



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

Misc Case 596 of 2005

STRUCTURAL CONSTRUCTION CO. LTD PLAINTIFF

VERSUS

INTERNATIONAL ISLAMIC RELIEF DEFENDANT

RULING

The Applicant herein has moved the Court under a Miscellaneous Chambers Summons said to have been brought under section 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya), Section 36 of the Arbitration Act (Act No.4 of 1995), and Rule 9 of the Arbitration Rules 1997. He prays that the Court reads and recognizes the arbitral award made in a dispute between the Applicant and the Respondent in which the Respondent was ordered to pay to the Applicant a sum of **Kshs.2,526,120/=**, which, despite demand being made the Respondent has refused to pay. He prays further that upon such reading and recognition the said award be enforced or executed.

Section 36 of the Arbitration Act provides as follows:

- (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 subject to this section and section 37.**
- (2) Unless the High Court otherwise orders, the Party relying on an arbitral award or applying for its enforcement shall furnish;**
 - (a) The duly authenticated original arbitral award or a duly certified copy of it; and**
 - (b) The original arbitration agreement or a duly certified copy of it.**

Rule 9 of the Arbitration Rules provides that an application under section 36 shall be made by summons in chambers. The original Award was filed in court alongside the Chamber summons on 26th April, 2005.

This application is opposed by both Respondents on the grounds that:

Firstly the 1st Respondent was denied an opportunity to be heard in the arbitration. It contends that the counsel appearing therein had no instructions and refers the court to deposition No.7 of the 1st Respondent's Replying Affidavit as supported by a letter annexed thereto as annexure "MF 4.". I have

looked at the said annexure and have noted that the advocate said to have appeared without instruction had this to say in the said letter to the Applicants:

“ I did receive a letter dated 3rd November, 2004 from one of your Directors Mr. Ahmed Msallam informing that your preferred Advocate of choice was Messrs Mohamed & Lithome Advocates. This explains why I never participated in the Arbitration process.”

It would seem from the above that the non-representation of the Applicant at the arbitration was due to their own neglect in ensuring that they were represented by an advocate of their choice. Strictly speaking this cannot be said to be a ground falling under Section 37 (1) (iii) under which I would be required to refuse the recognition or enforcement of the award for reasons that the applicant was:

“Otherwise unable to present his case (at the arbitration).” [Additions my own]

Other grounds for refusal as provided under Section 37 (1) do not apply to the application as regards the 1st Respondent's. Counsel for the Respondent has submitted on behalf of the 2nd Defendant that it was not party to the Arbitration Agreement cited herein.

According to subsection (2) (b) of Section 36 of the Arbitration Act, the original or a certified copy of the Agreement ought to have been filed in court as was the Original Award. There is no such original or certified copy of the Agreement on the court record. It would seem however that the copy annexed to the Supporting Affidavit of HARJI RAGHWAMI, as annexure HR 1 (i) is acceptable to the Respondent for their purposes. The same is therefore deemed to represent the Arbitration Agreement for the purpose of these proceedings.

Having said this, I find that indeed the 2nd Defendant is not party to the Arbitration Agreement and can therefore not be said to have submitted to the Arbitration proceedings to which the award in question relates. It goes without saying that even the award itself is clearly stated to be between M/S **STRUCTURAL CONSTRUCTION COMPANY** (claimant) and **INTERNATIONAL ISLAMIC RELIEF ORIGNISATION** (Respondent)

I find that the 2nd Respondent is wrongly joined in this application in the circumstances and the award cannot be recognized as binding or enforceable against it. I find no reason to refuse the recognition or enforcement of the Award in respect of the 1st Respondent at this stage and do allow this application in as far as it relates to the 1st Respondent. As regards the submissions by counsel for the Applicant that the Respondents' challenge to this application should not be entertained for reasons that Section 35 of the Arbitration Act has not been invoked, I am of the considered view that section 35 only comes into play after the award has been duly recognized as binding by the making of an order such as I have been called to make herein, and is to be invoked where, as stipulated in the said section, a party seeks to have such an award set aside.

I allow the application as regards the 1st Respondent and dismiss the same as regards the 2nd Respondent

Dated and delivered at Nairobi this 6th day of October, 2006

M. MUGO

JUDGE

06.10.2006

Ruling delivered in the presence of:

Mr. Ogweni for Applicants

Mr. Njiraini for Respondent

M. MUGO

JUDGE