



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL CASE NO 419 OF 2016

POPATLAL MADHAVJI & BROS LIMITED.....APPLICANT/RESPONDENT

VERSUS

PURUSHOTTAM ENTERPRISES LIMITED...1ST RESPONDENT/CLAIMANT

STANLEY KEBATHI.....2ND RESPONDENT/ARBITRATOR

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL CASE NO 383 OF 2016

PURUSHOTTAM ENTERPRISES LIMITED.....CLAIMANT

VERSUS

POPATLAL MADHAVJI & BROS LIMITED.....RESPONDENT

RULING

1. The above two mentioned cases were consolidated on 23/3/2017 for hearing together and Misc Case No.419/2016 was made the Lead file in respect of the two separate applications in the two files.

Applicant's Application dated 6th September 2016

2. In the application dated 6th September 2016 in High Court Misc Application 419 of 2016, the Applicant through a chamber summons dated 6th September 2016 brought to court pursuant to various provisions of the law thereto seeks the following orders:-

1. That this Honourable Court do find and order that the Honourable Arbitrator's fee note is unjustifiable, is manifestly excessive and is drawn contrary to the agreement of the parties and the Honourable Arbitrator (2nd Respondent) and that this Court Order and direct the proper fees payable to the 2nd Respondent by the Applicant and the 1st Respondent/Claimant (1st Respondent).

2. That the Award dated the 15th May 2016 (*the impugned Award*) purportedly issued by the 2nd Respondent be set aside on the grounds that:

i) The Arbitral award deals with a dispute not contemplate by or not falling within the terms of the reference to arbitration or contains matters beyond the scope of the reference to arbitration.

ii) The award was induced or affected by fraud, bribery, undue influence and corruption.

iii) The award is in conflict with the public policy of Kenya.

3. That the impugned award purportedly dated 15th May 2016 is not an award under the provisions of the Arbitration Act and it should therefore be formally set aside.

4. That in the alternative and without prejudice to paragraph 3 above, the impugned award dated 15th May 2016 is not the same as the award which was published by the Arbitrator's letter dated 12th May 2016.

5. That the 1st and 2nd Respondents be ordered to pay the costs of these proceedings.

3. The application is premised on several grounds on the face of the application and supported by supporting affidavit of Chandresh Raithathaa, director of the Applicant Company and annexures thereto.

4. The application is opposed and the 2nd Respondent in doing so filed a Replying affidavit dated 30th March 2017 and attached annexures thereto in support of the contents of the affidavit.

5. The 1st Respondent similarly opposes the application of the Applicant and in doing so has filed a Replying affidavit dated 30th November 2016.

1st Respondent's Preliminary Objection

6. The 1st Respondent further filed Notice of Preliminary Objection to the Applicant's application dated 6th September 2016; on the 29th day of November 2016 setting out 3 main preliminary objections being as follows:-

1. This Honourable Court lacks jurisdiction under the provisions of the Arbitration Act to grant the orders sought in the Applicant's Application dated 6th September 2016.

2. The Applicant has not furnished this Honourable Court with the original or certified copies of the arbitral award and arbitration agreement in breach of the provisions of Section 36(3) of the Arbitration Act.

3. The Applicant has not deposited the amount of fees and expenses demanded by the arbitral tribunal in breach of the provisions of Section 32B (4) of the Arbitration Act.

1st Respondent's Application dated 20th January 2017

7. In the Hcc Misc App. No. 383 of 2016 the 1st Respondent though a chamber summons dated 20th January 2017 brought pursuant to section 36 of the Arbitration Act and Rule 6 of the Arbitration Rules, 1997, seeks the following orders:-

1. That the Claimant be granted leave to enforce the arbitral award dated 15th May 2016 and filed in court on 23rd August 2016 as a decree of this court.

2. That the costs of this Application be provide for.

8. The application is premised on the grounds on the face of the Chamber Summons and supportive affidavit of Arun Kerai; a director of the 1st Respondent company.

9. I have very carefully perused the two applications; the response by the opposing parties in both applications, submissions by respective counsel, taking their rival positions and the issues arising thereto for consideration can be summed up as follows:-

a) Whether the Honourable Court lacks jurisdiction under the provisions of Arbitration Act to grant the orders sought in the Applicant's application dated 6th September 2016?

b) Whether the Applicant has not furnished the Honourable with the original or certified copies of the arbitral award and arbitration agreement in breach of the provisions of section 36(3) of the Arbitration Act?

c) Whether the Applicant's failure to have deposited the amount of fees and expenses demanded by the arbitral is in breach of the provisions of section 32 B (4) of the Arbitration Act?

d) Whether the preliminary objection notwithstanding, the Applicant's application dated 6th September 2016 can succeed on merits?

