



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**MISCELLANEOUS CIVIL CASE NO. 238 OF 2003**

**TRANSWORLD SAFARIS (K) LTD.....PLAINTIFF**

**VERSUS**

**EAGLE AVIATION LIMITED.....1<sup>ST</sup> DEFENDANT**

**KIRAN CHANDUBHAI PATEL.....2<sup>ND</sup> DEFENDANT**

**GILBERT MACHARIA KIBE.....3<sup>RD</sup> DEFENDANT**

**CHARLES KYALO MUTHAMA.....4<sup>TH</sup> DEFENDANT**

**RULING**

This is a ruling on the 2<sup>nd</sup> Defendant's application dated 5<sup>th</sup> December 2017 seeking the following orders:-

1. Spent;
2. That the Notice to Show Cause dated 17<sup>th</sup> October, 2017 and action for execution of the Arbitrator's award dated 19<sup>th</sup> July, 2002 against the 2<sup>nd</sup> Defendant be stayed, set aside or dismissed and;
3. That the 2<sup>nd</sup> Defendant be awarded costs for the Notice to Show Cause and of this application.

**Grounds on the Face of the Application**

1. **THAT** the award of the Learned Arbitrator arose out of an Arbitration clause in a contract between the Plaintiff and the 1<sup>st</sup> Defendant/judgment-debtor.
2. **THAT** the liability by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant/judgment-debtor are guarantors for payment by the 1<sup>st</sup> Defendant/judgment-debtor of principal debt due under the said contract is joint and severance by the Plaintiff will oppress and cause prejudice and occasion injustice to the 2<sup>nd</sup> Defendant.
3. **THAT** the action for enforcement of Learned Arbitrators award made on 19<sup>th</sup> July, 2002 has not been brought within 6 years of the making of the said award and action for enforcement thereof is barred by provisions of Section 4 (1) (c) of the Limitation of Actions Act .

The application is supported by Affidavit sworn by Kiran Chandubhai Patel who is the 2<sup>nd</sup> Defendant/judgment-debtor sworn on 5<sup>th</sup> December, 2017. He averred that he was served on 29<sup>th</sup> November, 2017 with the Plaintiff's Notice to Show Cause dated 17<sup>th</sup> October, 2017. He averred that after the making of the said award more than 15 years ago, no action against the Defendant has been taken.

He averred that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants jointly guaranteed the principal debt owed by the 1<sup>st</sup> Defendant to the Plaintiff in terms that in any event the 1<sup>st</sup> Defendant failed or was unable to pay debt due to the Plaintiff, the Defendant's would jointly be liable to pay the said debt

to the Plaintiff. A further affidavit was filed on the 8<sup>th</sup> February, 2018 in which it gave a further detailed breakdown of all the applications brought before Court in this matter in regards to the Arbitral Award.

In response the Plaintiff/ filed a Replying Affidavit sworn by Baloobhai Cchotabhai Patel, the managing director to Transworld Safaris Limited, the decree holder herein sworn on 29<sup>th</sup> January, 2018. He averred that prior to the said judgment, the 2<sup>nd</sup> Respondent/Judgement Debtor had lodged various applications seeking to frustrate the arbitral proceedings including one filed in **MISCELLANEOUS CIVIL APPLICATION NO. 600 OF 2000** by which he had sought an Order of Certiorari to quash the arbitral proceedings then pending before Mr. Justice E. Torgbor that after the application to adopt the award being filed, besides filing Grounds of Opposition thereto, the 2<sup>nd</sup> Respondent filed a Chamber Summons dated 24<sup>th</sup> March, 2003 seeking to strike out the said award. He further explained in his averments that the exchange of documents and applications to Court concerning the executing of the Arbitral Award.

#### **DEFENDANT/ APPLICANT'S SUBMISSIONS**

Counsel for the 2<sup>nd</sup> Defendant restated the grounds on the Notice of Motion and the Supporting Affidavits and the background of the matter was highlighted. The submissions brought about the following issues:-

1. Was the filing of the Arbitral Award capable of transposing into a decree?
2. Can an order by error or design metamorphose into "a decree"?
3. When did limitation time prescribed by Section 4 (1) of Limitation of Actions Act begin running?

Counsel submitted that in the case of **Osman Vs. United Insurance (1968) EA 102 CA** which says the following in reference to the Limitation Act:-

***"In their Lordship's opinion it is impossible to hold that in a matter which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in Court, outside of the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that the view is supported by the fact that S.3 of the Act is peremptory and the duty of the Court is to notice the Act and give effect to it....."***

#### **PLAINTIFF/ RESPONDENT'S SUBMISSIONS**

Counsel for the Plaintiff submitted that the Applicant is equating enforcement with execution. And that the two processes are separate and distinct and governed by different provisions of the law. He defined enforcement as an application to a Court to recognize the legal force and effect of an Arbitral Award and to ensure that it is carried out by using the available legal sanctions.

He added that the award does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party and that it is necessary to convert the award into a judgment or order of the Court by means of process of enforcement.

Plaintiff submitted that the Applicant's attempt to challenge the process of enforcement up to the Court of Appeal was not successful and that the present attempt to introduce the challenge is res judicata.

On the issue as to whether execution should proceed against the Applicant, Plaintiff submitted that judgment was entered against the 4 Respondents jointly and severally. Among authorities he cited are **KENYA AIRWAYS LTD VS. MWANIKI GICHOHI** where Ringera J stated as follows:-

***"The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent if such decree; However, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such Defendant cannot be recovered from the other Defendants."***

Counsel for the Respondent herein urged Court to dismiss the application and allow notice to show cause to proceed against the 2<sup>nd</sup> Respondent.

