



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL APPLICATION NO. 486 OF 2010**

**KINJI HOLDINGS**

**LIMITED.....APPLICANT**

**VERSUS**

**NIC CAPITAL**

**LIMITED.....RESPONDENT**

**RULING**

Kinji Holdings Limited, the applicant in the Chamber Summons dated 22<sup>nd</sup> July 2010 seeks orders of the court as follows –

1. **That a decree do issue in terms of the arbitral award published on the 9<sup>th</sup> February 2010 and filed in this court on 14<sup>th</sup> July 2010.**
2. **That the applicant be granted leave to enforce the decree.**
3. **That costs of the application be provided for.**

Although the Chamber Summons was filed exparte, and could well have proceed thus, it was nonetheless served upon counsel for the Respondent who appeared in court and intimated that they had spotted the same in the daily cause list of 1<sup>st</sup> October 2010 and wished to oppose the same.

The application is premised on the ground that the Respondent has refused to honour the terms of the award, thereby necessitating the filing of the motion. In the supporting affidavit sworn by Kithinji Kiragu, a Director of the Applicant Company on 22<sup>nd</sup> July 2010, the Applicant states that the Respondent has refused to honour its part of the award published by Steven G. Kairu on 9<sup>th</sup> February 2010 but proceeded, nonetheless to deduct the sums awarded to it under the arbitral award from certain sums of money held by the Respondent’s advocates as stakeholders. The arbitrator’s letter, under cover of which the award was delivered to the parties, is annexed to the supporting affidavit and marked “**KK1**”. The Respondent’s advocate’s letter to the applicant’s advocates, confirming the deduction of Kshs 1,986,843/- from the retention amount is annexed as annexure “**KK2**”.

The application is opposed on the grounds contained in the Replying Affidavit sworn by Henry Maina, the Legal Services Manager of the Respondent, on 5<sup>th</sup> October 2010. In it, the Respondent states that the applicant is guilty of material non – disclosure of the following important facts, relevant to the arbitral award now sought to be enforced by the issuance of a decree.

1. **That the award clearly provided that the Respondent was to take out third party proceedings in all third party claims pending in court and in which it seeks indemnity and that the Respondent had already done so.**
2. **That the Respondent has instituted a suit, in this court being H.C.C.C No. 618 of 2010 in which it seeks a declaration that it is entitled to indemnity from the applicant in respect of the claims set out in the Plaintiff and in which the applicant has sought, among other reliefs, a set off in**

## **respect of the retention monies held by the stakeholders.**

The Respondent contends that it has fully complied with the award in as far as the conditions set out therein are concerned, leaving all outstanding issues as relate to liability for the courts' determination. According to the Respondents, the issuance a decree (if at all) would, in the circumstances, have to await the outcome of the court proceedings and only be issued in accordance with **Order XX** of the **Civil Procedure Rules**, to be enforced only after the same has been extracted.

As stated in paragraph 8 of the Replying Affidavit the Respondent has no objection to the arbitral award being recognized and registered as a judgment of this court but maintains that the enforcement of the same as a decree cannot be ordered in view of the above facts. What then is the parties' contention?

The applicant's position is that **Section 36** of **Arbitration Act, 1997**, under which the application is brought entitles the applicant to the orders sought since the award has neither been challenged, nor has the Respondent made any application to set it aside under **Section 35** of the **Act**. The Respondents on the other hand argue that **Section 36** of the **Act** (as amended under Legal Notice No 11 of 2009) only calls for the recognition of the award by the court, which does not seem to be what is sought in the application. In this regard, learned counsel for the Respondents Mr. Gitonga Murugara, has invited the court to study the award and the annexures to the Replying Affidavit and to find that the same do provide proof that the Respondent has complied with the award, which the Respondent concedes is final but (in the Respondent's opinion) conditional upon certain things being done by the Respondent, the terms of which the Respondent has complied with fully.

In response to those submissions learned counsel for the Applicant, Mr. Mwaniki, submitted that the court, has no business testing the validity of the award and that since the monies held under retention are not in dispute, a decree should issue to compel the Respondent to release the balance of the retention amount in accordance with the award.

It is vital at this stage to state the genesis of the dispute between the parties herein, which goes back to a sale agreement entered between them on 15<sup>th</sup> October 2007, wherein the Applicant agreed to sell to the Respondent, and the Respondent agreed to buy, the applicant's 55% of issued share capital in a company called **Solid Investment Securities Ltd**. As a term of agreement, part of the proceeds in the sum of Kshs 15,125,000/- (referred to in the agreement as the retention amount) was to be held by the Respondent's Advocates as stakeholders and to be released to the Applicants after the expiry of 1 year (the retention period) after completion. A dispute arose in respect of the release of the retention amount leading to the matter being subjected to the arbitration the subject of these proceedings.

With due respect to counsel for the Applicant, it is imperative that the court examines the award to determine, firstly, whether indeed the Applicant is guilty of non-disclosure, secondly, whether or not the Respondent has failed to honour the terms of the award and, thirdly, whether, for those reasons, a decree can issue to enforce the award by way of execution.

It is not in dispute that the award of 9<sup>th</sup> February 2010 is indeed a final award in respect of the contract of sale between parties. The Respondent has conceded that the same may be recognized and registered as a judgment of the court. The arbitrator's findings and orders, as recorded in Paragraph 213 of the Published Award are as follows:

- (a) The Claimants claim for a declaration the Respondent is in breach of the sale agreement of 15<sup>th</sup> October 2007 by refusing to release the retention amount to the Claimant fails and is dismissed.**
- (b) The claimants claim for an order directing the Respondent to release the retention amount of KShs.15,125,000.00 together with the contractual interest accrued fails and is dismissed.**
- (c) The Respondents claim for an Award against the Claimant for KShs.52,047,468.75 fails and is dismissed.**
- (d) The Claimant shall pay damages to the Respondent in the sum of Kenya Shillings One Million Nine Hundred Eighty Six Thousand Eight Hundred and Forty Three only [KShs.1,986,843.00] which shall be offset against and deducted from the retention amount.**
- (e) The Respondent do, within One Hundred and Twenty [120] days from the date of delivery of this Award, serve notice on the Claimant of any retail investor claims or suits pending determination in any court against the Company or the Respondent with respect to which the Company or the Respondent is seeking indemnity against the Claimant and with respect to which claims or suits the Respondent or the Company will have applied for leave of the court to issue third party notice(s) or commenced other legal process to claim indemnity against the Claimant**

**and in default the Respondent do unconditionally release the balance of the retention amount in the sum of Kenya Shillings Thirteen Million One Hundred Thirty Eight Thousand One Hundred Fifty Seven only [KShs.13,138,157.00] and the accrued interest to the Claimant.**

**(f) Each party shall bear its own costs of the arbitration. The arbitrator's fees and expenses shall be apportioned and paid by the parties in equal shares. If any party has paid more than half of its share of the arbitrators fees and expenses it will be entitled to reimbursement from the other party of any amount paid over and above its one half share.**

The Respondent has stated in its Replying Affidavit, which is not controverted, that it has, in compliance with the order (e) above, served upon the applicant relevant notices in respect of all third party claims lodged against it in regard to the applicant's liabilities (retail investor claims/pending suits) under Solid Investment Securities Ltd, which had not been disclosed to the Respondent in the course of the transaction, and in respect of which the Respondent seeks indemnity, and has taken out third part notices with a view to exercising the right of set off against the retention amount. It is clear from the annexures to the Replying Affidavit that the Respondent did comply with the 120 days period of compliance. It is therefore, not obliged to release the retention sums which were only to be released in the event that it was in default.

Clearly from the above, the Applicant is not only guilty of material non-disclosure but has also misinterpreted the terms of the award. It is not, in the circumstances, entitled to an immediate release of the balance of retention amount, remaining after the deduction of the damages found due and awarded to the Respondent. Such payment can only be made after the conclusion of the processes initiated by the Respondent pursuant to the arbitral award. The orders sought by the Applicants in this motion cannot issue in the circumstances and the application is hereby dismissed with costs to the Respondents.

The dismissal order notwithstanding, the arbitral award published on 9<sup>th</sup> February 2010 is now recognized as binding upon the parties thereto and is hereby adopted as a judgment of this court.

**DELIVERED and SIGNED at Nairobi this 5<sup>th</sup> day of November 2010.**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Mr. Nyaencha holding brief for Mr. Mwaniki      For the applicant

Miss Gulenywa      For the Respondent