



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 404 of 2005

BUSURU RICHARD MARK

T/A BUSURU R.M. & PARTNERS ARCHITECTSPLAINTIFF

VERSUS

NZOIA SUGAR COMPANY LIMITED.....DEFENDANT

RULING

Before me is an application by way of Amended Chamber Summons dated 17th February 2006 and expressed to be brought under Section 36 of the Arbitration Act 1995 Rules 6 and 9 of the Arbitration Rules 1997 and Section 3A of the Civil Procedure Act seeking orders:-

- 1.A That the Arbitral Award made by Mr. Haron Nyakundi, Quantity Surveyor, the Sole Arbitrator, on 28th October 2004 be and is hereby recognized as binding and be adopted as judgment of the court.
- 2.A That a decree do issue for payment by the Defendant/Respondent to the Plaintiff/Applicant of the sum of Kshs.6,314,455.40 plus legal fees and arbitration costs.
- 3.A That a Certificate of Costs do issue for payment by the Defendant/Respondent a sum as shall be taxed by Arbitrator as costs of the arbitration as ordered on 28th October 2004.
- 4.A That the Defendant/Respondent do pay the Plaintiff/Applicant the costs of this Application.
- 5.A That there be an order for interest as ordered by the Arbitrator from the date of award till payment in full.

The application is premised on the grounds:

- (a) That a dispute arose between the Plaintiff/applicant and the Defendant/Respondent in regard to the payment for work done arising out of written instructions by the Defendant/Respondent to the Plaintiff/Applicant dated 9th July 1992 and in terms of the said written instructions, MR. HARON G. NYAKUNDI was appointed the Sole Arbitrator.
- (b) That the arbitral proceedings commenced thereafter and a final award in favour of Plaintiff/applicant against the Defendant/Respondent was issued on 10th October 2004 for the sum of Kshs.6,314,455 being

the amount for the award plus legal and arbitration costs.

(c) That the arbitrator ordered interest at 15% per annum till payment in full.

(d) That no application to set aside the arbitral award has been made and the time for filing the application has lapsed.

(e) That there are no grounds or reasons to warrant a refusal of the recognition or enforcement of the arbitral award.

On the body of the Chamber Summons it is stated that the application is supported by two affidavits of **BUSURU RICHARD MARK** filed in court on 29th April 2005 and 15th September 2005 respectively but there is no affidavit annexed to this Chamber Summons.

In opposition to the Chamber Summons the Respondent filed a Replying Affidavit sworn by Saul Wasilwa the Respondent's Company Secretary sworn on 8th May 2006 in which he has deponed that he has been advised by the Respondents Advocate on record that the award sought to be enforced by the applicant is void ab initio for the reason that the Applicant/Claimant was unlawfully making a claim for payment on behalf of 3rd parties who should have made their own independent references; that and further to the foregoing the applicant/Claimant acknowledged during the arbitral proceedings having received in full and final payment, his dues as contractors; that he is advised by his advocate Mr. Kibunja that the Amended Chamber Summons filed on 27th February 2006 is fatally defective as the same is amended without the mandatory leave of the court; that in the circumstances, the arbitral award referred to cannot be lawfully enforced or recognized.

Mr. Opiyo for the applicant in his submissions sought Prayers 1, 3 and 4 of the Chamber Summons amended on the 17th February 2006 and relied entirely on the Arbitral Award filed in court in which the Respondent participated and no appeal has been preferred.

Mr. Ashitiba for Respondent in his submissions relied on the affidavit sworn by Saul Wasilwa on 8th May 2006 and filed in court on 9th May 2006.

First he submitted that the Amended Chamber Summons is defective in that the same is not supported by affidavit and therefore the same is unattainable.

Secondly the Applicant had failed to comply with the provisions of Section 36 (2) of the Arbitration Act 1995 which is in mandatory terms.

36 (2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish.

(a) the duly authenticated original arbitral award or a duly certificate copy of it; and

(b) the original arbitration agreement or certified copy of it.

The two documents were to be attached by way of Supporting Affidavit but that has not been done. He further submitted that the Chamber Summons as amended does not indicate the rules pursuant to which it was amended or the order of the court granting the amendment which offends the mandatory provisions of Order VIA Rule 7 of the Civil Procedure Rules which states:-

VIA "7"(1) Every pleading and other documents amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or if no order has been made, the number of the rule in pursuance of which the amendment was made.

(2) All amendments shall be shown by striking out in red all deleted words, but in such a manner as to

leave them legible, and by underlining in red ink all added words.

This was not done and the so called amendments were done so casually that it leaves a lot to be desired. And finally counsel submitted on the issue of legal fees and arbitration costs as raised by the applicant. He submitted that costs in respect of the awards issued by the Arbitrator costs must be taxed by the Deputy Registrar under the Remuneration and Taxation Rules and it is not for this court to do so.

This application seeks orders that the Arbitral Award made by Mr. Haron G. Nyakundi the Sole Arbitrator on 28th October 2004 be recognized as binding and be adopted as a Judgment of this court. But the Respondent having demonstrated that the Claimant had failed to comply with the mandatory provisions of Section 36(2) of the Arbitration Act 1995 as well as the mandatory provisions of Order VIA Rule 7 of the Civil procedure Rules, the Claimant's application is bound to fail.

Accordingly the Claimant's Amended Chamber Summons dated 17th February 2006 is dismissed with costs.

Dated and delivered at Nairobi this 25th day of April 2007.

J.L.A. OSIEMO

JUDGE