



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
MISC CIVIL APPLICATION NO. 112 OF 2018

IVAN MINNAERTCLAIMANT

VERSUS

NATIONAL EXECUTIVE COMMITTEE OF AFC LEOPARDS; DR. MULE & 9 OTHERS ON
BEHALF OF AFC LEOPARDS SPORTS CLUB.....RESPONDENT

RULING

Introduction

1. The Applicant filed the Chamber Summons dated 26.9.2018 on the same date asking this court to receive and recognize the Arbitral Award made on 15.11.2016 in ***Arbitration Cause No.1 of 2016*** by the Football Kenya Federation Arbitration Tribunal; deem the award as a decree of the court; and grant leave to him to enforce it. He further prayed for costs of the Summons.

2. In response to the application the Respondent, filed the Notice of Preliminary Objection (PO) dated 19th October, 2018 contending that this Honourable Court lacks the jurisdiction to entertain this matter and that the Claimant's Application dated 26/09/2018 should be dismissed with costs for the following reasons that:

(a) In the case of “MV Lilian” the Court of Appeal held that upon the challenge of a court’s jurisdiction to entertain and determine a matter, the issue of jurisdiction must be determined first and no other step should be taken by the Court pending the confirmation of the Court that it has the jurisdiction to hear and determine the dispute.

(b) The Court of Appeal in “MV Lilian” makes it clear that once it is determined that the Court has no jurisdiction, the only option left to the Court is for it to down its tools.

(c) This Court does not have the jurisdiction to entertain this matter as it being a creature of Article 162(2) (a) of the Constitution and Section 4 of the Employment & Labour Relations Court Act, is not vested with the authority of the court identified in Section 36(1) of the Arbitration Act.

(d) This Court by virtue of Article 162(2) of the Constitution simply has the status of a High Court but is not the High Court provided for in Article 165 (a) of the Constitution and is thus not vested with the authority to enforce the award provided for in Section 36(1) of the Arbitration Act.

(e) Jurisdiction is everything and thus this Court cannot proceed any further in this matter.

(f) The jurisdiction of this Court is determined in Section 12 of the Employment & Labour Relations Court Act and what the Claimant seeks from the court is the enforcement of the Arbitral Award and not a dispute as indicated in Section 12 (1) (a) of the Employment & Labour Relations Court Act.

(g) The provisions of Section 36(1) of the Arbitration Act are clear that the only court that can enforce an Arbitral Award is the High Court created by Article 165 of the Constitution.

(h) This court cannot transfer the Application as filed to High Court because Section 12 (3) of the Employment & Labour Relations Court Act grants this Court specific and limited power and thus the only option open to this Court is to declare that it has no jurisdiction to entertain this Application and dismiss the same.

3. On 22.11.2018, the parties agreed to dispose of the PO by written submissions. The respondent filed hers on 13.12.2018 while the claimant filed his on 25.2.2019. The only issue for determination is whether this court lacks jurisdiction to entertain the application dated 26.9.2018.

Respondent's Submissions

4. The Respondent submits that the parties in this suit agreed to settle the dispute by way of Arbitration and which was held in Nairobi by a Tribunal set up under **Article 66 of the Constitution of the Football Federation of Kenya**. That after the tribunal heard both parties, it gave its decision on 15/11/2016 in favour of the Claimant and that due to circumstances beyond the Respondent's control, the Respondent was unable to satisfy the Tribunal Award leading to these proceedings by the Claimant.

5. It further submits that this court being a specialised Courts for determining Employment & Labour Relations disputes under **Article 162** lacks jurisdiction to determine the application by the Applicant. That none of the circumstances listed under **Section 12 (1) of the Employment & Labour Relations Court Act** apply in this matter because the Claimant seeks enforcement of the Arbitral Award and nothing else. In its view, the court with the jurisdiction to determine the application is the High Court. It therefore contends that the Claimant has come to the wrong court and that **Article 67 (1) of the Constitution of the Football Federation of Kenya** makes it clear that no dispute under the FKF Constitution can be entertained by any court in this country. That the Claimant having chosen to settle this dispute under the FKF Constitution thus divests this Court from the jurisdiction to entertain this matter.

Claimant's Submissions

6. The Claimant submits that being aggrieved by his unfair termination of employment, he lodged a claim at the FKF Arbitration Tribunal under **Arbitration Clause No.1 of 2016** and that the Respondent is yet to challenge the tribunal's decision. That the Respondent has instead failed and/or refused to settle the arbitral award thereby prompting him to file this Application so as to enforce the said arbitral award. He denied that this court lacks jurisdiction in this matter.

7. He further submits that the background of this claim falls within the ambit of this Honourable Court's jurisdiction under **Section 12 of the Employment & Labour Relations Court Act** because the dispute related to or arose out of employment between an employer and an employee. He cites **Misc Application No. 559 of 2016 – CMC Aviation Limited & another –v- Anastassios D. Thomas [2017] eKLR** where Fred Ochieng J, in a similar application, held that based on **Section 7 of the Sixth Schedule of the Constitution of Kenya 2010** the ELRC has a similar authority as the High Court if the arbitral award was in relation to employment and labour relations. He then ordered the application be transferred to the ELRC for hearing together with application for the enforcement of the award.

8. The applicant further relies on **ELRC Cause 994 of 2011- Anastassios D. Thomas –v- CMC Aviation Limited & another [2017] eKLR** where Linnet Ndolo J found that the ELRC has the jurisdiction to enforce an arbitral award.

9. Finally, the applicant argued that the dispute herein has already been heard and determined by the FKF Tribunal and not challenged and that what is before this court is the application to enforce the arbitral award given in his favour. He therefore prayed for the Respondent's Preliminary Objection to be dismissed with costs.

Analysis

10. After careful consideration of the application dated 26.9.2018, the PO and the rival submissions filed, there is no dispute that the parties herein were involved in an employment dispute which was resolved by an Arbitral award which is the subject of these proceedings. **Section 36(1) of the Arbitration Act** reads:

“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.”

11. The jurisdiction of this court is given by section 12 of the ELRC Act Pursuant to Article 162 (2) (a) of the Constitution and it is to determine disputes related to employment and labour relations. The background of the arbitral award herein is the employment relationship between the parties herein. It is therefore my opinion that this Honourable Court has jurisdiction to entertain an application for adoption and enforcement of an arbitral award.

12. The above view is fortified by the judicial precedents cited by the applicant herein above. I entirely agree with Ochieng J, in **CMC Aviation Limited & another –v- Anastassios D. Thomas [2017] eKLR** when he held that:

“Therefore, it cannot be argued by specifying the High Court as the court to which parties could have recourse against arbitral awards, the Arbitration Act intended to, inter alia, exclude the courts with status of the High Court.”

13. Having found that the court has jurisdiction to entertain the application dated 26.9.2018, I reject the PO by the respondent dated 19.10.2018 and dismiss with costs.

Signed, dated and delivered in Open Court at Nairobi this 14th day of May, 2019.

ONESMUS N. MAKAU

JUDGE

