REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 360 OF 2018

CHINA OVERSEAS ENGINEERING GROUP CO LTD.....APPLICANT

VERSUS

CYRUS THE GREAT PETROLEUM GROUP.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's *Ex-parte* application Chamber Summons dated and filed on 22nd June 2018 was filed pursuant to the provisions of Section 36 Arbitration Act, Rules 4(1) & (2), Rule 9 and Rule 11 of the Arbitration Rules 1997, Section 1A, 1B and 3A of the 3A of the Civil Procedure Act and any other enabling provisions of the law. It sought the following orders:-

> 1. **That the Arbitral Award by Hon. Justice (Rtd) J.B Havelock Sole Arbitrator dated 24th May 2018 be and is hereby recognised as binding and adopted as judgment of the court.**
>
> 2. **That leave be granted to the Claimant/Applicant to enforce the said Award and/or Judgment as a Decree of the Honourable Court.**
>
> 3. **That a Decree be issued to the Claimant/Applicant for enforcement against the Respondent in the following terms:-**
>
> > **a. The Defendant/Respondent to pay the Claimant/Applicant the total sum of Kenya Shillings Eight Million, Seven Hundred and Thirty Four Thousand and Four Hundred (Ksh 8,734,400/=) or United States Dollars Eighty Four Thousand and Eight Hundred (USD 84,800/=).**
> >
> > **b. That the costs of this Application and as well as such costs and expenses as are incidental to the arbitration enforcement and execution of the Award herein be provided for.**
> >
> > **c. That the Defendant/Respondent to pay the Claimant/Applicant interests on sub clause 3(a) above at court rates being 14% from the date of filing the Statement of Claim on 10th October 2017 until payment in full.**
> >
> > **d. That the Defendant/Respondent to pay the Claimant/Applicant the awarded costs of the Arbitration and the suit herein, if not agreed upon, to be taxed by the Deputy Registrar.**

2. Its Written Submissions were dated and filed on 6th March 2019. On 29th March 2019, the Respondent informed this court that it would not be filing any Written Submissions but it would only rely on the Replying Affidavit that it filed on 8th March 2019.

3. The decision herein has therefore been based on the said Applicant's Written Submissions only.

THE APPLICANT'S CASE

4. The Applicant's application was supported by the Affidavit of its Legal Officer, Victoria Mukiri, that was sworn on 22nd June 2019.

5. The Applicant stated that on 8th April 2016, it entered into a contract with the Respondent in which the Respondent was to supply it with Bitumen Grade 60/70 and Grade 80/100 at a cost of United States Dollars Four Hundred and Forty Three Thousand, Two Hundred only

($443,200) which was equivalent to Kenya Shillings Forty Five Million, Six Hundred and Forty Nine Thousand, Six Hundred only (Ksh 45,649,600/=)

6. It averred that a dispute arose between them and the matter was referred to Nairobi Centre of International Arbitration (NCIA) and (Rtd) Justice J.B. Havelock as the sole arbitrator. He heard the matter and rendered Final Award in favour of the Applicant against the Respondent for the sum of Kenya Shillings Eight Million, Seven Hundred and Thirty Four Thousand, Four Hundred Only (Kshs 8,734,400/=).

7. It was its contention that the Respondent had refused to pay it the said sum of money and consequently, as there were no grounds and/or reasons to warrant a refusal of the recognition or enforcement of the said Award, then its application ought to be allowed as prayed.

8. In opposition thereto, the Respondent's Replying Affidavit was sworn on 3rd February 2019 by its Director, Mohammed Mirjafari. It was filed on 8th March 2019.

9. It contended that concurrent to the institution of the arbitral proceedings before (Rtd) Justice J.B. Havelock, it declared and sought to have another dispute between them run concurrently, which proceedings were registered and that it notified the Applicant that a successful outcome would serve as a set off to the Applicant's claim.

10. It pointed out that the Applicant was unco-operative during the entire time of its arbitral proceedings wherein an arbitrator was also appointed by NCIA and had infact refused to settle the requisite arbitrator's fees so that it could access the said Award with a view to achieving the end result of a possible stet-off of the Applicant's Award.

11. It was its contention that neither of them could access the Award until all the Arbitrator's fees were paid and that the Applicant's action was aimed at stalling or frustrating the arbitral proceedings of its claim.

12. It thus prayed that the enforcement of the proceedings herein be stayed.

LEGAL ANALYSIS

13. As can be seen hereinabove, the said application had sought several orders. The Applicant did not require leave to enforce the Final Award that was made by Hon Justice (Rtd) J.B. Havelock on 24th May 2019 for the reason that if an arbitral award has not been set aside under the provisions of Section 35 of the Arbitration Act (Amendment) Act 2009, (hereinafter referred to as "the Arbitration Act") or the court has not been satisfied that there are any grounds for refusal of recognition of enforcement as has been set out in Section 37 of the Arbitration Act, then the arbitral award shall be automatically recognised and enforced under the provisions of Section 36 of the Arbitration Act.

14. Further, the Applicant did not need an order for a decree to issue for the reason that upon the said Final Award being recognised and adopted as a judgment of the court, it automatically became a judgment of this court and all subsequent processes became applicable as provided under Section 25 of the Civil Procedure Act Cap 21 (Laws of Kenya) that stipulates that:-

> **"The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow."** (emphasis court).

15. The contents of the decree that follows shall be as set out in Order 21 Rule 7 of the Civil Procedure Rules, 2010. All execution proceedings will also be undertaken strictly in accordance with Order 21 of Civil Procedure Rules. Order 21 Rule 7 of the Civil Procedure Rules stipulates that:-

> **1.The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.**
>
> **2.The decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.**
>
> **3.The court may direct that the costs payable to one party by the other shall be set-off against any sum which is admitted or found to be due from the former to the latter.**

16. This court could not also make an order for interest at court rates being fourteen (14%) per cent from the date of filing suit on 10th August 2017 until payment in full for the reason that the Arbitrator had already made a similar order in his Final Award. He had also addressed the issue of costs. Notably, part of Prayer No (b) and Prayers Nos (c) and (d) formed part of the Final Award the Applicant sought to have recognised and endorsed.

17. It was not lost to the court that in Order for Directions No 1 dated 14th September 2017, the Arbitrator had indicated that he would tax the costs should the need arise. In his Final Award, he reiterated that if the costs could not be agreed by the parties, he was open to determining the same. It is important to point out that once an arbitrator has made an award, the court has no power and has no jurisdiction to alter his findings.

18. It therefore followed that being a consensual process, the court could not depart from what the parties had agreed and order that if the costs were not agreed, then the same would be taxed by the Deputy Registrar.

19. The court's role was only limited to adopting the Final Award as a judgment of the court as set out in the Arbitration Act. Accordingly, Prayer Nos (2), (3) (a), Part of (b), (c) and (d) of the application were superfluous and ought not to have been included in the Applicant's present application.

20. In applications brought under Section 36 of the Arbitration Act, only the prayer seeking recognition and enforcement of the arbitral award should be in the application. It is hoped that the aforesaid holding will provide clarity to the Applicant and other applicants seeking similar orders on how best to proceed. The application should also not have been titled *"Ex parte"* for the reason that all parties to proceedings must be made aware of each and every step of a case to avoid the aspect of ambush. The time for trial by ambush is long gone.

21. Turning to Prayer No 1 of the Applicant's application, Section 36(1) of the Arbitration Act stipulates as follows:-

> **"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".**

22. Section 37 of the Arbitration Act states that:-

> **The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—**
>
> **(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—**
>
> **(i) a party to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;**
>
> **(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
>
> **(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or**
>
> **(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or**
>
> **(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made;**
>
> **or**
>
> **(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;**
>
> **(b) if the High Court finds that—**
>
> **(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
>
> **(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.**
>
> **(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.**

23. Section 35(3) of the Arbitration Act further states that:-

> **"An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award."**

24. Notably, there was no evidence of an application for setting aside the Final Award having been made by the Respondent before three (3) months elapsed from 24th May 2018 when the said Final Award was made or an application or order in which the court had refused to recognise the Final Award.

25. The Applicant furnished this court with a certified copy of the Final Award as is required under Section 36(3) of the Arbitration Act that provides that:-

"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."

26. The issue of set-off that was raised by the Respondent was neither here nor there. This is because it did not furnish this court with any agreement between it and the Applicant that if it was successful, the monies awarded to it would be set-off from the Applicant's award of Kenya Shillings Eight Million, Seven Hundred and Thirty Four Thousand, Four Hundred only (Kshs 8,734,400/=).

27. Arbitration is a consensual process. In the absence of any agreement, the court will proceed in accordance with Section 10 of the Arbitration Act No 5 of 1995 that provides that:-

"Except as provided in this Act, no court shall intervene in matters governed by this Act".

28. This court therefore had no power and/or jurisdiction to stay the enforcement and recognition of the Final Award if the Applicant had satisfied the requirement under the Arbitration Act.

29. Staying the proceedings because the Applicant had not paid its share of the arbitrator's fees in the arbitral proceedings that were commenced by the Respondent herein would not be possible because where an arbitrator has a lien over an award due to non-payment of his fees, any party to the proceedings can pay all his fees to enable him release the award.

30. If the Respondent was unsuccessful in his arbitral proceedings and he pays the arbitrator's fees to obtain the Final Award he would have suffered no prejudice as the Applicant would still have recovered the said costs from it if the Respondent was successful in his arbitral proceedings and he will have paid the arbitrator's costs, he will be able to pursue the said costs from the Applicant having obtained the Arbitral Award.

31. As matters stand, none of the parties benefits from the arbitrator's continued retention of the Final Award due to non-payment of his costs.

32. Accordingly, it was the finding and holding of this court that as there were no legal arguments that were advanced by the Respondent to demonstrate why the Final Award herein should not be recognised and enforced, this court was satisfied that the Applicant had shown that the said Final Award should be recognised and enforced.

DISPOSITION

33. For the foregoing reasons, the Ruling of this court was that the Applicant's *Ex-parte* Chamber Summons application dated and filed on 22nd June 2018 was merited and the same is hereby granted in terms of Prayer No (1) therein. The Respondent will bear the Applicant's costs of this application.

34. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of October 2019

J. KAMAU

JUDGE