



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CAUSE NO.23 OF 2018

HEVA FUND LLP.....APPLICANT

VERSUS

KATCHY KOLLECTIONS LIMITED.....RESPONDENT

RULING

1. This ruling is over two applications which were heard together. The first application is a Notice of Motion dated 10th May 2018 by **Ms. Katchy Kollections Limited** filed on 10th May 2018 and brought pursuant to Section 35(2), and 35(3) of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997 and all other enabling provisions of the law.

2. The 2nd application is a Chamber Summons dated 26th January, 2018 brought pursuant to Order 46 Rule 19 of Civil Procedure Rules, Section 1A, 1B, 3A of Civil Procedure Act and Section 36 of the Arbitration Act.

A. Applicant's Application dated 10th May 2018.

3. The Applicant in the above-mentioned application prays for five (5) Orders being as follows:-

1. **THAT leave be granted to the applicant to file this application out of time.**
2. **THAT pending the hearing and determination of the application, the Court be pleased to stay enforcement of the arbitral award published on 7th December 2017.**
3. **THAT the Court be pleased to set aside the arbitral award published on 7th December 2017.**
4. **THAT in the alternative to prayer 3 above, the Court be pleased to make such further or other order(s) as it may deem appropriate including remitting the Final Award for corrective action in regards to the dates.**
5. **THAT the costs and incidentals to the application be provided for.**

4. The application is premised on the grounds on the face of the application. The Applicant states in a final award published on 7th December 2017 the sole arbitrator awarded the claimant as against the Respondent as follows:-

- a. **That the respondent to pay the claimant a total of Kenya Shillings Eight Hundred and Fifty Eight Thousand One Hundred (Kshs. 858,100) being the amount due and owing.**
- b. **Kenya Shillings One Hundred Thousand (Kshs.100, 000) to be paid on the 15th April 2017 not later than 5 pm.**
- c. **Kenya Shillings One Hundred and Fourteen Thousand Five Hundred and Twenty Five (Kshs.114, 525) to be paid on 30th April not later than 5 pm.**
- d. **Kenya Shillings Two Hundred and Fourteen Thousand Five Hundred and Twenty Five (Kshs.214, 525) to be paid on 31st May 2017 not later than 5 pm.**

e. Kenya Shillings Four Hundred and Twenty Nine Thousand Fifty (Kshs.429, 050) to be paid on 31st July 2017 not later than 5 pm.

f. Both parties shall equally bear and pay my fees and the costs of this arbitration which I hereby determine in the invoice attached.

5. Aggrieved by the arbitrator's decision he seeks leave to file this application out of time given the 3 months contemplated in Section 35(3) of the Arbitration Act. It is urged the matter proceed in absence of the Applicant's advocate and even in absence of the Applicant when directions were given; that the applicant received a letter dated 6th April 2017 by the Respondent's Advocate to execute and did sign not knowing that it was actually entry into consent; that the arbitrator subsequently adopted the consent and issued a final award published on 7th December 2017; that the consent judgment herein is contrary to law and Public Policy of the Republic of Kenya; that the applicant was not accorded a chance to have legal representation despite expressly intimating to the Arbitrator his wish to be represented by a counsel; that it is against the Public Policy of Kenya, in that it contravenes and is inconsistent with the Constitution and the Laws of Kenya and contrary to justice and morality.

6. The application is further grounded on the ground that no proper notice was issued to the Respondent by the Arbitrator in regard to the proceedings; that there is an error on the face of the Arbitral award published on 7th December 2017 on the dates of payment which was before the Arbitral award date; that the Respondent was only aware of the arbitral award published on 20th February 2018, when the director was served with the Respondent's application dated 26th January 2018 and filed in Court on 1st January, 2018; that this arbitral procedure was not in accordance with the agreement of the parties; that failure to file the application in time was completely unintended, inadvertent, and out of the applicant reasonable control, that this application was brought to court with no further delay and at the earliest opportunity.

