



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
COMMERCIAL AND TAX DIVISION
MISC APPLICATION NO.506 OF 2016
IN THE MATTER OF THE ARBITRATION (AMENDMENT ACT

(NO. 11 OF 2009)

BETWEEN

NDIRITU MUCHEMI MICHAEL.....1ST APPLICANT

JULIUS IRUNGU NGIGI.....2ND APPLICANT

WANGOMBE HUMPHREY.....3RD APPLICANT

AND

ASHBELL MACHARIA WACHIRA.....1ST RESPONDENT

GITHUI MURITHII PETER.....2ND RESPONDENT

RULING

BACKGROUND

NOTICE OF MOTION

The Applicants filed a **Notice of Motion Application** dated 23rd February 2021 for Orders;

1. That the court allows the Decretal sum of **Kshs.3,132,561** deposited in the joint advocates account be released for use by the Applicants.

Which application was supported by the affidavit of **Michael Muchemi Ndiritu** on the following grounds;

1. That the 3rd Applicant **Humphrey Wangombe** is very sickly and requires urgent medical attention abroad hence the release of the said funds.
2. That the Respondents will not suffer any prejudice as the money belongs to the Applicants herein.
3. That the said decretal sum was ordered in order to suspend/stay the execution of warrants that had been issued by the court.

RESPONDENTS' RESPONSE

The Respondents responded to the above-mentioned Application through the Replying Affidavit of **Ashbell Wachira** dated 3rd of March 2021. The Respondents oppose the Applicants' Application by stating that; -

1. The Arbitrator published a Final Award on 9th April 2015 and the Claimants herein filed a Notice of Motion application dated 19th March 2019 seeking among other things, the Arbitral Award be converted to a decree of the Court.

2. By a Ruling delivered on 13th November 2019, the Court recognised and adopted the Arbitral Award as an order of the Court to be converted into a decree of the Court for execution.
3. After the Decree was extracted, the 1st Respondent sought stay and was granted on condition that the decretal sum be deposited in a joint account. The escrow account was opened and the sum of Kshs.2,132,561/- deposited which forms the basis of the application before the Court where the Applicants seek the release of these funds for their use.
4. Despite numerous reminders, the Applicants have failed and/or refused to comply with the Decree. Requests have been made to the Applicants to furnish the Respondents with the books of accounts of the company so that the outstanding liabilities can be enumerated and proper indemnities issued.
5. The Applicants have approached the Court with unclean hands and are being insincere. It is only just that the Applicants demonstrate that they are indeed capable of indemnifying the Respondents before any monies are released to them.
6. The sum deposited in the escrow account was meant to be utilised towards settlement of any amounts owed to the Creditors of the Company (**Pentapharm**) and not for personal use. However, should the Applicants wish to utilise the said funds for personal use, it would be fair to exonerate the Respondents first from any liabilities.
7. The Respondents simply ask for the Applicants to enable them exit the company by issuing binding and forceful indemnities, after which the Applicants are at liberty to deal with the Company.
8. The Respondents have not refused to make payment to the Applicants as ordered by the decree of the Court.

COURT PROCEEDINGS

On 4th February 2021, parties moved the Court as follows;

Mr Mwangi for the Applicant informed Court that vide the application of 23rd February 2021, they sought release of funds since one of his clients, Mr Humphrey Wangombe needs funds to have medical treatment in India. The Applicant annexed documents from Mater Hospital depicting treatment to the 2nd Claimant. The money deposited in an escrow account out of an Arbitral award was to forestall execution of a decree against the 1st Respondent and should be released to the Claimants. The funds were not to be refunded to the Respondents and the deposit of funds was not conditional. The funds were deposited in ABC Bank Ltd Ksh 3,132,561/- to forestall execution of warrants. The decree was issued in 2019 after adoption of the Final Award. The money was not to or for payment of Creditors and none of the Creditors have made claims. The Final award was to the effect that the decretal amount was to be paid by Respondents to the Claimants. The further orders of indemnity and transfer of shares are distinct and independent of the decretal amount. They are ready to execute the indemnity and release the same to the Respondents.

Mr Kabugu submitted that there is an Arbitral Award that resulted in a decree of the Court and a condition of stay of execution of the decree was to deposit the decretal amount in an escrow account. Then what the Claimants did not disclose to the Court is that there was a condition; the Claimants shall execute and deliver discharges of indemnity which will absolve the Respondents of all liabilities that the Company incurred as they exit and this was not done.

Further more the amount in escrow account is for Creditors and not for personal use. Until & unless the Claimant issues the Indemnity to be released from any liability that may accrue, that is when the money may be released. They are not opposed to release of funds but on the conditions set.

The Respondent sought time to respond and file Replying Affidavit before hearing and determination of the instant application. Due to the urgency of the matter, the Applicant seeking funds to seek medical treatment abroad, the Court granted the Respondent 1 day to respond and the Court to peruse the Court file as it was the 1st time the matter was before this Court. The matter proceeded on 5th March 2021.

The Applicant through Counsel, relied on the Affidavit sworn by Mr. Michael Muchemi Nderitu and Annexures thereto. He told the Court that they served the Respondents with Indemnity & Discharge on 19th February 2020 and a copy is annexed. They dealt with their part of the Final Award. They were willing to wait for the scheduled date 22nd March 2021 but due to 2nd Claimant's ill health that requires urgent medical attention and there was/is no appeal, they prayed the application is granted.

The Respondent through Counsel opposed the application and indicated that the funds deposited in an escrow account were to pay Creditors. The Final Award was clear that indemnity was to be granted and this cannot be discharged unless Accounts are taken to know Creditors and their liabilities. The Respondent calls for full compliance of the Final Award. They wrote to the Claimants on 27th July 2020, 8th August 2020, 25th August 2020 & 11th February 2020 and there was no response.

PROCEDURAL HISTORY

This Court perused the Court and found as follows;

1. Parties filed in ***HCCC 726 of 2010 Pentpharm Ltd vs Peter Muriithi Gichui & Ashbel Macharia Wachira***; by Ruling delivered by Havelock J. on 23rd May 2013, the proceedings were stayed and matter was referred to Arbitration.

2. Arbitration commenced and culminated with Final Award of 9th April 2015.

“CONCLUSION

1. *I hereby order and award that;*

a) *The 1st Respondent shall pay to the Claimants the sum of Ksh 3,132,561,00*

b) *The 1st Respondent [should read 2nd Respondent as clarified to be typographical error by Arbitrator at pg8 1st -4 lines of Arbitral Award] shall pay to the Claimants Ksh 1,167,590.00*

c) *The Claimants shall execute and deliver to each of the Respondents discharges and indemnities absolving Respondents of any and all liability the Respondents may incur or have incurred by virtue of their shareholding and directorship in the Company.*

d) *The Respondents shall execute and deliver to the Claimants their resignations from the board of the Company as well as share transfers to the Claimants or their nominees of all their shares in the Company as well as such other documents as maybe required for the said changes to the directorship and shareholding of the Company to be effected.*

e) *The Counterclaim is hereby dismissed*

f) *Each party shall bear its advocates' cost in respect of this reference; and*

g) *The Respondents shall reimburse to the Claimants the amount remitted by the latter as Arbitrator's costs herein.”*

3. The Respondents filed Notice of Motion dated 25th May 2015 to stay execution of the Final Award of 9th April 2015 published on 10th April 2015 and to set aside the Arbitral Award in its entirety. Hon. LJ Olga Sewe by Ruling of 14th September 2016 dismissed the application.

4. The Claimants filed application dated 29th September 2016, for the Final Award of 9th April 2015 published by Mr. T. Wamiti Esq to be converted into a decree of the Court. At the same time, the Respondents filed an application seeking stay of execution pending appeal and filed Notice of appeal. Hon L.J.G. Nzioka heard and dismissed both applications; the Claimants failed to comply with mandatory statutory provisions of Section 36(2) Arbitration and did not file original or certified Final Award. The Respondents was dismissed as the stay ought to be sought from Court of Appeal upon looking at the Memorandum of Appeal.

5. The Claimants filed application dated 19th March 2019 for the Final Award of 9th April 2015 published by Mr. T. Wamiti Esq to be converted into a decree of the Court. Hon. L.J.G. Nzioka upheld the application only with regard to prayer 1 that the Final Award was and is hereby recognized and adopted as an order of the Court to be converted into a decree of the Court for execution.

The other parts of the Final Award were disallowed because the Court noted *‘the Applicants have crafted the Prayers 2 & 3 in the application in such a manner as to alter terms of the Final Arbitral Award.’*

DETERMINATION

The Respondents are not opposed to the release of the decretal sum. However, this is on condition that the Applicants exonerate the Respondents from any liabilities. The Court notes that the final award required both parties to take action and that each party can only be released from liability upon fulfilment of the terms of the award. Looking at the final award published on 9th April 2015.

The sentiments expressed by Lady Justice Nzioka by Ruling delivered on 13th November 2019 that; -

“The Applicants cannot use this Court to order and/or compel the Respondents to comply with the award which the Applicants themselves have not demonstrated compliance on their part. In that regard, they are being insincere and/or less candid. They do not have clean hands in that regard.”

This Court has outlined the chronology of events to shed light on circumstances to be considered in grant or refusal of the instant application where the Applicants seek release of funds/decretal sum to cater for 2nd Claimant's emergency medical care abroad.

The terms of the Final Award are outlined verbatim and in full above.

The 1st Respondent shall pay to the Claimants the sum of Ksh 3,132,561,00/ the decretal amount it is not stated anywhere in the Final award that it was to cater for settlement of Creditors' claims as submitted by the Respondents' Counsel.

Secondly, the Arbitrator alluded to in the Final award Pg 4-5 that there were 2 memorandum of understanding documents as Claimants and Respondents could not agree on one version;

1. *The common thread in the 2 drafts [is] that the Respondents were to exit the Company, pay to the Company [or make*

payments to the Company's Creditors on its behalf] an amount of Ksh 12,000,000/-. In return for which they were to take over Company's shops at Victoria house & Spring valley, and be discharged from personal liabilities under guarantees to the Creditors of the Company.

2. The Respondents confirm having taken over the said 2 shops. The Respondents also made some payments/paid off some supplies.

This finding by Arbitrator confirms that the funds held in escrow account were not for Creditors but for the Claimants from the balance due after part payment from the global figure of Ksh 12,000,000/- that was due from the Respondents.

Thirdly, the Trial Court Hon. L.J. G.Nzioka on 27th February 2020; after the Deputy Registrar granted Daystar Auctioneers application and warrants of sale of property in execution of decree for money were issued on 27th January 2020; granted stay of execution on condition the 1st Respondent avails to Court the sum of Ksh 3,132,561/- within 14 days of the date of the order and the Claimant avails the indemnity and the matter shall be mentioned on 26th March 2020. Further since parties were unable to agree on the manner of payment, the funds shall be deposited in an interest earning Account.

The Applicant, one of the Claimants, is ailing and in dire need of medical attention. The appeal has not been heard and determined to date, despite stay of execution. The application to set aside the Final Award was dismissed. All that remains is parties comply with terms/orders of the Final Award.

Applicant's Counsel submitted that they attached indemnity annexures **MNM2** the Respondent did not acknowledge or respond to this fact. Similarly, the Respondent annexed correspondence to the Applicants on indemnity and the same was not responded to by the Applicants. Each party ought to comply.

This Court read the Final Award and found nowhere the requirement to have books of Account availed before compliance of terms /orders of the Final award. This is because at Pg 2 of the Final Award, the Arbitrator observed;

"It is however worth noting that the last signed audited financial statements were for the year 2009. The financial statements produced before this Tribunal for years 2010 & 2011 have neither been signed by Auditors or approved by the Board. From the definition of insolvency hereinbefore, it can only be determined by a comparison of the assets and liabilities of the Company, thus the balance sheet."

If the Arbitrator could not decipher the Company's financial health from financial statements availed, how will parties reconcile accounts after hearing and determination of their dispute through arbitration? The Final Award is binding on all parties and the Court lacks jurisdiction to vary, amend or alter the terms.

In light of the foregoing, the Court has observed that the 1st Respondent was to pay the Claimant Kshs.3,132,561/- which is only part of the decretal sum. The 2nd Claimant attached with medical documents Doctor's Letter/Recommendation for treatment abroad.

To ensure that the Claimant doesn't suffer any loss and to ensure fairness upon the Respondents, this Court orders as follows;

DISPOSITION

1. The sum of Ksh 3,132,561.00/- deposited in an interest earning escrow account in ABC Bank Ltd by joint advocates of the Claimants and Respondents shall be released forthwith to the Claimants Mr Nderitu Michael Muchemi Mr. Julius Irungu & Mr. Wangombe Humphrey to facilitate through his share, urgent medical care abroad for Mr. Wangombe Humphrey in terms of the application filed on 23rd February 2021 and Final Award.

2. The Claimants shall execute and deliver to each of the Respondents discharges and indemnities absolving Respondents of absolving Respondents of any and all liability the Respondents may incur or have incurred by virtue of their shareholding and directorship in the Company within 14 days from today.

3. The Respondents shall execute and deliver to the Claimants their resignations from the board of the Company as well as share transfers to the Claimants or their nominees of all their shares in the Company as well as such other documents as maybe required for the said changes to the directorship and shareholding of the Company to be effected within 14 days from today.

4. All the terms of the Final Award shall be complied with by the parties within 14 days.

5. Each party to bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH MARCH 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR KABUGU FOR THE RESPONDENT

MR. IRUNGU FOR THE APPLICANT

COURT ASSISTANT: TUPET

Mr. Kabugu: 1st Application is leave to appeal and it does not lie as of right, we seek leave to appeal and 2nd application seeks stay of execution of the orders of this court.

Mr. Irungu: We are opposed to the application. This is a delaying tactic. The matter should be closed.

Court:

1. 1st application to appeal will be considered after filing formal application in court and served to Respondent who will file response.
2. The stay of execution is not granted as the Applicant is sick and shall use the funds for treatment abroad. The court has enforced the orders/terms of Final Award.
3. The certified copies of court proceedings and ruling shall be availed to the Applicant upon payment of requisite fees.
4. This Ruling shall be availed to DR Commercial & Tax Division today by 4.00pm.

M.W. MUIGAI

JUDGE