REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 171 OF 2012

IN THE MATTER OF: SECTION 36(2) OF THE ARBITRATION ACT, 1995 AS AMENDED BY ACT OF 2009

AND

IN THE MATTER OF: ENFORCEMENT AND RECOGNITION OF AN INTERNATIONAL ARBITRAL AWARD ARISING FROM STOCKHOLM CHAMBER OF COMMERCE ARBITRATION V:09/20 BETWEEN KUNDAN SINGH CONSTRUCTION LIMITED CLAIMANT) – VS – TANZANIA NATIONAL ROADS AGENCY (RESPONDENT).

IN THE MATTER OF: AN APPLICATION BY TANZANIA NATIONAL ROADS AGENCY FOR RECOGNITION AND ENFORCEMENT OF AN INTERNATIONAL ARBITRAL AWARD.

TANZANIA NATIONAL ROADS AGENCY …..... APPLICANT

VERSUS

KUNDAN SINGH CONSTRUCTION LIMITED …..... RESPONDENT

RULING

This application by way of summons dated 15th January, 2013 is brought under rule 9 of the Arbitration rules 1997.

It seeks the following orders:-

1. That the international Arbitral Award from Stockholm Chamber of Commerce No. V:09/2009 between Kundan Singh Construction Limited (as claimant) and Tanzania National Roads Agency (Respondent) dated 25th January, 2012 together with interpretation and clarification of the same dated 8th March, 2012 be recognized and enforced as a decree of the court.
2. Costs be provided for

The application is supported by the affidavits of Engineer **SIMON INNOCENT ROMAN MGANI**

and **JOSEPH MANZI MUNYITHYA** as well as on the grounds set out on the body of the application. It is further supported by the supplementary supporting affidavits of **ENGINEER SIMON INNOCENT MGANI** and **JOSEPH MANZI MUNYITHYA** both filed on 31st day of May, 2013.

The application is opposed by the Respondent through the replying affidavit of **RIPTHUMAN SINGH UBHI** filed on 25th February, 2013 containing 48 paragraphs. Typographical errors contained therein were amended through a further affidavit by the said Ripthuman Singh Ubhi pursuant to consent orders recorded in Court on 30th May, 2013.

BRIEF FACTS

The parties herein entered into a contract on 1st August, 2007 whereby the Applicant the Respondent to carry out certain works for upgrading of **Mbeya – Chunya – Makongolosi Road Section I: Mbeya – Lwanjilo** to bituminous Standards for a consideration of Tsh. 27, 463, 878, 000/=. The contract provided that disputes between the parties would be referred to a Disputes Resolution Board (DRB) and that if any party was disatisfied with the decision of the DRB, that party could refer the dispute for arbitration to the Stockholm Chamber of Commerce.

Subsequently, disputes arose between the parties and which were referred to the Dispute Resolution Board.

On 12th day of February, 2009 the Dispute Resolution Board issued a recommendation in respect of the claim filed by the Respondent.

Being dissatisfied with the said recommendation, the Respondent on 16th May, 2009 submitted the matter for arbitration by the Arbitration Institute of the Stockholm Chamber of Commerce. The Respondent's claim inter alia was that the Applicant was responsible for the delays and that the Respondent was entitled to recover damages from the Applicant for breach of contract.

The applicant filed a defence to the Respondent's claim in the arbitration proceedings as well as a counter claim dated the 4th of October, 2010.

The arbitration proceedings were conducted by a panel of three Arbitrators who heard and determined the matter on 25th January, 2012 the arbitrators pronounced a majority final award with one dissenting. It is that final award that the applicant is now seeking to enforce through these proceedings.

The Respondent being dissatisfied by the final award, in April, 2012 moved to the Court of Appeal in Stockholm Sweden to challenge that outcome.

In a nutshell the applicants case is that the application should be allowed and the Arbitral Award be recognized and enforced as a decree of the Court. It submits that it has furnished the Court with the necessary documents required under section 36(2) of the Arbitration Act.

That the only grounds upon which the application can be declined by the Court are those set out in section 37 of the Arbitration Act. That the said section places the burden on the Respondent to prove the grounds upon which the Court should decline to enforce the arbitral Award. It is the Applicants contention that the Respondent has not discharged the burden placed on it by the Act and the Application ought to be allowed.

