



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Misc Civ Appli 17 of 2007

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

**IN THE MATTER OF AN APPLICTAION FOR RECOGNITION AND ENFORCEMENT OF
AN AWARD**

BETWEEN

EZRA ODONDI OPARRESPONDENT

VERSUS

INSURANCE COMPANY OF EAST AFRICA LTD..... APPLICANT

RULING

The applicant Insurance Company of East Africa Ltd has presented an application dated 28th May 2007, under Section 37(2) of the Arbitration Act, 1995 and Rule 4 (2) of the Arbitration Rules 1997, for the basic order that there be a stay of any further proceedings herein pending the hearing and determination of NAIROBI CIVIL APPEAL NO. 271 OF 2006.

The application contains seven (7) grounds listed in the body of the appropriate Chamber Summons as supported by the facts contained in the supporting affidavit deponed by the applicant's deputy manager. The respondent Ezra Odondi Opar opposes the application on the basis of the grounds of opposition filed herein on the 14th June 2007.

The genesis of the application may be traced to Kisumu Chief's Magistrate's Court Civil case No. 339 of 2003 in which the parties consented to having their dispute settled by way of arbitration. To that extent, JOHN OLAGO – ALUOCH, of Kenya Mediation and Arbitration Company of Kisumu was appointed and confirmed as the sole arbitrator. He commenced the arbitration process in Kisumu on the 8th January 2004 and concluded the same on the 13th April 2004 and made an award in favour of the respondent in the following terms:-

“ I therefore do hereby award and determine that the respondent (applicant) pay to the claimant (respondent) the sum of Kshs. 484,500/= being the contract value of the car KAK 317 H, Kshs. 2,095,000/= damages from loss of user, Kshs. 902,835/= being interest todate of this award, Kshs. 55,680/= being the claimant's counsels (costs). The aggregate of this award is therefore 3,538,015/=. This sum shall attract further interest at 14% per annum from today till payment in

full. Counsel for the parties to either agree on claimant's counsel costs or the same to be filed before me for assessment at the convenience of the parties".

The applicant was aggrieved by the award and filed Misc Civil Case No. 1253 of 2004 at the High Court in Nairobi to have the award set aside. The application was heard and dismissed by Justice Kubo on the 18th October 2006 and on the 16th January 2007 the respondent filed an application in this court for the recognition and enforcement of the award. The application is pending. On 28th May 2007 the present application was filed and seeks to have a stay of any further proceedings in relation to the arbitration until the hearing and determination of **NBI C/APP NO. 271 of 2006**.

At the hearing of the application on the 10th April 2008, the applicant was represented by Mr. Shivaji while the respondent was represented by Mr. Bosire. They both presented their arguments for and against the application and in the process this court was referred to a number of case authorities relating to stay of proceedings. Having considered the application and the submissions presented by learned counsels in support and objection thereto, this court is of the view that the grounds on which a finding may be made are only two i.e:-

- (i) The validity of the arbitration award is the subject of the appeal in the court of Appeal.**
- (ii) The appeal to the Court of Appeal would be rendered superfluous in the event that this court entertains the application for recognition and enforcement of the arbitral award.**

Mr. Shivaji argued that the stay of proceedings is sought on the basis that the applicant having argued his reasons for setting aside the arbitration award cannot be heard before this court and argue afresh that the court is not entitled to recognize the arbitrator's award, as that would be res judicata.

On his part Mr. Bosire argued that the Arbitration Act 1995 contains provisions dealing with setting aside an award and that the accompanying Arbitration Rules sets down the procedure to be applied yet the applicant filed his application in Nairobi prior to the conclusion of the entire arbitration process which in any event was concluded on the 11th December 2006.

This court has perused the ruling of Justice Kubo and what comes out there from is that there was no consideration of the application on the merits and that it was dismissed purely on account that it had been made prematurely, the arbitration process having not been completed. The holding that the application was premature is what is being challenged by the applicant in the Court of Appeal. The validity or otherwise of the arbitration award was not considered and adjudicated upon by Justice Kubo. The element of res-judicata does not arise in the circumstances. The applicant was simply told to go back and finalize the arbitration process and then return to the court for any invalidation of the resulting award. He was indeed entitled to move the High Court notwithstanding the fact that the Arbitration Act and Rules do contain provisions for the setting aside of awards. Similarly, he is entitled to move to the Court of Appeal now that he is dissatisfied with the ruling of the High Court.

The appeal to the Court of Appeal would be a first appeal meaning that a high probability will arise for the consideration afresh by the Court of Appeal of the failed application in its entirety. The Court of Appeal may then make its own decision on the issues arising or may return the matter to the High Court for consideration of the issues which were left out in the dismissed application.

A copy of the applicant's Memorandum of Appeal (See annexure marked "L5" in the supporting affidavit) shows that the key prayer is to have the Court of Appeal look into the merits of the application dated 3rd September 2004, which was dismissed by the high court. If the prayer is granted it will have far reaching effects on the arbitration award and all consequential applications including that dated 15th January 2007 by the respondent. The prayer may also be denied meaning that all applications consequent to the award including that dated 15th January 2007 by the respondent will have to be prosecuted.

Therefore, it is fair and just that the present application be allowed to the extent that there be a stay of

further proceedings in this cause pending the hearing and determination of **NAIROBI CIVIL APPEAL NO. 271 OF 2006**. **On condition** that the applicant do deposit in an interest earning bank account in the joint names of its counsel and that of the respondent within twenty one (21) days half of the amount of Kshs. 2,579,500/= representing the arbitrator's award of Kshs. 1,484,500/= being the contract value of motor vehicle registration number KAK 317 H and Kshs. 2,095,000/= being damages for loss of user i.e. a sum of Kshs. 1,289,750/=. In default, the application shall stand dismissed forthwith.

Those are the orders of the court.

Dated, signed and delivered at Kisumu this 17th day of April 2008.

J. R. KARANJA

JUDGE

JRK/aao