



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 994 OF 2011**

**ANASTASSIOS D. THOMOS.....CLAIMANT**

**VERSUS**

**CMC AVIATION LIMITED.....1<sup>ST</sup> RESPONDENT**

**TRIDENT ENTERPRISES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling relates to two applications. The first one, which is brought by the Claimant by way of Chamber Summons dated 23<sup>rd</sup> September 2016 and filed in court on even date seeks enforcement of an arbitration award dated 20<sup>th</sup> May 2016.

2. The second application is brought by the Respondents by way of Notice of Motion dated 25<sup>th</sup> November 2016, initially filed in the Commercial and Admiralty Division of the High Court and seeks setting aside of the arbitration award to the extent that it:

- a) Awards a September 2010 salary to the Claimant;
- b) Does not take into account that a sum of \$ 22,500 being the equivalent of one and a half months' pay was paid to the Claimant and applied to set off his staff ledger;
- c) Fails to set off payment of \$ 22,500 made to the Claimant against the award made to the Claimant, and therefore fails to reduce the award by that amount;
- d) Imposes the evidentiary threshold of the Evidence Act upon the arbitral proceedings;
- e) Dismisses the counterclaim filed by the Respondents and fails to order a disgorgement of the gains wrongfully made by Anastassios D. Thomos in the sum of \$ 740,000; and
- f) Without prejudice to (e) above, fails to take into account the two remittances of \$ 30,000 each made to the Claimant and does not set off these payments against the award made to the Claimant.

3. The Respondents' application is based on the following grounds:

- a) The award is in conflict with public policy in Kenya as it amounts to unjust enrichment of the Claimant;
- b) The award is in conflict with public policy in Kenya as it is inconsistent with the law of Kenya to

the extent that it applies the evidentiary threshold of the Evidence Act, contrary to the express provisions of Section 2(1) of the Evidence Act;

c) The award and/or its effects are contrary to established principles of law and justice, and therefore against public policy;

d) The Respondent admitted receiving his September 2010 salary during the arbitral proceedings;

e) Evidence was adduced during the arbitral proceedings that the sum of \$ 22,500 was paid to the Claimant and applied towards setting off the Respondent's staff ledger, which evidence was not rebutted by the Claimant;

f) There is clear proof of at least two remittances of \$30,000 each made to the Claimant which constitute gains wrongfully made by the Claimant, which together with other remittances amount to a sum of \$ 740,000 wrongfully made by the Claimant;

g) The Respondents have made a request for clarification and correction under Section 34 of the Arbitration Act, and for an additional arbitral award, but the Arbitrator by his decision dated 16<sup>th</sup> September 2016 declined to make the corrections;

h) It is in the interest of justice that the arbitral award or the specified parts thereof be set aside.

4. The Claimant's response to the Respondents' application is contained in his replying affidavit sworn on 31<sup>st</sup> January 2017. He depones that the Respondents' application dated 26<sup>th</sup> November 2016 was precipitated by his own application for enforcement of the arbitral award.

5. Rehashing the background to the applications now before the Court, the Claimant states that he filed a claim in this Court in June 2011, seeking relief for unlawful termination of employment. Pursuant to an arbitration clause in the employment contract, the dispute was referred to arbitration. The matter was heard by a single Arbitrator, Mr. Mwaniki Gachoka, who rendered a final award on 20<sup>th</sup> May 2016.

6. Being dissatisfied with the final award, the Respondents made a request for clarification and correction of the award and for an additional award as provided under Section 34 of the Arbitration Act. By a ruling dated 15<sup>th</sup> September 2016, the Arbitrator rejected the Respondents' request.

7. The Claimant deems the Respondents' application as a ploy to prevent him from realising the fruits of the award.

8. The Respondents filed grounds of opposition to the Claimant's application stating that:

a) The jurisdiction of the Court has not been properly invoked as the application is premature in that:-

i) The Respondents filed a request for clarification and correction of award, and for an additional award on 19<sup>th</sup> July 2016;

ii) The Arbitrator delivered his decision on the request on 15<sup>th</sup> September 2016;

iii) Pursuant to the provisions of Section 35(3) of the Arbitration Act, the period within which an application to set aside the arbitral award may be made herein runs for three (3) months from 15<sup>th</sup> September 2016.

b) The period granted under Section 35(3) of the Arbitration Act has not lapsed and as such the Claimant's right to have the arbitral award recognized and enforced as a decree of the Court has not accrued.

c) The application is therefore vexatious and an abuse of the court process and should be dismissed with costs.

9. The first issue for determination in the consolidated applications is whether the Respondents have established a case for setting aside the arbitral award. Instructively, the grounds for setting aside an award under Section 35 of the Arbitration Act are similar to those for refusal of recognition or enforcement under Section 36.

10. The Respondents argue that because the three month period granted under Section 35(3) of the Arbitration Act, within which a party may apply for setting aside of an arbitration award has not lapsed, then the Claimant's application for enforcement is premature.

11. The Court finds no legal basis for this argument. In my view, the time limit given in Section 35(3) of the Act is the ceiling and not the floor, meaning that the Respondents could well have moved the Court the very next day after the final ruling by the Arbitrator. I do not think that a Claimant with an award in their favour will sit and wait to see if the Respondent will exercise their right under Section 35. That arguments ends there.

12. The Respondents further submit that the award ought to be set aside because it is against public policy. In recognizing the very wide nature of public policy, **Ringera J** ( as he then was) in ***Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2EA, 366*** held that an arbitral award could be set aside on the basis of inconsistency with the public policy in the following instances:

- a) If it is inconsistent with the Constitution or other laws of Kenya, whether written or unwritten or;
- b) Is inimical to the national interest of Kenya; or
- c) Is contrary to justice.

13. In ***Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR*** the Court of Appeal rendered itself as follows:

***“ Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State’s power is exercised.”***

14. I have considered the issues raised by the Respondents, both in their own application dated 25<sup>th</sup> November 2016 and in their grounds of opposition to the Claimant's application dated 23<sup>rd</sup> September 2016, and find that they are in essence matters for review and/or appeal of the arbitral award. They do not in my view, fall within the parameters for setting aside of an arbitral award as provided under Section 35 of the Arbitration Act. I therefore find no ground for setting aside the arbitral award herein.

15. In the oral submissions made by Counsel, a suggestion was made that this Court does not have jurisdiction to enforce the arbitral award. The only thing I will say on this account is that the jurisdiction of this Court to entertain employment matters is well stated under Section 12 of the Employment and Labour Relations Court Act. Indeed, the parties herein subjected themselves to that jurisdiction way back in June 2011.

16. To argue now that the Court has no jurisdiction to enforce an award arising from a claim filed in this very Court would result in an absurdity that could not have been intended by the legislators. I therefore find that this Court is fully clothed with jurisdiction to enforce the arbitral award dated 20<sup>th</sup> May 2016, which is hereby adopted as the final judgment in this matter.

17. The final result is that the Claimant's application dated 23<sup>rd</sup> September 2016 is allowed and the Respondents application dated 25<sup>th</sup> November 2016 is dismissed with costs to the Claimant.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ambala for the Claimant

Miss Kirimi for the Respondent