REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 196 OF 2009

PRIMKA DEBUCON CONSTRUCTION LTD.....PLAINTIFF

VERSUS

1. MANYOTA LIMITED….....1ST DEFENDANT

2. ZTE CORPORATION ….....2ND DEFENDANT

RULING

1. There are two applications before me.

2. The plaintiffs application dated and filed on the 28th July 2015 seeks that the Arbitration award read on the 25th April 2014 be pronounced as judgment of the court for purposes of recognition and enforcement.

The award arose from an order of the court in HCCC No. 386 of 2008 that the dispute between the parties be referred for Arbitration in terms of the Agreement entered into between the plaintiff and the Defendants on the 1st October 2008.

3. A dispute arose and in terms of the arbitration clause, the court by its order issued on the 28th May 2012, directed that the Architectural Association of Kenya to appoint an Arbitrator to arbitrate on the dispute. A mention date was given for the 24th September 2012 to confirm whether or not the report award was filed.

4. I have perused the court file and I have not seen any other proceedings since the 24th September 2012 when a further mention was given for the 19th October 2012.

I have also not seen the Arbitration award delivered on the 25th April 2014 nor has it been filed by the Arbitrator interms of the court order.

5. The defendants application is dated 29th July 2015 and was filed on the 31st July 2015. It seeks an order of stay of any intended proceedings touching on the recognition and or enforcement of the award made on the 25th April 2014. It further seeks to set aside the said arbitration award and referral of the dispute to a fresh and different arbitrator on grounds that

(1) The Arbitrator went beyond the scope of the reference to the arbitration

(2) That the ward is inimical to public policy

(3) That the arbitral ward is a nullity in law as it was affected by fraud and

(4) That the defendant was not given a fair hearing.

6. I have read the supporting affidavit sworn by the defendants director, Kenneth Kuria Njukia sworn on the 29th July 2015.

Both parties have filed written submissions on the two applications.

7. To understand the background to the two applications, I have read the parties pleadings including the subcontract agreement entered into between parties and also the Arbitral award dated the 25th April 2014.

To start with, the Arbitral award is not filed as per the orders of this court issued on the 24th September 2012. I have not seen any order extending the period of filing of the Arbitral award. It is however annexed as an Exhibit in the plaintiffs affidavit sworn by Advocate David Mong'eri on the 28th July 2015.

8. The Arbitration process is hangered upon **Article GC/17** of the Agreement between the parties whereof it is agreed that judgment upon the award may be entered in court with jurisdiction.

9. The **Arbitration Act, Chapter 49 Laws of Kenya** and the **Arbitration Rules 1997 (L.N. 58/1997)** govern the Arbitration process.

> **Section 36(3) of the Arbitration Act** makes it mandatory that the party applying for recognition and enforcement of an award should file the following:
>
> *(a) The original arbitral award or a duly certified copy of it and*
>
> *(b) The original arbitral agreement or a duly certified copy of it."*

I have stated above that the original arbitral award or a certified copy has not been filed. The mandatory provisions of Section 36(3) of the Act have therefore not been complied with.

10. In the case **David Chabeda & Another -vs- Francis Ingasi (2007) e KLR,** the court rendered itself that failure to comply with the mandatory provisions of **Section 36(3)** of the Act renders the application for recognition of an arbitral award incurably defective. The same holding was upheld in the case **National Oil Corporation of Kenya Ltd -vs- Prisco Petroleum Network Ltd(2014) e KLR.**

The bottom line in my considered opinion is that the original Arbitral award must be filed first before it can be recognised as a Judgment of the court.

Further provisions of **Rule 4 and 5 of the Arbitration Rules 1997** too must be adhered to, that the party filing the award shall give notice to all other parties of the filing of the award giving the date and the cause number and registry in which it has been filed and thereupon file an affidavit of service. This too has not been complied with.

Without the procedure stated in **Section 36 and 37 of the Act** and **Rule 4 and 5 of the Arbitration Rules** stated above, there can be no valid award for the court to either recognise or adopt as a judgment of the court.

11. This being the position in this matter, it follows that the plaintiff's application dated 28th July 2015 is incompetent. I proceed to dismiss it with no orders as to costs. See **Iris Properties Ltd & Another -vs- Nairobi City Council (2002) e KLR** where Justice Githinji (as he then was) strike out an application for recognition and adoption of an award when it was not filed, but only appended to the applicants affidavit.

12. Coming to the defendants application dated 29th July 2015 I am urged to stay all intended proceedings in respect of the award made on the 25th April 2014, and set it aside on grounds stated at the face of the application and at Paragraph 4 above.

Section 35 of the Act grants the High Court power to set aside an award where certain things are shown to have taken place.

However, having made a finding that the arbitral award has not been duly filed interms of the mandatory provisions of **Section 36(3) of the Act** there are no valid proceedings for this court to stay touching on the award.

13. The filing of an award and giving notice of the filing precedes any application to enforce it. The chamber summons envisaged under Section 36 to enforce the award can not be made in vacuum. In this case the arbitral award was not filed. To that end the defendant's application to set aside the award cannot supercede the filing of the ward. It is premature.

Section 35(2) of the Act sets grounds upon which an award may be set aside. Among them are if it is made against public policy, is affected by fraud and/or misrepresentation and if the arbitrator exceeded the terms of reference.

I shall not go into the merits or otherwise of the grounds set out for the reasons that since no valid arbitration award has been filed, there is nothing for the court to interrogate and set aside as doing so, in view, would be jumping the gun. The court orders directed to the Arbitrator on the 24th September 2012 was that the award would be filed. **Section 14(2)** of the Act provides for enlargement of time if time set under **Section 14(1)** has expired. That was not done.

It is upon the parties to move to court upon compliance with Section 36 of the Act, and upon filing of the Arbitral award in court that the court would constitute itself and cloth itself with the necessary jurisdiction to deal with the application as stated and filed by the defendant.

14. I am of the contrary view from the defendant's opinion that an arbitration award ought not be recognised and adopted by the court first before an application for setting it aside may be lodged. This is so because unless the arbitration award is filed in the strict sence, there is no award worth looking at.

This is so because unless the arbitration award is filed in compliance with the court order, a court would be dealing with an invalid document which is null and void as is the case here. The analogy is like having a case fully heard by a court and before the judgment of the court is delivered in court, one of the parties moves the court for an orders of setting aside the judgment that has not yet been delivered. It is not the scenario envisaged in **Section 14 (1) (3)** of the Act where a party may challenge the arbitration proceedings or the tribunal in the manner of its conduct of the proceedings before it is finalised and an ward delivered. What we have here is an award that has no legal validity and therefore null and void.

> See the case **National Corporation of Kenya Ltd** (Supra) where the subject was well addressed by the Hon. Justice F. Gikonyo in his judgment dated 3rd July 2014.

15. For those reasons I come to the finding that the defendants application dated 29th July 2015 is premature as there is no valid arbitration award filed in court upon which the court may make an order of stay of proceedings touching on the recognition or enforcement, and or setting aside of the same. The application is therefore incompetent. It is dismissed with no orders as to costs.

Dated, Signed and Delivered this 19th Day of January 2017

JANET MULWA

JUDGE