



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E202 OF 2019

JAYDEN LIMITED.....APPLICANT

VERSUS

BRADLEY LIMITED.....RESPONDENT

RULING

1. This ruling is in respect to two applications dated 28th May 2019 and 11th October 2019.
2. Through the application dated 28th May 2019, the applicant seeks orders for recognition and adoption of an Arbitral Award delivered 2nd April 2019 in an arbitration between the parties conducted by Nairobi Centre of International Arbitration pursuant to an arbitration agreement.
3. The applicant also seeks leave to enforce the said award as a judgment and decree of this court. The application is supported by the affidavit of Peter Mugo and is brought under Section 36(1) of the Arbitration Act (herein after “the Act”) and Rules 6 and 9 of the Arbitration Rules 1997.
4. The respondent did not file day response to the application.
5. At the hearing of the application, Mr. Litoro, learned counsel for the applicant submitted that the application ought to be allowed as prayed as it is unopposed. Counsel further submitted that the award in question having been published on 2nd April 2019, the period of 3 months provided for under Section 35(3) of the Act for lodging an application to set aside the arbitral award had long lapsed and further, that the Act does not provide for the enlargement of such period.
6. I have considered the application dated 28th May 2018. I am satisfied that the respondent was duly served with the application but opted not to oppose it. The court record shows that on 3rd June 2019, when the application first came up for hearing before me, Mr. Njenga, learned counsel for the respondent stated as follows:

“I am yet to file a response to the application. I have advised my client to consider honouring the award. I pray for a mention date to talk to my client.”
7. The case was subsequently mentioned on 13th August 2019 and 17th September 2019 when the same was listed for hearing on 28th January 2020 by consent when the respondent’s counsel did not attend court.
8. In view of the undisputed fact that there is no challenge to the arbitral award and that the said award has not been honoured, I find that the present application satisfies the legal and evidential threshold set out at Section 36 and 37 of the Arbitration Act which stipulate as follows:

[36]. 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 any 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 translation of 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.*

[37]. Grounds for refusal of recognition or enforcement

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

(i) a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) *If an application for the 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 the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.*

9. For the above reasons I find that the application dated 28th May 2019 is merited and I allow it as prayed with costs to the applicant.

10. Turning to the application dated 11th October 2019, I note that it seeks orders for attachment before judgment. The application is not opposed. The applicant's case is that in view of the fact that the Award has not been set aside and flowing from the orders issued in the earlier application dated 28th May 2019, a case has been made for the granting of the orders sought in the later application.

11. The applicant submitted on the principles for granting orders under order 39 of the Civil Procedure Rules. Counsel cited the decision in the case of *International Air Transport Association & Another –V- Akarim Agencies Company Limited & 2 Others*[2014] e KLR wherein it was held:-

[31] The threshold for the grant of freezing order are enunciated in *GOODE ON COMMERCIAL LAW*, 4th Edition at page 1287 to be as follows:

“ The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctionsBefore granting a freezing injunction the court will usually require to be satisfied that;

a. *The claimant has ‘a good arguable case’ based on a pre-existing cause of action;*

b. The claim is one over which the court has jurisdiction;

c. The defendant appears to have assets within the jurisdiction;

d. There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and

e. There is a balance of convenience in favour of granting the injunction;

f. The court can also order disclosure of documents of the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”

[32] “Arguable case” has been assigned a meaning within the context of freezing order and has been adopted with approval by many courts in Kenya. See the case of AFRICAN BANKING CORPORATION LIMITED –VS- NETSATAR LIMITED & 6 OTHERS NAIROBI MILIMANI HCC NO. 299 OF 2009 (UR) where the court observed that:

“ A “good arguable case” was defined by Mustill J. in the Niedersachsen[1983] 2 Lloyd’s Rep 600 at page 605 to be:

“ One which is more than barely capable of serious argument, but not necessarily one which the judge consider would have a better than 50 per cent chance of success.”

This in my view, is a sound principle to rely on in establishing whether a plaintiff has a good arguable case.”

12. Counsel submitted that not only does the applicant have an arguable case against the respondent having obtained an Award that has not been challenged but that it has also proved that there is a real risk that the respondent will avoid, obstruct or delay the judgment that may be passed against it.

13. I have considered the application dated 11th October 2019 together with the supporting affidavit and the submissions by counsel for the applicant. I note that the respondent did not present any submissions to the said application

14. I am satisfied that the applicant has made out a case for the granting of the orders sought in the said application.

Consequently, I allow the application dated 11th October 2019 with costs to the applicant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of May 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Osoro for Applicant

No appearance Njengu for Respondent

C/A & DR Hon Wanyama

W. A. OKWANY

JUDGE