IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWILU & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 229 of 2006

BETWEEN

KENFIT LIMITED ……. APPELLANT

AND

CONSOLATA FATHERS ……...…….....…. RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (J.B. Ojwang, J.) dated 17th June 2005

in

H.C Misc. Civil Application No. 1592 of 2003)

****

JUDGMENT OF THE COURT

1. This appeal arises from arbitration proceedings and the crux of the matter is whether a partial arbitral award can be recognized and enforced by the High Court. Mr. John S. Mbaya was appointed by an agreement between the appellant and the respondent on 30th August 2000 to act as sole Arbitrator in a dispute between the parties. On 30th November 2000, the Arbitrator made an award titled "FINAL AWARD".

2. In the "Final Award" the Arbitrator made a determination, *inter alia*, that the claimant be paid Ksh.389,740/= being the value of liquidated and ascertained damages deducted without proper notification as required by the contract. In relation to costs, the Arbitrator expressed himself as follows: "The costs of this reference together with the Arbitrators costs to be paid by the Respondent on party to party basis and to be submitted for taxation if parties are unable to agree".

3. By a Chamber Summons application dated 16th December 2003, the appellant herein made an application before the High Court for confirmation of the Arbitrator's Award. The order sought was to the effect that the court recognizes and enters judgment in favour of the appellant against the respondent in terms of the Arbitration Award dated 30th November 2000. Vide a replying affidavit dated 17th February 2004 deposed by ***Rev. Father G. Bertaina***, the respondent opposed the application *inter alia* on the ground that it was premature, misconceived and unnecessary.

4. Counsel for the respondents filed a Preliminary Objection dated 13th

February 2004 at the High Court raising a point of law that the appellant's

Chamber Summons application dated 16th December 2003 was premature more relevantly that:

"1. *The Arbitrator's Award sought to be converted into a court judgment had not determined the issue of costs of the Arbitration Reference but reserved the issue to be finally determined by the Arbitrator himself through taxation upon submission by the parties and since the issue of taxation of costs was duly submitted to the Arbitrator and no determination has been made, the present application to court is premature and misconceived.*

2. *All aspects of the Arbitration Award have been satisfied in full except the unresolved and undetermined issue of costs which the Arbitrator reserved to be specifically taxed by him if the parties are unable to agree, rendering the present application unnecessary, frivolous and vexatious."*

5. The respondent filed grounds of opposition dated 13th February 2004. The preliminary objection was heard on 5th May 2005 before Hon Justice J.B. Ojwang (as he then was). Upon hearing both counsel, the learned judge upheld the preliminary objection and expressed himself as follows:

"The various points in this ruling, lead me to the conclusion that the stage has not yet been reached when it would be proper to invite the court to give a judgment incorporating the arbitrator's award. An application in that regard could be made only after the arbitrator has determined all questions referred to him, including the important matter of costs. As there is no legal basis upon which the court could give the judgment requested, it follows that the application is premature. I therefore uphold the respondent's preliminary objection and strike out the applicant's Chamber Summons of

16th December 2003 with costs to the respondent."

6. Aggrieved by the ruling of the High Court, the appellant has lodged the instant appeal citing eight (8) grounds in the memorandum as follows:

"(i) That the learned Judge erred in law and fact by failing to appreciate that the arbitrator's award dated 30th November 2000 was final, binding and capable of recognition by the High Court as a judgment of the court.

ii. *That the learned Judge erred in law by failing to consider and analyze the conditions stipulated under Section 36 of the Arbitration Act 1995 which conditions were already satisfied by the appellant in the application before the court and by so doing he arrived at a wrong decision.*

iii. *The learned Judge erred in law by failing to appreciate the fact that non-apportionment of costs payable by the respondent in the final award was not one of the conditions stipulated under the provisions of Section 37 (1) of the Arbitration Act, 1995.*

iv. *The learned Judge erred in law in holding that the application was premature when in essence the appellant had complied with the requirements set out by the law under the Arbitration Act, 1995.*

v. *The learned Judge erred in law and in fact by misinterpreting and applying the provisions of Section 32(6) (a) of the Arbitration Act, 1995.*

vi. *The learned Judge erred in law by failing to hold that the Arbitrator was functus officio the moment the arbitral proceedings terminated.*

vii. *The learned Judge erred in law by failing to hold that the arbitral award dated 30th November*

2000 was a final award and hard terminated the arbitral proceedings.

viii. *The learned Judge erred in law by entertaining the respondent's preliminary objection which objection did not constitute the criteria set out in authorities cited before him by the appellant.*

7. This appeal, upon directions given by this Court was urged by way of written submissions. Both parties filed their submissions.

8. The appellant in its written submissions emphasized that pursuant to

Section36 (2) (a) and ***(b)*** of the Arbitration Act, all that was required for the High Court to enter judgment in terms of the arbitral award were a duly authenticated arbitral award or a certified copy thereof and the original arbitration agreement or certified copy thereof. That the appellant annexed the two documents the affidavit in support of its Chamber Summons application; that the learned judge erred in law in failing to find that it is only the two documents that were required before the court that could adopt and enter judgment in terms of the arbitral award. Counsel submitted that the grounds upon which an arbitral award can be challenged are set out in

Section 37 of the Arbitration Act and the respondent never raised any ground relating to the said ***Section 37*** but instead raised objection under

Section 32 (6). That the learned judge erred in entertaining the preliminary objection without any reference to ***Section 37*** of the Act. Counsel submitted that the arbitral award lodged in court determined all issues including costs, the award determined who should pay costs and the arbitrator went further to determine his costs. It was reiterated that the arbitration proceeding terminated on 30th November 2000 when the award was made. Counsel urged this Court to find that the application for recognition and enforcement of the arbitral award was proper, regular and fulfilled all the conditions set out in ***Sections 32(1)*** and ***36 (2) (a)*** and ***(b)*** of the Arbitration Act, 1995.

9. In opposing the appeal, the respondent in its submissions stated that by the time the appellant filed its Chamber Summons application dated 16th December 2003, the Arbitrator had not yet issued any additional award on the outstanding issue of costs and therefore there was actually no "Final Award" capable of being enforced; that what the appellant was asking the court to do is to issue a "blank cheque" or "open-ended" type of judgment which could expose the respondent to prejudice upon execution for an unspecified amount of money in respect of the said judgment; that the award has been partially satisfied and the appellant did not indicate in its application what part of the award had been satisfied and the issue of costs was still outstanding; that ***Section 32 (6)*** of the Arbitration Act expressly provides that the costs and expenses of arbitration shall be determined and apportioned by the arbitral tribunal; that because no final decision has been made by the arbitrator on the issue of costs, the award dated 30th November 2000 is a partial award and not a final award. Counsel urged this Court to uphold the ruling by the learned judge and dismiss the appeal.

10. At the hearing of this appeal, learned counsel Mr. J. Mangi holding brief for Mr. Oyugi S.O appeared for the appellant while learned counsel Mr. Patrick Mwiti appeared for the respondent. Both counsel confirmed to this Court that as at the date of hearing of the appeal, the arbitrator had neither made a determination on costs nor had taxation of costs had been done.

11. We have considered the grounds of appeal and the written submissions filed in this matter; we have also considered the ruling delivered by the learned judge particularly the reasoning that an application to recognize and enforce an arbitral award can only be made after the arbitrator has determined all questions referred to him, including the important matter of costs.

12. We find merit in the reasoning by the learned judge. There can only be one award from a decision and determination of an arbitrator; this is not to say that the one award cannot be contained in two or more documents or made at different times. What we say is that the one award must be the final

or composite award that determines all issues referred to the arbitrator for consideration. An award does not become final merely because the word "final" has been inserted as its heading; an award is final when all issues for consideration have been canvassed and a finding or determination made.

13. We have examined the contents of the award dated 30th November 2000. Although it is titled "Final Award" the arbitrator at paragraph 10.0 thereof expressly reserved the issue of costs either for agreement between the parties or determination bide taxation. We are satisfied that the award dated 30th November 2000 was not final as the quantum of costs was left in abeyance for determination. We find that the award dated 30th November 2000 was a partial award. It is only after the quantum of costs of arbitration reference has been determined that a final arbitral award can come into existence.

14. We have considered the submission by counsel for the respondent that the arbitration proceedings were terminated on 30th November 2000. This is not supported by facts. To illustrate the fallacy of this submission, if the parties were to go for taxation to determine costs, what type of proceedings would this be? Would this be part of the arbitration proceedings? The quantum determined as costs in the taxation proceedings would be part of what award and where will it be taken for enforcement? We are of the considered view that a party cannot litigate in installments. Courts must discourage piecemeal litigation over the same subject matter and a party should not be vexed twice over the same issue. The High Court cannot recognize a partial arbitral award and then later through another application recognize and enforce costs relating to the same arbitral proceedings.

15. In the instant case, the arbitrator did not become *functus officio* when he made the partial award dated 30th November 2000; he could only become *functus officio* if the award did not reserve costs for consideration and agreement by the parties or taxation master. By stating that the parties can agree on costs or taxation to ensue if there is no agreement, the arbitrator delegated his functions to other parties and these parties can only be exercising the power to ascertain costs as part of the arbitration proceedings. The High Court can only recognize and enforce the final award by an arbitrator if the award does not reserve any matter for consideration by the arbitration or any other person. We clarify that in this matter the High Court did not refuse to recognize the arbitral award; what the learned judge ruled was that the application before court was premature. Subject to all relevant laws, the right of the appellant to make an application at a later date for recognition and enforcement of the arbitral award remains unfettered.

16. For reasons stated above, we conclude by finding that the learned judge did not err in his ruling dated 17th June 2005 which we hereby uphold. This appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 19th day of June, 2015

H. OKWENGU

.....

JUDGE OF APPEAL

P. MWILU

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR