REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL SUIT MISC NO 714 OF 2012

SAMURA ENGINEERING LIMITED.....PLAINTIFF/RESPONDENT

Versus

DON-WOODS COMPANY LIMITED.....DEFENDANT/APPLICANT

PARTIAL RULING

Setting aside of arbitral award and decree, and stay of execution

[1] The court is being asked, by Motion dated 8th March, 2013, to stay execution of the Decree dated 5th February, 2013, and to bar M/S Kindest Auctioneers, their servants and agents from visiting or entering the Applicant's premises for purposes of execution. The application is also seeking; for the judgment herein adopting the award together with all consequential orders to be set aside; and of course costs. The application is supported by the affidavit of DONALD K. MWAURA, the grounds on the face of the application and the submissions filed here. It has been vehemently opposed by the Respondent.

COURT'S RENDITION

[2] I must admit that after considering the elaborate submissions by the parties, and the pertinent issues that emerge, I should say the application before me is quite a convoluted one. More trouble is found in the fact that there has been another suit by the Applicant which the Respondent submitted was anchored on similar grounds like the ones being raised before me. But the court is experienced at resolving such complex matters, and in that competence, the court has chosen to determine one issue at preliminary stage, to wit:

> ***a) Whether the recognition order made by the court on 5th February, 2013 should be reviewed and set aside the judgment, decree and eventual execution thereto; or***

[3] The other issues listed below will be determined after compliance of the orders I will issue upon this partial decision. The issues are:

> ***a) Whether the arbitrator was appointed in accordance with the arbitration agreement; or***
>
> ***b) Whether the arbitral proceedings were in accordance with the***

arbitration agreement and the law; or

c) Whether the arbitral award should be set aside or recognized, adopted by the court and enforced accordingly.

[4] While I will be determining the above issues, I will take into account all the other strands that are appurtenant to the issues I have formulated. For instance, I reckon that issue (c) above entails other strands or arguments around alleged failure to make true and correct disclosures, concealment of material facts, fraud and corruption on the part of the Respondent. Those strands will be accorded appropriate weight in my final decision. Meanwhile, let me determine the first Issue which bears preliminary connotation. Once again, the justification of the course I have taken will be borne out after I have made my decision.

Probity of the Recognition and Enforcement of award herein

[5] Two arguments were advanced by the Applicant to demonstrate that the recognition of the award and the eventual execution thereto ought not to have been granted in the first place. The first argument was that the applicant did not supply the court with; a) a duly authenticated original arbitral award or a duly certified copy of it; and b) the original arbitration agreement or certified copy of it as required in section 36(2) of the Arbitration Act. The other argument is that the Respondent did not bother to serve the Applicant with the application for recognition and enforcement of the award; an act that denied the Applicant an opportunity to bring to the attention of the court the issues it is raising now. The Applicant is even more categorical in paragraph 3 of the Further Affidavit by DON K. MWAURA that the application before the court now is seeking to set aside orders which were made against him- I presume he is referring to the Applicant- without being afforded an opportunity to be heard on the issue of enforcement of the award which led to the decree herein. That request embodies a request for a review of the orders of the court, which, contrary to the submission by the Respondent, I find to be in order within our legal regime governing civil litigation. Such request for review and setting aside of orders which had been made in error of law and process should not be confused with an appeal, and needless to state, is a remedy available where the Applicant, as is here, has not proposed an appeal. Indeed in law, such orders by the court should be set aside *ex debito justitiae* for irregularity or because they are tinctured with breach of statutory provisions. I understood the argument on behalf of the Respondent, to be that the only option available to the Applicant in this case is to appeal against the adoption orders issued on 5th February, 2013. I am not able to accede to that argument by the Respondent and I reject it. Thus, my formulation of the issue below:

a) Whether the recognition order made by the court on 5th February, 2013 should be reviewed and set aside the judgment, decree and eventual execution thereto.

[5] Without administering any sudden shock, I am convinced there was an error that was apparent on the face of the record, for which a court of law would be entitled to vacate its orders *ex debito justitiae;* in this case, the orders which adopted the award herein as the decree of the court on 5th February, 2013. Judicial authorities on this point of law are legion and I need not multiply them except I am content to adopt from a work of this court in **ANTHONY KALAMU & 14 OTHERS [2013] eKLR** where the court cited landmark decisions on the subject and held that:

An irregular order can be set aside by the court that made it on application being made to that court either under the rules of court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warrant (e.g. where there has been a breach of the rules of natural justice)

[6] The irregularity in this case emanates from the error on the face of the record, which is really an omission arising from breach of statutory requirements by the Respondent, and breach of

rules of natural justice in the way the adoption orders were procured; and that will be borne out in the following rendition of the court. The Chamber Summons application for enforcement of the award dated 22nd March, 2012 was expressed to be made under section 36 of the Arbitration Act and Rule 9 of the Arbitration Rules, 1997. Section 36(1) of the Arbitration Act provides that:

> ***A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37***

Therefore, the application for recognition was subject to all the requirements under section 36 especially 36(3) of the Act which provides as follows:

> ***Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish.***

a. ***The duly authenticated original award or a duly certified copy of it; and***
b. ***The original arbitration agreement or certified copy of it."***

[7] I pose there. I have perused the record and the Chamber Summons and I can only see a duly signed award in original ink by the arbitrator, but I do not find the original agreement or a certified copy of it. That is one error on the face of the record which is readily and easily discernible by cursory perusal of the record. Section 36(2) of the Arbitration Act is strict and in the absence of any express order of the court authorizing a departure from the requirements of the section, strict adherence to the said section is not negotiable. I do not even think the discretion given to the court under section 36(2) of the Act would include excusing a party from filing any or all of the documents required under that section, because those are the primary documents which form the basis of the recognition and enforcement of the award as the order of the court. Perhaps, the discretion would only entitle the court to accept the award irrespective of the state in which it was made in which case the court will accept an exemplification or a certified or duly authenticated copy thereof, but the documents must be present lest the court should be acting on nothing or anything which is never an acceptable judicial practice. To say the least, any practice to the contrary of what I have stated would be the most awful and extravagant exercise of discretion.

[8] There is no doubt that the application for enforcement of the award dated 22nd March, 2012 was made *ex parte* through a Chamber Summons dated 26th November, 2012. It was never served on the Applicant, and it proceeded *ex parte*. It was also granted as such by Mabeya J on 5th February, 2013. Section 36(1) of the Act allows a party to file an application for recognition and enforcement of the award. Rule 9 provides for the procedure of applying as follows:

> ***An application under section 36 of the Act shall be made by summons in chambers.***

Another further but important detail: Rule 6 provides for an *ex parte* application in the following manner:

> ***If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.***

A cursory and shallow reading of rule 6 above may found a justification of sort that the application envisaged under section 36(1) of the Arbitration Act and rule 9 of the Arbitration Rules is to be made ***Ex parte*** especially where the person against whom the recognition and enforcement of the award is being invoked, has not filed an application to set aside the award under section 35 of the Arbitration Act. But, that kind of approach or interpretation will certainly excite serious constitutional objections on the front of the right to be heard. At least in this case, the objection has already been raised in that behalf; and it being a major constitutional matter, gives the court occasion to settle it in a more resounding manner.

[9] Let me go back to section 36(1) and (3) of the Act which provides as follows:

> **36(1)** ***A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37***
>
> ***36(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish.***

a. ***The duly authenticated original award or a duly certified copy of it; and***
b. ***The original arbitration agreement or certified copy of it."***

Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) ***the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it.*** Doubtless, the award must be filed. Accordingly, by that requirement, I think, a notice will invariably be required and the provisions of rules rule 4 and 5 of the Arbitration Rules on filing of the award will abide, which provide that

> ***The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.***

[10] The proposition I have made, finds support in the provisions of section 37 of the Arbitration Act with which an application under section 36(1) of the Arbitration Act must comply. Section 37 gives the party against whom the recognition and enforcement of the award is being invoked, an opportunity to file an application in court for the setting aside or suspension of an arbitral award on the grounds set out in subsection (1)(a)(vi); and 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. There are striking similarities on the grounds of setting aside the award under section 35 and 37 of the Arbitration Act. It is also clear that both sections give the party against whom an award has been made opportunities at different stages of the proceedings. But despite that clear position, I have heard many practitioners posit that there is a conflict between section 35 and 37 of the Arbitration Act, and that argument has breed two school of thought on the matter. The proponents of one school of thought favours strict application of section 35 of the Arbitration Act and seem to assign legitimacy to an *ex parte* application being made under section 36(1) of the Arbitration Act without reference to the other party; while there are others who ascribe to the constitutional desire and principle of fair trial and right to be heard. The latter advert themselves to the argument that the right to a fair trial which includes the right to be heard in all substantive processes in a judicial proceedings is a constitutional right which cannot be circumvented, and in arbitration the right extends to the process of recognition, adoption and enforcement of the award as the order of the court. The process in section 36 and 37 of the Arbitration Act leads to the adoption of the award by the court thus, the court super-adds its authority into and embodies the award as the order of the court; from that time, the person in whose favour the award is made can enforce the award, and the person against who the award is made runs the risk of suffering execution. On that basis, I agree that there is justification and merit in the argument that an application for recognition and enforcement of the award under section 36(1) of the Arbitration Act and Rule 9 of the Arbitration Rules should be served on the other party. Again, I do not think there is any conflict between section 35 and 37 of the Arbitration Act. Equally, I do not think section 35 of the Arbitration Act is a craw-back on the opportunity to be heard granted under section 37 of the Arbitration Act. In any event, the Arbitration Act as an existing law as at the effective date of the Constitution of Kenya, is the exemplar and classic promoter of the principles of justice enshrined in the Constitution. The opportunity to be heard in section 37 of the

Arbitration Act is not, therefore, rendered otiose just because the person against whom execution of the award is sought has not filed an application under section 35 of the Arbitration Act. Accordingly, by making specific reference in section 36(1) of the Arbitration Act that, recognition and enforcement of the award will be subject to section 36 itself and section 37, Parliament was not under any delusion, and the opportunity to be heard in section 37 of the Arbitration Act is not an unnecessary or superfluous addition or appendage; it is a substantive provision of the law aimed at providing substantive justice to all the parties in the arbitral proceedings. The process provided for in the Arbitration Act should also be seen within the nature of arbitration as a consensual and voluntary process. There is absolutely no prejudice that the party applying will suffer in adhering to the law and serving all processes on the other party. The practice of adhering to procedure in the Arbitration Act will only reinforce the probity of and sanctify the courts willingness to issue adoption orders, and undoubtedly, execution will be freed from unnecessary applications by unscrupulous parties who do not wish the arbitral process to end. I hope parties will so comply with the law and obviate a situation where the court will waste the precious judicial time on a convoluted matter such as this. I also would wish to see a recast of the Arbitration Rules in order to reconcile them with the requirements of the Act and the Constitution which encourages Alternative Disputes Resolution.

FINDINGS AND ORDERS

[11] Ultimately, I find that only the award was filed. The original arbitration agreement or a duly certified copy of it was not filed. The ‘’agreement’’ annexed in both the supporting affidavit and the replying affidavit are photocopies which, a court of law, cannot rely upon as ‘the original arbitration agreement or a duly certified copy of it’’. That is a grave omission, an error that is apparent on the face of the record and goes to the root of the orders sought for and granted on 5th February, 2013. I also find and hold that the Applicant was not afforded an opportunity to be heard under section 37 of the Arbitration Act because of the approach the Respondent adopted in filing the award and not serving the Applicant with the relevant notice of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed. I, therefore, set aside the orders of adoption made on 5th February, 2013, and all consequential orders arising therefrom.

[12] However, I have not set aside the award as that issue is yet to be determined. Instead, I hereby order the Respondent to file the original arbitration agreement or a certified copy of it and serve the same on the Applicant within 14 days of today. I will determine the other issues which have been raised in the application herein once the original agreement is filed and I have given further directions thereof. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 12th day of May, 2014

F. GIKONYO

JUDGE