7. The application is supported by Supporting Affidavit of Antony Mulli, a director of the Applicant Company who has deponed that the two company entered into an agreement dated 9th October, 2018 in which the Applicant agreed to disburse Kshs.1 million to be repaid over a period of 18 months (*attached marked "A" a copy of the Agreement*); that a dispute arose and parties involved clause 14 of the aforementioned agreement; that the Arbitrator was to be appointed by the Chairman of the Chartered Institute of Arbitration, Kenya Chapter; but that did not happen however; that Mr. James Monge're, Advocate, was appointed, that in a meeting attended by parties on 22nd December 2016, he requested for an adjournment for reason as he was not able to get his advocate hence the matter adjourned to 28th December 2016; that preliminary meeting was subsequently convened on 3rd January 2017 and directions given in his absence; which was prejudicial to him as Arbitral proceedings took place without being accorded the right to secure an Advocate for his representation; that they received a letter to execute through clerk dated 6th April 2017; (marked *annexture "B"*); which the deponent executed not knowing that he had actually entered into consent; and which was adopted by the Arbitrator and final award published. He has in his affidavit repealed grounds on the face of the application and produced (*annextures A to C as AM-1*). The Applicant further relies on further affidavit dated 2nd July 2018; which reiterates the grounds on the face of the application.

8. The Respondent is opposed to Applicant's application dated 10th May 2018 and have filed a Replying affidavit sworn by Maureen Wakiuru Njuguna, finance and investment manager of the Respondent dated 21st June 2018. She avers that the Applicant's applications is an abuse of the court process for the following reasons:-

i. There is no provision in the Arbitration Act for extension of time, set out in Section 35(3) of the Arbitration Act therefore strict compliance with the timeline of 3 months is imperative, and comports well with the principle of finality in arbitration.

ii. The Respondent has not notified the Arbitrator of the application in accordance with Rule 7 of the Arbitration rules 1997 which provides that; "An application under section 35 of the Act shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator."

iii. The Respondent has not provided any proof of an application made for correction of the Final Arbitral Award published on 7th December 2017 in regards to the dates if indeed that was an error as he claims as provided for by Section 34 of the Arbitration Act.

iv. The Respondent has not furnished proof as required under section 35(2) of incapacity, invalidity, lack of notice or undue influence to warrant setting aside of the arbitral award.

9. It is further deponed that on 30th November 2016 the Applicant gave a written confirmation for the arbitration process to proceed with sole arbitrator Mr. James Mang'erere (*see annexture MWN-2 and WMN-3*) to deponents affidavit of 26th January 2018; that the Applicant was present at the preliminary meeting of 22nd December 2016, where parties agreed by consent if the Applicant was unable to get the Advocate the parties would proceed with arbitration without their Advocates involvement (*annexed as marked "MWN-1A"*) is a copy of Directions from mediator after meeting of 22nd December 2016; that "*MWN-2B*" copies of e-mail correspondence of Arbitrators directions and copies of Applicant cheque); confirming that proper notice was issued to him in regard to the Arbitration proceedings and he was engaged with the Arbitrator both on phone and via e-mail on his availability; it is further deponed the Applicant was not influenced nor coerced with proposals to pay a debt that he already owes, and that it was him who made the proposal on how he wished to make payments and that dates stated in the final Arbitral award published on 7th December 2017 are exactly as per the Respondent's proposal to pay and consent dated 6th April 2017 and notified to the Arbitrator for adoption as a consent award.

10. It is further averred by the Respondent that if leave to file the application for setting aside the Final Arbitration Award published on 7th December 2017 out of time is granted to the Applicant, it would be in the interest of justice for the court, in exercise of powers under section 37(2) of the Arbitration Act, to order the Applicant to provide appropriate security by depositing of the sum of Kshs. 858,100/- into an

interest earning account in the joint names of the parties or their advocates, otherwise the Respondent prays the Applicant's application be dismissed.

11. Arising out of the Applicant's application the issues for determination can be summed up as follows:-

i. Whether leave can be granted to file the application out of time?

ii. Whether the court can set aside the arbitral award published on 7th December 2017?

iii. In the alternative to (ii) above whether court can make further or other orders as it may deem appropriate including remitting the Final Award for corrective action in regard to the dates?

Whether leave can be granted to file the application out of time?

12. The Applicant's application is premised on **Section 35(2) and 35(3) of the Arbitration Act, 1995** none of which sections deals with granting leave to file an application out of time but deals with setting aside arbitral award.

13. **Section 35(3) of the Arbitration Act 1995** provides:-

"(3) 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."

14. The Applicant has stated that it became aware of the Arbitral Award in February 2018, by which time 2 months had lapsed since the Arbitral award had been published. It had time to file application to set aside the award but did not nor did it give any sufficient reason why it did not exercise its constitutional right to challenge the award if it was aggrieved by the same.