The Respondents case on the other hand is that the majority arbitrators went beyond their scope and decided on matters beyond the scope of reference to arbitration. Further that the Arbitrators should not have made a decision in favour of the Applicant counterclaim as the Applicant did not first refer its claim to the Dispute Resolution Board before referring the same for arbitration as required by the contract.

Secondly, that the majority decision completely ignored to apply the Tanzanian Legislation which was the law governing the contract.

Thirdly, that the Arbitral Award has not gained full legal force as it was subject to challenge in the proceedings filed by Respondent in the court of Appeal in Stockholm Sweden.

ISSUE FOR DETERMINATION

The main issue for determination by this court is whether the applicant has satisfied the Court that it has met the conditions stipulated in the arbitration Act for the enforcement of a foreign arbitral award or whether the Respondent has placed before the Court a case for refusal or rejection of the enforcement and recognition.

Section 36(2) of the Arbitration Act No.4 of 1995 is worded as follows:

> **"An International Arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards.**
>
> **(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish -**
>
> **(a) the original arbitral award or a duly certified copy of it; and**
>
> **(b) The original arbitration agreement or a duly certified copy of it".**

The applicant has duly complied with the provision of the above quoted section on account of having furnished the Court with the requisite documents.

In deciding whether to recognize and enforce the arbitral Award, the court will be guided by and large the provisions of section 37 of the Arbitration Act which are as follows, "Section 37(1) The recognition or enforcement of an 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 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 or

(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.

The gist of the Respondents case is that the majority Award was arrived at by wrongly applying English Law and not **Tanzanian Law** as specifically provided in sub clause section I of the contract between the parties dated 1st August, 2007. That the majority two failed to apply Tanzanian Legislation dealing with procurement (goods, works, non – consultant services and disposal of public assets by tender) Regulations 2005 (GN No. 97 of 2005) and the Law of Contract Act (Cap 345 R.E. 2002).

That they only confined themselves to section 123(2) of the public procurement regulation whereas they were obliged to consider all the provisions of the said Regulations applicable in the matter.

The Respondent also contends that sub clause 60. 2 of the contract places the burden of certifying certificate for payment upon the Engineer but its in conflict with section 123 (2) of the public procurement Regulation which places such burden on the Respondent. Thus the majority two ignored the Law of Tanzania by relying on clause 60.2 of the contract and English decisions in coming to the conclusion that the Engineer was not an agent of the Respondent and that it would be against the public policy of Kenya to accept such an award as valid.

It is further contended by the Respondent that the proceedings before the SVEA Court were challenge proceedings rather than appeal proceedings and have a very much narrower ambit than an appeal. Further that in dismissing the challenge mounted by the Respondent the SVEA Court proceeded on the basis as stated in page 8 of their Judgment,

> **"that the tribunal had not neglected to apply Tanzania Law, it is not the responsibility of he Arbitration Board to find independently which legal regulations are applicable to the legal facts referred to by the parties. That facts referred to by the parties. That (the majority) of the arbitration Board may have been wrong about the meaning of Tanzania Law is another matter. Such an incorrect application of the law is not a ground for challenge".**

The Respondent contends that the position in Kenya is different by dint of section 37 of the Arbitration Act which provides that an award shall not be enforced inter alia if it offends the public policy of Kenya.

The Court is invited, by itself to decide whether the majority two failed to apply Tanzanian Law at all or correctly for it they did not then the award cannot possibly be enforced in Tanzania and if it cannot be enforced in Tanzania then it cannot be enforced in Kenya as to allow it would clearly be against the public policy of Kenya. It is also contended that there is failure by the applicant to disclose that it has recently filed in the High Court of Tanzania Dar-es-salaam Misc. Cause No. 4 of 2013 seeking recognition and enforcement of the Award in Tanzania which proceedings are ongoing. Attached to the further affidavit of Ripthuman Singh is an opinion expressed by **DR. WILBERT BASILIUS KAPINGA** who is said to be an eminent Lawyer in Tanzania who had testified before the SVEA court in support of his opinion which opinion is receivable under section 41 and 48 of the Evidence Act.

The relevant Law of Tanzania applicable to the agreement between the parties is said to include

I. The Judicature Act
II. The Tanganyika order in council of 1920
III. The law of Contract Act
IV. The public procurement Act 2004
V. The public procurement (works) Regulations 2005
VI. Tanzanian authorities.
VII. The Doctrine of precedent in the court of Appeal ODF East Africa.

