REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 486 of 2011

ALLAN MICHAEL GILHAM
PATRICIA ANN GILHAM ……...……..…………………… CLAIMANTS

VERSUS

BEL AIR INVESTMENTS LTD. …………………………… RESPONDENT

R U L I N G

1. On 2nd October 2012, I dismissed the Respondent's Notice of Motion dated 9 December, 2011 seeking to enlarge time for challenging the Award delivered by Norman Mururu dated 11 April 2011. At the end of my Ruling, I noted that the Claimants could now proceed to set down their Application to enforce the said Award, such application being a Chamber Summons dated 28 July 2011. This is now the application presently before court for determination. The grounds upon which the Application was based as detailed in the award of the said Arbitrator as follows:

a) Refund of deposit of Kshs 3,500,000.00.

b) Recovery of conveyance legal fees of Kshs 500,000.00.

c) Payment of Kshs 4,000,000.00 by the Respondent within 30 days of receipt of the Award failing which the unpaid amounts shall attract interest at 10% p.a. on several rate basis.

d) Claimants to bear Kshs 100,000.00 and Respondent to bear Kshs 552,500.00 of the arbitrator's fees.

e) Respondent to pay Claimants' reasonable costs of arbitration failing agreement to be assessed by the High Court.

2. The Claimants noted that the Respondent had refused, neglected and/or otherwise failed to comply with the Award which had been duly filed in this cause and a copy thereof served upon the Respondent. The Application was supported by the Affidavit of the first Claimant, **Alan Michael Gilham** dated 28 July 2011. The deponent gave details of the Arbitration Agreement dated 6 May 2009 in which both parties had agreed to submit to arbitration any such dispute as may have arisen between them as regards the said agreement. When a dispute had arisen, the Claimants had moved to court seeking interim orders but such proceedings were abated after the Respondent had filed an application seeking to stay the proceedings before court and have the matter referred to arbitration. The deponent then went on to detail as to the selection of Mr. Norman Mururu as the arbitrator and after he had duly heard the parties and their witnesses, he issued his Award, in writing as above, dated 11 April 2011. The Award had been lodged in Court on 26 May 2011 and a notice of the filing thereof was served upon the Respondent's advocates on 6 June 2011. Demand as to payment of the Award amounts was sent to the Respondent's advocates under cover of a letter from the Claimants' advocates dated 2 June 2011. Mr. Gilham wrapped

up his Affidavit in support of the Application by stating that he had been advised by his advocates on record, that apart from the Application for leave to extend time for an application to set aside the Award, the Respondent had taken no further action in respect of the Award. Further, the costs of the arbitration which were awarded to the Claimants had not been agreed as between the parties.

3. The Respondent filed Grounds of Opposition to the Claimants' Application of 28 July 2011, on the 9 December 2011. Those Grounds detailed that the Award contained matters beyond the scope of the reference to arbitration and that the proceedings to enforce the Award were commenced prematurely in violation of the provisions of **section 35** of the *Arbitration Act (1995)*. The Respondent also maintained that the Award was in conflict and contrary to the public policy of Kenya and that the Arbitrator had misdirected himself by giving an Award which was not prayed for by the Claimants. Further, the Application was incompetent and void in law and the Award contains serious irregularities which would cause substantial injustice to the Respondent.

4. In their Submissions filed herein on 24 December 2012, the Claimants set out the details of the Application and the background facts thereto. They referred the court to **section 36** of the *Arbitration Act (2010)* which they detailed recognises that a domestic Arbitral Award is binding and allows a party to apply for enforcement of the same. They noted that **Rules 4, 5, 6 and 9** of the *Arbitration Rules 1997* detailed the procedure for making such an application. The Court was also referred to the case of **<u>Iris Properties Ltd & Anor. Versus Nairobi City Council</u>, HCCC No. 947 of 1999 (unreported)**. The Claimants noted that at the time the Application before court was filed, there had been no application made by the Respondent to set-aside the Award. Indeed, the Claimants referred to **section 37 (2)** of the *Arbitration Act* which made reference to the situation where a court may adjourn its decision on enforcement proceedings where an application for setting aside or suspension of an arbitral award has been made by a respondent.

5. The Claimants also submitted that **section 37** of the Act detailed grounds upon which the court may refuse recognition or enforcement of an arbitral award. They maintained that the Respondent had failed to show, by way of affidavit evidence or otherwise, whether such grounds exist to warrant a refusal of an order for the enforcement of the Award herein. As regards the Respondent's allegation that the enforcement proceedings were filed prematurely, the Claimants pointed out that **section 35** of the Act to which the Respondent had referred makes no mention of any such time limit for enforcement proceedings, but only in respect of an application to set aside an arbitral award. The Claimants noted that the Arbitrator had directed that the Award amounts should be paid within 30 days after which interest would become payable thereon. If this was what the Respondent was referring to, then the said 30 days had long expired from the date of delivery of the Award to the Respondent on the 12 May 2011 as the Application was filed on 28 July 2011. The Court was then referred to the case of **<u>Oltukai Mara Ltd versus Conservation Corporation (Kenya) Ltd</u> HC Misc. App No. 666 of 2006** reported at **(2006)eKLR**. The Claimants concluded by stating that there would appear to be no reason at all why their Application should not be allowed as they deserved to enjoy the fruits of the Award.

6. The Respondent filed its submissions on 29 January 2013. It dwelt upon the fact that the proceedings for enforcement had been commenced prematurely. It maintained that such proceedings ought only to be brought after the expiry of the period for challenging the Award had lapsed, which period is 3 months from the publication of the Award. It maintained that an application for enforcement of an Award is akin to an application requesting for judgement in litigation. The Respondent relied on the case of **<u>David Engineering Ltd versus Emirates Neon Ltd</u> HC Misc Cause No. 488 of 2011 (unreported)**. As regards the reliance placed by the Applicants on the **<u>Oltukai Mara</u>** case (supra), the Respondent maintained that such was not persuasive as the Judge had missed the opportunity to expose and interpret the correct position on when an application for enforcement of an Award can be made.

7. As regards the submission that the Award was in conflict and contrary to the public policy of Kenya, the Respondent pointed to clause 12 (c) of the Agreement for Sale between the parties that the purchasers (the Claimants) would forfeit their deposit for the purchase of the property if they decided to pull out for whatever reason. The Respondent maintained that the Arbitrator had totally ignored that provision of the Agreement as between the parties. He had also ignored the provisions of clause 18 of the said Agreement

for Sale which provided that each party should pay its own legal fees but that the purchasers (the Claimants) would pay stamp duty and registration fees on the Lease and the reversionary interest of the property. The Respondent maintained that the Arbitrator had purported to rewrite the parties' agreement by making alternate orders in the Award in relation to costs. The Respondent also maintained that the Arbitrator, although acknowledging the existence of the said Agreement for Sale, had ignored it in his conclusion to his Award. The Respondent further complained that the Arbitrator had misconducted himself when he found in favour of the Claimants. The Claimants had admitted in the arbitral proceedings that they had not paid their advocates and that the sum of Shs. 651,164/-was not verified by the Arbitrator at the hearing but he then proceeded to exercise its discretion and award costs of Shs. 500,000/-inclusive of VAT. Further, the said Agreement for Sale between the parties had provided that in the event that the Claimants pulled out of the purchase of the property, the Deposit would not be refunded. The Arbitrator had therefore no reason whatsoever to award that the deposit of Shs. 3,500,000/-was refundable to the Claimants.

8. The Respondent concluded its submissions by requesting the Court to dismiss the Application for enforcement as it was clearly brought prematurely and contained irregularities which, if left unaddressed, would reflect badly on the administration of justice. It maintained that the amount sought in the Application of Shs. 5,152,500/-was not the amount awarded, even if interest had been compounded. As regards the Award being contrary to public policy, the Respondent relied upon the finding of **Ringera J.**in the case of **Christ for All Nations versus Apollo Insurance Company Ltd (2002) EA 366**.

9. The Claimants' Application has been brought before this Court under the provisions of **section 36** of the *Arbitration Act 1995* and **Rule 9** of the *Arbitration Rules 1997*. Of course, the *Arbitration Act 1995* has now been amalgamated with the *Arbitration (Amendment) Act 2009* to become the *Arbitration Act (Cap 49, Laws of Kenya)*. **Section 36** thereof is the appropriate section for a party to come before court to seek leave to enforce an award. I see nothing in **section 36** which gives any sort of time guideline in relation to when an application seeking leave to enforce an award may be filed. What the Act does require is that where there have been no proceedings before court in relation to the arbitration by way of the seeking of interim orders etc., then the Award needs to be filed and an appropriate case number assigned to it. Indeed that is what the Claimants have done by filing the Award on 26 May 2011, the same being allocated the case number as above. The time limit only applies as regards an application to set aside an award on whatever grounds. **Section 35 (3)** of the *Arbitration Act* requires that such application must be made within 3 months from the date on which the award was received. As stated by **Azangalala J.** in the **Oltukai Mara** case (supra):

"As already observed above the respondent/ applicant was perfectly entitled to lodge the said application as the law permits the filing of such an application before the expiry of 3 months from the date on which the award was received. Before a determination of that application the court has in my view inherent jurisdiction to consider an application for stay of enforcement and execution of the award".