15. Under the provision of the Arbitration Act, there is no provision specifically providing for extension of time and in my view for extension of time to be granted the Applicant has to demonstrate sufficient cause for court to make orders for in its favour. Three (3) months period within which to file an application to set aside the final award is sufficient time to necessary take action; further in this matter the Applicant should blame no one but itself. Having considered the final submissions by the Applicant for delay in filing the application I find the same to be an afterthought, as the Applicant was aware of the decision according to it within the two months since the award was published; yet it sat down without taking any action for a period of 3 more months. I find no reason to grant extension of time to file an application out of time.

(ii) Whether the court can set aside the arbitral award published on 7th December 2017?

16. Under **Rule 7 of the Arbitration Rules 1995** it is provided:-

"An application under section 35 of the Act shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator."

The Applicant has not demonstrated compliance with the above-mentioned rule and even if an application has property been filed, the failure to comply with the rule is fatal to the Applicant's application.

17. In **Anne Mumbi Hinga Vs Victoria Njoki Gathara [2009] eKLR** the learned Judges stated that **Section 35 of the Arbitration Act** bars any challenge of the award even for a valid reason after 3 months from the date of delivery of the award.

18. In the above case the Court of Appeal further expressed itself as follows on applications that are not expressly provided for in the Arbitration Act, and which purport to rely on the Civil Procedure Act and the Rules:

"....all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot overrule Section 10 of the Arbitration Act which states: "Except as provided in this Act no court shall intervene in matters governed by this Act."

19. I therefore find that the Court has no jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application for setting aside an arbitral award out of time, further the application of the Civil Procedure Rules would be regarded as inappropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration.

20. In the instant case, the Arbitrator, Mr. James Mang'erere notified both parties that the arbitral award was ready pending payment of the arbitration fees via email of 31st May 2017. The final award was published on 7th December 2017. (*Annexed herein and marked "HF1" are copies of email correspondence between the parties and the arbitrator*).

21. The Respondent filed a Notice of Motion on 10th May 2018 requesting the Court to grant leave to allow it to file an application to set aside the final arbitral award dated 7th December, 2017 out of time. The Application herein is bad in law, for having been filed outside the 3

months period provided for in **Section 35(3) of the Arbitration Act**. A party can only bring an application to set aside the arbitral award within 3 months from the date on which the party making the application received the arbitral award.

22. The Applicant sought prayers Nos.(2), (3) and (4) prematurely as his application was and is not properly on record as it was filed out of time without the leave of the court. I have declined to grant leave for reasons I have stated here in above; that notwithstanding I am not convinced that the Applicant demonstrated it would have been successful in view of the contents in the Respondent's affidavit dated 21st June 2018. The Applicant gave written confirmation for the arbitration to proceed with the sole arbitrator; Mr. James Mang'erere the Applicant, was present at preliminary meeting on 22nd December 2016, where the parties agreed by consent that if Applicant was unable to get his Advocate the parties would proceed with arbitration without the Advocates involvement. I find the Applicant engaged with the arbitrator both on phone and via e-mail on its availability and even paid fees to arbitrator (*MWN-2B*). The Applicant admitted signing consent judgment but failed to prove fraud or being influenced or coerced to do so. In view of the uncontroverted affidavit of the Respondent; I find that the Applicant did not prove any of the allegations in support of his application dated 10th May 2018.

23. In view of the above and having found that there is no valid application on record by the Applicant and having declined to grant leave to file an application out of time as sought, by the Applicant, I find no basis to consider other issues raised by the Applicant. I proceed to dismiss the Applicant's application dated 10th May 2018 with cost to the Respondent.

