REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 196 OF 2009

PIMKA DEBUCON CONSTRUCTION LTD.....PLAINTIFF/APPLICANT

-VERSUS-

MANYOTA LIMITED.....1ST DEFENDANT/RESPONDENT

ZTE CORPORATION.....2ND DEFENDANT/RESPONDENT

RULING

1. The Dispute between the parties hereof was brought to court vide a plaint dated 3rd March 2009.

It involves of Civil Works of Optical Fibre Backbone Infrastructure at the Eldoret-Kitale-Lokumai project.

Certain agreements and sub-contract agreements in respect of the works were entered into between all the parties in respect of payments upon completion of the specified works in the agreements, but disagreements arose necessitating the plaintiff to file this suit.

2. The plaintiff's claim is for a sum of Ksh.3,961,238/= being part performance of the contract sums against the 2nd defendant. It seeks an order to compel the 2nd Defendant to fulfil directly as per the sub-contract agreement being vicariously liable for the debts owed by the 1st Defendant hence the claim against both defendants.

3. On the 28th May 2012, the court(Hon. Wendo J) referred the dispute, by consent of the parties and in terms of an arbitration cause in the agreement, to Arbitration through The Architectural Association of Kenya who appointed a single arbitrator to hear the dispute.

4. In the day's proceedings as seen from the court file, the court directed that the arbitrator to file his report in court and gave a mention date for the 24th September 2012 for the court to confirm whether the report had been filed. It was not filed and an extension was given upto 19th October 2012. There are no other proceedings in respect of the filing of the arbitral award.

The parties to the arbitration too did not move the court for any orders from the 19th October 2012.

5. On the **28th July 2015** the plaintiff filed an application seeking that the arbitration award supposedly read on the 25th April 2014 be pronounced as judgment of the court and be recognised as such enforcement.

6. On the **31st July 2015** the defendants too filed an application dated **29th July 2015** seeking an order of stay of any intended proceedings touching on the arbitration award made on the 25th April 2014, and for an order to set aside the said award. They also sought that a fresh and different arbitrator be appointed to hear the dispute.

7. Upon hearing both parties on the two applications, I disallowed the applications on ground that no award had been filed following the arbitration proceedings in compliance with the court order. None had been filed in court at the time. I rendered that both applications were premature.

8. **What is before me is another application by the plaintiff. It is dated 16th May 2017** and filed on the 18th May 2017.

It is made under **Section 36** of the **Arbitration Act, and Rules 4(1) (2) (3) (5) and (6) of the Arbitration Rules 2017.**

The Plaintiff seeks:

(a) that the arbitral award read to the parties on 25th April 2014 be recognised, adopted and enforced as a decree of the court.

It is based on grounds that the final arbitration award was pronounced on the 25th April 2014 in the presence of both parties hence should be recognised, adopted and enforced as a decree of the court for enforcement purposes.

9. The Defendants have objected vehemently to the prayers sought in a replying affidavit and written submissions.

The main objection is to the effect that the prayers sought are similar to those sought in the earlier application dated 28th July 2015 which was dismissed as premature, that it is *res-judicata* and therefore incompetent and an abuse of the court process.

10. I have taken liberty to state the background to this application as the earlier ones will have a bearing on the determination of the present application.

I agree with the Respondents that this application is similar to the one dated 28th July 2015 that I declared to have been premature. In the first instance I have not seen any filed award at all todate.

11. The court order that initiated the arbitration process was clear on when the award was to be filed. There is no order extending the time for filing the award and none was applied for by any of the parties.

It is averred by the Advocate for the applicant that the award was pronounced in presence of both parties on the 25th April 2014. I have seen a letter from the arbitrator dated 13th February 2017 to the Deputy Registrar of this Court stating that he released the final award to the parties on 10th July 2015. Releasing the award to the parties in my view does not mean **pronouncing it to the parties, or reading it to them. Further there is no evidence that the final award or a certified copy thereof has been filed in court in line with Section 36(3) of the Arbitration Act.**

12. The question of paramount import is whether the award was ever filed in court so as to give the court power to pronounce on it.

In the case **National Oil Corporation of Kenya Ltd -vs- Prisko Petroleum Network Ltd (2014) e KLR, Gikonyo J** was categorical that the **Arbitral** award must first be filed.

Section 36(3) makes it mandatory that the party applying for recognition and enforcement should

(1) file the duly authenticated original award or a duly certified copy and

(2) the original arbitration agreement or certified copy of it.

13. Upon such filing it undoubtedly follows that a notice of such filing will be required to be served upon the opposite party under **Rule 4 and 5 of the Act.**

It is only then within a period of 30 days that any aggrieved party may apply to set it aside or seek for recognition and enforcement – by application under **Section 36(1).**

It is only after the above process has been adhered to that under **Section 36 and 37** the court can move to recognise it as a decree of the court and make an order for enforcement.

14. I have stated above that the Arbitral award was not filed.

I say so because there is no demonstration of such filing. Yes, the arbitrator did forward the final award to the Deputy Registrar. It is in the court file. I however note that the Deputy Registrar was not requested to file it.

It is not stamped by the relevant court registry that received it if indeed it was received. There is too no court fees receipt to evidence such filing.

15. The court order (Wendoh J) was that the Arbitrator was to file the award within a specific period. That was not done. No extension of time was obtained. I will not go in details here because I have held that no award was filed.

Placing a document in a court file without evidence that it was received for filing, and indeed filed does not constitute itself to filing. A documents authenticity can only be vouched by an official court stamp coupled with a court filing fees receipt.

It can therefore not be said that the Arbitral award was ever filed in court within the stipulated period or out of time or at all. – See **David Chabenda & Another -vs- Francis Inganji (2007)e KLR.**

16. Even if I were to assume that the award was filed which is not the case, it would follow that it was filed out of time and without leave of the court.

The court's hands are tied where its orders have not been complied with and cannot move to issue orders without certain things been done –

Section 35.

17. In **Mairi -vs- Ngongoro B. & Another (1986) KLR** the Court of Appeal held that:

> ***"As the Arbitration award had been filed out of time and nothing had been done under Order XLV Rule 8 to extend the time for making of the award, the award filed was a nullity."***

- See also **Ben Njoroge Mithamo & Another -vs- the Hon. The Solicitor General and Another** – Misc. Appl. No. 136/2014.

18. Going by the above and the objection submissions filed and articulated by the respondents, and there being no any demonstration of any Arbitral award filed in line with **Rule 4 & 5 of the Arbitration Rules** (no serial number in the civil registry, no stamp, no court fees paid, no affidavit of service), it is evident that there is no arbitral award filed upon which this court can move to either recognise, adopt as a decree of the court or order enforcement.

19. That was the same findings that I came to in the applicant's earlier application dated 28th July 2015.

Being grounded on the same material facts, and the applicant having failed to move to court to cure the defects in the application, I find the said application as an abuse of the court process and fatally defective. It is dismissed with costs.

Date, signed and delivered this 13th day of December 2018

J.N. MULWA

JUDGE