REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 666 of 2006

OLTUKAI MARA LIMITED ….……
CLAIMANT/APPLICANT

VERSUS

CONSERVATION CORPORATION (KENYA) LIMITED …….
APPLICANT/RESPONDENT

R U L I N G

Oltukai Mara Limited (hereinafter called the claimant) was involved in an arbitration with Conservation Corporation (Kenya) Limited (hereinafter called the respondent/applicant) pursuant to an arbitration agreement contained in a Management Agreement dated 6.7.1994. The dispute was settled on 28.4.2006 when the arbitrator made and published his award as follows:-

(a) The respondent to pay the claimant the sum of Kshs.17,006,499/= with interest thereon at 12% p.a. from 6.12.2003 until payment in full.

(b) The arbitrator's fees assessed at Kshs.883,340/= inclusive of VAT be paid as follows – 2/3 by the respondent and 1/3 by the claimant.

(c) The respondent to pay 2/3 of the claimant's taxed costs reasonably incurred in the arbitration.

(d) The award amount to be due and payable within 60 days of the date of the award.

On 10.7.2006, the claimant applied for leave to enforce the award under the provisions of Section 36 of the Arbitration Act 1995 and Rule 6 of Arbitration Rules, 1997. The application was filed under a Certificate of Urgency and was placed before me on 11.7.2006. I allocated 13.7.2006 for the hearing of the application. On the latter date, I heard the application and on being satisfied that no application to set aside the award had been made granted leave to the claimant to enforce the same. On 14.7.2006, the respondent/applicant lodged the application under the provisions of Sections 35(2) (a) (iv) and 37 of the Arbitration Act for orders ***inter alia*** that the same award be set aside. On 19.7.2006 the respondent/applicant applied to the court under the provisions of Section 37 (2) of the Arbitration Act Rule 4 (2) of the Arbitration Rules 1997 and the inherent jurisdiction of the Court for the following primary order:-

That the enforcement of the Arbitral Award including any steps towards execution be stayed pending hearing and determination of the application to set aside the same award.

I heard the application on 28.7.2006. The substance of the respondent/applicant's case was that there was no need for the claimant to seek recognition and enforcement of the award under a Certificate of

Urgency as in law the respondent/applicant still had time to seek setting aside of the award and had lodged the application timeously. It was also the respondent/applicant's view that the application to set aside the award had good prospects of success as the award is fundamentally flawed and is made on considerations not properly before the arbitral tribunal and that if the orders were not granted there was a real risk that if the sums awarded are paid over to the claimant the same would not be refunded if the application to set aside the award succeeds. The claimant according to the respondent/applicant will not in any event suffer any prejudice if a stay is ordered as the award contains an element of interest until payment in full which, element secures the claimant's position.

With respect to security the respondent/applicant states that it is a sound Kenyan company able to satisfy the Arbitral Award in the event that its application to set aside the award fails. Further it is a member of the substantial business group Conservation Corporation Africa, based in South Africa which group fully supports it.

On behalf of the claimant it was submitted that a case for stay of execution had not been made out at all. In the claimant's view the principles to be followed in considering the application for stay of execution are similar to the principles set out in Order 41 Rule 4 of the Civil Procedure Rules and the respondent/applicant had failed to establish the same. It was contended that the application had not been made without unreasonable delay and the applicant had not demonstrated that it would suffer substantial loss if the order of stay of execution is not made. In the claimant's view it was not enough for the respondent/applicant to merely allege loss but furnish evidence of loss that is substantial. For this proposition reliance was placed upon the cases of **Kenya Shell Limited vs. Kibiru and Another [1986] KLR 410** and **ABN Amro Bank N.V. vs. Le Monda – Civil Application No. Nai 15 of 2002 (UR)**

With regard to delay it was contended that the award was given on 28.4.2006 and the arbitrator allowed 60 days within which the same was to be paid. The respondent/applicant did not move the court to set aside the award immediately but sought interpretation of the same from the arbitral tribunal 4 weeks after the award had been given. The period allowed by the tribunal lapsed before any application to set aside the award was made. It was therefore open to the claimant to file the award and seek leave to enforce the same which it did and should not be faulted for doing so expeditiously. According to the claimant once the leave to enforce the award was granted the jurisdiction to stay execution was lost.

