



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 328 OF 2009 (O.S)

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995

IN THE MATTER OF AN ARBITRATION

BETWEEN

GICHUKI VENTURES

LIMITED.....PLAINTIFF

AND

**CHINA NATIONAL ELECTRIC WIRE CABLE IMPORT AND EXPORT
CORPORATION.....1ST DEFENDANT
SINOTEC (K)**

**LIMITED.....2ND
DEFENDANT**

RULING

1. The Chamber Summons dated 2nd July, 2010 is brought under the provisions of Section 37 (1) (a) (iii) of the Arbitration Act No. 4 of 1995, and Rules 3 and 11 of the Arbitration Rules 1997. The applicants are the 1st and 2nd defendants and they are seeking for an order that the court do decline to recognize or enforce the arbitrator's award made on 3rd March, 2010. The court is also asked to remove **Mr. Norman Mururu** as an arbitrator and appoint another arbitrator. This application is supported by the grounds stated of the body thereto and the supporting affidavit of YU YANG sworn on 2nd July, 2010.

2. According to the applicant, the 2nd defendant is a foreign company which is incorporated in China. It is contended that they were not served with the pleadings herein in which the applicant sought

for leave of the court to appoint Mr. Mururu as the arbitrator. It is further contended that the registered offices of the 2nd defendant was in China and there was no office in Kenya apart from the Chinese office. It was further submitted that the documents were served upon a Mr. JIG HUA who was not authorized to receive documents of the company. It is trite that legal documents should always be served according to the rules set out under the Civil Procedure Rules. Counsel for the applicant submitted that ex-parte proceedings went on, and an order that is pre-judicial to the applicants was made and they should be given a chance to defend themselves. It was also argued that the application by way of an Originating Summons was not complete because there arbitration award and the certified copy of the contract were not attached. Counsel urged the court not to enforce their award.

3. This application was opposed; Mr. Munene, learned counsel for the Claimant relied of the Replying Affidavit sworn by **Allan Gichuki** on 14th July, 2010. The claimant had filed a Chamber Summons dated 21st March, 2010 in which they sought an order that the award by their arbitrator made on March, 2010 be adopted and made the order of this court within the meaning of Section 9 of the Arbitration Act. It was submitted that the applicant were properly served as provided for under Order 5 2(b) of the Civil Procedure Rules which makes provisions on how a Corporation should be served. There is no distinction made under the rules between a foreign and a local Corporation. If the officers of the company cannot be traced or if there is closure of office then service can be effected where the business of the company is carried on either upon a Director or an Officer or summons can be left at the office where the business is carried on.

4. The claimant gave clear details of the place where the Project Manager of the applicant was served with the court document. He acknowledged receipt and dated them after stamping. As regards the actual proceeding of arbitration, the arbitrator served the applicant through their registered Post Office. All the arbitral documents were served upon the applicant and they acknowledged receipt. Thus according to the counsel of claimant this application is brought in bad faith as they were aware of the Originating Summons and also of the arbitral process. The original award was filed in court on 8th April, 2010 and the contract that is annexed to the Originating Summons is the same one which was before the arbitrator. The court was also asked to consider that the applicant are denying there was no consideration thus setting aside the orders will not be in the interest of justice.

5. This application is brought under the provision of Section 37 especially paragraph (iii) which provides as follows:-

“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.”

The issue for me to determine is whether the applicant was given proper notice. The applicant main contention is that their main office is in China and there is no registered office in Kenya. Secondly, the documents were served upon a person who was not authorized to receive documents. The claimant has given a detailed account of the efforts that were made by the process server to effect service on the applicant who had closed their offices and who were evading service. The provisions of Order 5 Rule 2(b) are clear that service upon a Corporation can be made through the registered office or leaving the document at the place where the Corporation carries on business.

6. The applicants do not deny that they entered into the contract with the claimant on the 6th April, 2007. I find the court documents were served and acknowledged on behalf of the 1st defendant. The arbitral proceedings were also served according to the affidavit of service on record. The applicants were aware of the court proceedings and they were also aware of the arbitral proceedings. I do not see any justifiable reason why the court should set aside the orders as prayed by the applicant. For the above reason I find that application dated 2nd July, 2010 lacking in merit and it is dismissed with costs. It is

evident that this application was filed by way of an opposition to the Chamber Summons dated 31st March, 2010. Since it is dismissed, I grant the orders that sought in the application dated 31st March, 2010. The award be enforced against the respondent as prayed for under prayer No.1 and 2. The claimant shall also have a cost of this application.

RULING read and signed at Nairobi this 10th day of January 2011.

M. K. KOOME

JUDGE