



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E004 OF 2018

IN THE MATTER OF ARBITRATION BETWEEN RILEY SERVICES LIMITED (CLAIMANT)
AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA AND THE CHIEF
REGISTRAR OF THE JUDICIARY (RESPONDENT)

AND

IN THE MATTER OF THE ARBITRAL AWARDS

RILEY SERVICES LIMITEDAPPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA...1ST RESPONDENT

THE CHIEF REGISTRAR OF THE JUDICIARY2ND RESPONDENT

RULING

1.This ruling relates to an ex parte application, namely a chamber summons application dated 17th April 2018, brought under the Provisions of Section 36 of the Arbitration Act, Rules 4(3) and 6 of the Arbitration Rules, 1997 and Section 3A of the Civil Procedure Act.

2. The Applicant is seeking for orders as here below reproduced;

(i) That leave be granted to the Applicant herein, Riley Services Limited, to enforce the Arbitral Partial Award dated 18th April, 2017 as read together with the Final Arbitral Award dated 26th November 2017, as a Decree of the Honourable Court;

(ii) That a Decree do issue in terms of the Arbitral Award dated 18th April 2018 as read together with Final Arbitral Award dated 26th November 2017;

(iii) That costs of the Application be provided for.

3. The Application is premised on the grounds on the face of it and an affidavit in support dated 17th April 2018, sworn by Fred Odhiambo, the Sales and Marketing Director of the Applicant. He deposed

that the Applicant and the Judiciary of the Republic of Kenya, entered into an Agreement (herein “the Agreement”) dated 28th May 2013, for provision of Security services by the Applicant to the Judiciary, in its various premises throughout the Country.

4. That the Judiciary terminated the Agreement on 6th January 2015, and stopped the Applicant from providing security services to the it forthwith. Upon termination of the Agreement, the Applicant demanded from the Judiciary a sum of Kshs. 32,649,468.00, as due payment for the services rendered under the said Agreement. However, the Judiciary denied that any such sums were due and payable to the Applicant under the terminated Agreement.

5. Consequently the Applicant, by a letter dated 19th April 2016, gave a statutory notice to the Attorney-General’s office (herein “the 1st Respondent”) of its intention to institute recovery proceedings against it and the Judiciary (herein “the 2nd Respondent”). By a reply letter dated 28th June 2016, the 1st Respondent on behalf of the 2nd Respondent denied owing any sums of money to the Applicant under the Agreement

6. However, the Applicant avers that under clause 2.13 of the General Conditions of Contract, as read together with the clause 3.2 of the Special Conditions of Contract of the Agreement between the parties, it was mutually agreed that any dispute between the Parties would be resolved through Arbitration by a single Arbitrator, appointment by the parties and, in default appointed by the Chairman of the Chartered Institute of Arbitrators–Kenya Chapter.

7. Accordingly, the Applicant initiated the process of appointment of the sole Arbitrator to resolve the dispute regarding the amount of money due and owing to it by the Judiciary under the Agreement. By a letter dated 29th July 2016, the Chairman of the Chartered Institute of Arbitrators-Kenya Chapter proposed Mr. Philip Alier for appointment as the Sole Arbitrator over the dispute between the parties. The parties executed a statement of Independent and the Consent to Appointment dated 6th August 2016 appointing Mr. Alier as the Sole Arbitrator over the dispute. Consequently, by a letter dated 8th August, 2016, the Chairman of the Chartered Institute of Arbitrators-Kenya appointed Mr. Philip Alier to determine the dispute between the parties.

8. The parties accordingly executed the Terms of Appointment dated 26th September 2016 of Mr. Philip Alier; the Sole Arbitrator. Subsequently, the arbitration proceedings were conducted and upon considering oral testimonies of witnesses, witness statements and documentary evidence, and the submissions, the Arbitrator delivered a partial award dated 18th April 2017. The a final award dated 26th November 2017, was subsequently rendered and delivered to the parties vide email dated 4th December 2017.

9. It is averred that under the said partial and final awards, the Respondents are liable to pay the Applicant the sums made out as follows:-

a) Principal sum Kshs.27,827,127.50

b) Interest on (i) above at 14% p.a. from 1/2/2015 to 31/3/18 Kshs.12,336,693.55

c) Arbitration costs Kshs. 2,500,000.00

d) Refund of sums paid by the Applicant towards cots of theArbitral Tribunal & proceedings
Kshs. 2,615,000.00

Kshs. 45,278,821.05

10. Further that under the awards, interest due on the principal accrues from 1st February 2015, until payment in full at the rate of 14% per annum.

11. It is submitted that the Respondents have declined, failed and/or refused to comply with the arbitral awards, despite demand by the Applicant for compliance, thus the need for enforcement of the awards against the Respondents.

12. I have considered the Application and I note that it has been brought under Section 36 of the Arbitration Act, which deals with recognition and enforcement of awards. It states that, an arbitral award can only be recognized as binding and enforceable, after an Application in writing to the High Court for an order for the same and the order is granted.

13. Section 36(2) of the Act provides for the various items and/or documents which the Applicant needs to furnish to the Court. It states as follows:-

“36(2): unless the High Court otherwise orders, the party relying on an arbitral award for applying for its re-enforcement shall furnish:-

(a) the duly authenticated arbitral award or duly certified copy of it;

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

14. I have perused through the documents annexed to the affidavit in support of this Application and I note the following documents are annexed:-

(i) a demand letter dated 16th January 2016 (marked “FO1A”);

(ii) a reply to that letter dated 20th January 2016 (marked “FO1B”);

(iii) notice of intended Court proceedings served on the Attorney General (marked as “FO2A”);

(iv) the response to the notice dated 28th June 2016 (marked “FO2B”);

(v) a letter dated 6th June 2016, to the Chartered Institute of Arbitrators to appoint an Arbitrator, (marked as “FO3A”)

(vi) a response thereto dated 9th June 2016, from the chartered institute (marked “FO3B”);

(vii) a letter date 6th June 2016 to the 2nd Respondent for the appointment of the Arbitration (marked “FO3C”);

(viii) a letter dated 18th July 2016 written to the CEO of the Chartered Institute of Arbitrators confirming the appointment (marked “FO3D”);

(ix) a letter dated 29th July 2016, addressed to the Arbitration (marked “FO4A”);

(x) a statement of independence and consent to appointment dated 6th August 2016, (marked “FO4B”);

(xi) a letter dated 8th August 2016, for the appointment of an Arbitrator (marked “FO5”);

(xii) the document containing the terms of appointment of an Arbitrator (marked “FO6”);

(xiii) an email dated 4th December 2017 from the Arbitrator to the parties forwarding the final award dated 26th November 2017; (marked :FO7”)

(xiv) a letter dated 13th February 2018 addressed to the Chief Registrar of Judiciary demanding

the total sum of 44,629,521.05 (marked 'FO8').

15. It is therefore clear that the Applicant has not annexed the “original” and/or “certified” copy of the partial and/or final arbitral award, nor the original arbitration agreement or a duly certified copy thereof.

16. The provisions of section 36(2) of the Arbitration Act are couched in mandatory terms by use of the word “shall” and failure to comply with the same renders the application incurably defective. Even if the Court were to disregard the same, it cannot give an order to enforce awards not availed to enable it appreciate the content thereof and/or verify that indeed the amount sought as awarded was awarded and is due and owing.

17. Finally, I note from the Affidavit of service sworn by Dan Otieno Achando (the Process Server) that this application was served upon the office of the first Respondent, there is no evidence that it was served upon the 2nd Respondent yet according to the averments in the affidavit in support of the application, this partial and final arbitral award is enforceable against the 2nd Respondent. It is however expressed to be ex parte. But I note that Rule 4 and 5 of the Arbitration Rules 1997 require notice of the filing of the award, the cause number and Registry in which it has been filed be brought to all the parties.

18. Be that as it were, I find that the application is incompetent for non-compliance of the provisions of Section 36(2) of the Arbitration Act and in the given circumstances I strike it out.

19. Those, then are, the orders of the Court.

Dated, delivered and signed on this 13th day of June 2019 in an open Court, Nairobi.

G.L. NZIOKA

JUDGE

In the presence of:

Kyengo for Wahome:for the Applicant

No appearance :for the Respondent

Fred :Court Assistant