With regard to security the claimant contended that the security to be ordered must be one that ultimately will be binding upon the respondent/applicant and not a different party. No such security had been offered by the respondent/applicant and for this reason the application must fail. For this proposition, reliance was placed upon the case of **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 others.** Nairobi C.A. No. 291 of 1997 (UR)

With regard to the submission that the claimant would be unable to repay the sums awarded if the same are paid over and the stay is subsequently allowed, it was contended that the claimant had furnished evidence of solid assets valued far in excess of the award and the respondent/applicant stood no risk of losing the sums if the application for stay of execution is refused.

I have considered the application, the affidavits filed and the submissions made to me by Counsel. I have also considered the cases cited. Having done so, I take the following view of the matter. I will first determine whether or not there is jurisdiction to consider the application. In order to make that determination it is necessary to appreciate the import of Sections 35(3), 36 (1) and 37 of the Arbitration Act 1995.

Section 35(3) limits the period within which an application for setting aside an arbitral award may be made to 3 months from the date on which the party making the application received the award. In the application at hand, the award sought to be challenged is dated 28.4.2006. The application to set aside the same was filed on 14.7.2006. The application in my view has therefore been lodged within the time allowed by Section 35(3) of the Arbitration Act 1995.

Section 36 (1) provides for the recognition and enforcement of awards. The enforcement of an

arbitral award is however made subject to the provisions of Section 37 of the same Act – subsections 1 (a) (vi) and 2 whereof read as follows:-

"**37. (1) The recognition or enforcement of an arbitral award irrespective of the state in which it was made, may be refused only –**

(a) at the request of the party against whom it is invoked if that party furnishes the High Court with proof that –

(iv) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court …

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in sub-section 1 (a) (vi) the High Court may adjourn its decision and may also on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

In the matter at hand, there is now no question with respect to the recognition or enforcement of the arbitral award as an order has already been made granting leave to the claimant to enforce the award. The provisions of Section 37 1 (a) (vi) of the Arbitration Act do not therefore apply to this application.

In my understanding, the provisions of sub-section 37 (2) of the said Act do not apply to the application at hand either. That sub-section in my view deals with a case where the application for the setting aside or suspension of an arbitral award has been made before the court has determined an application by a beneficiary of an arbitral award for the recognition or enforcement of the same. Before a determination of such an application the court would adjourn its decision on the application if there is an application for the setting aside or suspension of the arbitral award. In the present case the claimant has already been granted leave to enforce the arbitral award. There is therefore no decision to adjourn.

The respondent/applicant has however made an application to set aside the award. As already observed above the respondent/applicant was perfectly entitled to lodge the said application as the law permits the filing of such an application before the expiry of 3 months from the date on which the award was received. Before a determination of that application the court has in my view inherent jurisdiction to consider an application for stay of enforcement and execution of the award. In the premises I find and hold that the respondent/applicant was entitled to move the court as it has done. Having taken that view of the matter, I must now consider the principles applicable. I agree with counsel for the claimant that the grounds upon which an order of stay of enforcement or execution of the arbitral award may be made in this case should be analogous to the grounds set out in Order XLI Rule 4 (1) and (2) of the Civil Procedure Rules. I say so because the arbitral tribunal has already adjudicated upon the dispute between the claimant and the respondent/applicant and has made an award in favour of the claimant. That award has been filed and the court has granted leave to the claimant to enforce the same. The claimant is therefore the holder of a decree in its favour which it is entitled to execute.

For the respondent/applicant to succeed in this application, it had to show that there is sufficient cause to order stay of enforcement and execution of the arbitral award. It was also required to establish that it will suffer substantial loss if the order of stay is not granted and that the application had been made without unreasonable delay. Finally the respondent/applicant had to demonstrate that it can furnish such security as may ultimately be binding upon it.

Regarding delay, it is noted that the respondent/applicant had a statutory period of 3 months from the date of receipt of the award within which to lodge the application to set aside the arbitral award. I have already found that the application to set aside the award was filed in court within the prescribed period. The claimant however moved to court earlier and has already been granted leave to enforce the arbitral award. Between that order granting leave to enforce the award and the present application for stay there is a short difference of 6 days. A delay of 6 days cannot in my view be said to be unreasonable. I find and hold therefore that this application has been made without unreasonable delay.

