



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION & ADMIRALTY DIVISION

MISC. CIVIL CAUSE NO. 131 OF 2016

GOODISON SIXTY ONE SCHOOL LIMITED.....APPLICANT

Versus

SYMBION KENYA LIMITED.....RESPONDENT

RULING

1. Symbion Kenya Limited (Symbion) seeks Leave of the Court to enforce as a Decree of this Honourable Court the Arbitrator's Final Award of 25th February 2016. This request against Goodison Sixty One School Limited (Goodison) is contained in a Chamber Summons dated 16th March 2016 and anchored on the provisions of Section 36 of The Arbitration Act (The Act).
2. Goodison opposes and has filed Grounds of Opposition dated 25th April 2018, Affidavits of Zainab Jaffer sworn on 21st April, 2018 and 26th June 2018.
3. Section 36 of The Act makes provision for Recognition and Enforcement of Awards while Section 37 sets out the Grounds upon which Recognition or Enforcement can be refused. The Award sought to be enforced is a Domestic Arbitral Award and by annexing to the Application a duly certified copy of the Award and a duly certified copy of the Arbitration Agreement, Symbion has satisfied two essentials of Section 36(see subsection (3) thereof).
4. Goodison takes the position that this Court should neither Recognize nor Enforce the Award on the basis of two broad grounds namely that the making of the Arbitral Award was induced or affected by fraud, bribery, corruption or undue influence and that its Recognition or Enforcement would be contrary to the Public Policy of Kenya.
5. The Grounds set up by Goodison are among the Grounds for refusal of Recognition or Enforcement which are fully cataloged in Section 37 as follows:-

“(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(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 recognized 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.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security”.

6. A short history of the proceedings herein, not the dispute itself, reveals why this this late stage of the proceedings should not be involved.

7. In the proceedings before the Arbitral Tribunal, Goodison made two formal Challenges to the Arbitrator. The second of the two was that of 3rd February 2016. The Grounds for challenge made out by Goodison are reproduced in verbatim;

“The grounds for this challenge are that you have Failed to disclose the following facts which you were under a lawful duty to disclose under Section 13 of the Arbitration Act and the IBA Guidelines on Conflicts of Interest (2014):-

1.2.1 That you are a member of the Panel of Mediators of the Strathmore Dispute Resolution Centre (“SDRC”) a position from which you presumably earn an income.

1.2.2 That Counsel for the Claimant, Mr. Anthony Gross, is described in the SDRC website as a Director of SDRC and “...a founder member and Director of the Dispute Resolution Centre in Nairobi now amalgamated with the Strathmore Dispute Resolution Centre under the Law School...”.

1.2.3 As such, Mr. Gross and/or his firm presumably earns an income or other financial reward from SDRC or has an economic interest in its success.

1.2.4 As a Director of SDRC Mr. Gross is one of the persons who must have been privy to and responsible for your appointment to the Panel.

8. In a Ruling of 25th February 2016, Paul Ngotho (the sole Arbitrator), dismissed the said Challenge. By dint of the provisions of Section 14(3) an unsuccessful Challenging Party is entitled to apply to the High Court to determine the matter by either rejecting or upholding the Challenge. Goodison took its chance under these Statutory provisions and in an application dated 23rd March 2016, it asked the Court not only to uphold the challenge but also to declare the Arbitration proceedings a nullity and the Final Award and Costs Award dated 23rd February 2016 and any and all other Orders, Ruling or Awards in the Arbitration Proceedings void.

9. It fell to Hon. Ochieng J. to hear and determine that Application. In a Ruling dated 6th October 2016, the good Judge held as follows:-

“38. In the final analysis, the application dated 23rd March 2016 is unsuccessful, because;

a) It was brought after the arbitrator had already given his final Arbitral Award and Costs Award. Therefore, there was nothing further that the Arbitrator could be stopped from doing as work had come to an end; and

b) The Arbitrator could not be condemned without being accorded an opportunity to be heard. But, as the applicant had not made the Arbitrator a party to the application before the Court, the arbitrator was denied any opportunity at which he could have responded to the allegations directed against him”.

10. Aggrieved by that Decision, Goodison filed an application dated 15th November 2016 in which it sought to Review and have the Decision of Hon. Ochieng J. set aside. That Application was not successful and was dismissed by Hon. Mwongo J. on 2nd May 2018.

11. Following that determination, Goodison argued its Application dated 23rd May 2016 to set aside the Award. One of the Grounds put forward by Goodison and forcefully argued by its Counsel was that the Arbitrator failed to treat the Parties with equality due to his lack of impartiality or independence and his manifest bias. In a Ruling dated 13th April, 2018, I made the following observation on this Ground:-

“3. Although Goodison has in the present Application also asserted that the Arbitrator failed to treat the parties with equality due to his lack of impartiality or independence and was manifestly biased, the occasion to consider that assertion is passed. The Court notes that in an Application dated 23rd March 2016, Goodison had not only sought to declare the Arbitral proceedings and the Award therefrom a nullity but also to have the Arbitrator disqualified and removed from the proceedings. The mainstay of that Application was an allegation of partiality and lack of independence by the Arbitrator. That application was dismissed in a decision

(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful”.

9. It would seem to this Court that a Party who is entitled to mount a Challenge to an Arbitrator but has, for good reason, not had the opportunity of raising the Challenge under the Procedure set out in Section 14 and an award has been made, can nevertheless use the circumstances contemplated by Section 13(3) to either seek the setting aside of the Award or resist its recognition and/or enforcement. For example, there is no reason why a Party who demonstrates the existence of justifiable doubts as to the impartiality and independence cannot use that reason to advance an argument that the Award made was induced and/or affected by undue influence or that it would be against Public Policy to recognize an Award made in those circumstances.

10. However, where like here, the Party has had an opportunity of filing a Challenge Application before the High Court and has in fact presented and argued it, and the Application has been determined, then it may amount to an abuse of Court Process for the Party to re-agitate the same Grounds in subsequent Applications for setting aside or opposing Recognition or Enforcement. Of course, it is true that the Application for Challenge made by Goodison was determined on technicalities and the substantive arguments were not decided but it has to be remembered that the primary forum to take up the issue of doubts as to the impartiality and independence of the Arbitrator (as opposed to the apparent bias during the Arbitral Proceedings) has to be by way of a Challenge under Section 14(3). Once the Court has rendered its Decision on the Challenge, albeit on a technicality, then it may amount to abuse of Court process to use the Grounds raised in the Challenge to advance a cause for setting aside or opposing Recognition. To allow a Party to argue the same issues would be to permit the Party to find a way of going round the technical difficulties it encountered in the Challenge Application by simply rearguing the Grounds in the subsequent Applications.

11. Even if I was wrong in this view, two other considerations sway this Court away from entertaining the arguments raised by Goodison.

12. First, in the Further Affidavit of Oscar Ogunde (on behalf of Symbion) filed on 21st June 2018 he depones,

“That against the above backdrop, the Respondent has always filed Notices of Appeals (which are on Record) against every Ruling delivered by this Honourable Court in these aspects. In this regard and in response to paragraph 10 of the Respondent Replying Affidavit, the Respondent if dissatisfied by this Honourable Court various Rulings and/or findings will have an opportunity to canvass its grievances in the said Appellate Court as this Honourable Court lacks the jurisdiction to sit as an Appellant Court against its own Decisions”.

In response to this further Affidavit, Goodison filed a Supplementary Affidavit by Zainab Jaffer sworn on 26th June, 2018. In response to the issue raised by Ogunde, Jaffer depones,

“5. THAT I am advised by my Advocates on record whose advice I verily believe to be true that the contents of paragraphs 10 and 11 of the Further Affidavit amount to legal submissions and the Deponent is not qualified to give an opinion on matters of Law and ought to be disregarded. Nevertheless I am further advised by the Respondent’s Advocates on record that the Respondent raises clear and weighty matters of Law which directly pertain to the Respondent’s Constitutional right to appear before this Honourable Court to seek redress for the manifest injustice that has been visited upon it and is properly before this Honourable Court”.

13. If it is true that the Ruling of 23rd March 2016 is under Challenge by way of Appeal (and this is not denied by Goodison) then it would be an abuse of Court process for Goodison to redeploy the same issues that will arise at the Appeal in resisting the enforcement proceedings. This Court has not been told why Goodison should not pursue the Appeal and await its outcome.

14. Secondly, in responding to the Application before Court, Goodison has made damning allegations against the Arbitrator. In much the same way as the provisions of Section 14(4) entitles the Arbitrator to appear and to be heard, the Arbitrator would have a right to appear and be heard on the allegations made against him by Goodison in the response made to the Application now before Court. This Court is not certain whether the Affidavits of Zainab Jaffer sworn on 21st April 2018 and 26th June 2018 in Response to the Application were served upon the Arbitrator. From reading the Affidavits themselves they were only to be served upon A.F Gross Advocate. This Court would be reluctant to make any findings against a person who has not been given an opportunity to be heard.

15. Even if this Court were to find that the issues raised are not *res judicate* those raised in the Challenge application, I still hold as I did in my Ruling of 13th Day of April, 2018 that the moment for raising the issue of independence and impartiality passed with the dismissal of the Challenge Application.

16. For the reason that the fulcrum of the resistance has crumbled, then the Court has no reason but to allow the Application for Leave under Section 36 of The Arbitration Act. The Chamber Summons of 10th March 2016 is allowed as prayed. Costs to the Applicant.

Dated, delivered and signed in open Court at Nairobi this 7th Day of December, 2018.

F. TUIYOTT

JUDGE

Present:

Amin for Respondent

N/a for Applicant

Nixon-Court Assistant