REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 124 OF 2019

PRIDE ENTERPRISES LIMITED.....APPLICANT

-AND-

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

RULING

1. The parties herein entered into a contract in which the respondent awarded the applicant a contract for the reinstatement of Bondo – Kisian Road in Kisumu West, Rarieda and Bondo District in Nyanza Province.

2. Pursuant to Clause 67.3 of the FIDIC Conditions of Contract, the parties agreed to refer any disputes arising between them to Arbitration. A dispute arose between the parties over the payment of the applicant's dues which dispute was referred to arbitration and an award thereafter published in favour of the applicant on 21st January 2019. Following the filing of an application dated 20th February 2019 for the correction of the award, an Additional Award was on 1st April 2019 made in favour of the applicant. An Application dated 27th June 2019 seeking to set aside the said Additional Award was however dismissed by this court on 29th day of April 2020.

3. After the dismissal of the application to set aside the Awards, the applicant fixed the application for the recognition and enforcement of the awards for hearing.

4. The Respondent opposed the enforcement application through Grounds of Opposition in which it listed the following grounds: -

> ***a. That the application is fatally incompetent as it offends the mandatory provisions of Section 36(3)(a) & (b) of the Arbitration Act.***
>
> ***b. That by making the additional award of 1st April 2019, the Honourable Arbitrator in effect irregularly set aside, on appeal, the Award dated 8th February 2019.***
>
> ***c. The Parties to the Arbitration did not cloth the Honourable Arbitrator with jurisdiction to sit on appeal against her own decision of 8th February 2019, or at all. Consequently, the Additional Award dated 1st April 2019 is null and void ab initio as it was made contrary to the procedure agreed to by the parties and without jurisdiction and is against public policy.***
>
> ***d. The application is meritless and ought to be dismissed with costs to the Respondent.***

5. This ruling is therefore in respect to the Applicant's application dated 11th December 2019 for the recognition and enforcement of the Award. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought.

6. The applicant argued that the issues raised in the Grounds of Opposition are ***res judicata*** having been dealt with by this court when considering the respondent's earlier application dated 27th June 2019. In the said application, the applicant sought to have the Additional Award of 1st April 2019 set aside on the main ground that the Arbitrator exercised appellate jurisdiction which the parties did not confer to her. According to the applicant, the issue of whether or not the Arbitrator was justified in issuing the Additional Award had already been determined by this court in the ruling delivered on 29th April 2020 and cannot be revisited through the Grounds of Opposition.

7. Section 7 of the Civil Procedure Act stipulates as follows:

No court shall try any suit or issue in which the matter is directly and substantially in issue has been directly and substantially in issue in a former suit between parties under whom they or any of them, claim litigating under the same title, in a court competent to try such subsequent such suit in which such issue has been subsequently raised and has been heard and finally determined. "

8. *The purpose of the doctrine of res judicata is to stop parties whose disputes have already been resolved by a court of competent jurisdiction* from re-litigating the same issues against the same opponent. *Res judicata* is a tool for saving the courts valuable and scarce resources by arresting the mischief of multiple litigations over the same subject matter by parties who have already had their day in court.

9. In ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),*** the Court of Appeal held that:

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

The Court explained the role of the doctrine thus:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

10. In the present case, it is not disputed that the Respondent's application seeking to review the decision by the Arbitrator to issue the Additional Award on the basis that she lacked the jurisdiction to issue the Award was dismissed by this court in the ruling rendered on 29th April 2020. In the said ruling, the court held as follows: -

"My finding is that Section 34 of the Act does not bar any party from seeking correction or clarification of an award as long as such clarification is sought within the time stipulated under the section upon notice being issued to the other party. My finding is that the 1st respondent was justified in seeking the additional award so as to get the arbitrators clarification/correction of the arbitral award."

11. It is also noteworthy that the respondent has not appealed against the ruling of 29th April 2020. My finding is the respondent cannot revisit the issue of the jurisdiction of the Arbitrator to correct the Award.

12. Turning to the issue of whether the instant application is fatally defective for non-compliance with Section 36(3)(a) & (b) of the Arbitration Act, I note that this is an issue that was, unfortunately, not addressed by the applicant either through a further affidavit or in the written submissions.

13. Section 36 of the Arbitration Act provides;

Recognition and enforcement of Awards

1) A domestic Arbitral Award, 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) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or nay other convention to which Kenya is signatory and relating to arbitral awards.

3) Unless the HIGH Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish-

a) The original arbitral award or a duly certified copy of it; and

b) The original arbitration agreement or a duly certified copy of it.

4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translated f it into the English language.

5) In this section, the expression "New York Convention" means the Convention on the Recognition and Enforcement of foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June 1958, and acceded to by Kenya on the 10th February 1989, with a reciprocity reservation."

14. The said section requires an applicant seeking the recognition and enforcement of an arbitral award to furnish the court with the original arbitral award or a certified copy thereof and the original arbitration agreement or a duly certified copy of it.

15. Non-compliance with Section 36(3) renders the enforcement application defective. This is the position that was taken in ***Ndiritu Muchemi Michael & 2 Others v Ashbell [2018] eKLR*** it was held: -

"21. …. the provisions of Section 36 (3) of the Act make it mandatory that the original Arbitral Award or a duly certified copy of it must be furnished by the Applicant making an application under the Section. The Respondent faults the Application on the grounds that the original and/or certified copy of the Award has not been provided.

22. I have gone through the documents annexed to the Affidavit sworn by Dr. Ndiritu and I note that she states at Paragraph 2 thereof that: "the arbitral awards were served upon the Applicants advocates on 13th April, 2015. Annexed herein and marked "NMN 1" is a true copy of the said award." That annexture is attached. The only clear thing is that the said annexed Award is not the "original" copy and is not certified. Yet the provisions are very clear, the copy that should be annexed to the Application must be a "duly certified copy." Similarly, Section 36(3)(b) states that "in addition to provision of the original certified copy of the Arbitral Award, the original Arbitration Agreement or a duly certified copy thereof must be provided." <u>That has not been done herein</u>.

23. In that regard, the Applicants in their Application dated 29th September, 2016 have not fully complied with the mandatory provisions of order 36 (3) of the Arbitration Act. Therefore, there is no competent Application before the Court for consideration. The Application is consequently struck out and all the prayers therein fall by the way. As regards the Application dated 2nd December, 2016, the Respondent argued that it is frivolous and a waste of Court's time. That no Appeal can lie against the decision of the High Court. I note that these grounds do not fault the "competence" of the Application. In that case, I consider the merits of the Application thereof."

16. Guided by the above decision, I find that I cannot re-invent the wheel on the requirement that an applicant for orders to enforce an award must furnish original or certified copies of the award and contract that was the subject of the arbitration. For the above reasons, this court would have moved to strike out the application for non-compliance with the provisions of Section 36(3) of the Act. However, since no timelines are set for filing the documents under **Section 36 of Arbitration Act** and in order to comply with legal provisions and in the wider interest of justice, I order that the applicant shall file the original Arbitration Agreement and the two Awards in Court through Deputy Registrar Commercial & Tax Division within 14 days from the date of this ruling and serve the Respondent. It is only after proper service of the Original or duly certified copy of Arbitration Agreement and Awards that the Court shall consider granting the order of recognition and enforcement of the Final Arbitral Award.

17. Mention on 22nd July 2021 for further orders.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

<u>In the presence of: -</u>

Mr. Andole for Obok for the Applicant.

Ms Misere for Respondent.

Court Assistant: Sylvia