As we have seen in this matter, the Award was received by the Respondent 12 May 2011. It had until 11 August 2011 to make an application to set aside the Award. It did not make such an application. Although this Application was filed before 11 August 2011, that does not mean to say that the same is premature. It is the application to set aside the Award which has the time limit not the application to enforce the same. Indeed, the substance of the **Azangalala J.** Ruling in the **Oltukai Mara** case involved an application to stay the enforcement and execution of the arbitral award. I have perused the **David Engineering** case (supra) as relied upon by the Respondent. With respect, the matter before court in that case was an application to set aside a judgement in default. I found no assistance in relation to the Application before me, from the portion of the Ruling of my learned brother Mabeya J to which the Respondent referred me viz.:

"The question that arises is whether a judgement can be entered on an irregular request for judgement. My view is, since Order 10 Rule 10 is categorical that a request shall be made after a Defendant has failed to enter appearance or file a defence within the time allowed, it follows that a request made before time for entering appearance or filing of defence has elapsed is irregular.

Further, it also follows that the judgement based on an irregular request is also irregular."

If I understand the Respondent correctly, it is basing its submission that the enforcement proceedings were commenced prematurely on the finding of Mabeya J as to the time for filing appearance or defence in normal civil proceedings. The difference is that **Order 10 Rule 10** lays down specific time guideline for the entering of appearance and a defence in a civil suit. This is not the position under **section 35 (3)** of the *Arbitration Act*.

10. Under the heading that the Award was in conflict and contrary to the public policy of Kenya, the Respondent dwelt at length referring this Court to the Agreement for Sale between the parties and how the Arbitrator had departed in his Award from the contents thereof. With respect, these are matters which would normally be raised in an application to set aside the Award. They have nothing whatsoever to do with an application for the enforcement of the Award. The Respondent missed the bus in failing to file an application to set aside the Award herein in time. I now find that it is trying to sneak criticism of the Arbitrator's findings through the back door, alluding to misconduct on the Arbitrator's part. As far as I'm concerned, the contents of clause 19 of the said Agreement for Sale are absolutely clear and read as follows:

"19. If any dispute shall arise whether during the continuance of this Agreement or upon or after its determination between the parties hereto touching or concerning this Agreement or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement such dispute shall in accordance with and subject to the provisions of the Arbitration Acts or any statutory modification or re-enactment thereof for the time being in force be referred at the request of either party to the arbitration and final decision of an Arbitrator appointed by the Chairman for the time being of the Law Society of Kenya".

To my mind, the Arbitrator was given the power by the parties to the said Agreement to deal with any matters in dispute as between them which would include legal fees for the conveyancing, refund of the deposit paid by the Claimants and such other matters as the Arbitrator saw fit to deal with under the Agreement. If this Court was to interfere in any way with the finding of the Award this would be tantamount to appealing the same which under the provisions of **sections 10 and 39** of the *Arbitration Act*, this Court has no power so to do.

11. Finally, I would refer to the holding of **Ringera J.**in the **<u>Christ for All Nations</u>** case (supra). I believe that the finding of the learned Judge as regards what "Public Policy" means in no way helps the Respondent herein. In quoting from the Indian case of **<u>Renusagar Power Co. versus General Electric Co.</u> AIR[1994] SC 860** the Judge had this to say:

"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 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 could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Police 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. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals".

Further, I think I can do no better than to adopt what **Ringera J** concluded in that case as follows:

"In my judgement this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a

statute or contract on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the Public Policy of Kenya. On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act."

In this matter, so far as the Respondent's submissions are concerned I find myself on all fours with the **Ringera** Ruling above. I find nothing on the Respondent's part in any way sufficient for me to not allow the Claimants' Application before court.

12. The conclusion to all the above is that I allow the Claimants' Chamber Summons dated 28th of July 2011 with costs. I can only hope that this Ruling on the matter brings finality in relation to this matter.

DATED and delivered at Nairobi this 23rd day of April 2013.

J. B. HAVELOCK
JUDGE