B. Respondent's/Applicant's Chamber Summon dated 26th January 2018.

24. The 2nd Application by the Respondent is dated 26th January 2018 and is seeking the following orders:-

1. THAT the Court adopts the arbitral award dated 7th December, 2017 as an Order of this Court.

2. THAT the costs of this Application be provided for.

25. The application is premised on the grounds on the face of the application thus;

a. THAT the Applicant and Respondent entered into an agreement dated 9th October 2015 wherein the Applicant agreed to disburse Kshs. 1,000,000 (Kenya Shillings One Million) to the Respondent to be repaid over a period of 18 months.

b. THAT the Respondent failed to honour its payment obligations despite being granted time to do so including a including a restructuring of the payments. As a result the Applicant decided to invoke clause 14 of the agreement and referred the dispute to Arbitration.

c. THAT the agreement dated 9th October, 2015 contains a valid arbitral clause pursuant to which the Applicant proposed and nominated an arbitrator –Mr. James Mang'erere via letter dated 15th November 2016.

d. THAT the Respondent confirmed the proposed appointment of the arbitrator and commencement of the arbitration process via email on the 30th November 2016.

e. THAT the parties at a meeting held at the arbitrators office on the 15th March 2017 agreed to settle the matter in the terms of a consent agreement which was signed on the 6th April and notified to the arbitrator for adoption as a consent award.

f. THAT the Respondent to date has refused, failed and neglected to honour the terms of the consent to pay Kshs. 858,100 to the Applicant as well as half of the costs of arbitration.

26. The Respondent relies on affidavit by Maureen Wakiuru Njuguna in which she reiterates the grounds on the face of the application and annexure "*MW-1*" a copy of the agreement dated 9/10/2015 between the parties herein, in which the Respondent disbursed Kshs. 1,000,000/- to the Applicant; but the Applicant did not pay as agreed with effect from 19th February 2016 at a rate of Kshs. 75,354; that due to default on part of the Applicant the Respondent invoked clause of the agreement dated 9th October 2015 and referred the dispute to the Arbitrator (annexed *MWN-2* a copy of letter dated 15th November 2016 to the Applicant referring the dispute to arbitrator); that the Applicant confirmed the appointment of the proposed arbitrator (*see annexure MWN-3*) a copy of the Respondents email dated 30th November 2016; Respondent statement of claim dated 16th January 2017, the Applicant's statement of defence and Applicant's statement of reply in defence dated 30th January 2017 (*marked MWN-4*); parties meeting was held at arbitrators office on 15th March 2017, when the matter was agreed to be settled in terms of the consent agreement signed by both parties on 6th April 2017 and notified to the arbitrator for adoption as consent and (*marked MWN-5*) being a copy of *signed consent*"); that pursuant to the Arbitration and consent, an award was made (*marked "MWN-6"* being a copy of the award dated 7th December 2017 together with invoices and proof of payments of costs of the arbitrator by the Respondent.

27. In the recognition and enforcement of arbitral award the Arbitration Act has set out criteria to guide the court. According to **Section 32(1) and (3) of the Arbitration Act**, the arbitral award is required to be made in writing and signed by the arbitrator and also should show reasons upon which it is based; however where parties have signed no reasons are to be given. In the instant matter, the parties agreed to settle the matter in terms of a consent agreement which both parties signed on 7th April 2017 and notified the Arbitrator.

28. The Arbitration Act confers the High Court with powers to recognize and enforce domestic arbitral award as binding upon application by parties for such orders under the provisions of section 36(1) of the Arbitration Act, which provides:-

"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."

29. Section 37 of the Arbitration Act on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against which it is involved. The said Section 37(1) (a) and (b) provides:-

“(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**
- ii. 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."**

30. In the instant application, the Applicant has not furnished the court with any proof as per **Section 37 of the Arbitration Act** to warrant refusal of recognition or enforcement of an arbitral award. The applicant did not demonstrate he was influenced nor coerced to agreeing to settle the matter in the terms of a consent agreement which it signed together with the Respondent herein. The Respondent proved that it was the Applicant who made proposal on how it wished to make payments to the Respondent; that proposal formed the basis of the consent agreement and its claim for ignorance of what it signed is an attempt to evade payment of the amount owed; after all there is no denial of the indebtedness.

31. Section 36(3) of the Arbitration Act provides:-

"(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.**

I have perused the court record and have found that the Respondent has complied with conditions set out in **Section 36(3) of the Arbitration Act** and has furnished the court with the final award dated 7th December 2017 and the original arbitral agreement dated 9th October 2015.

32. The 2nd application by the Respondent is merited and I proceed to make the following orders;

a) The Final Award made on 7th December 2017 by Honourable Arbitrator is hereby recognized as binding and leave is hereby granted as prayed for its enforcement as a decree of this court.

b) The costs of the 2nd application to the Respondent/Claimant.

Dated, signed and delivered at Nairobi this 11th day of October, 2018.

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J .A. MAKAU

JUDGE