June, 2014 and submissions by counsel.
3. The parties herein entered into a sale agreement in which the Respondent agreed to purchase from the claimant a caterpillar D6H LGP tractor registration number KBC 537D (hereinafter "the machine"). A dispute arose between the parties and in accordance to the arbitration clause in the agreement, the same was referred to arbitration before Mr. Chacha Odera as the sole arbitrator. Upon hearing, review and adjudication over the dispute, the arbitrator rendered his decision on the 19th December, 2013, where the Claimant was entitled to the payment of Kshs. 4,799,894/=, interest on the sum of Kshs. 4,799,894/= at the rate of 12% from 14th March, 2012 until payment is made in full together with the arbitrator's and claimant's costs. It was the contention of the claimant that the Respondent having failed to file an application to set aside the award under section 35 (2) (a) (iv) of the Arbitration Act, it was only prudent for the court to allow the prayers sought.
4. Ms. Koross, learned counsel for the Applicant orally highlighted the written submissions in court. It was her submission that the Arbitral award herein was valid and enforceable and the Respondent has not demonstrated any grounds for setting aside the same. In the Applicant's assessment the issues raised by the Respondent, namely, that the Arbitral award was delivered late and that enforcement of the same would allegedly be contrary to public policy were flimsy since the Respondent did not furnish the court with any proof or explanation of these allegations. While citing the case of **Christ for All Nations –v- Apollo Insurance Co. Ltd (2002) 2E.A 366**, Ms.

Koross argued that the Respondent failed to meet the threshold required for the award herein to be set aside for being contrary to public policy. It was also stated that the Arbitrator was right in holding that Respondent should not be discharged from his obligation to pay the outstanding debt by the act of repossession and the sale of the car and machine in question. That the Arbitrator took into consideration the outstanding debt and the state of disuse following the Respondent's alleged reckless use of aforementioned machine. With regard to the argument that there was unjust enrichment by the Claimant/Applicant, it was Ms. Koross's submission that the Respondent having admitted being indebted to the Applicant vide a deed of acknowledgement dated 5th July, 2010 and having failed to settle the debt, the Claimant had no option but to sell the motor vehicle through an auction. That the same fetched an amount of Kshs. 400,106/= leaving a debt of Kshs. 4,799,894/=. In sum, it was the Applicant's position that the application is merited and the court should adopt the Arbitral award and enforce it as the court's own decree.

5. In opposition to the application, the Respondent filed a Replying Affidavit sworn on 20th June, 2014. It was deponed that the parties entered into an agreement for the sale and purchase of the machine at the center of this suit. According to the Respondent, the machine was sold on an "as is" basis. He further contended that he took machine and paid an initial sum of Kshs. 1,200,000/= and promised to settle the balance of Kshs. 5,200,000/= as per the terms of the agreement. The Respondent went on to add that he put up a Toyota Lexus G300 motor vehicle registration number KAZ 751S as security for the transaction as required by the contract. That the said vehicle was valued at Kshs. 1,620,000/=. The Respondent alleged that soon after the purchase, the machine started experiencing mechanical problems, eventually becoming inoperable in 2010. That due to the foregoing, the Respondent fell into arrears as the machine could not operate optimally. That upon default, the Claimant proclaimed and took possession of the said machine. It was additionally contended that the Claimant transferred motor vehicle registration number KAZ 751S to the name of its Director, Joseph Muita, in pursuance of exercising its right under the sale agreement. The Respondent further contended the Claimant then sent an auctioneer to take the said motor vehicle from Zone Limited and sell it by public auction, which the auctioneer purported to do at a gross undervalue of Kshs. 400,016/=. The Respondent also faulted the award issued by the Arbitrator, since the same was based on a deed of acknowledgement of debt signed by himself. According to him, the same was executed on a "no prejudice basis". That the original deed of acknowledgement was not presented during the arbitral proceedings. He further contended that the award having been delivered on 18th December 2013, almost a year after the parties made their final submissions. In the opinion of the Respondent all these reasons make the award contrary to public policy. He further pointed out that there was still a suit pending which referred the instant matter for arbitration, thus making the current application superfluous.
6. The Respondent's filed written submissions orally highlighted in court by Learned Counsel Mr. Wandabwa. It was submitted that though there was no application to set aside the arbitral award, the court was still mandated by law to confirm whether the award met the threshold set under section 37 of the Arbitration Act. Mr. Wandabwa went on to state that the Award was not in conformity with public policy. According to him, the learned arbitrator having taken so long to deliver his decision, possibly forgot the intricate details of the matter before him. That at page 11, paragraph 5 of the Arbitral award, the arbitrator held that in exercising its right to attach the machine, the Applicant did not lose its right to pursue an alternative remedy. Thus, according to learned Counsel, the arbitrator erred against public policy by holding that a party can recover an item sold and also recover the purchase price. He was of the opinion that the same amounted to unjust enrichment and therefore against public policy. While citing the case of **Madhupaper International Ltd & another –v- Kenya Commercial Bank Limited & 2 others (2003) eKLR**,the Respondent emphasized that a party should not retain a benefit that would amount to being unjustly enriched at the expense of another party. It was also the contention of the Respondent that the Arbitrator erred in relying on a deed of acknowledgement of debt dated 5th November, 2011 which was clearly marked as "without prejudice". According to Mr. Wandabwa, this offended the rules of evidence, specifically section 23 of the Evidence Act, which prohibits the use of without prejudice communications. With regard to the proclamation and repossession of the machine, it was submitted that vide a letter dated 25th March, 2011, the Claimant's auctioneers acknowledged repossessing both the machine and motor vehicle KAZ 751S. That though the proceeds of the sale of the motor vehicle KAZ 751S were revealed as Kshs. 400,106/=, the sum