A) Whether the Honourable Court lacks jurisdiction under the provisions of Arbitration Act to grant the orders sought in the Applicant's application dated 6th September 2016?

10. The Applicant's application dated 6th September 2016 is brought pursuant to section 19, 19A, 32B,(1), (4) and (6), Section 35(2) (a) (iV) (Vi) (b) (ii) of the Arbitration Act revised 2010 (1995); Rule 7 of the Arbitration Rules Revised (2010) (1997); Article 159(2) (d) (e) of the Constitution of Kenya. The main prayers are set out on the face of the chamber summons.

11. The Applicant's contention as regards this ground is that, it is entitled to seek redress before this Honourable Court in its supervisory jurisdiction provided the Applicant invokes the enabling provisions of the Arbitration Act to bring itself within the purview of this court's supervisory jurisdiction. It is the Applicants contention that invoking the powers of section 35 (iv) (vi) and 35 (vi) and (b) (ii) of the Arbitrators Act in seeking to set aside an arbitral award it has brought itself within the supervisory jurisdiction of this Honourable Court.

12. Section 35(2) (iv) (vi), (b) (ii) of the Arbitration Act provides:

"An Arbitral award may be set aside by

the High Court only if:-

35(2) (iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or 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, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v)

(vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) (ii) The award is in conflict with the public policy of Kenya."

13. The Applicant further relies on the case of **D. Manji Construction Limited Vs C & R Holdings Limited [2014] eKLR** where the court confirmed that the statutory grounds set out under paragraph 35 of the Arbitration Act confers necessary jurisdiction to court to entertain an application for setting aside an arbitral award.

14. The Applicant seeks under prayer No. 2 that the Award dated the 15th May 2016 (*the impugned Award*) purportedly issued by the 2nd Respondent be set aside on the grounds that:

i) The Arbitral award deals with a dispute not contemplate by or not falling within the terms of the reference to arbitration or contains matters beyond the scope of the reference to arbitration.

ii) The award was induced or affected by fraud, bribery, undue influence and corruption.

iii) The award is in conflict with the public policy or Kenya.

15. Under section 32 B (4) of the Arbitration Act dealing with costs and expenses it is provided:-

"Section 32 B (4) If the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined."

16. The applicant in this matter having been aggrieved by fees and expenses demanded by the arbitral tribunal should have complied with section 32 (B) (4) of the Arbitration Act. The Applicant in this matter did not demonstrate that following withholding the delivery of an award, as a party to the arbitration, he caused notice to the other party and to arbitral tribunal, and proceeded to make payment with court of the fees and expenses demanded by the arbitral tribunal, nor did it demonstrate that it applied to the High Court for an order directing the manner under which the fees and expenses properly payable to the arbitral tribunal shall be determined. It is evident from the pleadings before me, that the Applicant herein is in breach of the express provision of the Arbitration Act. I find owing to the Applicant's failure and the breach of the express provision of the Act, the court cannot proceed to entertain the Applicant's prayer to have the fees and expenses determined.

B. Whether the Applicant has not furnished the Honourable with the original or certified copies of the arbitral award and arbitration agreement in breach of the provisions of section 36(3) of the Arbitration Act?

17. Section 6(3) of the Arbitration Act dealing with the recognition and enforcement of the awards requires that, the party relying on an arbitral award or applying for its enforcement must furnish:-

a) The original arbitral award or duly certified copy of it or

b) The original arbitration agreement or duly certified copy of it.

18. It is contended by the Applicant; that having filed its application under section 35 of the Arbitration Act, which enables it to seek the

setting aside of the impugned arbitration award, it is not required to file a certified copy of the arbitration award and arbitration agreement in court; urging that in the affidavit sworn by Chandresh Raithathaa in support of the application, the agreement and conditions of contract for building works, (*The Agreement*), dated 25th August 2010, is annexed to the application as **Exhibit CR-1** and the impugned Award as **Exhibit CR-25**. The Applicant therefore takes the position that it has brought to the attention of the court the contents of the said Agreement and impugned award to address the complaints before it. It is further urged at any event the 1st Respondent has filed in Nairobi High Court Milimani Law Courts miscellaneous Civil Case No. 383 of 2016, between it and Applicants on "*Notice of Filing Award*".

