



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLICATION NO. E004 OF 2018**

**RILEY SERVICES LIMITED.....APPLICAN T**

**VERSUS**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF REGISTRAR OF THE JUDICIARY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The ruling relates to a notice of motion application dated 28<sup>th</sup> June 2018, brought under the provisions of Rule 11 of the Arbitration Rules, 1997, Sections 1A, 1B, 3A & 80 of the Civil Procedure Act, Cap 21, Order 45, Rules 1,2,3 & 5 and Order 51, Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law.

2. The Applicant is seeking for orders;

(i) *That the Honourable court be pleased to review and set aside its ruling and resultant orders delivered on 13<sup>th</sup> June 2018 by the court;*

(ii) *That the chamber summons herein dated 17<sup>th</sup> April 2018 be served on the Respondents and re-heard inter parties on merit;*

(iii) *That the costs of the application be provided for.*

3. The is premised on the grounds on the face of it and an affidavit dated 28<sup>th</sup> June 2018, sworn by Fred Odhiambo, a Director; Sales and Marketing of the Applicant. He deposed that, by a ruling delivered on 13<sup>th</sup> June 2018, the court struck out the Applicant's chamber summons application dated 17<sup>th</sup> April 2018, which sought for orders inter alia that; leave be granted to the Applicant to enforce the Arbitral partial award dated 18<sup>th</sup> April 2017; as read together with the Final arbitral Award dated 26<sup>th</sup> November 2017, as a decree of the Honourable court.

4. That the Application was struck out for the reason that the said application is incompetent for non-compliance with the provisions of Section 36(2) of the Arbitration Act, wherein the court stated at pages 8 and 9 thereof that:

*“....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. 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...”*,

5. That the said quoted statement of court in the impugned ruling is an error/mistake apparent on the face of the record as the said documents were in the court records and were before the court during the hearing of the said chamber summons dated 17<sup>th</sup> April 2018 and consideration of the said application by the court. Therefore the court did not have notice of and/or consider;

(i) *the certified copy of the Arbitration agreement contained in clause 2.13 of the General Conditions of Contract as read together with clause 3.2(2.13) of the Special Conditions of Contract in the Contract agreement dated 28<sup>th</sup> May 2013;*

(ii) *the Certified copy of the Arbitrator's Terms and conditions of appointment dated 26<sup>th</sup> September 2016;*

(iii) certified copy of the partial award dated 18<sup>th</sup> April 2017, and

(iv) the certified copy of the final award dated 26<sup>th</sup> November 2017 which were on record before the court, the same having been filed on 12<sup>th</sup> April 2018 in compliance with Section 36 of the Arbitration Act and Rule 4(1) of the Arbitration Rules, 1997.

6. That due the inadvertent omission by the Honourable court to take notice of and have regard to the documents filed in court by the Applicant in compliance with the mandatory requirements of Section 36 of the Arbitration Act, resulted in the order striking out the Applicant's chamber summons dated 17<sup>th</sup> April 2018, and is a sufficient reason warranting a review of the said ruling to avoid a miscarriage of justice.

7. That the orders for review sought herein are for the ends of justice in the circumstances of this matter and the Respondents will not be prejudiced in any way by a grant of the sought orders.

8. The Application was presented before the court and the court informed that the orders were based on ex parte application whereby the court directed the Applicant to dispose of the matter by filing skeleton submission which was done. The Applicant submitted that, the court's powers to review the impugned order is founded on Rule 11 of the Arbitration of the Arbitration Rules, 1997 as read together with Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

9. The Applicant relied on the case of; *Nairobi City Council vs Thabiti Enterprises Ltd (1997) eKLR* where Hon. Tonui J.A. (as he then was) held that, the court has unfettered discretion to review its own decrees or orders for any sufficient reason and make such orders as it deems fit on an application for review.

10. It was therefore a procedural and/or legal error for the court to strike out the chamber summons application dated 17<sup>th</sup> April 2018 on the basis that the mandatory documents under Section 36 of the Arbitration Act were not annexed to the supporting affidavit when the said provision as read together with the Arbitration Rules, 1997 do not require the said documents to be annexed to the supporting affidavit but only provide for the same to be furnished/provided to the court as the Applicant did by filing the same.

11. That the practice in compliance with Section 36(3) of the Arbitration Act and Rules 4 and 6 of the Arbitration Rules 1997, is for an Applicant to file the mandatory documents under Section 36(3) of the Act, followed by a chamber summons application for recognition and enforcement of an award as a decree of the High court (see; *Justus Nyang'aya vs Ivory Consult Ltd (2015) eKLR*). In the case of; *Open Joint Stock Company Xarubezhtroy Technology vs Gibb Africa Ltd (2017) eKLR*, the Applicant had filed the certified award in court together with the agreement which contained the Arbitration agreement pursuant to Section 36(3) of the Arbitration Act and later applied for recognition and enforcement of the award. The court held that the Applicant had satisfied the requirements under Section 36 of the Act and granted the application for recognition and enforcement. The Applicant's submitted that, in accordance with order 45 Rule 1 of the Civil Procedure Rules, there is shown sufficient reason warranting a review of the impugned orders.

12. That in the case of; *Tanzania National Roads Agency vs Kundan Singh Construction Ltd (2013) eKLR*, the court observed that the main issue for determination by a court seized of an application for recognition and enforcement of an arbitral award is whether the Applicant met the conditions stipulated in Section 36(3) of the Arbitration Act for recognition and enforcement of an arbitral award. It was the court's holding that Applicant who furnishes the court with requisite documents complies thereby.

13. The Applicant prayed that the court reviews and sets aside the impugned order striking out the said chamber summons dated 17<sup>th</sup> April 2018 and direct that the said chamber summons be served on the Respondents for hearing inter parties. This is because even though the Arbitration Rules permit applications for recognition and enforcement of awards to be made ex parte, the court has held and required that such applications be served on the Respondents to enable them exercise the right objection under Section 37 of the Arbitration Act. (See *Justus Nyang'aya vs Ivory Consult Ltd (2015) eKLR*).

14. I have considered the application, the prayers therein, the grounds and the affidavit in support. The main reason advanced for review of the court's ruling delivered on 13<sup>th</sup> June 2018, is that the court did not take cognizance of the documents required under Section 36 of the Arbitration Act to support an application for leave to enforce a partial or arbitral award. The Applicant avers that the documents were on the court record when the court held that they had not been provided and struck out the application for being incompetent. I have perused the court record and I note that, the subject application was filed on 25<sup>th</sup> April 2018. It was supported by an affidavit dated the same date. The documents annexed to that affidavit did not comply with the said provisions, and that informed the findings of the court.

15. However, it has been brought to the knowledge of the court that these documents had been filed earlier on in court on 12<sup>th</sup> April 2018. A fact which was not revealed in the supporting affidavit. I have now noted from these documents filed on 12<sup>th</sup> April 2018, there is a certified copies of; the arbitration agreement, the arbitrators terms and conditions of appointment dated 26<sup>th</sup> September 2016, partial award dated 18<sup>th</sup> April 2017 and a certified copy of the final award dated 26<sup>th</sup> November 2017.

16. In that regard, I find that the Applicant has made a case for review of the orders given on 13<sup>th</sup> June 2018. I therefore allow this subject application in terms of prayer (i) and (ii) and order that the costs of the application be in the cause.

17. It is so ordered.

**Dated, delivered and signed in an open court this 8<sup>th</sup> day of July 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Oluoch for the Applicant

No appearance for the Respondent

Dennis.....Court Assistant