REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS CAUSE NUBER E517 OF 2019

FEDERICA MARTINA FERRO..PLAINTIFF/APPLICANT

VERSUS

GABRIELLA ZOURAS FERRO..DEFENDANT/RESPONDENT

RULING

1. The ruling herein relates to a chamber summons application dated 7th October 2019, brought under the provisions of; Section 36(2), (3) of the Arbitration Act, 1995, as amended by; Section 27 of the Arbitration (Amendment) Act No 11 of 2009, and Section 1A (1), (2) and (3), Sections 3A and 59, of the Civil Procedure Act

2. The Applicant is seeking for orders as follows: -

a) *That the Arbitration award dated 10th June 2019, be recognized and enforced as a decree of this Honourable Court; and*

b) That the costs of this application be borne by the Respondent.

3. The application is based on the grounds thereto and the affidavit dated 3rd October 2019, sworn by the Applicant's Attorney; Stefano de Bosio. He disposed in a nutshell that, the Respondent claimed to have a dispute with the Applicant under a Settlement Agreement dated 19th January 2018. The Respondent further claimed that the Agreement had an arbitral clause and referred the dispute to arbitration.

4. However, the Applicant raised a preliminary objection on the ground that the agreement did not exist and therefore there was no arbitral clause, and the Arbitral Tribunal (herein "the Tribunal") had no jurisdiction to hear and determine the dispute. The Tribunal heard the preliminary objection, upheld it and awarded the Applicant the costs of the arbitration proceedings in the sum of; Euro 15, 237. 26 and Euro 54,000.00, being the Applicant's legal fees and expenses. However, the Respondent has failed and/or neglected to settle the amounts awarded. That, the Respondent is currently residing in Malindi within the jurisdiction of this court and hence the plea for the grant of the orders sought herein.

5. The Respondent however, opposed the application vide her replying affidavit, sworn and dated 6th November 2019, wherein she averred that, the arbitral proceedings which culminated in the said arbitral award were governed by the provisions of the Italian law, specifically; Article 839 and 840 of the Italian Code of Civil Procedure, which provides for a procedure of settlement of any court orders.

6. The Applicant has failed, refused and/or ignored to process and obtain a warrant requiring the Respondent to pay the requisite amounts and state how much, where, when to pay and in which currency and/or bank account the monies should be paid in. Further there has been no correspondence from the Applicant giving the aforesaid requisite details.

7. The only reason why the Applicant has refused to abide by the provisions of the Italian law, is because the Applicant owes her a sum of Euros 700,000, and is aware that, upon such a demand being made, the Respondent would apply to set off that amount against the Applicant's claim amount. Thus, by refusing to follow the provisions as laid down in the Italian laws, the Applicant has brought the proceedings in bad faith with a view to evading justice before the courts in Italy.

8. The Respondent also averred that, the arbitral agreement which forms the basis of the jurisdiction to recognize and enforce foreign arbitral award was never filed by the parties, in accordance with the New York Convention (herein "the Convention") on the Recognition and Enforcement of Foreign Arbitral Award. Consequently, the arbitral award sought to be recognised and enforced in Kenya is not capable of recognition and/or enforcement under the Convention.

9. Further the court has no jurisdiction to intervene in arbitral proceedings except as is expressly provided for under sections; 10, 36 (2) and (5), and 37 (1) of the Arbitration Act, No. 4 of 1995, and the Convention. Consequently, the arbitral award has not yet become binding on the Respondent within the meaning of section 37(1) (a) (vi) of the Arbitration Act and cannot be recognised and/or enforced by the court.

10. That, it is also contrary to public policy in Kenya to grant such orders, where the Applicant is seeking to wrongfully, illegally and dishonestly to use the court as an instrument for evading justice in Italy and/or defeating the course of justice before the courts in Italy and is a violation of the constitution of Kenya. The application is thus an abuse of the court process, as the Respondent is ready and willing to pay and not incur unnecessary costs in the process. Finally, the refusal to grant the orders herein will not cause any prejudice to the Applicant since she still can obtain the same orders before the courts in Italy.

11. However, the Applicant filed a response through a further affidavit dated 10th December 2019, sworn by Stefano Di Bosio. He averred that, the replying affidavit does not raise any serious issues to warrant the courts' refusal to recognise and enforce the arbitral award. There are no provisions under Italian law for processing of a warrant, in order to enforce an arbitral award in another jurisdiction, capable of enforcing such an award. Neither is there provisions that provide that, an order for costs by an Arbitral tribunal cannot be enforced outside Italy.

12. Further, the alleged sum of Euros 700,000, was the subject matter of the arbitration proceedings in Italy and the arbitral tribunal found that the alleged contract was never concluded and therefore the debt is non-existent. The correspondence produced by the Respondent as "GZF-1" is privileged information between Advocates and cannot be used as evidence. The same is scandalous, frivolous and vexatious.

13. That, an authenticated copy of the award from the Milan Chamber of Commerce and a certified translation is on record. It is a final award capable of being recognised and enforced within the meaning of section 36 of the Arbitration Act and in line with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Kenya is a party.

14. Finally, the Respondent has not shown how the recognition and enforcement of the arbitral award by the courts in Kenya would be contrary to public policy. In any case, the recognition and enforcement of such an award is in line with the Kenyan public policy to promote dispute resolution by way of arbitration in line with the provisions of; the Arbitration Act and the Constitution of Kenya 2010.

15. However, before I consider the arguments advanced on application, it suffices to note that, the Respondent filed a chamber summons application dated 23rd January 2020, under the provisions of; Sections 1A, 1B and 3A of the Civil Procedure Act (cap 21), Order 19 Rule (2) and (9) of the Civil Procedure Rules 2010, seeking for orders that: -

> a) *Stefano de Bosio attends court for cross examination on the contents of paragraphs 4(a) and (b), 6 and 7 of his further affidavit sworn on 10th December 2019 at Milano;*
>
> b) *In the alternative, paragraphs 4(a) and (b), 6 and 7 of the further affidavit sworn by Stefano de Bosio on 10th December, 2019 at Milano be struck out;*
>
> *c) The costs of this application be borne by the Respondent.*

16. The application is based on the grounds and the Respondent's affidavit dated 23rd January 2020. She avers that, Stefano de Bosio has averred on incorrect points of law and facts and therefore ought to be cross examined to enable the court ascertain whether he is guilty of perjury and which questions asked on cross examination are relevant to the issues in the application herein. Further the affidavit offends the provisions of; Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 and neither will the intended cross examination prejudice the application dated 7th October 2019.

17. However, the Applicant filed a replying affidavit sworn by Stefano de Bosio in response to the application, and termed the application as scandalous, frivolous and vexations and ought to be struck out. He deposed that, the application has been filed with the aim of delaying the Applicant's application. It is improper to make an application to cross examine a deponent on matters of law, which are properly dealt with by the court upon hearing the parties and are not subject of cross examination.

18. I have considered the entire arguments on whether, the deponent of the affidavit in support of the main application should be availed for cross examination and I find that, first and foremost, it is Respondent who avers that, the Applicant has not complied with the provisions of Italian Civil Procedure Code, which govern enforcement of court order including an order for costs.

19. It is trite law that he who alleges proves. Once the Applicant denied the existence of subject procedural provisions, the Respondent was put on notice to identify, specify and/or bring to the knowledge of the court the existence of the said provisions. If the provisions of the Italian Civil Code exist, as alleged the court will interpret the same and there will be no need for cross examination of the deponent. Secondly, if there are issue of facts, a response through a replying affidavit should be sufficient and submissions thereafter should point out any discrepancies. In any case, the parties have fully canvassed the Applicant's application for recognition and enforcement of the award and it should be determined, in the interest of justice and expeditious disposal thereof. As a consequence, the Application by the Respondent is not allowed.

