



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

MISC. APPLICATION NO. 472 OF 2017

TALENT GRAPHICS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DANIEL OMALA ODURU.....DEFENDANT/RESPONDENT

R U L I N G

This is a ruling on the Plaintiff's application dated 27th November, 2017. It seeks to have the Arbitral Award dated 6th November, 2017 be recognized and enforced as a decree of the Court.

Grounds on the face of the application are that the dispute between the parties herein was referred to the chairman of the Chartered Institute of Arbitrators to appoint an arbitrator by consent of the parties. Parties submitted the dispute before the sole Arbitrator, Ms. Njeri Onyango. The tribunal determined the issues in dispute and communicated the final Arbitral Award to the parties herein vide a letter dated 1st November, 2017 which was delivered on 6th November 2017.

That the Respondent has not challenged or sought to review the final award in any forum and is yet to comply with the terms therein; that Applicant cannot enforce the final Arbitral Award unless and until adopted or enforced as an order/decree of this Honorable Court.

That the dispute arose in 2013 and any further delay is now denying the Applicant the fruits of its judgment or award.

The application is supported by Affidavit sworn by Tom Mboya Oduru who restated the grounds on the face of the application.

In response the Respondent filed Replying Affidavit sworn by Daniel Omala Oduru dated the 27th February, 2018. He refuted all the accusation brought forward by the Applicant and averred that he was dissatisfied with the Arbitral Award of the sole arbitrator Ms. Njeri Onyango.

He averred that he is convinced that the said Arbitral Award was procured by fraud, non-disclosure and deception by the Applicant herein. He stated that he was not a party to most of the arbitral proceedings; that the proceedings took place in his absence and was therefore denied the right to be heard as provided in Article 50 of the Constitution of Kenya 2010.

He averred that the Applicant has rushed to file the application seeking enforcement of the said award yet the 90 day period stipulated in the Arbitration Act for challenging the award has not lapsed since the award was granted; that he would like to challenge the Arbitral Award as it was procured contrary to the rules of justice.

ANALYSIS AND DETERMINATION

I have considered the above averments by parties herein. I have perused the documents attached to affidavit filed and considered submissions filed by parties herein.

I wish to consider whether the Applicant has raised sufficient grounds for the Court to refuse recognition and adoption of the final Arbitral Award.

On perusal of the final award, I note that it was delivered on 6th November 2017 and the Respondent was ordered to comply with the award within 14 days from the date of delivery of the final Arbitral Award. The application to recognize and enforce the award was filed on 29th November 2017.

Clause 30 of the agreement attached to the application is the arbitration clause wherein parties agreed to submit disputes that may arise from the agreement to arbitration. A letter dated 11th July 2016 confirm that parties consented to giving authority to chairman of Chartered Institute of Arbitrators, Kenya branch to appoint an arbitrator on their behalf.

On perusal of the award and Court file, I note that it is now about 8 months after delivery of the final arbitral award but despite the Respondent indicating that 90 days period had not lapsed when this application was filed which is true, no application to set aside the final Arbitral Award has been filed.

The Respondent in the Replying Affidavit has indicated the award was procured by fraud, non-disclosure and deception by the Applicant .the particulars were however not particularized by the Respondent.

Section 10 of the Arbitration limits Courts power to interfere with Arbitral Award to circumstances provided by arbitration Act which are provided in Section 35 and 37 of Arbitration Act.

It is upon the party alleging grounds laid down on Section 35 and 37 of the Arbitration Act 1996 to state and prove any one or more of the said grounds while challenging or refusing recognition and adoption of the final award. Apart from saying the award was procured by fraud, non-disclosure and deception in paragraph 5 of the Affidavit, the Respondent has not gone further to particularized and prove fraud.

In paragraph 6 of the Replying Affidavit, the Respondent states that he was not a party to the arbitral proceedings and that his constitutional right to fair hearing under Article 50 was infringed. On the other hand the Applicant has filed a consent wherein both parties agreed to authorize the Chairman Nairobi Institute of Chartered Administrators to appoint an arbitrator on their behalf.

Paragraph 15 and 16 of the award indicate that each party herein appointed an Advocate of their choice; that Advocates appointed are the same ones who had represented the parties herein before the dispute was referred to arbitration. Paragraph 19 show that parties appeared before the arbitrator for directions.

Paragraph 36 show that parties attended hearing on 23rd March 2017 where Advocates for respective parties made opening remarks.

Paragraph 37 and 50 show that the claimant called 3 witnesses while the Respondent relied on his pleadings and evidence adduced by Respondent himself.

From the foregoing, I do not see reasons to refuse to recognize the award herein.it is over 90 days from 6th November 2017 when the final arbitral award was delivered and no application to set aside has been filed.

From the proceedings on record, it is evident that the Respondent participated in the arbitration and allegation of breach of Article 50 of the Constitution cannot stand.

FINAL ORDERS

The application dated 27th November 2017 is hereby allowed. The final Arbitral Award delivered on 6th November 2017 is hereby recognized as binding among parties herein and adopted as the as the judgment of this Court. Costs to the Applicant.+

Dated and Delivered at Nairobi this 13th day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE

COURT ASSISTANT

MS ACHIENG H/B FOR KIRIMI: COUNSEL FOR APPLICANT

OTIENO H/B FOR NYAUKO: COUNSEL FOR RESPONDENT