



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**MISC. APPLICATION NO. 506 OF 2016**  
**IN THE MATTER OF THE ARBITRATION ACT (NO. 4 OF 1995)**  
**AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT (NO. 11 OF 2009)**  
**AND**  
**IN THE MATTER OF ARBITRATORS**  
**BETWEEN**  
**NDIRITU MUCHEMI MICHAEL,**  
**JULIUS IRUNGU NGIGI,**  
**WANG'OMBE HUMPHREY.....CLAIMANTS**  
**VERSUS**  
**AHBELL MACHARIA WACHIRA,**  
**GITHUI MURIITHI PETER.....RESPONDENTS**  
**RULING**

1. The ruling relates to a notice of motion application dated 19<sup>th</sup> March 2019, brought under the provisions of Order 22 of the Civil Procedure Rules 2010, Section 36 of the Arbitration Act, 1995 (as amended) Section 3A of the Civil Procedure Act (Cap 21) of the Laws of Kenya and all other enabling provisions of the law.

2. The Claimants are seeking for orders;-

*(a) That the arbitration award dated 9<sup>th</sup> April 2015 published by T. Wamiti Esq be and is hereby converted into a decree of the Honourable court;*

*(b) That upon being so converted, the said decree be executed to recover the sum of Kshs. 3,132,561 from the 1<sup>st</sup> Respondent and Kshs. 1,167,590 from the 2<sup>nd</sup> Respondent plus Arbitrators costs of Kshs. 286,720 making a total of Kshs. 4,586,871 further costs and interest at court rates from 9<sup>th</sup> April 2015 until recovery in full, such execution be an enforcement of the award under the provisions of order 22 of the Civil Procedure Rules and Sections 36 of the Arbitration Act, 1995 as amended aforesaid;*

*(c) That the Respondent do execute their resignation letters as directors of M/S Pentapharm Limited and transfer shares to the Claimants failing which the Deputy Registrar of the court do execute for them;*

*(d) That the costs of the application and subsequent execution proceedings and/or incidental thereto, be paid by the Respondents/Judgment debtors.*