It is the respondents case that had the majority two considered the provisions of the public procurement (works) Regulations 2005. First regulation 123(1) and then regulation 123(2) as was done by MRS Ufot SAN in her dissenting opinion, then they too would have come to the same conclusion. Instead they offered an interpretation of Regulation 132 (2) which was not in tandem with the regulations. That because of that misinterpretation they held that the Engineer was not an agent of the Employer whereas they should have held as Mrs ufot that the engineer was the agent of the procuring entity.

Further the court is urged to find that it is not bound by the decision of the SVEA Court in the challenge proceeding as they were not an appeal proceedings because no appeal lies from the Award under the Arbitration Act of Sweden.

As to what is the meaning of Public policy in Kenya the Respondent relies on the case of **CHRIST FOR ALL NATIONS VS APOLIO INSURANCE CO. LTD. 2002 EA 366** where Ringera Judge as he then was rendered himself thus,

> **" 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 contest incapable of praise definition, or that as the common law judges of Younder years used to say, it is an unruly horse and when once you set 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 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 …..".**

The court was also referred to the case of **Kenya Shell Ltd. Vs Kobil Petroleum Ltd** which was also cited by the applicants and which the Court of appeal considered with approval the views of Ringera Judge in the case of **Christ for all Nations Vs Apollo Insurance Co. Ltd** on the issue of public policy.

The Respondent also relies on the authority of **HCC No. 836 of 2003 RWAMA FARMERS CO-OPERATIVE SOCIETY LIMITED VS THIKA COFFEE MILLS LTD.** Page 3 paragraph 13 thereof from the foregoing it is quite clear that the term,

> **"conflict with the public policy" used in section 35(2) of the Arbitration Act is a kin to "contrary to Public Policy" "against public policy". These terms do not seem to have a precise definition but hey connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violates the basic norms of society".**

Relies also on the case of **MAHIGAN INVESTMENTS LTD. VS GIOVANI GAIDA & 79 OTHERS MISC. APPLICATION NO. 792 OF 2004** where the Judge also concurred with Ringera Judge thus,

> **"I would with respect agree that there is not an all embracing definition which exhaustively defines what public policy includes. Suffice to say that what is contrary to public policy will be a matter to be determined by a judge in any case where it is alleged to have been infringed".**

The Respondent also relies on the ruling in Mombasa **HCCC No. 388 of 2000 GLENCORE GRAIN LTD. VS TSS GRAIN MILLERS** where it was held that in an application brought under rule 9 and section 36 a court can refuse to recognize and enforce an award and its not necessary for the Respondents to file a separate application under rule 4 of the Arbitration Act.

The Respondent takes issue with the Applicants submissions found at paragraph 6 page 7 as to

whether the award has become binding on the parties as argued therein that the award was made on 25th January, 2012 and interpretation done by March 2012.

The Respondent maintains that the applicant has concealed the fact that the application to set aside the award was filed by the Respondent as far back as 25th April, 2012 being Milimani Commercial & Tax Division cause No. 248 of 2012. Ruling was delivered on 18th December, 2012 and that it was after that ruling that the Applicant filed this application on 17th January, 2013. That there an appeal pending in respect to that ruling dated 18th December, 2012.

On the issue of the list of authorities filed by the applicant and case law relied on, the respondents maintain that not withstanding any terms contained in the New York Convention or any provisions in the Kenyan Arbitration Act including section 36 and 37 of the arbitration Act Kenyan courts expressly retain and preserve the autonomy and applicability of Kenyan National Law and the power to refuse recognition and enforcement of an arbitral award irrespective of the state in which it was made on the specific grounds contained in section 37.

Under section 37(i) (b) it is provided:

> **"If the High Court finds that,**
>
> ii. **the recognition or enforcement of the award would be contrary to the public policy of Kenya".**

The Respondent further maintains that this ground is applicable to the circumstances of this case as there is evidence in replying affidavit and the further affidavit that the decision of the majority as set out in the award is made contrary to the Laws of Tanzania which was the law governing the contract. Further that under the procurement legislation of Tanzania the Engineer is the agent of the employer as a matter of law. The majority in the Award held in direct contravention of the law of Tanzania that the Engineer was not an agent of the employer applying principles of English Law which was not the law governing the contract.

It is further contended that the applicant is seeking to enforce the contract through the back door by using Kenya Courts in an attempt to recognize and enforce an award that would be deemed invalid and unenforceable in Tanzania and that this is contrary to public policy of Kenya to allow our courts to be used in a manner which constitutes an abuse of the court process.

Further that the provisions of section 36 and 37 of the Arbitration Act clearly provide that our courts have jurisdiction over any award. Section 37 specifically provides that the recognition or enforcement of an **Arbitral award irrespective of the state in which it was made** may be refused in the circumstances set out in section 37.

Further that article V(2) (b) of the convention expressly supports the above as it provides,

> **" Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that:**
>
> **The subject matter of the difference is not capable of settlement by arbitration under the law of that country or**
>
> **(b) The recognition or enforcement of the award would be contrary of public policy of that country".**

The case of **DALLA REAL ESTATE & TOURISM HOLDING CO. VS MINISTRY OF RELIGIOUS AFFAIRS GOVERNMENT OF PAKISTAN 2010** was cited by the Applicants in that case the court was dealing with the issue of jurisdiction of the tribunal. It was held that,

" a party who objected to the jurisdiction of the tribunal had two options.

(1) it could challenge the tribunals jurisdiction in the courts of the arbitral seat and it could resist enforcement in the court before which the award was brought for recognition and enforcement".

The case supports the Respondents position though also distinguishable.

In the case of **Celine Gueyffier Vs Ann Summers Ltd**. Cited by the Applicant it was held,

"that the New York convention mandates specifically that the state in which, or under the law of which, the award is made will be free to set aside or modify an award in accordance with its domestic arbitral law".

Respondents contention is that the case in question was not dealing with the issue of an award made in an international arbitration. The relevant legislation in that case was not at all at per with the provisions of our Kenyan Arbitration Act. That it was further held,

"all other signatory states are secondary jurisdictions in which parties can only contest whether that state should enforce the arbitral award".

It is the Respondents contention that this is exactly what it is doing and which is in conformity with article V(2) (b) of the New York Convention.

The applicant cited the case of **Gulf Petro trading company Vs Nigerian Petroleum Corporation 2008 1 ARB 137 & AIR 2008 SC 1061** where it was held that,

" it would be seriously undermine the functioning of the Convention if the fact that the opportunity for judicial review of an award in the primary jurisdiction has passed could open the door to otherwise impermissible review in a Secondary jurisdiction".

This case is distinguishable as article V(22) (b) of the New York Convention actually is in tandem with section 37 (1) (b) of our arbitration Act.

In the case of **Empressa Colombiana de vias ferres Vs Drumuod Ltd.** it was held,

" the New York Convention contains no provisions granting general jurisdiction to national court's to hear a recourse to set aside a foreign arbitral award, on the contrary, the convention provides that one of the grounds on which contracting states may deny recognition or enforcement of a foreign arbitral award is the setting aside or suspension of the award by a competent authority of the country in which,or under the law of which, the award was made".

This case was dealing with the issue of setting aside an arbitral award.

The case of **Steel Corporation of the Philippines Vs International Steel Services Incorporation year Book of Commercial arbitration Vol. XXX 111 2008 page 1125** held that,

" only courts at the primary jurisdiction could set aside an arbitral award".

In the case of **Shashana Vs Sharma (2009) EHWC 957 (Comm) (2009) 2 ALL ER (Comm) 477** it was held that,

" the basis of the Convention (NYC) as applied in England in accordance with its own principles on the conflict of the laws is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst of course, under article

V of the Convention there are limited grounds upon which other contradicting states can refuse to recognize or enforce the award once made".

In the case of **Kihuni Vs GaKungo & Another (1986) KLR 572 .**

The case concerned itself with the provisions order XLV rule 14(1) (c) of the old Civil Procedure Rules and the consequences when an award could be remitted for re-consideration.

The statute law in this case is abundantly clear in its provisions.

Section 36(2) of the Arbitration Act No.4 of 1995 provides,

" An International arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards".

Section 37(1) provides,

"the recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

(a) ….....

(b) If the High Court finds that:

(i) ….....

1. **the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya".**

The provisions of section 36 and 37 of the Arbitration Act are emphatic that our courts have jurisdiction over any arbitral award. It is clearly provided in section 37 of the Act that the recognition and enforcement is irrespective of the state in which it was made.

Articlel V(2) (b) of the Convention provides,

" Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country or,

(b) the recognition or enforcement of the award would be contrary of public policy of that country".

What can be deduced from the above is that recognition an arbitral award is automatic under the provisions of section 36 of the Act and can only be refused if the party against whom it is sought is able to satisfy the requirements of section 37 of the Arbitration Act.

Section 37 of the Act does not specifically differentiate between a domestic arbitration Award and an International Arbitral Award as the words used are basically an **"arbitral award".**

It is common ground that challenge proceedings were filed before the SVEA Court which dismissed the challenge thus,

" that the tribunal had not neglecter to apply Tanzania Law, it is not the responsibility of the Arbitration board to find <u>independently</u> which legal regulations are applicable to the legal facts referred to by the parties.

That the arbitration board may have been wrong about the meaning of Tanzania Law is another matter. Such an incorrect application of the law is not a ground for challenge".

I am therefore being asked to find out and decide whether the majority two failed to apply the Tanzanian law at all or correctly and if they did not then the award cannot be enforced. The Respondent has severally and consistently maintained that the arbitral award cannot be enforced in Kenya.

An opinion as to the law of Tanzania in relation to the arbitral proceedings was rendered by Dr. Wilbert Basilius |Kapinga an eminent Lawyer in Tanzania at the SVEA Court.

It is s apparent that there as no contradictory opinion rendered. This opinion is attached to the Respondents further affidavit. The same is admissible under section 41 and 48 of the Evidence Act. The Respondent has also attached Law Reports of Tanzania . Also attached is relevant Tanzanian Legislation in the form of bundles. I have perused the material on the Tanzanian law as relates to the case at hand and I am of the considered view (as that held by the Respondents) that had the majority two considered the provisions of the public procurement (works) Regulation 2005, first regulation 123 (1) and then regulation 123 (2) as was done by Mrs. Ufot SAN in her dissenting opinion then they too would have come to the same holding as she did. Instead as alleged in paragraphs 300 to 302 of the majority award, the majority two offered an interpretation of regulation 123(2) which was not in tandem with the scheme of the said regulations.

This resulted in a wrong finding, unlike Mrs Ufot san that the Engineer was not an agent of the Employer. That had the majority two read the provisions of regulation 123(2) in the context of the management of the works, they would have most certainly have reached the conclusion that the Engineer was indeed the agent of the procuring entity on the other hand Mrs. Ufot in her dissenting opinion at paragraphs 5.35 to 5.37 correctly held that the Engineer is the agent of the procuring entity.

On the issue of public policy I am in agreement with the decisions in the case of a **<u>Christ for all Nations Vs Apollo Insurance Co. Ltd. (2002) EA 366</u>** in which he rendered himself thus,

"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, its 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 page 35(2) (b) (ii) if the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (e) inconsistent with the Constitution of Kenya or to 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. In the second category I would without claiming to be exhaustive include the interest of the national defence and security good diplomatic relations with friendship 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, fraud or whether it was founded on a contract contrary to public morals".

In our present case the final award was arrived at in breach of the express terms of the agreement between the parties which contains the arbitration clause that any dispute shall be referred to arbitration and shall be **<u>governed</u>** by the law of Tanzania.

There is ample evidence from the Respondents replying affidavit and further affidavit that the decision of the majority as set out in the award was made contrary to the laws of Tanzania.

Should the court condone that breach by recognizing and enforcing the award.

I find there would be no justification legally or morally to condone a breach of a contract Between two parties and it would contrary to the public policy of Kenya to allow a court to be used towards that end.

The upshot is that the application dated 15th January, 2013 to recognize and enforce the award as decree of the Court is dismissed with costs.

Ruling dated and delivered in open court this **15th** day of **August, 2013.**

….....

M. MUYA

JUDGE

15TH AUGUST, 2013

In the presence of:-

Umara holding brief Munyithya Learned counsel for the applicant.

Learned counsel for the Respondent Mr. Nagpal absent

Court clerk Mr. Musundi

Mrs Umara

I pray for certified copies of ruling of the court and stay of the ruling itself.

Mr Gikandi holding brief Nagpal.

There is nothing to stay

Court

Certified copies of the ruling to be furnished to the parties. There is nothing to stay.

….....

M. MUYA

JUDGE

15TH AUGUST, 2013