for the sale of the machine was not given. In a nutshell, the Respondent contended that the Arbitral award was flawed and the same should not be enforced. He therefore urged the court to decline the orders sought and dismiss the application with costs.

7. After reviewing the Affidavits on record as well as the submissions of Counsel, and the authorities relied on, I am of the opinion that the issue for determination is whether or not to enforce the arbitral award. The Applicant is seeking the recognition and enforcement of the award dated 19th December, 2013, which it says was made in accordance with law, it is final and binding on the parties. The Respondent has on the other hand contested the award on the basis that it offends public policy as it unjustly enriches the Applicant and that the same was based on a deed of acknowledgement that was marked as "without prejudice".
8. I must state from the outset that an award should be made or obtained in accordance with the law that is the Arbitration Act and the Constitution. And once an arbitral award is accordingly made, Section 10 of the Act will shield it from interference by the Court except as provided in the Act. See section 10 of the Arbitration Act, which states that:-

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

9. From the above, it is important to note that the court can only interfere with an arbitral award in accordance to the Act. In the instant application, the Applicant has sought to enforce the award, under section 36 of the Arbitration Act. An order for recognition and enforcement of the arbitral award herein under sections 36 of the Arbitration Act supplies the award with the authority of the Court and avails the process of the Court to the successful party to enforce the award by way of execution. However, section 36(1) provides as follows:

> ***36(1) 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. Thus in considering the application, the court must bear in mind the provisions of section 37 in order to determine whether or not the award should be enforced. The said provision states thus :-

> ***" 37 (1) The recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused only—***
>
> ***(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—***
>
> ***i. a party to the arbitration agreement was under some incapacity; or***
>
> ***ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;***
>
> ***iii. the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***
>
> ***iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or***
>
> ***v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the***

parties, was not in accordance with the law of the state where the arbitration took place; or

vi. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

vii. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

(b) if the High Court finds that—

i. the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

11. From the foregoing provision, the Court has the power to refuse recognition and enforcement of an arbitral award if any of the specific grounds contained in section 37 is proved by an opposing party. From the Replying Affidavit and submissions of the Respondent, it is clear that the application is being opposed on several fronts. That is on the grounds of public policy; unjust enrichment; the Arbitrator's reliance on a document that was marked as "without prejudice", and the Arbitrator's non recognition of the fact that the machine had already been proclaimed, but there was no credit to the same. Are these grounds merited? I shall proceed to analyze each ground as hereunder.

Public policy

12. The argument advanced is that the award herein should be set aside for it violates public policy on account of the delay of delivering the award. In addition the Respondent contended that the Arbitrator held that the Applicant could attach and proclaim the caterpillar as well also recover the purchase price through an alternative remedy which according to the Respondent amounted to unjust enrichment which was against public policy. Ringera J proclaimed in **ALL NATIONS V. APPOLLO INSURANCE CO. LTD [2002] 2 E.A 366,** as follows;

"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as a the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award to be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either; (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality."

13. From the foregoing one can tell that for the court to decide whether an award is offensive to public policy, one must show that the award is inconsistent with the Constitution or other laws of Kenya; or inimical to the national interest of Kenya; or contrary to justice and morality.As Ringera J postulated, it is only the first category that is straight forward. The other two are not as straight forward, and neither the Court nor the Legislature can provide an exhaustive list of the elements or items that constitute; inimical to the national interest or Kenya; or contrary to Justice and

Morality. It will all depend on the circumstances of the particular case, the facts being pleaded, and the evidence offered in support of those facts.

14. Also in the case of **Profilati Italia SrL vs. PaineWebber Inc (2001) 1 All ER (Comm) 1965, (2001) 1 Lloyd's Rep 715, Moore-Bick J** stated that where a party alleges that the way in which an award was procured was contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the part of the successful party has contributed in a substantial way to the award being made. The court should not be quick to interfere. Thus it is my view that public policy being an elastic ground would require cogent proof if an award is to be set aside on that account.I see nothing has been presented to satisfy the test of public policy as a ground to set aside the award herein. The fact that there was delay in the publication of the award cannot be a ground hinged on public policy as the Arbitration Act does not provide a time frame in which an arbitral award should be rendered or published.