20. The Applicant's application was disposed of vide written submission. The Applicant invited the court to determine whether; the Tribunal had the power to rule on the issue of its jurisdiction and/or make an award for costs and whether the arbitral award should be enforced.

21. The Applicant submitted that, legal doctrine of; *competence-competence* that allows an arbitral body power to decide on whether or not it has jurisdiction to hear a dispute, has since been accepted in the Kenyan jurisprudence. That, in the case of; ***Safari com Limited vs Oceanview Beach Hotel Limited &2 Others (2010), e KLR,*** the Court of Appeal, held that a Tribunal has the power and mandate to decide on

the issue of its jurisdiction.

22. Furthermore, that the doctrine has been codified under section 17 of the Arbitration Act No. 4 of 1995 which gives an Arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. Therefore, it was well within the mandate of the Tribunal to rule that, it had no jurisdiction to determine the dispute.

23. However, the Respondent submitted that the authority relied upon by the Applicant is irrelevant since it concerns the enforcement of a local arbitral award and supports the provisions of the Arbitration Act. That, section 37 of the Arbitration Act provides that, the Convention shall apply in enforcement and/or recognition of foreign arbitral award.

24. I have considered the aforesaid arguments on the subject issue and I find that, first and foremost, the issue of the Tribunal's jurisdiction was canvassed before the Tribunal and an appeal against it can only be raised before the courts within the jurisdiction where the award was rendered. Therefore, for all intent and purpose unless that decision has been set aside, this court will uphold it. On that basis it stands that, the Tribunal had the mandate to rule on its own jurisdiction.

25. Be that as it were, generally where the Tribunal makes a decision that no valid arbitration agreement exists, that decision would include at the same time, a corollary finding that, the Tribunal also lacked power to determine on its own jurisdiction, since there was no basis, for such jurisdiction. One possible solution would be to refer all questions on the Tribunal's jurisdiction to courts. However, a recalcitrant party could create considerable delay merely contesting the existence of the validity of the arbitration agreement, which will seriously undermine arbitration as a dispute resolution mechanism.

26. It is against this background that, the doctrine of *competence-competence*, evolved to avoid these draw backs. The doctrine is a legal fiction granting the Tribunal power to rule on its own jurisdiction. In that regard, Article 36(6) of the International Court of Justice, (ICJ), allows the court to rule on its own jurisdiction.

27. A comparative competence was recognised for arbitration tribunal under Article V (3) of the European Convention, which provides: -

> "*Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or any validity of the arbitration agreement or of the contract of which the agreement forms part*"

28. The doctrine has since found recognition in; Article 41(1) of the ICSID and is firmly established in most arbitration laws. Article 16 (1) of the Model Law also affirms the doctrine and so do the provisions of; section 17 of the Arbitration Act No. 4 of 1995. However, even where such provisions do not exist the Tribunals have traditionally, assumed a right to rule on its own jurisdiction.

29. In the case of; *TOPCO v Libya 104 Clunet 350 (1977)* the arbitrator held that he has jurisdiction to rule on his jurisdiction, basing his decision primarily on;

> "—*a customary rule, which has the character of necessity, derived from the jurisdictional nature of the arbitration, confirmed by the case law more than 100 years old and recognized unanimously by the writing of legal scholars*"

30. Based on the aforesaid I find and hold that the Tribunal had the mandate to decide on the issue of its jurisdiction. The next issue to determine is whether this court has jurisdiction to hear and determine the subject application.

31. In that regard, the provision of; Article III of the Convention are unambiguous in providing that: "each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon" In addition, Article III mandates that, a foreign award must be enforced without unnecessary inconvenience or excess fees, and the conditions; set out in Article IV of the Convention, must not be more onerous than those for domestic awards.

32. Similarly, national laws also contain provisions relating to enforcement of foreign awards and usually incorporate verbatim the text of the relevant international convention and add procedural rules of national implementations or merely provide that enforcement of foreign awards will be governed by the New York Convention.

