Archipoint Consulting Architects v Isaac's Investment Company Limited (Miscellaneous Cause E1017 of 2023) [2024] KEHC 11141 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11141 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CAUSE E1017 OF 2023

FG MUGAMBI, J

SEPTEMBER 20, 2024

BETWEEN

ARCHIPOINT CONSULTING ARCHITECTS .... APPLICANT

AND

ISAAC'S INVESTMENT COMPANY LIMITED .... RESPONDENT

RULING

Introduction and Background

1. On 5/2/2024, this court delivered a ruling allowing the applicant's ("ACA's") application for adoption and enforcement of the award dated 26/8/2019 ("the Ruling" and "the Award").

2. The respondent ("IICL"), through the Notice of Motion dated 8/2/2023 brought under sections 1A,1B, 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 40 and 51 Rule 1 of the *Civil Procedure Rules* seeks to set aside the Ruling and stay this proceedings pending hearing and determination of Nairobi Petition No.E464 of 2023 ("the Petition") or that in the alternative, an order that the present application be heard together with the Petition.

3. The application is supported by the grounds on the face of it and the affidavit sworn by Ali Isaac, IICL's Managing Director, on 8/2/2024. It is opposed through the replying affidavit sworn by ACA's architect, Alfred Mango on 24/2/2024. Following directions issued by this court, both parties filed and highlighted their respective written submissions which I have considered and will make relevant references to in my analysis and determination below.

Analysis and Determination

4. IICL seeks to be allowed to participate in the application for recognition and enforcement of the arbitral award. It contends that it was never served with the said application and that its advocates had

no instructions to represent it since they did not participate in the arbitration proceedings. As such, it is its case that the service was improper.

5. IICL further contends that the advocate who was previously handling other files on its behalf was away on official duties for most part of December 2023. He reported late in January 2024 on account of ill-health. That unfortunately, the served documents were filed away and the advocate only came to know about the application on 7/2/2024.

6. IICL acknowledges that the application before court is not an application to set aside the Award and further admits that the court in Misc. E447 of 2022 dismissed its application seeking to stop the delivery of the Award. It further confirms that this court, (Chepkwony, J) held that the only recourse open to IICL was to apply to set aside the Award, which by dint of section 35 was already time barred, necessitating the Petition. IICL accuses ACA of material non-disclosure for not informing the court about the pending Petition.

7. In response, ACA confirmed the decision of the court as stated by IICL, in the previous application filed in Misc E447 of 2022. It was confirmed that the court ruled on a preliminary objection filed by ACA that the Award had already been published and that the only recourse for IICL was either filing an appeal or an application to set aside the award.

8. Regarding the issue of service, ACA contends that its advocates in Misc E447 of 2022 were served with a Notice of Change of Advocates where IICL stated that it had since appointed the present advocates on record.

9. ACA further states that there is no valid challenge to the Award as per section 35 of the *Arbitration Act* (Chapter 49 of the Laws of Kenya). Consequently, the next logical step for ACA was to proceed with having the Award enforced, as required by section 36 therein. ACA states that IICL has not raised any challenge to the Award as set out in Section 37.

10. Additionally, ACA argues that there is no mandatory requirement for service of an application seeking enforcement of a final award and that such service is carried out as a matter of good practice. In any case, ACA maintains that service was effected and acknowledged by the last known advocate on record for IICL.

11. In conclusion ACA argues that the court's intervention is limited by section 10 of the *Act* and that it should be allowed to reap the benefits of the Award that was rendered in his favor four years ago.

12. I take the view that, although the Award has already been adopted as an order of the court, it is important to remember that this court retains the power and discretion to review and set aside its orders ex debito justitiae. This is in cases of irregularity or where there has been a breach of statutory provisions.

13. For example, if the rules of natural justice have been violated and a party has not been given the opportunity to be heard, the court is not bound by the mere fact that the award has been adopted as an order. The court's authority to intervene remains intact under such circumstances. (See *Samura Engineering Limited V Don-Woods Company Limited*, [2014] eKLR).

14. The Learned Judge had this to say on the issue of service of such applications:

> "A cursory and shallow reading of rule 6 above may found a justification of sort that the application envisaged under section 36(1) of the *Arbitration Act* and rule 9 of the Arbitration Rules is to be made Ex parte especially where the person against whom the recognition and enforcement of the award is being invoked, has not filed an application to

set aside the award under section 35 of the *Arbitration Act*. But, that kind of approach or interpretation will certainly excite serious constitutional objections on the front of the right to be heard."

15. On the issue of service, I agree with ACA that there is no mandatory requirement under Rule 6 of the Arbitration Rules to serve a respondent with an application for recognition and enforcement. This is so especially if the respondent has not filed an application to set aside the Award under section 35 of the *Arbitration Act*. However, I share the preferred view expressed by Gikonyo, J in *Samura Engineering Limited* (*supra*) that such an application ought to be served on the other party, regardless.

16. This position aligns with the constitutional principles of a fair hearing and the rules of natural justice, ensuring that all parties have equal opportunities to be heard.

17. Fortunately, in the ruling delivered on 5/2/2024, the court was satisfied that the application was properly served on IICL, as evidenced by the return of service sworn on 6/12/2023. IICL has attempted to evade this service by claiming that its present advocates had no instructions at the time.

18. I note that IICL has not refuted ACA's assertion that Messrs. Muma & Kanjama Advocates, who received the application for recognition and adoption on 6/12/2023 were the last known advocates on record for them. The record confirms that Messrs. Muma & Kanjama Advocates filed a Notice of Change of Advocates dated 17/11/2023 and they cannot therefore purport to be strangers to these proceedings.

19. Assuming that after receipt of the application, the advocates did not have the requisite instructions as alluded to, IICL has not stated why it did not immediately or within reasonable time, instruct its advocates to proceed with this matter. Such that if there is any mistake, then the same is on the client, IICL and its advocates and cannot be visited on ACA which had fulfilled its obligations.

20. I therefore reaffirm the court's ruling that IICL was properly served with the recognition and enforcement application, and the claim that it was denied an opportunity to be heard is unfounded. Furthermore, even if IICL had not been properly served, it has not presented any valid grounds under section 37 of the *Arbitration Act* for the court to consider granting it an opportunity to oppose the recognition and enforcement application or to refuse enforcement of the Award.

21. In the absence of any valid reasons, the court cannot set aside its orders and permit IICL to participate substantively in the recognition and enforcement proceedings. Additionally, I find that there is no provision in the *Arbitration Act* that allows the court to stay enforcement and recognition proceedings, especially in the absence of an application to set aside the arbitral award. Granting such a stay would undermine the primary objective of arbitration, which is the expeditious resolution of disputes.

22. I reiterate the court's ruling in Misc E447 of 2022 where IICL was informed that after the publication of the Award, the only recourse available to it was lodging an appeal or filing an application to set aside the Award. Since IICL has done neither of this, the court cannot, by craft or innovation, introduce other avenues to bypass clear statutory procedures. This would be an affront to section 10 of the *Arbitration Act* which limits the court's intervention in arbitration matters.

23. I therefore find no reason to warrant a stay of these proceedings or reason to direct that the two matters be heard together as the said Petition is neither an application to set aside nor an appeal to the Award as envisaged in the *Arbitration Act*.

Disposition

24. Accordingly, I find no merit in the application dated 8/2/2024. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE