



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 256 OF 2018

JOHN OMOLLO NYAKONGO(T.A H.R. GANIJEE & SONS)APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

R U L I N G

1. Before the court for determination is the Notice of Motion dated 3/10/2018 expressed to be brought pursuant to the provisions of section 36, Arbitration Act, Section 3A & 3B Civil Procedure Act as well as Rule 9, Arbitration Rules and Article 159 of the Constitution. It seeks order that:-

i. “This application be certified as urgent.

ii. This Honourable court be pleased to grant the applicant’s application for enforcement of the arbitral interim order herein annexed.

iii. The annexed interim order be enforced in a manner as if being a Decree of this Honourable Court.

iv. This Honourable Court gives Orders against the Respondents to pay accrued interests and damages.

v. The costs of this application and any other costs be provided for”.

2. The grounds disclosed to support the Application are that on 17/2/2017, the arbitrator awarded to the applicant costs in the sum of Kshs.208, 000/= to be paid before the next date set for hearing.

3. According to the documents exhibited, the order for costs was made on the 17/2/2017 in general terms but it took the Applicant to write to the arbitrator and ask for its costs in the specific sum of Kshs.208,990/= by a letter dated 8/3/2017. That request was apparently acceded to by the arbitrator who by his letter of 10/3/2017, asked the respondent to pay the costs as requested. What the applicant considered as arbitral award, therefore, is the sum ascertainable from the correspondent by the claimant’s advocates as acknowledged by the arbitrator.

4. When served with the application, the respondent filed a Replying Affidavit sworn on the 26/11/2018. The gist of the opposition is that there was no arbitral award to be recognized or enforced and further that a provision of Section 36 & 37 as well as Rule 5 of the Arbitration Act had not been satisfied. The position taken is that the direction on payment of costs did not constitute an award as defined under the statute but could only amount to direction by the arbitrator. It was also contended that no certified copy of the award had been exhibited just as was there was no copy of the arbitration agreement.

5. Once the Replying Affidavit was filed, the parties filed respective submissions and attended court to highlight the same. The applicant filed submissions dated 7/01/2019 and further submissions dated 9th April 2019 while the respondent’s submissions are dated 15/02/2019 and supported to lists of authorities dated 26/11/2018 and 18/2/2019. Those submissions were highlighted in court by the parties on 22/5/2019.

6. I have had the benefit of studying the submissions filed in line with the record of the Application and the response thereto. From my reading of the said papers, I have isolated the following issues for determination:-

a. Whether there is an arbitral award by the arbitrator capable of recognition and enforcement?

b. If the above be answered in the affirmative, whether the applicant has complied with the legal requirement for recognition and enforcement of such award to be entitled to the orders sought?

c. If the above is resolved in the affirmative whether the applicant is entitled to interests and damages on the sum awarded as costs?

7. Even though, the issues are three, the need to resolve the 2nd and 3rd would largely and wholly depend on the outcome of the first issue. If however the 1st issue be determined in the negative then the rest would become moot and purely academic and superfluous.

Existence of an award

8. The Arbitration Act defines an arbitral award to mean any award of an arbitral tribunal and an interim arbitral award. Would this be construed to mean any incidental and every preliminary order or direction by the arbitral tribunal? To determine this issue one must start from the Act itself and of assistance in Section 32 of the Act which provide for the form and content of an arbitral awards. The law commands that an award be in writing, signed by the arbitral tribunal, state the reasons for the award, state the date of the award and the seat of the arbitration. It is to me clear that the form and content prescribed to be contained in an award suggest and point to a formal determination not of the issues in the dispute and not just an incidental or preliminary direction like an order on costs of an adjournment made before the dispute is gone into.

9. An order on costs of an adjournment as in this matter would not even amount to a preliminary award (partial award) determining some and not all of the issues between the parties. [1]. I do find that for a decision of an arbitral tribunal to pass as an award, it must relate to the issues for determination even if only part of such issue be determined.

10. In the context of this matter, an order for payment of costs for an adjournment does not qualify as an award to be recognized and enforced. In coming to this conclusion I have had regard to the virtues over the years attributed to arbitration over litigation. The strongest of these attributes is that arbitration as a dispute resolution mechanism is faster, expeditious and cost efficient, further parties autonomy as much as it is more confidential as opposed to litigation.[2]

11. To further the said attributes of arbitration and general Alternative Dispute Resolution (ADR) mechanisms, courts are cautious not to interfere with party choice of forum so that the expected benefit of speedy disposal is achieved. Even courts intervention in the parties chosen forum is discouraged to further the final intended nature of the process

12. If the above remain the benefit of arbitration over litigation, as ordinarily undertaken before the court, then to allow every order or direction by the arbitral tribunal to be treated as an award and to be ran with to court, would be to slow down the dispute resolution and wholly dilute any benefit thereby expected.

13. Such is evidently depicted here. While the reference and appointment of the arbitral tribunal was done way back in early 2016, and the subject under on costs having been made in the months of February and March 2017, the lapse of more than two years is indeed a deep lesson on why an incidental and interlocutory order on costs should not be deemed an award for enforcement.

14. I would stop at that level and say that there is no award for recognition or enforcement just as much as I do find that “**ORDER FOR DIRECTIONS 11**” did not have the character and attributes of an award as circumscribed in the statute in as much as the order did not specify the costs. That the applicant wrote to arbitrator and asked for the quantified costs and that arbitral tribunal acceded to the request by asking the respondent to pay may not by itself make the order an award as to be amenable to enforcement.

15. That mode of determining the costs may itself invite the question whether there was observance of the right to be heard just as it opens up the need to find out if the award to be recognized and enforced was dated 17/2/2017 or on the 10/3/2017 when the arbitral tribunal asked the respondent to pay, and set period of compliance. I reiterate there has not been made any award capable of enforcement

16. The upshot is that I do find that there being no award for recognition and enforcement, there is no need to interrogate the other two issues with the consequence that the Notice of Motion dated 3/10/2018 fails for lack of merit and the same is thus dismissed with costs.

Dated and delivered at Mombasa this 17th day of September 2019.

P.J.O. OTIENO

JUDGE

[1] Section 32(6)

[2] Per Karanja JA in Nyutu Agrovet vs Airtel Networks Ltd [2015] eKLR