#### **ANALYSIS AND DETERMINATION**

I have considered the above averments by parties herein. I have perused the documents attached and I have also considered written and oral submissions by Counsels herein.

Issues for determination

1. Whether execution of award herein is barred by Section 4(1) (c) Limitation of Actions Act;
2. Whether execution should proceed against the 2<sup>nd</sup> Respondent/Applicant herein.

The Applicant submitted that the Plaintiff is seeking to execute against an Arbitral Award issued over 15 years ago. Applicant contend that the award arising from a contract should have been executed within 6 years as provided by provisions of Section 4 (1) (c) of the Limitation of

Actions Act. Applicant/2<sup>nd</sup> Respondent contend that the enforcement of the award was on 19<sup>th</sup> July, 2002. On the other hand the Counsel for Applicant/Respondent herein submitted that the Applicant herein filed chamber summons to set aside the award on 24<sup>th</sup> March 2003 and has made several applications to frustrate enforcement of the award up to the Court of Appeal.

On perusal of the file I note that applications have been made both before the deputy registrar and High Court in respect of execution of costs.

Section 36(1) Arbitration Act provide for recognition of domestic Arbitration award as follows:-

**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.**

**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 translation of it into the English language.**

The Arbitration Act provide time within which an application to challenge an Arbitral Award can be made but it does not provide time frame for filing an application for enforcement of the award.

However Section 4 of Limitation of Actions Act provides as follows:-

**“The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-**

**a) Actions founded on contract;**

**b) Actions to enforce a recognizance;**

**c) Actions to enforce an award;**

**d) Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; (e) actions, including actions claiming equitable relief, for which no other**

A party who is successful in Arbitration process cannot compel the other to comply before moving the High Court to recognize the award as binding between the parties. That will be done by filing an application under Section 36 of the Arbitration Act and what follows next is the process of enforcement. My understanding is that moving the Court under the above Section is subject to Section 4 (1) (c) of the Limitation of Actions Act.

From the foregoing, it is evident that two separate limitation period will apply to Arbitral Awards set out as follows:-

1. Six year period for bringing an action for enforcement of an award provided under Section 4 (1) (c) of the Limitation of Actions Act. This is brought under Section 36(1) and 36(2) of the Arbitration Act for Domestic and Foreign Awards respectively.

2. The 12 year limitation period for enforcement and/or execution of Decree pursuant to Section 4 (4) of Limitation of Actions Act

From record the Arbitral Award was delivered by Justice (Rtd) E. Torgbor on 19<sup>th</sup> July 2017.

Defendant filed application dated 24<sup>th</sup> March 2003 seeking to set aside Arbitral Award. The application was dismissed on 19<sup>th</sup> June 2003.

The Plaintiff filed application dated 10<sup>th</sup> March 2003 seeking to have the award adopted and to enforce the award as decree of the Court. The application was challenged but delivered. By ruling delivered by O. K Mutunga J on 30<sup>th</sup> October 2006 the award was adopted as the judgment of the Court and leave granted to the Applicant to enforce the award as the Decree of the Court.

The Court gave effect to the award by adopting it as the judgment of this Court; the Court further granted leave to enforce the judgment. What does enforcement mean? I understand it to mean the process of compelling the unsuccessful party to comply with the arbitral decision. Party who is unwilling to comply with decision is compelled through execution of decree issued by the Court.

Execution begins after issuance of the decree by the Court from the judgment of the Court. Time for execution of decree is provided under Section 4 (4) of the Limitation of Actions Act.

The provisions of **Section 4 (4)** states that an action may not be brought upon a judgment after the end of 12 years from the date on which the judgment as delivered. The Court of appeal dealt with this issue in the case **M’IKIARA M’RINKANYA AND ANOTHER VS GILBERT KABEERE M’MBIJIWE** where it made the following observations :-

**“...as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local Courts barring recovery after 12 years, is as shown in “ LOWSLEY V FORBES”, consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years”.**

The award was adopted as the judgment of this Court on 30<sup>th</sup> October 2006. The Plaintiff filed Notice to Show Cause against the 2<sup>nd</sup> Defendant on 16<sup>th</sup> August 2017. The application was filed within the 12 year period for execution of a decree for judgment. Execution against the 2<sup>nd</sup> Defendant is not therefore time barred.

In respect of the second issue, the Applicant submitted that the Respondent has chosen to execute against the Applicant alone on perusal of the record. I note that payment order was made against the Respondents jointly or severally. It is trite law that where judgement or an order is entered against parties jointly or severally, the Decree Holder can proceed against all the parties or any of the parties. The party executed against has recourse to pursue the co-defendants for claim paid. This was held in **DUBAI ELECTRONICS VS TOTAL (K) LTD & 2 OTHERS HCCC N0.870 OF 1998** where the Court stated as follows:-

***“Clearly where you have joint liability, all tortfeasors are and each of them is liable to settle full liability. However in a pure several liability, each tortfeasor is liable to settle the sum due to the tune of his liability. However, where liability is jointly and/or severally, the Plaintiff has an option of either directing his claim against one of the tortfeasors or making his claim against each of the torfeasors according to their individual liability. However Defendants are entitled to reimbursement from co-Defendants in the event Plaintiff opt to recover from one of them”***

From the forgoing, it is therefore proper for the Respondent to execute against the Applicant herein.

#### **FINAL ORDERS**

The application herein is dismissed with costs to the Respondent.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of July, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

**GRACE: COURT ASSISTANT**

**WAMALWA: COUNSEL FOR APPLICANT**

**NO APPEARANCE FOR RESPONDENT**