



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 535 OF 2018

IN THE MATTER OF THE APPLICATION BY TALEWA ROAD CONTRACTORS LIMITED FOR THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

AND

IN THE MATTER OF THE ARBITRATION ACT, 1995

BETWEEN

TALEWA ROAD CONTRACTORS.....APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

DIGITAL DEN LIMITED.....PROPOSED RESPONDENT

RULING

By a Chamber Summons application dated 18th December 2018, pursuant to **section 36 of the Arbitration Act, 1995 and Rules 4(2), 8 and 9 of the Arbitration Rules, 1997** and all other enabling provisions of the law; the Applicant sought orders;

- a) The award published by the Sole Arbitrator, Eng Paul Thang'a Gichuhi on 22nd March 2018 be recognized as binding on the parties;
- b) The award published by the Sole Arbitrator, **Eng. Paul Thang'a Gichuhi** on 22nd March 2018 be enforced as a decree of this Honourable court.

The application was based on the grounds;

- a) The dispute between the parties was heard before the Sole Arbitrator on diverse dates and site visits also undertaken in the presence of parties and consequently the award dated 22nd March 2018 was published.
- b) The Respondent had been served with the Arbitral Award and the Respondent had not filed an application to set aside the Award.
- c) The Applicant intends to appeal against the said award but only in relation to the amount awarded as it has taken the view that the amount awarded was too low and should be enhanced.
- d) To this end there is a pending application for enlargement of time within which to file the appeal filed in ***High Court Civil Appeal No E001 OF 2018, Talewa Road Contractors Limited –vs- Kenya National Highways Authority.***
- e) The intended appeal is not a reason for the Respondent's failure to pay the amount awarded.

GROUND OF OPPOSITION DATED 27TH FEBRUARY 2019

The Respondent opposed the application on grounds;

- a) That the Application is fatally incompetent and bad in law having been filed contrary to the express provisions of **section 36(3) of the Arbitration Act 1995**;
- b) That the Application is fatally incompetent and bad in law having been filed contrary to the express provisions of **Rule 6 of the Arbitration Rules 1997** and during the pendency of proceedings invoking the court's powers under **section 35 of the Arbitration Act** in High Court **Civil Appeal No. E001 of 2018** between ***Talewa Road Contractors Limited –vs- Kenya National Highways Authority***;
- c) That the application is otherwise an abuse of the process of this Honourable court.

REPLYING AFFIDAVIT

The Application is opposed vide a Replying affidavit dated 4th April 2019, sworn by Nathaniel Munga, a senior Legal Officer for the Respondent. He states that there is a mandatory requirement, under **Section 36 (3) of the Arbitration Act**, obligating the Applicant herein to furnish this Honourable Court with both the Original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it.

That the Authority raised objections to the Applicant's Application citing inter alia that the Applicant had failed to comply with the requirements of **Section 36 (3) of the Arbitration Act** and instead filed a copy that was signed and dated on the last page as well as on each page of the Arbitral award by the Hon. Arbitrator but not certified as a true copy of the original.

That subsequent to filing of the Respondent's Grounds of Opposition the Applicant filed a Supplementary Affidavit on 8th March 2019 to furnish the Honourable Court with another version of the Arbitral award which was certified as the purported true copy of the original arbitral award in order to comply with the requirements of **section 36(3) of the Arbitration Act** but which this time was signed by the Hon. Arbitrator on the last page but not dated on that last page and not signed on each page as was the case with the version annexed to the Supporting Affidavit filed earlier.

That it appears that the Applicant is in possession of two versions of the Arbitral Award whose authenticity can therefore not be vouched for in the obtaining circumstances.

Section 36 of the Arbitration Act provides;

“recognition and enforcement of Awards

- 1) 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.***
- 2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or nay other convention to which Kenya is signatory and relating to arbitral awards.***
- 3) 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.***
- 4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translated f it into the English language.***
- 5) In this section, the expression “New York Convention” means the Convention on the Recognition and Enforcement of foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June 1958, and acceded to by Kenya on the 10th February 1989, with a reciprocity reservation.”***

DETERMINATION

The Respondent submitted as follows;

The Recognition and enforcement of the purported arbitral award would be contrary to public policy on the following grounds;

- a) The Applicant filed 2 versions of the Arbitral Award one on 19th December 2018
- b) The other copy of Arbitral award certified true copy of the original is undated and substantially unsigned contrary to the provisions of **Section 32 of Arbitration Act**.
- c) The following copies of the Arbitral award certified as true copy of the original are unsigned contrary to provisions of **Section 32(1) Arbitration Act at pages 2-4,6-13,15-29,31-36,38-43,45-55,57-60,62-70,72-80,92-117&119-132** of the Award.

d) The inference drawn is that the Applicant had access to the Arbitral award before it was formally published in accordance with provisions of **Section 32 (5) Arbitration Act**.

e) **Section 37 (1) (b) (ii) Of the Arbitration Act** is instructive that recognition and enforcement of an arbitral award may be refused if it is contrary to public policy.

