



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 186 OF 2017**

**FANAKA VIJANA INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSAM SERVICES LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff filed a Chamber Summons dated 16<sup>th</sup> July, 2018 supported by the grounds set out on the body thereof and the sworn affidavit of *Alice Wairimu Mugo*. The orders sought therein are:

**i) Spent.**

**ii) THAT the arbitral award made by Kenneth Akide on 12<sup>th</sup> June, 2018 be adopted by this Honourable Court and leave be granted to the plaintiff/applicant to enforce the said award as a decree.**

**iii) THAT the deputy registrar do issue a decree to the plaintiff/applicant.**

2. The deponent, *Alice Wairimu Mugo*, stated that following the institution of arbitration proceedings involving the parties herein, the arbitrator in making his award ordered the defendant/respondent to pay the sum of Kshs.1,000,000/= together with interest and penalties amounting to Kshs.1,636,000/= to the plaintiff/applicant. The deponent added that the defendant/respondent is yet to comply with the award and hence the need to enforce the decree.

3. *John Nyabuti* swore a replying affidavit in response thereto, asserting that a freezing order had previously been issued by the court and hence granting the prayers sought in the Chamber Summons would be a futile exercise; that the award made by the arbitrator is incapable of enforcement by this court and in any case, the proper procedure for enforcing arbitral orders has not been followed; and that the sum of Kshs. 1,636,000/= sought by the plaintiff/applicant is unfounded.

4. The parties were directed to file written submissions and it would appear only the plaintiff/applicant complied. That said, the plaintiff/applicant in essence submitted that the arbitral award has not been challenged or otherwise set aside; that an award once made can be enforced pursuant to Section 36 of the Arbitration Act and that the plaintiff/applicant has proved that the orders sought are valid and ought to be granted since the defendant/respondent has since failed to comply accordingly with the award.

5. I have taken into consideration the averments articulated in the application and affidavit in support thereof, together with the contents of the replying affidavit and submissions by the plaintiff/applicant.

6. I gather that the first issue to be addressed concerns whether or not the arbitral award is enforceable as it stands. Upon perusal of the same, I have established that the arbitrator drew guidance from the written agreement between the parties coupled with their conduct in determining that the same was valid and subsequently breached by the defendant/respondent. Consequently, he ordered the said defendant/respondent to pay to the claimant the principal amount of Kshs.1,000,000/= together with the accrued interest and penalties from September, 2016 up to 7<sup>th</sup> April 2017 when the contract was terminated.

7. To my mind, there is nothing to show that the award is incapable of enforcement. In any case, the award was made in compliance with the form and content stipulated under Section 32 of the Arbitration Act and as far as I am aware, the defendant/respondent has not challenged the award in any way. That being the case, I find the arbitral award to be binding upon the parties.

8. In close reference to the above is the issue of whether or not the arbitral award can be enforced by this court. I first wish to make reference to Section 36 (1) of the Arbitration Act providing that:

**“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.”**

9. Furthermore, Section 36(3)(a) of the said Act is clear that:

**“Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—the original arbitral award or a duly certified copy of it”**

10. Upon perusal of the award availed by the plaintiff/applicant, I am able to confirm that the same is a certified copy of the original and hence the application is properly before me. This was as well appreciated by the High Court in *Lalji Meghji Patel & Co. Limited v Nature Green Holdings Limited [2017] eKLR* where a similar order for enforcement was sought and the learned judge had this to say in that regard:

**“The annexation of a certified copy of the arbitral award, the original agreement upon which the arbitral award was based, a formal application has been fixed and served upon the respondent, and there are no outstanding issues/application seeking to set aside the arbitral award.”**

11. Section 37 mentioned hereinabove lists the grounds on which the High Court can reject the enforcement of an arbitral award. In due consideration of the terms encompassing the award, I find no reason to deem that the award cannot be enforced by this court. As earlier indicated, the defendant/respondent has not sought to have the same set aside or afforded proof of invalidity of the award. In view of the foregoing, it is therefore safe to conclude that the High Court is bestowed with the power to enforce arbitral awards. Having determined so, I am convinced that conditions precedent to the enforcement of the award have been met.

12. In the end, I find merit in the Chamber Summons and allow the same as prayed. The plaintiff/applicant did not seek for costs and I will therefore make no such order.

Dated, signed and delivered at **NAIROBI** this **1<sup>st</sup>** day of **March, 2019**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent