REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION 520 OF 2005

HON. CHRYSANTHUS BARNABAS OKEMO …….. PLAINTIFF

VERSUS

APA INSURANCE COMPANY ……..…… DEFENDANT

RULING

The Applicant and the Respondent Insurance Company have been involved in an arbitration in respect of compensation for the Applicant's Motor vehicle plus costs of the arbitration. Honourable Justice E. Torgbor (Retired) was the arbitrator and on 25.2.2005 awarded the Applicant Kshs 2.2 million being the compensation and Ksh s473,680/= being costs of the arbitration both sums to attract interest at Court rates from 1.4.2005 until payment in full.

On 14.4.2005 the Respondent lodged the arbitral award in Court with notice to the Applicant. The registry allocated serial number 241 of 2005. On 5.5.2005 the Respondent applied to set aside the arbitral award in the said cause which application was fixed for hearing on 3.6.2005 but the application was not heard because it could not be reached. The Application was subsequently by consent fixed for hearing on 20.6.2005 on which date the cause was not listed.

According to the Applicant, since the said date, the Respondent has not bothered to prosecute its application and he believes the Respondent filed the Application merely to delay settlement of the award. It is because of the perceived inaction on the part of the Respondent that the Applicant on 5.7.2005 filed this application under the provisions of Section 36 and 37 of the Arbitration Act 1995 and Rules 4 and 9 of the Arbitration Rules 1997 for enforcement of the said award and in the alternative the Respondent be ordered to furnish security by deposit of the sums awarded together with costs and interest to date.

The application was canvassed before me on 21.7.2005 by Mr. Gaita Learned Counsel for the Applicant and Mr. Mutua Learned Counsel for the Respondent. The substance of the applicant's case was that despite demand for payment the Respondent has neglected and/or refused to pay the said sums and as the Respondent is not prosecuting its application to set aside the arbitral award the Applicant should be allowed to enforce the same. In Counsel's view, mere filing of an application to set aside the award is not a bar to the application to enforce the award.

In the event that the Court was inclined to adjourn the Application, Counsel for the Applicant sought an order that the entire sums awarded be deposited in an interest earning account in the joint names of the advocates appearing. In counsel's view such an order would stir the Respondent into prosecuting its application to set aside the award with some urgency. Anticipating the Respondent Counsel's submissions Counsel for the Applicant argued that it was not necessary to file this application in Misc. Cause No.241

of 2005 as enforcement of an award is dealt with differently under the Arbitration Act. Counsel for the Respondent in opposing this application submitted that Rule 4 of the Arbitration Rules 1997 presupposes that an award can only be filed once and as the arbitral award in question was filed in Misc. Cause No.241 of 2005, this application should have been filed therein. In the premises, this application according to Counsel for the Respondent is incompetent.

Turning to the merits of the application Counsel submitted that the Respondent having lawfully challenged the arbitral award in Misc. Cause No. 241 of 2005, it was not open to the Applicant to seek enforcement of the same award. Counsel further submitted that it was not correct to allege that the Respondent was using Misc. Cause No. 241 of 2005 to delay settlement of the award. Counsel emphasized that the Applicant in his affidavit in support of this application does not make such an allegation.

With respect to the prayer for security, Counsel submitted that the Applicant had not made out a case for the same and indeed there is no basis for such an order. I have now considered the application, the affidavits filed and the submissions of counsels appearing. Having done so, I take the following view of the matter. I will first dispose of the issue of competence raised by Counsel for the Respondent. Under Rule 4 (1) of the Arbitration Rules, 1997 any party is at liberty to file an award in the High Court. Rule 4(2) reads:- "4(2) All Applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date." There is no dispute that the Respondent pursuant to the said sub rule 4 (1) filed the arbitral award in court which became Misc. Cause No.241 of 2005. There is also no dispute that this application is subsequent to the filing of the said arbitral award by the Respondent. On the face of it therefore it appears that the Applicant should have filed this Application in Misc. Cause No.241 of 2005. However, is the filing of this application in a different cause fatal to the application? I think not. The parent Section i.e. Section 36 of the Arbitration Act 1997 does not say so.

In my view the applicant's application cannot be defeated merely because it offends the provisions of the subsidiary legislation. I am also informed that the arbitral award filed in Misc. Cause No. 241 of 2005 did not comprise the award in respect of costs of the reference which award is formerly availed in this application. I hold that the application is competent. Turning now to the merits of the first limp of the application with respect to the enforcement of the award, I am afraid the prayer sought is discretionary at this stage. This is because there is in existence a valid application for setting aside the arbitral award made under the provisions of Section 37. This application has been made under Section 36 (1) which reads:-

"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 subject to this Section and Section 37. It can be seen that the enforcement is made subject to Section 37 which provides for inter alia setting aside of the arbitral award. Sub rule 2 of Section 37 reads:- "37 (2) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection 1 (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on application of the party claiming recognition or enforcement of arbitral award, order the other party to provide appropriate security."

In this application, the primary reason given by the applicant for making this application is that the Respondent is not keen on prosecuting its application to set aside the arbitral award. But the record seems to be that the parties by consent fixed the said application for hearing on 20.6.2005 when for reasons which were not attributed to the Respondent the matter was not listed. Two weeks thereafter the Applicant lodged this application. In my view it is unfair to accuse the Respondent of using the application to set aside the arbitral award to delay settlement of the award. In the circumstances of this case the just cause of action is to adjourn a determination of this application pending I hope expedited prosecution of the Respondent's application in Misc. Cause No.241 of 2005.

The next issue to determine is whether or not the applicant has established a case for the Respondent to provide appropriate security. In determining this issue, the financial standing of the Respondent is material. The applicant has not suggested that the financial standing of the Respondent is not solid. On the other hand the Respondent has deponed that it is a reputable and solvent insurance company and in fact it

annexed to it’s replying affidavit, financial statements published in line with the provisions of the Insurance Act.

These financial statements have not been challenged. In the circumstances I find and hold that there is no real risk that the Respondent may be unable to satisfy the award in the event that its application is refused. In the result, I decline to order the Respondent to provide security. The orders of the Court are:

1. The Respondent should prosecute its application for setting aside of the arbitral award in Misc. Application No. 241 of 2005 within this High Court term. 2. A determination of this application is adjourned pending the results of the Respondent’s said application. 3. Each party has liberty to apply. 4. Costs shall be in the cause. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-