33. In the instant case, it suffices to note that, Kenya ratified the New York Convention on 10th February 1989. The provisions of; Article 2 (6) of the Constitution, 2010, "any treaty or convention ratified by Kenya shall form part of the law of Kenya." Therefore, the Convention is applicable and enforceable by the national courts as any other statute enacted by Kenyan parliament.

34. The Respondent referred to the Court of Appeal the case of; *Caren Njeri Kandie Vs Alsanne BA & Another (2005) eKLR*, to submit that, the provisions of the Convention overrides or prevails over conflicting provisions of the Arbitration Act, if any. That the governing law in this case is therefore that, the Convention as interpreted, developed and clarified by the case law, prohibits this court from recognizing as binding and/or enforcing the arbitral award sought to be enforced herein.

35. However, it is noteworthy that, the provisions on which the application is premised of; section 36(2) and (3) of the Arbitration Act, provides that; -

> *(2) An international arbitration award shall be recognised 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*.

36. In my considered opinion the provisions of, Article 2(6) 0f the Constitution domesticated the provisions of Article III of the Convention and were subsequently codified under section 36(2) of the Arbitration Act. All these provisions confer upon the courts in Kenya the power and/or jurisdiction to hear and determine an application for recognition and enforcement of foreign awards. The court therefore has the jurisdiction to hear and determine this application.

37. Similarly, the pre-requisites for enforcement require the court to have jurisdiction over the Respondent. In general, the existence of assets within the country is sufficient, to establish jurisdiction for enforcement actions. If the award creditor has investigated where the assets are, then the proceedings will be expeditious, efficient and less costly.

38. The Respondent submitted that, she has no attachable assets in Kenya which can be used to settle the arbitral award, even if the award is to be recognized as an order of the court, the court will be acting in vain. That, she used to be the rightful proprietor of; a house on Sheila Island, Lamu under Title No. Lamu/Block IV/162, but the title has since been revoked through Kenya Gazette Notice No. 5564 Published on 21st May, 2010. She also stays in Germany and Italy and no allegation has been made or evidence furnished to prove that, she doesn't own any property or assets in Italy and Germany, which can be used to satisfy the arbitral award sought to be recognized and/or enforced.

39. However, the Applicant maintained that the Respondent resides in Malindi within the jurisdiction of the court. The averments raised by the Respondent above were raised I the submissions and not in the replying affidavit even then there is no evidence of the alleged gazette notice.

40. In addition, the main statutory prerequisite conditions do not require proof of Respondent's assets within the jurisdiction of the enforcing court. I find that once the arbitral award is recognised as an order of the court, enforcement follows, and the tracing of assets for attachment rests on the Applicant. It cannot be a ground of refusal to recognise the award for enforcement.

41. The next issue to consider is whether, the Applicant has met the criteria for grant of the orders sought. Article IV of the Convention imposes minimum formal conditions, to make the formal requirements for enforcement as simple as possible. These provisions prevail over stricter national law in respect of foreign awards. The party seeking to obtain the recognition and enforcement shall, at the time of the application supply: -

> *a) The duly authenticated original award or a duly certified copy thereof:*
>
> *b) The original agreement referred to in Article II or a duly certified copy thereof*.

42. Similar provisions are provided for under section 36(3) of the Arbitration Act No. 4 of 1995, which states that; -.

> *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.*

43. The Respondent argues that, the Italian Arbitral Tribunal, Milan Chambers of Commerce based in Italy, found and expressly held that, the arbitration agreement was not valid within the meaning of Article II of the Convention. And since it is the arbitration which clothes the Tribunal with jurisdiction to determine issues before it, there being no such agreement, the Tribunal was ripped off the power the make the award for costs.

44. However, the Applicant submitted that, the issue before the Tribunal was whether or not there was an arbitral agreement and the Tribunal struck out the arbitration proceedings as there was no arbitral agreement and therefore it is unconscionable for the Respondent to require the Applicant to produce what does not exist.

45. I have considered the arguments advanced and I find that, it is not in dispute that the Tribunal found that there was no arbitration agreement Therefore, the Respondent cannot argue that the Applicant has failed to produce the original or a duly certified copy of the arbitration agreement. The noncompliance with that prerequisite is explained sufficiently. The certified copy of the award was availed. In my opinion, the statutory conditions referred to are satisfied.

46. The Respondent further submitted that, the mandatory procedural conditions and/or enforcement of foreign award have not been complied with, as no application to recognize and enforce an arbitral award outside Italy is permitted unless, it can be shown that all efforts have been made to secure payment in Italy and has been unsuccessful. The Respondent relied on section 825 of Italian Civil Procedure Code, which provides that, a party who intends to enforce an award is required to file a request to the court at the seat of the arbitration tribunal for fixing exequatur.

47. It was further submitted that, an award for cost is recoverable, upon registration of the same as any other order of the court and the award for cost only cannot be enforced outside Italy. The only arbitral award which can be enforced outside Italy is an arbitral award which directs compensation alongside payment of costs.

48. However, the Applicant submitted that, the Practice Guideline of the Institute of Chartered Arbitrators, an award of costs is perfectly enforceable in line with the provisions of the Convention. Further Italian law does not have a provision that requires a preliminary warrant in relation to the request of an exequatur of an Italian arbitration in another jurisdiction.

49. However, in further response the Respondent submitted that, the Chartered Institute of Arbitrators; International Arbitration Practice Guidelines on Jurisdictional Challenges, has no force of law in Kenya since the Tribunal found and expressly held that, it did not have jurisdiction to hear and determine the alleged issues before it, as there was no valid arbitral agreement between the parties. The matter is not about the challenge of the jurisdiction of the Tribunal and as such the Charter is not applicable in this case.

50. I have considered the submissions on the issue under consideration and it is noteworthy that, the Convention, offers no definition of an award, Article 1 (2) thereof provides that; "arbitral awards" shall include not only awards made by the arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted. Therefore, the decisions of the Tribunal which determine finally a specific issue and have res judicata effect may be enforced. The decision may be jurisdictional decisions (see; Di Pietro and Plate, Enforcement of International Arbitration Awards pages 31-56), and will normally be final. It is noteworthy that he decision of the Tribunal herein, is not interim. It is a final decision.

51. Be that as it were, I have already ruled on the issue of none compliance with the Italian law, even then under Article III of the Convention, the contacting state shall recognize awards as binding and enforce them in accordance with "the rules of procedure of the territory where the award is relied on". Therefore, having held the court has jurisdiction to hear and determine the subject application the rules of procedure that govern the application herein is national rules of procedure.

52. The Respondent further submitted that the enforcement of the arbitral award would also be contrary to the public policy by reason of the fact that it would facilitate and abet deliberate violation of the provisions of Italian law in pursuit of selfish but immoral goals.

53. However, the Applicant submitted that, the enforcement of an arbitral award is an automatic process which is provided for in the Arbitration Act and Convention. A court can only interfere with the process, if it has been shown that there are valid reasons for not doing so, based on the ground provided for in section 37 of the Arbitration Act, as held in the case of; *Lalji Meghji Patel & Co. Limited v Nature Green Holdings Limited (2017) e KLR.* The Respondent has not shown any valid grounds upon which the court should not proceed to enforce the arbitral award, which is line with public policy.

54. Further, the Respondent not only instituted but also participated in the arbitral proceedings. It is therefore in the interest of justice and in line with Kenya's public policy to enforce the arbitral award. The case of; *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited (2017) e KLR* was relied on.

55. I have considered the subject issue and I find that, under section 37 of the Arbitration Act No. 4 of 1995, the grounds for refusal of recognition or enforcement includes the fact that; the subject matter of the dispute is not capable of settlements by arbitration under the law of Kenya or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

56. Similarly, Article V (2) of the Convention, provide further grounds on which an award may not be enforced. It provides recognition and enforcement will be declined, if the subject matter is not capable of settlement by arbitration under the law of the enforcing country; or would be contrary to the public policy of that country.

57. Indeed, as observed by as per Borrough J, in *Richardson v Melish (1892) 2Bing 229, 252,* public policy "is never argued but where other points fail" That this ground is usually construed narrowly. In fact, only violations of the enforcement state's public policy with respect to international relations is a valid defence. Thus, it is difficult if not impossible to define public policy.

58. In the Court of Appeal case of; *DST v Rakol* (1987), 2 Lloyd's Rep.264, 254, the court held that;

> "*consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution…..It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and full informed member of the public on whose behalf the powers of the state are exercised*"

59. Further, public policy has by its very nature, a dynamic character, so that any classification may crystallise public policy only at a certain period of time. In the case of*; Renusagar Power Co, Ltd v General Electric Co, (1995) XX YBCA 681, para 24,* the Supreme Court of India observed that;

> "*The basic tenet of this provision is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement is sought from being harmed…"*

60. Further in the year 2000 and 2002, the International Law Association Committee on International Commercial Arbitration published a report and a resolution on "public policy as a bar to the enforcement of foreign arbitration awards". The report offers a guidance for the classification of public policy grounds as procedural or substantive. Accordingly, possible procedural public policy grounds include, fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of law; manifest disregard of the facts; annulment of place of arbitration. The report further lists as substantive public policy grounds mandatory rules, /*lois de police*; fundamental principles of law; actions contrary to good morals; and national interest/foreign relations.

61. Be that as it may, it is upon the Respondent to show which public policy is being violated. A mere allegation will not suffice. In the case of; *Deutsche Schachtbau-und Tiefbohrgesellscraft mbH v Ras Al Khaimah National Oil Company (1987) Lloyd's Rep 246,* the court held that, where public policy considerations are invoked, it has to be shown that, there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the powers of the state are exercised.

62. The Respondent has not adduced evidence to support the alleged ground of public policy or how the award is injurious or prejudicial to her and/or the public. Therefore, and I find and hold that, the Respondent has not proved that, the arbitral award herein violates the public policy.

63. Finally, before I concluded this matter an issue arose as regards the sum of Euros 700,000. The Applicant submitted that, there is no evidence by way of a decree or an arbitral award, that she owes the Respondent Euros 700,000 and referred to the case of; *Gaitarau Peter Munya v Dickson Mwenda Kithinji [2014] e KLR,* where the Supreme court held that: -

> "*the person who makes an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of law. On the other hand, the evidential burden is shifting one, and is a requisite response to an already discharged initial burden"*

64. It was further submitted that, the Honourable court does not have the jurisdiction to determine any alleged dispute on this issue, as the court is not authorised to undertake any other role other than either the recognition and enforcement of the award or the setting aside of the said award and relied on the Court of Appeal, case of; A*nne Mumbi Hinga vs Victoria Njoki Gathara Civil Appeal No 8 of 2009*. Even then the Respondent can still enforce her rights against the Applicant.

65. The Respondent did not submit on the issue and having considered the law and submissions by the Applicant, I concur that, the issue is not available for determination at this stage. The court has no evidence of a decree or an award that the sum is owed and/or should be set off the claim amount herein.

66. In summation I find that, the Applicant has met the threshold of grant of orders sought in the chamber summons application dated 7th October 2019 and l allow it as prayed in terms of prayer (1). However, taking into account, the Applicant's own submission that orders sought for herein are a mere formality, therefore whether the Respondent opposed the application or not, the application would be made anyway, the costs thereof will be in the cause. Ito the contrary, the Respondent choose to oppose the application and therefore will bear her own costs.

67. It is so ordered

Dated, delivered virtually and signed on this 7th Day of September 2020

GRACE L NZIOKA

JUDGE

In the presence of;

Ms Onyango for the Applicant

Mr. Munyua for the Respondent

Robert ----------Court Assistant