Unjust enrichment

15. Secondly, on the matter of unjust enrichment, I note that the same was hinged on the argument that the learned arbitrator held in his decision that in exercising its right to attach the machine, the Applicant did not lose its right to pursue an alternative remedy. I have seen and read the award attached to the application. On page 9 to 11, it contains the findings of the arbitrator on the issue of what remedies the Applicant had after the Respondent defaulted on the payments of the machine as contained in the agreement.
16. The Arbitrator stated at page 10 and 11 that ;

> ***" Clause 9.2 of the subject agreement gave the Claimant the right of repossession without to any other legal remedy available.***
>
> **……**
>
> ***Unlike the legal regime in respect of realization of an immovable security where there are in-built safeguards respecting the value that the security can be sold, there are no similar safeguards in respect of realization of moveable assets. The sale price is determined by bids at the auction and not by the valuation of the asset.***
>
> ***I am unable to fault the Claimant's auctioneer for selling the motor vehicle at Kshs. 400,106/=.***
>
> ***The attachment of the Caterpillar was a right also preserved by clause 9 of the subject agreement.***
>
> ***In exercising that right, the Claimant did not lose its right to pursue an alternative legal remedy.***
>
> ***From the statement filed on behalf of the Respondent, the said Respondent states at paragraph 15 that the Caterpillar was left at Milimatatu as it had been proclaimed.***
>
> ***The Respondent further stated that he received an offer of Kshs. 4,200,000/= for Caterpillar but was unable to accept it as the Caterpillar was under proclamation. However, the Respondent did not allege or produce any evidence that he communicated this offer to the Claimant and in the premises, I am not persuaded that the Respondent can rely on this offer to discharge himself from the outstanding debt.***
>
> ***By reason of the matters I have observed above, I find and hold that the Respondent having defaulted in its repayment obligation, was not discharged from his obligation to settle the outstanding debt by the act of repossession of his car and its subsequent sale and the subsequent attachment of Caterpillar."***

17. From the above, it is clear that the arbitrator dealt with the issue of default conclusively. He dealt with the facts before him and made certain conclusions. However, on whether the findings were correct or not, I am of the opinion that this court has no jurisdiction to make a finding and holding contrary to what the Arbitral Tribunal had arrived or to interfere with the award given. As held in the case of **Rashid Moledina& Co (Mombasa) Limited & Others vs Hoima Ginners Limited (1967) E.A. 645**, courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute.
18. If the court would look into the issue of whether there was enrichment as invited to do, it is my finding that the same would be tantamount to the court trying to render itself on a question of fact. The Arbitrator used the facts before him indetermining whether or not there was breach of any of the terms of the subject Agreement.And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case **Kenya Oil Company Limited & Another v Kenya Pipeline Company [2014] eKLR, Moran v LLoyds (1983) 2 ALL ER 200** and **DB SHAPRIYA & CO. v BISHINT (2003) 3 EA 404**, where there is judicial consensus that;

> ***"All questions of fact are and always have been within the sole domain of the Arbitrator……..the general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator."***

19. The arbitral tribunal was therefore seized of relevant material and facts which were placed before it by the Applicant. It considered all relevant material. It inquired into the existence of the facts in the case and decided on the extent of the Respondent indebtedness. The court cannot thus be called to disturb the award on that front.

Deed of acknowledgement.

20. I also hold the same position with regard to the issue of whether or not it was proper for the Arbitrator to deal with a deed of acknowledgement of debt that had been marked as "without prejudice". The question as to whether or not the deed contained the words "without prejudice", is a matter of fact. On the one hand, the Applicant states that the same did not contain the phrase while the Respondent was emphatic that the deed contained those words. According to the Respondent's replying affidavit in paragraph 9, the issue was raised before the Arbitrator. However, it was contended that the Claimant's counsel promised to provide the original deed for ascertainment. However, it was deponed that the Claimant's advocate failed to produce the original as promised. It is of note, that none of the parties produced the proceedings of the tribunal for the court to verify whether this did indeed happen. Additionally the Award does not make any mention to the deed having being signed on a no prejudice basis. As such, the court cannot assess on whether the said deed was admitted into evidence wrongly as it is unclear which document was presented before the Arbitrator. As such, I find that the issue on the deed of acknowledgement being a without prejudice communication was one of fact.
21. As stated hereinabove, the court does not have any jurisdiction to re-open findings of fact that have already been made by an arbitral tribunal. Once an arbitrator makes a finding of fact, the court cannot review it even it is of the view that it would have arrived at a different conclusion. See the case of **Geogas S.A. vs Tammo Gas Limited ("The Baleares") 3 All ER 554.**
22. On the point raised, that there exist another suit in which an order referring this matter to arbitration therefore rendering the current application superfluous, I find that the same does not hold any water. The Respondent did not offer any proof or details of the court case to which they make reference. The Court cannot therefore issue orders blindly. The objection is therefore dismissed.
23. The upshot is that the court rejects the objections raised by the Respondent. Consequently, the application dated 5th May, 2014 is allowed. The award dated 19th December, 2013 is hereby recognized and adopted as the order of this court; it shall be enforced as such order.
24. The Applicants is also awarded the cost of the application.

Dated, Signed and Delivered in Court at Nairobi this 10th day of December, 2015.

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C. KARIUKI

JUDGE