19. Reading from **section 36 of the Arbitration Act**; it is clear that a party who wishes to have an award recognized and enforced should furnish the original Award or certified copy of the Award or original Agreement or certified copy. The provision is not couched in a mandatory manner for it is a provision hinged on the discretion any power of the court as it is easily discerned from the reading of section 36 (3) of the Act which 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."

20. In the instant application the Applicant is not seeking recognition or enforcement of any award as its position is that there is no valid award as the 1st and 2nd Respondent's award is an impugned one. That aside the 1st Respondent has filed an application for recognition and enforcement of the award; attaching original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it; which in itself meets the requirement of section 36(3) of the Arbitration Act. The Applicant has also exhibited the said documents in the supportive affidavit of Mr. Chandresh Raithatha; a director in the Applicant's company. I find therefore no merit in preliminary objection under ground (b) of the objection.

C. Whether the Applicant failure to have deposited the amount of fees and expenses demanded by the arbitral is in breach of the provision of section 32 B (4) of the Arbitration Act?

21. There is no dispute that in this matter the Applicant did not deposit the fees and expenses demanded by the arbitral tribunal; however the Applicant contention is that the 2nd Respondent; fee note was manifestly excessive, extortionist and contrary to **section 19A of the Arbitration Act**. The said section provides:-

"19 A The parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings."

22. It is contended by the Applicant; that all material times it intimated; that it was contesting the said fee note inspite of the 1st Respondent complying, conferring an undue financial benefit to the 2nd Respondent by paying its portion and purporting to pay the Applicant's portion thereby inducing the 2nd Respondent to release its Award and that of the Applicant contrary to section 32(5) of the Arbitration Act. The said section 32 (c) of the Arbitration Act states:-

"32 (c) Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award."

23. It is from the above that the Applicant is of the view that the payment of fees and expenses by the 1st Respondent to the 2nd Respondent of its share and that of the Applicant an inference of fraud can be drawn. I have perused the Applicant's affidavit and I have been unable to find any attempt to demonstrate existence of collusion or fraud on part of the 1st and 2nd Respondents. No evidence has been provided for the court to draw an inference of fraud. The court is also alive to the fact that it is common in arbitration practice; if any party delays or is unwilling to pay his/her or its portion of the Arbitration fees; for any one of them to pay or may pay the entire fees and collect the award. Once that is done, depending on the contents of the award; the party on whose behalf the payment was made would have to refund the party who had made the payment. I believe that is the standard procedure in arbitration and I find that nothing malicious can be read out of the same.

24. In any event, I find that the sequence of events that led to the 1st Respondent paying the Applicant's portion of the Arbitrator's fees as per the copies of the cheques is spelt out at paragraphs 45 to 48 of the Replying Affidavit of Arun Kerai sworn on 30th November 2016 and filed on the same date. The copies of the cheques and the bank statements is sufficient evidence that the cheques to the Arbitrator were in settlement of the Arbitrator's fees as annexed to the said Affidavit as annexures **AK 27, 28, 29, 30** and **31**.

25. In addition to the above I find that the Applicant breached the provisions of section 32 B (4) of the Arbitration Act that renders his application untenable.

D. Whether the preliminary objection notwithstanding, the Applicant's application dated 6th September 2016 can succeed on merits?

26. The Applicant in the chamber summons dated 6th September 2016 amongst other prayers seeks that:-

a) That this Honourable Court do find and order that the Honourable Arbitrator's fee note is unjustifiable, is manifestly excessive and is drawn contrary to the agreement of the parties and the Honourable Arbitrator (2nd Respondent) and that this Court Order and direct the proper fees payable to the 2nd Respondent by the Applicant and the 1st Respondent/Claimant (1st Respondent).

b) That the Award dated the 15th May 2016 (the impugned Award) purportedly issued by the 2nd Respondent be set aside on the grounds that:

i) The Arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains matters beyond the scope of the reference to arbitration.

ii) The award was induced or affected by fraud, bribery, undue influence and corruption.

iii) The award is in conflict with the public policy or Kenya.

c) That the impugned award purportedly dated 15th May 2016 is not an award under the provisions of the Arbitration Act and it should therefore be formally set aside.

d) That in the alternative and without prejudice to paragraph 3 above, the impugned award dated 15th May 2016 is not the same as the award which was published by the Arbitrator's letter dated 12th May 2016.

27. On the issue raised concerning the Arbitrator's fees; the 1st Respondent raised a preliminary objection. I have already considered the same and find that section 32 B (4) of the Arbitration Act was and has not been complied with; as regard a situation in which a party wishes to challenge the arbitrator's fees. It is also noted that 1st Respondent in its Replying Affidavit it averred that it has no objection to the Arbitrator's fees and it has indeed paid the same.

28. In seeking to set aside the award of an Arbitrator, the Arbitration Act has specifically set out the conditions to be satisfied. Section 35(1) and 3 of the Arbitration Act sets out the grounds on which an award can be set aside. I have gone through the said section and I have not found any ground to the effect that a challenge on quantum of the Arbitrator's fees can be one of the grounds to justify or qualify for setting aside an Arbitral Award. The Applicant has failed to take an advantage to challenge the Arbitrator's fees and expenses as provided by the statute; he cannot go round the statute to seek setting aside the award. The Applicant's application do not in the remotest way meet the requirements of section 35 (2) (a) and (b) of the Arbitration Act; which provides:-

35 (2) - An arbitral award may be set aside by the High Court only if:-

"(a) the party making the application furnishes proof—

(i) That 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, the laws of Kenya; or

(iii) The party making the application 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 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, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) 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 award is in conflict with the public policy of Kenya."

29. The Applicant further alleges there were two awards one dated 15th May 2016 and another dated 12th May 2016. It is alleged by the Applicant that since notification of the award was ready for collection on 12th May 2016, it then followed logically that there had been an award dated 12th May 2016 and that of 15th May 2016. The Applicant did not produce any award dated 13th May 2016 to demonstrate of its existence. None of the Respondents support that there were two awards. I take that a notice to parties that the judgment is ready for delivery does not mean that the judgment is ready and dated and that it bears the same date as the notice of its delivery. What such notice means in my view means is that the judgment has been written and is ready for delivery and a date that will be put on the judgment is the date when it will be read and delivered. The input of a letter from the Arbitration notifying parties that the Arbitral Award was ready for collection only meant that the Arbitral Award had been written and the parties were required to organize themselves and pay the Arbitrator's fees before collection of the same. The point has been canvassed by the Arbitrator, Architect Stanley Kebathi, the 2nd Respondent in his Replying affidavit of 30th March 2017 under paragraphs 24, 25, 50, 51, and 52. The Applicant has not provided evidence to the contrary to buttress

the 2nd Respondent's assertion that there was only in existence of one award and the 1st Respondent do not receive an award before it was even published. The affidavit of Arun Kerai of 30th November 2016; on behalf of 1st Respondent clearly denies there being two awards.

30. I have very carefully perused the Applicant's application and affidavit in support and I am satisfied that it does not meet the threshold of the provisions of section 35 (2) of the Arbitration Act; simply because there is no evidence put forward by the Applicant on the following:-

- a) That any party to the arbitration agreement was under some incapacity; or
- b) That the arbitration agreement was not valid under the laws of Kenya; or
- c) That the Applicant 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
- d) That the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; or
- e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or
- f) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;

31. The Applicant has not produced any evidence to prove the grounds set out under section 35 of the Arbitration Act, and as such I find the Applicant's application dated 6th September 2016 is bound to fail for want of merits.

32. I now turn to the 1st Respondent's application dated 20th January 2017 in Hc Misc No. 383/2016 which was on 23rd March 2016 ordered by the late Hon. Justice J. Onguto to be consolidated with application dated 6th September 2016 in Hcc No. 419/2016 and the same be heard together.

33. The 1st Respondent filed an application for leave to enforce the award as a decree under the provisions of section 36 of the Arbitration Act and Rule 6 of the Arbitration Rules.

34. I have perused the application and I am satisfied the 1st Respondent has fully complied with provisions of the law and the Applicant's application having been found to be without merits and there being no grounds of opposition for further consideration by this court, I am satisfied that the application is meritorious.

35. The upshot is that the Applicants' application dated 6th September 2016 is without merits. The 1st Respondent's application dated 20th January 2017 is meritorious. I accordingly proceed to make the following orders:-

- a) The Applicant's application dated 6th September 2016 is dismissed.**
- b) The 1st Respondent/Claimant be and is HEREBY granted leave to enforce the arbitral award dated 15th May 2016 and filed in court on 23rd August 2016 as a decree of this court.**
- c) The 1st Respondent is awarded costs of the application.**

Dated, signed at Nairobi this 15th day of November, 2018.

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J .A. MAKAU

JUDGE

Delivered on 15th day of November 2018 at Nairobi.