



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Miscellaneous Civil Case 800 of 2008**

**AIRCRAFT CONTRACTS KENYA LTD. ....PLAINTIFF**

**VERSUS**

**BALMORAL CONTRACTS KENYA ROBIN REID .....DEFENDANTS**

**R U L I N G**

Application dated 30/10/2008 brought under Section 35, Arbitration Act, Rule 4 (2) and 11 Arbitration Rules 1997, Section 3A Civil Procedure Act. Orders sought are the stay of execution and/or enforcement of the arbitrators award dated the 5/9/2008 pending the setting aside of the award. The grounds upon which the application is based are stated on the application namely; that the arbitration agreement was not valid as it was not signed and delivered as required and the process of execution was never completed and that parties never entered into agreement to submit to arbitration, and that the agreement is against public policy, the arbitrator having no jurisdiction and the said agreement is not capable of enforcement or performed as ordered and is not valid as required by law and finally it is just and fair the same be set aside.

The supporting affidavit is sworn by Mr. Mohamed Nyaoga. It is sworn that the execution Clause 10 (8) of agreement in dispute was not complied with. There was failure to execute counterpart to the agreement and delivery to the other party. Therefore, the parties never formally entered into the agreement including the agreement to submit to arbitration. The agreement was never dated. Furthermore, by the commencement of arbitral proceedings the applicant was not aware that the claimant had executed its counterpart since the same had not been delivered. Therefore, the complaint was that document was not delivered. There was never therefore jurisdiction for arbitral proceedings.

It is also sworn that in statement of defence it was denied that there was an agreement to enter into arbitration, see Defence and Preliminary Objection marked "MN (2a)" and ("2b"). The arbitrator confirmed his jurisdiction in a preliminary award and proceeded to assume jurisdiction. The applicant shall suffer substantial loss and damage.

Section 35 of Arbitration Act provides:-

*"Recourse to the High Court against the arbitral award may be made only by an application for setting aside any award under sub section (2) and (3), if a party was under incapacity or that the arbitration agreement was not valid or the party making the application was not given proper notice of the appointment of arbitrator or arbitral proceedings or was otherwise unable to present his case or arbitral award deals with a dispute not contemplated by the parties ... or the composition of the tribunal was not in accordance with the agreement of the parties."*

In this case complaint is that the main agreement was not valid for non delivery and therefore no

agreement to enter into arbitration. The respondents caused an affidavit in reply to be sworn by one Suzanne Muthaura, an advocate conducting the matters now referred to the court. She swears that applicant had not satisfied the requirements to warrant setting aside of the arbitral award. That the applicant was always aware of the fact that the respondent had executed their counterpart of the agreement and was duly informed by e-mail between advocates for both parties as shown by exhibit "SM 2" dated 14/8/2006.

Clause 10 (8) of agreement relates to form and the agreements have been signed by the parties. It does not relate to the substance of the transaction or the obligation of parties. It is stated by the respondent that the only outstanding issues were the completion meeting and exchange of documents and payment of purchase price. That the arbitrator had jurisdiction to determine the dispute between the parties. The agreement signed by the parties was valid and ought to be enforced.

Clause 8 of the Agreement specifies how the agreement may be executed

*"may be executed in any number of counterparts by different parties on separate counterparts each of which shall when executed and delivered constitute an original but of which shall together constitute one and the same instrument."*

On dispute resolution it is agreed:-

*"(12) Each party hereto should use its best efforts to settle amicably all disputes arising out or in connection with this agreement or in its interpretation."*

Exhibit "SM 4" the agreement is signed firstly at page 55 by Mohamed Nyaoga and at page 56 by the other parties. But it is admitted that the counterpart was never delivered. The applicant has filed a list of authorities:-

1. HCC No.239 of 2005 – Seban Enterprises Ltd. vs. Westmont Power Kenya Ltd.

In this case the arbitrator had come to the conclusion that he had no jurisdiction in the matter. The matter was brought to High Court under Section 17 (6) Arbitration Act. The court (Hon. Azangalala, J.) was of the view that that provision was clear as enacted by Parliament in accordance with International law. The court found that a party to arbitral proceedings may approach the High Court as provided under Section 17 (6).

2. Kenya Shell Ltd. vs. Kobil Petroleum Ltd.

This was in respect of completed final award and the issue was whether the Court of Appeal would grant leave to the applicant to appeal to its court after the High Court refused to grant the same. The parties had not invoked Section 35 (2) (b) (ii) of the Arbitration Act. And neither party satisfied the court that the award ought to be set aside.

In the present case, the grounds to set aside are stated as invalid agreement for non delivery and therefore the process of execution as envisaged by the agreement was never completed. The parties therefore never entered into any agreement to enter into arbitration and that arbitrator lacked jurisdiction. And that the award is against public policy. With regards to disputed jurisdiction. The Arbitration Act, Section 17 (1) empowers the Arbitral Tribunal to rule on its own jurisdiction including ruling on any objections with respect to existence or validity of the arbitration agreement.

A decision of the Arbitrator may be challenged within 30 days of notice of the ruling by application to the High Court to decide on the matter. There is no evidence that such challenge was taken. The arbitral proceedings proceeded until Final Award was made on 5/9/2008. From what is stated the issue of the validity seems to be raised on the ground that the relevant document was not delivered. No disagreement is raised on the main agreement.

The applicant relies on the point that unless the document was delivered the execution process was not completed. Therefore, the offer was not accepted. The decision of the interim (preliminary award) having not been challenged within the prescribed time it must be an indication that the applicant was satisfied by that decision on validity of the agreement. It is clear that the terms of agreement by the parties were not challenged and there is no dispute as to the substance of the main agreement.

No evidence or grounds has been put forward to warrant the setting aside the award. To say that the award is against public policy is not sufficient. It must be shown in what way. That it is not capable of being performed or that the basis of the agreement has been eroded by the time of reference does not prove that it is contrary to public policy.

Upon considering all the issues raised by the parties. I have come to the conclusion that no reasons as required under Section 35 2(a) or Section 35 2(b) have been advanced to warrant setting aside of the interim or final award made herein.

I dismiss the application with costs to the respondents.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 21<sup>st</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**