REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Misc Cause 472 of 2004

IN THE MATER OF ARBITRATION ACT 1995

AND

IN THE MATTER OF AN ARBITRATION BETWEEN

FRANCIS K.E. HINGA …….....…….…….APPELLANT

VERSUS

GEORGE B. NYANJA …….....…….…….RESPONDENT

RULING

The background of this suit is that the parties agreed to refer their dispute for arbitration. The award of the arbitrators was made on the 7th January 2003. The claimant filed in this court an application for enforcement of that award. That application was granted as prayed. When the claimant attempted to execute for the amount granted in the award the respondent filed an application to set aside the enforcement of that award. That application was heard by Justice Njagi who proceeded to set aside the orders enforcing the award. The reasons for granting that order was because the claimant had filed a suit in the magistrate's court at Milimani claiming the same amount that was the subject of the arbitration. On an application for summary judgment being refused at the Magistrate's court the claimant filed an appeal namely HJCCC misc. Application No. 472 of 2004. Justice Njagi was of the view that to have the award enforced in the High court whilst the claim both in the Magistrate's court and the High court was an abuse of court and was contrary to section 6 of the Civil Procedure Act. The claimant has now come to court by way of Notice of Motion dated the 6th of March 2006.

The application seeks that the chamber summons dated 24th June 2004 to be heard de nova. The grounds upon which the claimant seeks the above order is that the said application was heard on the 7th of July 2004 that the respondent applied and obtained an order to set aside the ruling delivered on the 11th of July 2005 on the orders of the chamber summons dated the 24th of June 2005. That the proceedings both in the Magistrate's court and in the High court have now been withdrawn and accordingly it is now fair and just to allow the application of 24th of June 2004 to be heard de novo. The application is supported by the claimant's affidavit which depones that after the ruling of Justice Njagi he did withdraw the pending suit in the magistrate's court and the pending appeal in the High court and it was in his view right that the application dated 24th of July 2004 seeking to enforce the arbitral award should be heard de novo.

In oral submissions by the claimants advocate in support of the application counsel also submitted that is now no suit which is an impediment to the hearing of the application for the enforcement of the arbitral award. He therefore submitted that the stay granted by justice Njagi should be set aside. Counsel for the claimant drew the attention of the court to the attached notice of withdrawal filed both in the magistrate's court and in the High court. He therefore submitted that the only pending issue in those suits is the award of costs. He submitted that the respondent is free to move the court under order XXIV of the Civil Procedure Rules for an award of costs. He submitted that the issue raised by the respondent whereby the

respondent denies service of notice of filing of the award was unmerited. he drew the court's attention to the affidavit of service and stated that the court on the 7th of July 2007 gave an enforcement order of the arbitration award on being satisfied that the respondent had been properly served he therefore concluded that the application by the claimant is merited and ought to be granted as stayed. He sought that once the court grants the order the application dated the 24th of June 2004 should be heard on priority since it is now three years since it was filed and the date of filing. The application was opposed and counsel for the respondent relied on the replying affidavit. The respondent in his replying affidavit deponed that the withdrawal of the suits in the magistrate's and the high court was done exparte without informing the high court the respondent. He was of the view that such withdrawal was oppressive and unfair to him because it did not accompany an order for costs. Further deponed that an order for the hearing of the claimant's application de novo should not be allowed because he was not served with a notice of filing of the arbitral award. Counsel for the respondent in oral submission stated that the issue of improper service e was canvassed because Justice Njagi. Justice Njagi he said delivered his ruling but did not determine issue of service. He was of the view that the ruling of Justice Njagi was to the effect that the claimant's application was stayed pending the determination of the other suits. In regard to the application he submitted that the absence of determination of costs in respect of the withdrawn suits ought to be decided before the applicant's application could be granted. In respect of the alleged non service of the notice of filing the arbitral award respondents counsel stated Rule 5 of the Arbitration Act requires a notice to be served. He submitted that on that notice being served the respondent would have had three months to file an application to set aside the award. Counsel submitted that service of the notice was effected by register post and since their arbitration rules do not give a mode of service one would have to rely on order V of the Civil Procedure Rules. Counsel say that the respondent is raising the issue of service at this time because he would not have the opportunity later if orders are given since the applicants application dated 24th of June 2004 is an exparte application. He however submitted that if the application is allowed the court should indicate that the proceedings should begin prior to the chamber summons dated the 24th of June 2004. having heard the counsels argument I have heard opportunity to read the ruling delivered by justice Njagi dated 11th of July 2005, I do find that arguments relating to service of the Notice were canvassed before him that he was of the view that the primary decision why the claimants application had to be set aside and this stay was because of the pending suits. Having listened to the arguments of the service of notice I ma of the view that it is not sufficient reason to refuse the orders sought by the claimants. Indeed rule 5 of the arbitration rules provides as follows:

"**The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been file and shall file an affidavit of service".**

This rule requires indeed that a notice of filing the arbitral award be given. However when one considers the provisions that section 36 [1] of the Arbitration Act. An arbitration award is binding upon an application in the High court. That section provides as follows:

36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and upon application in writing to the High Court, shall be enforced submitted to this section and section 37.

Section 36 (1) clearly shows that it is only subject to the provisions of section 37. When one considers the provisions of rule 5 it ought to be considered that it is a subsidiary legislation. It therefore cannot make provisions which are ultra vires to section 36. I therefore find that section 36 cannot not impeached by rule 5. on order XXV of the Civil Procedure Rules a suit can be withdrawn by the party who initiated it at any stage once a suit is withdrawn it ceases to exist indeed the Blacks Law dictionary defines withdrawal as "**to refrain from prosecuting or proceeding with an action"** I do not accept that the pending issue of costs can be said to mean that the suit is still subsisting I therefore find that the reason given by Justice Njagi when he ordered the setting aside of previous orders of enforcement of arbitral award and the stay was based on the pending suits. Those suits are no longer in existence. I therefore find no reason why this court should not allow the claimants notice of motion dated 6th of March 2006.

Accordingly I grant the following orders:

1. That the chambers summons dated 24th of June 2004 be heard de novo at a date to be given by the registry.

2. The costs of the notice of motion dated 6th of March 2006 shall be in the cause.

DATED this 13th day of October 2006

MARY KASANGO

JUDGE