REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 41 OF 2016

LALJI MEGHJI PATEL & CO. LIMITED……...……APPLICANT/CLAIMANT

Versus

NATURE GREEN HOLDINGS LIMITED.....DEFENDANT/RESPONDENT

RULING

LALJI MEGHJI PATEL & CO. LIMITED hereinafter referred as the applicant moved this court by way of chamber summons pursuant to section 36 of the Arbitration Act, Chapter 49 of the Laws of Kenya, Rules 4 (1) (2) (3) (5) and (6) of the Arbitration Rules 1997 section 59 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Order 46 of the Civil Procedure Rules and all enabling provisions seeking the following substantive order:

(1) That the arbitral award dated 7/10/2016 be recognized, adopted and enforced as an order of the court.

(2) Leave be granted to enforce the arbitral award as decree of this court.

(3) The costs of the application be provided for.

The application is grounded on the premise that the parties were directed to submit their dispute to the Arbitration by the senior resident magistrate court on 7/7/2014. The arbitration was concluded and an award made in favour of the applicant on the 7/10/2016. The statutory period of 30 days have lapsed whereas the respondent has not taken steps to set aside the arbitral award. The award ought to be recognized, adopted and enforced as order of this court.

There is no appeal preferred against the arbitral award/or objection.

In addition to the grounds the applicant filed a supporting affidavit sworn by Mr. Parbat Premji Patel dated 1/12/2016 and filed in court on 2/12/2016. The essential features of the disposition in the affidavit is in all material aspect in support of the grounds and annextures in reference of the matter heard by an arbitrator and certified copy of the arbitral award.

In opposing the application one Donald Mutinda Amolo sought leave to file a reply to the application as one of the majority shareholders of the respondent company. Mr. Donald swore an affidavit sequencing events on the ownership of the company, the respondent to this application. Mr. Donald further deposed that the applicant company and the respondent company had entered into a binding contract which was duly undertaken. That a dispute arose within the contract which was submitted to the jurisdiction of arbitrator vide Kajiado Civil Case No. 168 of 2013. The arbitrator according to Mr. Donald affidavit determined the dispute between both parties with an award of Ksh.11,098,867.04 together with interest at

25% p.a, the award arbitrated upon annexed as DMA 2. According to Mr. Donald there has been a dead lock in the company which has resulted in resolving the issue on settling the award. That there is a dispute as to Ksh.2,756,049.01 which amount he sought a relief from this court to have it set aside.

BACKGROUND:

The history of the dispute is traceable to the Agreement and Conditions of Contract for Building Works between the applicant/plaintiff and the respondent/defendant to this application. The agreement was made on 22/7/2010 with a date for practical completion of the works stipulated to be on 22/4/2011. The contract sum was indicated as Ksh.22,098,538.00 for the four units to be constructed. The dispute resolution mechanism on matters arising out of the agreement was provided for under Clause 7 of the main agreement was to be subjected to arbitration.

According to the suit paper a dispute arose in the year 2013 culminating filing of civil suit No. 168 of 2013 before the Senior Resident Magistrate Court. On consideration of the matter the court in the presence of both parties refereed the matter to arbitration. The tribunal entertained the matter and rendered its own final award on the merits on 7/10/2016. The award provided for Ksh.11,098,867.04 to be paid to the claimant within 14 days from the date of the award. The tribunal also addressed the sanctions on default one such penalty clause in the event of non-payment. The amount was to attract interest of 25% per annum.

At the time this application was being canvassed before me there was no evidence of compliance with the arbitral award nor any proposal of settling the quantum rendered by the arbitral tribunal.

The issue before this court therefore is whether the applicant has made out a case for recognition and adoption of the final arbitral award as a court judgement? The first point of call is to set out the legal instruments and provisions applicable to the recognition and enforcement of the award.

In this discussion I am concerned with recognition and enforcement of an award. Under the Arbitration Act of Kenya section 1 arbitral award manes any award of an arbitral tribunal and includes an interim award. ***RLC Hunter on the law of Arbitration in Scotland 2nd Edition Butterworth's UK 2007-277-278*** defined an award as:

> **"A decree or award is a decision reached by a qualified and properly appointed arbiter or arbiters or oversman without misconduct, corruption, bribery or falsehood, upon questions properly submitted on the basis of a valid and subsisting arbitration agreement, and issued to the submitters in such form and at such time or place as the law or the contract requires. If only one award is made in a submission of existing dispute, it must exhaust all the questions at issue, if there are more awards than on, all the part awards must together exhaust those questions. An award by one oversman must be based on a proper devolution of the matters determined by the decree. The decree arbitral or award should be accurate to embodiment of the arbiters own clear, precise, internally consistent, self contained and unconditional judgement not mere hope or opening upon a disputed question or questions which the parties had agreed to submit for determination. It is not competent to submit to arbitration and to make an award upon a matter if the object is simply to attempt to give the force of a decree arbitral to an issue which had already, prior to the submissions, been agreed between the parties or their agents (Law of Arbitration in Scotland 2nd Edition Butterworth's UK 2002."**

However despite these attempt to give the arbitral award save character of definition but I am of the considered view that any approach to define arbitral can sometimes lead into problems or be restrictive as to what constitutes an arbitral award. As far as the recognition and enforcement of arbitral awards the law has set out the criteria. According to section 32 (2) (3) of the Arbitration Act the arbitral award shall be made in writing and signed by the arbitrator(s) and also state the reasons upon which it is based unless the parties have agreed that no reason are to be given.

The perusal of the arbitral award falls under the category where the arbitrator made a decision

accompanied with reasons in support of the award. Under section 32 (A):

> **"Except otherwise agreed by the parties an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."**

Section 34 deals with correction and interpretation of the arbitral award:

> **"(1) Within 30 days after receipt of the arbitral award unless a different period of time has been agreed upon the parties:**
>
> > **(a) A party may upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature and a party may open notice in writing to the other party require the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award."**

Setting aside of the arbitral award is provided for under section 35. The grounds upon which an application must be made to the High Court are specified as:

> **"2(a) if 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 awards deals with a dispute are contemplated by or not falling within the terms of the reference to arbitration or cautions decisions on matters beyond the scope of the reference to arbitration….."**
> >
> > **(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.**
> >
> > **(vi) The making of the award was induced or affected by fraud, bribery, induce influence or corruption."**

The application for setting aside the arbitral award may not be made after 3 months have lapsed from the date on which the party making that application had received the arbitral award.

In so far as the facts of this case are concerned and the applicable law I drew the conclusion that courts have no jurisdiction to correct glaring errors of law on an award unless it is one which goes to the jurisdiction of the arbitral tribunal or can be shown to be of such a nature as to render the award contrary to public policy. The general principle in the law of arbitration with regard to the finality of the award is that an award given at the end of the arbitral proceedings is binding and enforceable. See section 32, 34.

Musioki on Commercial Arbitration 2nd Edition pg 47, commenting on mistakes on law he stated as follows:

> **"By submitting their disputes to arbitration, the parties consent to run the risk that the chosen tribunal will prove unequal to its task. The position is the same as regards errors of law, and that the court will not order remission or setting aside, even where it is quite obvious from the terms of the award that the Arbitrator made a mistake. If the losing party has any remedy it must take the shape of an appeal and this will be available only if it has not been**

validly excluded by consent."

What I am trying to bring out is that the respondent objection to the recognition and enforcement of the arbitral award within the provisions of section 34 and 35 of the Arbitration Act is not sustainable in law in reference to this particular arbitral award before me. The objection raised as to why the award should not be adopted as a court judgement without variation or correcting the error of 2,756,049.01 falls short of the jurisdiction of the court on arbitral awards.

The applicant in this matter has presented the court with a domestic arbitral award. The duly certified copy of it and the certified copy of the arbitration agreement has been presented before this court. There are no grounds to vitiate the arbitral award as provided for under section 37 of the Arbitration Act. The objector Donald has not demonstrated that any of the grounds under section 37 do exist to persuade this court to refuse to recognize and enforce the arbitral award. In the case of **Tanzania National Roads Agency v Kudan Sigh Construction Limited Misc. Civil Application No. 171 of 2012** the court held interalia that:

> **"Recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the Arbitration Act. The conditions set under section 37 of the Act have not been met to warrant this court not to recognize and enforce the award."**

The finality of a decision from a arbitral tribunal was discussed in the case of ***Anne Mumbi Hanga v Victoria Njoki Gathara:***

> **"We therefore reiterate that there is no right for any court to intervene in the arbitral process, or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and simultaneously there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the Arbitration Act."**

The Court of Appeal also in the case of ***Nyutu Agrovet Ltd v Airtel Networks Ltd [2015] eKLR:***

> **"My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts for determination by a body put forth themselves, and adding to all that as in this case, that the arbitrators award shall be final, it can be taken that as long as the given award subsists it is theirs. But on the event it is set aside as was the case here, that decision of the High Court final remains their own, none of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agree must live with it unless, of course, they agree to go for fresh arbitration."**

The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. In ***Adrian Manubeli Meja v Trident Insurance Co. Ltd [2005] eKLR*** the applicant sought leave to enforce an arbitral award as a decree of the court under section 36 of the Act and Rules 4 and 6 of the Arbitration Rules 1997. The court observed:

> **"I am satisfied that all the necessary provisions of the law have been complied with"**

I have considered the rival submissions by Mr. Osundwa learned counsel for the applicant and the objection raised by Mr. Donald the director of the respondent company.

All the issues have been subjected to the applicable law of Arbitration in Kenya and the cited authorities.

The point of departure as I see it from Mr. Donald's stated point is more to do with settlement of the arbitral award in favour of the applicant than the non-repayment and enforcement of the award. The grounds in objection to the recognition and enforcement of the award itemized as stalemate by the company to transact business, secondly an error in computation on award of Ksh.2,756,049.01 to be

raised by this court is not tenable. These are issues Mr. Donald should have canvassed within the stipulated period of 30 days from the day the award was read and served upon them.

What the defendant director is attempting to do through this objections is to seek the setting aside of the award through back door. However as I have already argued elsewhere in this ruling he has not satisfied the legal criteria to vary or set aside the arbitral award clearly the defendant director is not dealing with anything new at this stage he is not called upon to defend the entire arbitral proceedings. The objection filed has been overtaken by the timelines set out under section 34 regarding the 30 days to apply to the arbitral tribunal to correct any computation errors/mistakes in the award. In the event the objector director was interested to set aside the award he ought to have come under section 35 of the Act.

In view of the legal position I am unable to discern any anomaly in the arbitral award to persuade me not to allow the application on recognition and enforcement. It is evident from the observations made and submissions by learned counsel that the applicant has satisfied the conditions precedent for grant of the orders sought such as:

The annexation of a certified copy of the arbitral award, the original agreement upon which the arbitral award was based, a formal application has been fixed and served upon the respondent, and there are no outstanding issues/application seeking to set aside the arbitral award.

For the above reasons I am satisfied that the applicant has complied with provisions of the Arbitration Act on recognition and enforcement of the arbitral award. The chamber summons filed in court on 2/12/2016 is hereby allowed with costs to the respondent.

Dated, delivered and signed in open court at Kajiado on 13/3/2017.

….…….

R. NYAKUNDI

JUDGE

Representation:

Ms. Obel for Osundwa for the Respondent

Mr. Donald - Applicant

Mr. Mateli – Court Assistant present