The Respondent relied on the following cases; *Christ for All Nations vs Apollo Insurance Co Ltd HCCC No 477 of 1999 & Kenya Shell Limited vs Kobil Petroleum Limited[2006]eKLR*;

“... although public policy is a most broad concept incapable of precise definition, ...an award will be set aside under section 35 (2)(b)(ii) of the Arbitration Act as being inconsistent with the Public policy of Kenya if it was shown that either it was :

a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or

b) Inimical to the national interest of Kenya; or

c) Contrary to justice and morality...”[emphasis added]

The Respondent also argued that the Arbitral Award may not be enforced and/or recognized because of illegality and cited the following cases; *Tanzania Roads National Roads Agency vs Kundan Singh Construction Limited[2013]eKLR*;

“There is ample evidence from the Respondents replying affidavit and further affidavit that the decision of the majority as set out in the award was made contrary to the laws of Tanzania.

Should the court condone that breach by recognizing and enforcing the award?

I find there would be no justification legally or morally to condone a breach of a contract between two parties and it would be contrary to the public policy of Kenya to allow a court to be used towards that end.

The upshot is that the application dated 15th January, 2013 to recognize and enforce the award as decree of the court is dismissed with costs.”

In *Cape Holdings Limited vs Synergy Industrial Credit Limited [2016] eKLR*, the High Court held that anything done relating to the Arbitral which is contrary to the law is contrary to public policy;

“Without a doubt, an award which is inconsistent with the Constitution or the law, written or unwritten, is said to be against public policy and it will be set aside under section 35 of the Arbitration Act..

With regard to the question that the Arbitrator breached the provisions of sections 19 and 27 of the Arbitration Act by admitting an expert report through submissions was against public policy ...when the Arbitrator acts contrary to law by admitting document at the submission state, the same falls afoul to the law and thus contrary to public policy.”

The Respondent also raised the issue of whether the Applicant satisfied the mandatory statutory conditions for recognition and enforcement of arbitral award.

The Respondent relied on **Section 36 (3) of Arbitration Act** to buttress the point that the Applicant failed to provide the original award or duly certified copy of it and original arbitration agreement or a duly certified copy of it.

The Applicant acknowledged its failure to comply with conditions set out in conditions set out in **Section 36 (3) of the Arbitration Act** as provided for in the Applicant’s Supplementary affidavit filed on 4th March 2019 and produced a purported arbitral award certified as true copy of the original and a copy of excerpts of the Contract Agreement entered into between the Applicant and the Respondent.

The Respondent’s view is that the version of the Arbitral award is different from the original one filed earlier and that the excerpts of the Contract Agreement did not produce the Arbitration Agreement.

ANALYSIS

The Arbitral award annexed to the application filed on 21st December 2018 is a copy of the Final Award signed on each page from beginning to end.

The Supplementary Affidavit filed on 8th March 2019 by the Applicant in reply to Objection raised by the Respondent is annexed a certified copy of the Arbitrator’s Final Award which the Respondent claims is different from the 1st copy and was not signed on all pages as indicated above.

I have painstakingly schemed through both copies of Final award and found content to be identical.

The filing of 2 copies of Final award was necessitated by mandatory compliance with **Section 36 of Arbitration Act**.

The Original Final Award was filed in Court on 22nd July 2019 and no challenge was raised during the oral high lights of submissions on 25th July 2019.

Therefore; **Section 36 (3) (a) Arbitration Act** is complied with.

3) 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.

With regard to the original arbitration agreement; although it is referred to in paragraph 4 of the Arbitrator's Final Award as one of the vital important documents that set out the Contract conditions; it is not filed in this Court file. The excerpts of Contract Agreement do not contain the original arbitration agreement or a duly certified copy.

To that extent the Respondent's application is upheld.

Since no timelines are set for filing the same under **Section 36 of Arbitration Act** ; in order to comply with legal provisions and not continue to act against public policy , the Applicant shall file the original Arbitration Agreement with the Court through Deputy Registrar Commercial & Tax Division within 14 days from today and serve the Respondent ONLY THEN after proper service of the Original or duly certified copy of Arbitration Agreement shall the Court grant the order of recognition and enforcement of the Final Arbitral Award dated 22nd March 2018 by Arbitrator Eng P.T. Gichuhi, FCIARB, RCEng FIEK, LLM Chartered Arbitrator.

Further Mention on 28th November 2019 for compliance and final orders. Costs in the Cause.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH NOVEMBER 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MUNGE FOR APPLICANT

MR. OMOLLO FOR RESPONDENT

MS JASMINE- COURT ASSISTANT