3. The application is premised on the grounds on the face of it and an affidavit of the even date, sworn by the 1<sup>st</sup> claimant herein Dr. Ndiritu Muchemi Michael. He deposed that, subsequent to grant of the final award, the Respondents filed a notice of motion on 26<sup>th</sup> May 2015, seeking for orders of stay and setting aside of the award. The application was heard by the Honourable court and dismissed with costs on 14<sup>th</sup> September 2016.
4. After the ruling, the claimants advocates wrote to the Respondents advocates asking the Respondents to pay the amount to avoid further costs. The letter was acknowledged on 19<sup>th</sup> September 2016 but no payment has been made to date.
5. Thereafter the claimants filed an application dated 29<sup>th</sup> September 2016 seeking for similar orders as herein but application was struck out by the Honourable court for reasons that the final arbitral award had not been filed as required by the law. Hence this application.
6. However, the application was opposed vide a replying affidavit dated 2<sup>nd</sup> October 2019, sworn by Dr. Ashbell Macharia. It was argued that the parties to this suit are the directors and equal shareholders of a private pharmaceutical retail company called; Pentapharm Limited. The parties worked together until the year 2011 when irreconcilable differences arose and compelled them to part ways. Subsequently, the claimants filed the suit number *HCCC No. 726 of 2012 Pentapharm Limited vs Ashbell Macharia Wachira & Another*, which was referred to arbitration. After the arbitral proceedings, the arbitrator, T. Wamiti published the final award on 9<sup>th</sup> April 2015.
7. The Respondents submitted that this application is disguised as one for adoption and enforcement of the award but in actual fact prayer (2) thereof seeks orders that are substantially and materially different from the orders made by the arbitrator in the published award. That the Applicants are obviously prevaricating and have intentionally overlooked and/or abandoned order number (c) in the final arbitral award in their application before this court.
8. That the intention is to enforce payment of monies without dealing with the corresponding order in respect of indemnity absolving the Respondents of any and all liability that the Respondents may incur or have incurred by virtue of their shareholding and directorship in the company. Therefore the award cannot be adopted or implemented in respect of order number (c) as adjudged by the arbitrator without laying the books of accounts of the company so that outstanding liabilities can be enumerated and proper indemnities given to the Respondents. Thus it is only just that the claimants demonstrate that they are indeed capable of indemnifying the Respondents before any orders for payment under the arbitral award can be issued by the court so as to avoid an injustice where only one party reaps the benefits of the award.
9. It was argued that the Applicants have not come to court in good faith but as part of a much wider scheme to defeat the Respondents legitimate claim of simultaneously being absolved from the debts and liabilities of the company, in line with the orders made by the arbitrator. Further, the Respondents are aware that Pentapharm Limited has tax arrears owed to the Kenya Revenue Authority. That the Respondents should be absolved from the same through discharge and indemnities to be executed by the claimants.
10. The 2<sup>nd</sup> Respondent opposed the application through a replying affidavit he swore dated 2<sup>nd</sup> October 2019. He joined issues with the 1<sup>st</sup> Respondent, save to state that from a reading of both the award and the application, it is clear that the prayers sought in the said application are not in tandem with what was awarded by the arbitrator as outlined in the certified award filed herein. The subject application seeks to enforce an award against him for an amount that was never awarded by the arbitrator. The certified award as filed does not contain any order against him for the payment of any sum of money that is capable of being adopted as the judgment of this court.
11. However, he is ready and willing to abide with order (c) of the award and execute and deliver to the claimants his resignation from the board of the company as well as a share transfer to the claimants of all his shares in the company as well as all documents as may be required for the said changes to the directorship and shareholding of the company to be effected on condition that the claimants abide with order (d) and deliver to the him an executed discharge and indemnity absolving him from any and all liability that he may incur or have incurred by virtue of his shareholding and directorship in the company.
12. I have considered the application and I find that, the Applicants herein filed a notice of motion application dated 29<sup>th</sup> September 2016, referred to herein seeking for similar orders as herein. The court heard and determined the application on 20<sup>th</sup> June 2018. For all intent and purpose, the court shall adopt the analysis of that application in so far as it relates to the prayers sought and the arguments advanced by the respective parties thereto. The Applicants have provided a copy of the final arbitral award which was not available during the hearing and determination of the first application.
13. Therefore, I have considered the application on its merit and I find that, the provisions of Section 36 of the Arbitration Act, 1995 empowers the High Court to recognize an arbitral award as binding application and enforceable subject to the provision of Sections 32 and 37 which lays down the grounds of recognition and enforcement of an arbitral award.
14. From the averments in the instant application, it is evident the application to set aside the arbitral award was dismissed. The Respondent however argues that, the application seeks to vary the orders of the final arbitral award. It suffices to note that, the simple role of the court as envisaged under Section 36 and 37 of the Act, is to “recognize and enforce the arbitral award” as rendered. In that case, the court by granting the order for enforcement, lives within the four corners of the award.
15. If there are orders made for the claimant to obey and implement, then, the claimants need to. If the Respondents too have orders made against them, then they too, should upon recognition and adoption of the arbitral award, execute the same.
16. In the instant matter, the orders made by the arbitrator are clear at pages (9) to (10) of the final arbitral award. They require both parties to take certain actions. Therefore, each party can only be released from liability upon fulfillment of the terms of the award. This court cannot allow itself to be sucked into a dispute that was a subject of arbitral proceedings and over which it has no jurisdiction.
17. I however note that the Applicants have crafted the prayers (2) and (3) in the application in such a manner as to alter the terms of the final

arbitral award. There was no order requiring the 2<sup>nd</sup> Respondent to pay any money to the claimants. The Applicants cannot also use this court to order and/or compel the Respondents to comply with the award which the Applicants themselves have not demonstrated compliance on their party. In that regard, they are being “insincere” and/or less than candid. They do not have clean hands in that regard.

18. In conclusion, I allow the notice of motion application dated 19<sup>th</sup> March 2019 in so far as it relates to prayer (1) alone, so that, the final arbitral award by T.W. Wamiti dated 19<sup>th</sup> March 2019, be and is hereby recognized and adopted as an order of the court to be converted into a decree of the court for execution, unless otherwise ordered. The other prayers in the application are disallowed. I make no orders as to costs.

19. It is so ordered.

**Dated, delivered and signed in an open court this 13<sup>th</sup> day of November 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Oduor holding brief for Mr. Mwangi for the Claimants/Decree holders

Ms. Moenga holding brief for Mr. Kabugu for the Respondents

Dennis -----Court Assistant