With regard to the establishment by the applicant that substantial loss may result to it if the order of stay is not granted, I have found as follows: The supporting affidavit does not show that the respondent/applicant stands to suffer any loss if the stay is not granted. The further affidavit however, suggests that if the sums awarded to the claimant are paid the same will simply disappear in the claimant's losses and may not be recoverable in case the award is set aside. This to my mind appears to be the only attempt made by the respondent/applicant to demonstrate that substantial loss may result to it unless the order of stay is made. The claimant on its part contends that it owns substantial assets within the jurisdiction of the court including L.R.No.14898 located in Maasai Mara Game Reserve which assets are valued at KShs.216,865,013.00. The claimant also has capital reserves valued at KShs.153,287,463.00. These have not been challenged in any way. The mere fact that the claimant has previously made loses in itself does not make the claimant insolvent. In my view the claimant has demonstrated to my satisfaction that in the event that the award is set aside it will be in a position to refund the sums awarded if the same are paid by the respondent/applicant. In **Kenya Shell Limited –vs- Kibiru & Another (Supra)** Hancox J.A as he then was delivered himself as follows at page 416 of the judgment:

"It is usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

The respondent/applicant in the application at hand has not substantiated Order XLI rule 4 of the Civil Procedure Rules as suggested by Hancox J.A. above. On the other hand the claimant has discharged its burden of showing that it would be in a position to refund the sums in the award if it is paid out to it and the pending application to set aside the award were to succeed. The claimant has done exactly what was suggested by the Court of Appeal in the case of **ABN AMRO Bank –vs – Le Monde Foods Limited: Civil Application No. Nai 15 of 2002 (UR 11/02) (UR).** In that case the Court stated as follows at page 4 of its Ruling:-

"So all an applicant in the position of the Bank can reasonably be expected to do is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal amount if it were paid over to him and the pending appeal was to succeed …… The evidential burden would have shifted to the respondent to show that he would be in a position to refund ……. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on." That is exactly what the claimant has done in the application at hand and the respondent/applicant has on its part failed to show by affidavit evidence that the claimant will not be in a position to refund the sums awarded if the same were paid over to it and the pending application to set aside the award were to succeed.

The last requirement is that of security. The respondent/applicant in its further affidavit has deponed that it is a member company of the substantial business group Conservation Corporation Africa based in South Africa and its Chief Financial Officer supports the application for stay. Annexed to the further affidavit is a copy of a letter from the said Chief Financial Officer to support the deposition. I have perused the said letter. In my humble view the same cannot amount to the kind of security envisaged under Order XLI Rule 4 (2) (b) of the Civil Procedure Rules. Firstly, the offer of guarantee contained in the letter is made by an entirely separate legal entity against whom enforcement would entail separate proceedings. Secondly, no material is availed before me regarding the entity's financial status or capital base. Thirdly, the proposed guarantee is conditional on the happening of events that the claimant cannot control. In the premises, I find and hold that the respondent has not furnished such security as may guarantee the due performance of the decree herein.

In the end, the respondent/applicant has failed to persuade me that it is entitled to the order of stay sought. That would have been the end of the matter. However, the claimant is prepared to concede to a stay if there is an order for deposit of the sums awarded. It is on that basis alone that I make the following orders:-

1. **That the sum of Kshs.17,006,499/= be deposited into an interest earning bank account in the joint names of the Advocates for the claimant and respondent/applicant. The said deposit be made within thirty (30) days from the date of this order.**

2. **I order that the enforcement of the Arbitral Award made on 28.4.2006 including any steps towards execution pursuant to the order of this court dated 13.7.2006 be and is hereby stayed pending hearing and determination of the respondent/applicant's application to set aside the arbitral award which application is dated 14.7.2006.**

3. **The respondent/applicant shall pay the claimant the cost of this application in any event.**

DATED and **DELIVERED** at **NAIROBI** this **20TH** day of **SEPTEMBER, 2006.**

F. AZANGALALA

JUDGE

20/9/2006

Read in the presence of: