REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. MISC. 112 OF 2018

IVAN MINNAERT.....CLAIMANT

VERSUS

NATIONAL EXECUTIVE COMMITTEE

AFC LEOPARDS FOOTBALL CLUB.....RESPONDENT

RULING

1. This ruling relates to the Respondent's Notice of Motion dated 6.4.2021 which seeks the following orders:

(a) Setting aside of the ex parte decree made on 1.10.2019.

(b) Grant leave to the Respondent to file response to the application dated 26.9.2018 and have the same heard inter parties.

(c) Costs of the application

2. The application is supported by the Affidavit sworn by Mr. Daniel Akala Shikanda and it is opposed by the Applicant vide the Replying Affidavit sworn by the applicant on 26.4.2021

3. The background to the instant application is that the Claimant was employed by the Respondent as the Head Coach but his contract was prematurely terminated by the Respondent on 31.8.2016. The Applicant was aggrieved and pursuant to arbitration clause in his contract of employment, he referred the dispute to the Football Federation of Kenya (FKF) Arbitration Tribunal where he secured a final arbitral award on 15.11.2016 declaring the termination of his contract unfair and awarded him compensation of USD 24,000 plus costs of Kshs. 200000.

4. The Respondent did not challenge the award. Instead by its lawyers letter dated 29.11.2016, the Respondent accepted the award and requested the Applicant to accept payment of the award by equal instalments spread over 18 months. The Applicant never responded to that request but it seems that he requested FIFA Disciplinary Committee to intervene in enforcing the award.

5. However by the letter dated 8.8.2017, the Head of the said Fifa Committee declined the request and informed the Applicant that under Article 64 of the FIFA Disciplinary Code, the Committee only enforces decisions passed by a body, committee or an instance of FIFA or a subsequent CAS appeal decision, and not internal matters in respect to proceedings followed at national level. The letter further advised that the matter herein fall under the FKF and was governed by the applicable regulations of the FKF. Finally the letter forwarded the request to FKF for consideration and action.

6. It seems that FKF did not help in enforcing the arbitral award dated 15.11.2016 and as a result, the Applicant brought the application dated 26.9.2018 asking this court to recognize the award and deem it as a decree of the court. It also asked the court to grant leave to the Applicant to enforce the award as a decree of the court.

7. The Respondent did not oppose the application but only filed a Notice of Preliminary Objection (PO) dated 19.10.2018 contending that this court lacks jurisdiction to entertain the application because the court endowed with that jurisdiction is only the High Court. However the court dismissed the Preliminary Objection by a ruling delivered on 14.5.2019.

8. The application was fixed for hearing on 1.10.2019 and the Respondent's counsel was served with a Hearing Notice on 24.7.2019 as evidenced by the stamped copy the Hearing Notice annexed to the Affidavit of service sworn on 30.9.2020 by Mr. Moses Onyango Otongo, a process server. From the date the said Preliminary Objection was dismissed and even after the service of the Hearing Notice the Respondent never filed any response to oppose the application dated 26.9.2018. In addition the Respondent and its counsel failed to attend

court on 1.10.2019 for hearing and the court allowed the application as prayed because it was unopposed.

9. As evident from the record, the Applicant applied for a court decree and had his costs were determined by the taxing officer of the court. Thereafter he executed the decree by way of attachment of the Respondent's assets through an Auctioneer.

10. The applicant contended that before and after the recognition of the arbitral award by the court the Respondent has paid a total of Kshs. 800,000 towards settling the arbitral award (now decree of this court). The Respondent has not denied that allegation. It is also not in dispute that the Respondent's bus has been proclaimed by the auctioneers in execution of the decree.

THE RESPONDENT'S CASE

11. The Respondent contends that the court has an unfeterred discretion to set aside ex parte judgment. It submitted that the failure to attend the hearing of the application on 1.10.2019 was a mistake of counsel which ought not to be visited on a litigant. For emphasis it relied on the case of **James Kanyita Nderitu[2016]eKLR** where the Court of Appeal held that a court has a wide discretion to set aside ex parte judgment to alleviate actual or imminent prejudice likely to be suffered by a party who has triable defence.

12. The Respondent further agued that this court has jurisdiction under section 36 of the Arbitration Act to adopt and enforce an arbitral award. However it contends that the award in issue herein was not made under section 36 of the Arbitration Act and as such it is incapable of being enforced by the court under section 36 of the Act. According to the Respondent the award was made pursuant to the Constitution of the FKF which under Article 65 provides for setting up of an Arbitration Tribunal to deal with all internal disputes between the FKF, its members, players, officials and players agents; and to punish any member who fails to comply with lawful orders and direction of its judicial bodies.

13. The Respondent further contends that Article 69(3) states that disputes between clubs and their coaches shall be taken to an independent Arbitration Tribunal recognized by FKF or CAF or to the Court of Arbitration for Sports (CAS) in Lausanne Switzerland. He also argued that under Article 69(4) of the FKF Constitution provides that the decisions of the FKF Committees and the judicial bodies are final and FKF members are prohibited from taking such matters to ordinary court, and any member violating that bar shall be subjected to disciplinary measures stipulated under the FKF and FIFA Disciplinary Code.

14. Consequently according to the Respondent, the Applicant having subjected himself to the judicial bodies and processes established under the FIFA Constitution, he cannot jump ship and seek to enforce the arbitral award through a mechanism that is not provided under the said Constitution. In its view, the applicant ought to first exhaust the mechanism available under the FKF Constitution and the FIFA statutes.

APPLICANT'S CASE

15. The Applicant contents that the arbitral award in issue emanate from an employment contracts between the parties herein and as such this court has exclusive jurisdiction to deal with the same by dint of section 12 of ELRC Act and Article 162 (2) of the Constitution of Kenya, 2010. For emphasis he relied on the case **CMC Aviation Limited & Another v**. **Anastassios D. Thomas[2017]eKLR** where the High Court declined jurisdiction and held that this court has jurisdiction to adopt and enforce arbitral awards made under section 36 of the Arbitration Act.

16. As regards the order for setting aside the ex parte judgment, the Applicant submits that the Respondent has not shown any sufficient cause for that order to issue. He contended that the failure to respond to the application for adoption of the award and the failure to attend court for hearing was deliberate.

17. He contends that the Respondent accepted the arbitral award and even negotiated for settlement by instalments. Consequently, the applicant prayed for the Respondent's motion to be dismissed with costs for being made in bad faith and in abuse of the court process.

ISSUES FOR DETERMINATION

18. Having considered the application, the Affidavits and the submissions by the parties, it is not in dispute that on 1.10.2019 this court adopted as a decree of the court the arbitral award made by the FKF Arbitration Tribunal dated 15.11.2016 after the Respondent failed to opposed the application dated 26.9.2018. The issue for determination therefore is whether the ex parte decree should be set aside and the Respondent given liberty to respond to it.

19. In the case of **James Kanyita Nderitu v. Maria Philotas Ghika & Another [2016]eKLR** the Court of Appeal held that:

> ***"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other."***

20. In this case the default judgment/decree was made on 1.10.2019 and the application to set aside was made on 6.4.2021, about 19 months thereafter. The Respondent was aware of the decree because it paid Kshs. 300000 on 19.10.2020 and as indicated in the letter by Mr. Victor

Bwibo, CEO of the Respondent dated 23.11.2020 responding to demand letter by the Applicant's lawyer dated 19.11.2020. In the circumstances I find that the delay to make the application for 19 months after the passing of the impugned decree to be unreasonable. If there was any desire to defend the suit the Respondent would have moved the court within reasonable time for setting aside the decree.

21. In addition, the Respondent did not give any reason for the failure to file defence before the decree was passed. It is common ground that the Respondent was served with the application dated 26.9.2018 and filed Preliminary Objection but after the dismissal of the Preliminary Objection its counsel did not file response to the application despite being served with Hearing notice on 24.7.2019. The only reasonable inference to draw from the default is that it had no reasonable defence and especially after accepting the arbitral award and making part payment.

22. The Respondent has explained that the decree is irregular because it was not made pursuant to section 36 of the Arbitration Act but under Article 69 of the FKF Constitution which prohibits members of FKF, their players and officials from invoking the jurisdiction of the ordinary courts in their disputes or else face disciplinary action from FKF and the FIFA.

23. The Respondent urged the court to set aside the decree because its jurisdiction was prematurely invoked before exhaustion of the mechanism provided under the FKF Constitution and FIFA Disciplinary Code. That argument is a sudden change of mind following the dismissal of the Respondent's Preliminary Objection. The Preliminary Objection did not challenge the court's jurisdiction on the basis of FKF or FIFA Constitution and Disciplinary Code but on the basis of section 36 of the Arbitration Act.

24. Having considered all the material presented to the court by both sides, I find that the application is an afterthought which is brought in abuse of the process of the court. It is frivolous and vexatious, calculate to delay settlement of a regular decree passed by this court under section 36 and 37 of the Arbitration Act. It is common ground that this court has jurisdiction to recognize and enforce a domestic arbitral award which has been accepted by all the parties.

25. The arbitral award herein was made by a local FKF Tribunal and it was final. It has not been challenged or set aside. The Respondent has not shown how the award can be executed except through voluntary means. The only other way is through disciplinary process which only ends at punishing for failure to comply with orders or directives of the FKF judicial bodies or committees.

26. In my view, that coercive mechanisms may not guarantee settlement of the award. Consequently, I believe that the invocation of this court's jurisdiction vide the application dated 26.9.2018 was the proper action to take in order for the court to give effect and encourage the process of ADR in employment relationships.

27. I have further considered the respective prejudices that may be suffered by either side should the decree be set aside. The Respondent will definitely suffer no prejudice if the decree is not set aside because it is lawfully bound by the unchallenged award made on 15.11.2016 which it has accepted and made partial settlement. However the applicant will suffer prejudice because since 15.11.2016 the Respondent has deliberately failed, neglected and or refused to pay the sum awarded forcing the Claimant to incur expenses filing the application in this court for adoption and enforcement of the arbitral award.

28. Having found that there was no sufficient reason for the failure to file defence, that the time lapsed from date of passing of the decree to the time of filing the instant application was unreasonable, that there is no reasonable defence with triable issues, and that only the applicant will suffer prejudice if the decree is to be set aside, I hold that it is not in the interest of justice for the Respondent's application dated 6.4.2021 to be allowed. Accordingly, I dismiss it with costs.

Dated, signed and delivered at Nairobi this 18th day of August, 2021.

ONESMUS N.MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE