

MISC. CIVIL CASE NO. 39 OF 2014

KAY CONSTRUCTION COMPANY LIMITED VS ATTORNEY GENERAL [2015] eKLR

Date of delivery of the Ruling: 17th April 2015

SUMMARY OF FACTS

The parties herein entered into a contract in relation to civil and engineering construction. It was a clause in the contract that any dispute arising under the contract would be referred to arbitration. A dispute arose as to the payments ought to be made by the Respondent pursuant to the aforesaid contract. This prompted the Applicant to refer the matter to arbitration pursuant to the provisions of the said contract.

The final Award was published in favour of the Applicant. The Applicant then filed a Chamber Summons Application under Section 36 of the Arbitration Act 1995 and Rule 4 of the Arbitration Rules 1997 seeking for the recognition and enforcement of the Award.

In opposition to the Application, the Respondent filed Grounds of Opposition contending that the Arbitrator failed to notify them of the availability of the award for collection. They further contended that attempts to have the Arbitrator confirm that he had reissued the Award remained un-answered. Therefore, it was the Respondent's case that their right to challenge the Award as reserved in the consent was abridged.

In response, the Applicant averred that the Arbitrator duly notified the parties that the Award was ready.

ISSUES

Whether or not the Arbitral Award in question could be enforced as a judgment of the court? 2

ANALYSIS/DETERMINATION

The Judge was of the view that the Respondent did not provide proof to warrant the court to refuse to recognize and enforce the Award. Furthermore, the court held that it was not a strict requirement that the arbitrator was to notify the Respondent of the Award and that in any case, it was evident from the proceedings that the Respondent was aware that the Award had been released.

The court stated that it was not enough for the Respondent to state that lack of notification denied them the right to challenge the award without providing any grounds upon which they would challenge the same.

In light of all the above, the court was of the view that the Respondent did not provide sufficient reasons to warrant the court to refuse to recognize and enforce the Award.

RULING/HOLDING

The court allowed the Applicant's Chamber Summons Application to recognize and enforce the Award.

RATIONALE

The court reached its decision based on a narrow and strict interpretation of the grounds for refusal of the recognition and enforcement of the arbitral awards in that, any of the grounds relied upon would have to be strictly proved and established.

CASE RELEVANCE

The recognition and enforcement of arbitral awards is provided under Sections 36 and 37 of the Arbitration Act, Cap 49 Laws of Kenya. Section 36(3) requires that the party applying for the enforcement of the award to furnish the original arbitral award and the original arbitration agreement or duly certified copies of the same.

The provisions of Section 36(3) of the Arbitration Act do not specify who is to certify the award. Section 37 of the Act provides the grounds upon which then Court may refuse to recognize an arbitral award. The court may refuse to recognize the award at the request of the party against whom the award is made if the party proves that: a party to the agreement was under some incapacity; the arbitration agreement is not valid under the applicable law; the proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given to the party or that no party was otherwise unable to present his case; that the award does not fall within the terms of the reference of the arbitration; the composition of the arbitral tribunal was not in accordance with the arbitration agreement; that the arbitral award has not yet become binding or has been set aside; that the making of the award was induced or affected by fraud, bribery, corruption or undue influence



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL CASE NO. 39 OF 2014

KAY CONSTRUCTION CO. LTD. :.....: APPLICANT

VERSUS

THE ATTORNEY GENERAL :.....: RESPONDENT

RULING

INTRODUCTION

1. The Application before this Court is the Applicant's Chamber Summons dated **13th October 2014** and filed in Court on **14th October 2014**. It is expressed to be brought pursuant to **Section 36** of the **Arbitration Act 1995**, and **Rule 9** of the **Arbitration Rules, 1997**.
2. The Application is based on the several grounds stated in the application and is supported by the undated Affidavit of HASMITA PATEL, a director of the Applicant. It is seeking for the following orders:-

1. ***That this Honourable Court be pleased to make orders of recognition of the Arbitral Award dated the 22nd day of February 2011 by eng Joseph Thuo, (Hereinafter called the "said Arbitral Award")***.
2. ***That the said Arbitral Award be enforced as a Judgment of this honourable court.***
3. ***THAT this honourable court be pleased to issue a decree in enforcement of the said Arbitral Award.***
4. ***THAT the cost of this application be in the cause.***

THE APPLICANT'S CASE

3. The Applicant avers that by a letter dated 25th October, 1990, the Respondent accepted its tender dated 20th September 1990 to undertake aircraft pavement rehabilitation works at Laikipia Airbase. Consequently an agreement was entered into between the Applicant and the Respondent on 21st February 1991. The agreement adopted the conditions of contract for overseas works mainly on civil and engineering construction (Commonly known as Overseas Civil Conditions of Contract). Clause 66 of the said Overseas Civil Conditions of Contract provided that any dispute arising under the contract would be referred to Arbitration.
4. The Applicant commenced the works pursuant to the aforesaid contract and duly completed the

same whereupon the Respondent issued a final Certificate of completion on 4th November 1994. However, the Respondent failed to make payments pursuant to the aforesaid contract. This prompted the applicant to refer the matter to arbitration pursuant to the provisions of the said agreement as read together with the provisions of the said Overseas Civil Conditions of Contract.

5. On 22nd February, 2011 the arbitrator wrote the Arbitral award. It is this award that the Applicant seeks to enforce before this Court. It is the Applicant's case that through their Advocates they filed a certified copy of the award as well as a certified copy of the aforesaid agreement in this court on 23rd October 2013 pursuant to the provisions of Section 36(3) of the Arbitration Act, in Miscellaneous Civil Cause No. 39 of 2013. Thereafter, in the said cause they filed an application, seeking orders of recognition and enforcement of the said Arbitral Award, pursuant to the provisions of Section 36 of the Arbitration Act (Chapter 49 of the Laws of Kenya). However, the application was struck out by a Ruling delivered on 3rd October 2014 by this Court and directions given that a fresh application be filed seeking recognition and enforcement of the said award.
6. It is by reason of the foregoing that the Applicant has filed this application seeking recognition and enforcement of the said award, in accordance with the provisions of Rule 4 of the Arbitration Rules 1997.

THE RESPONDENT'S CASE

7. In opposition to the application, the Respondent filed Grounds of Opposition dated 11th December 2014 on 15th December 2014 as well as a Replying affidavit sworn on 21st January 2015 by L. MUIRURI NGUGI, described as a Senior Litigation Counsel with the Attorney General. There is also a Further affidavit sworn by the same person on 10th February 2015.
8. The Respondent averred that they had filed Misc Application No. 130 of 2011 seeking orders to bar the Arbitrator from issuing the award and terminating his mandate to determine the dispute from the parties arising from the contract dated. Consequently, the parties agreed to record the consent dated 19th March 2013 determining the said miscellaneous application. According to the Respondent, the said consent required the arbitrator to notify the parties of the readiness of the award and its availability for collection. It further provided either party with the opportunity to challenge the award upon publication.
9. It is the Respondent's contention that the Arbitrator failed to notify them of the availability of the award for collection. It is further their contention that attempts to have the arbitrator confirm that he had reissued the award remained unanswered. It is therefore the Respondent's case that their right to challenge the award as reserved in the consent was abridged.

APPLICANT'S REPLY

10. In reply, the Applicant filed a further affidavit sworn by HASMITA PATEL on **30th January 2015**. The Applicant's position is that the consent order dated 19th March 2013 did not require the arbitrator to notify the parties of the readiness of the award. The Applicant averred that the arbitrator duly notified the parties that the award was ready for collection on 20th March 2013 and they collected their copy of the award. However, according to the Applicant, the Respondent chose not to collect their copy despite knowledge that the award was ready. The Applicant attached an affidavit sworn by Redempta Nganga, an administrator at Chartered Institute of Arbitrators, who deponed that she hand delivered a letter to the Respondent informing them that the award was ready.

ANALYSIS

11. I have considered the application, the affidavits in support and opposition to the application as well as the oral submissions by Counsel. Having done so, I take the following view of the matter.
12. From the above pleadings, the main issue for determination is whether or not the arbitral award in question can be enforced as a Judgment of this Court.
13. The recognition and enforcement of arbitral awards is provided for under sections 36 and 37 of the Arbitration Act, Cap 49 Laws of Kenya. Section 36 (3) requires that the party applying for the enforcement of the award to furnish the original arbitral award and the original arbitration agreement or duly certified copies of the same.
14. It was the Respondent's case that the Applicant's application was incompetent as it was in contravention of the aforementioned section. The Respondent submitted that the award attached to the application was neither original nor was it certified as a true copy of the original by the Arbitrator in accordance with the provisions of Sections 65 to 68 of the Evidence Act. The provisions of Section 36 (3) of the Arbitration Act do not specify who is to certify the award or the document and therefore the said sections of the Evidence Act as quoted by the Respondent do not apply. I have perused a copy of the award attached to the Applicant's application and indeed the same is certified as required under the Arbitration Act.
15. Section 37 provides the grounds upon which the Court may refuse to recognise an arbitral award. The Court may refuse to recognise the award at the request of the party against whom the award is made if the party proves that: a party to the agreement was under some incapacity; the arbitration agreement is not valid under the applicable law; the proper notice of the appointment of an arbitrator or of the arbitral proceedings was not given to the party or that the party was otherwise unable to present his case; that the award does not fall within the terms of reference of the arbitration; the composition of the arbitral tribunal was not in accordance with the arbitration agreement; that the arbitral award has not yet become binding or has been set aside; that the making of the award was induced or affected by fraud, bribery, corruption or undue influence. **See section 37 (1) (a) of the Arbitration Act.**
16. It is plain that the Respondent has not provided proof of any of the above ingredients to warrant the Court to refuse to recognise and enforce the award herein.
17. The Respondent's contention is that the Arbitrator failed to notify them of the availability of the award for collection, therefore denying them the right to challenge the award as reserved in the consent. I have perused the Consent dated 19th March 2013 and paragraph (a) of the said consent states as follows in verbatim; ***"The first Respondent be and is hereby authorised to release the final award in the dispute between the 2nd Respondent and the Applicant in respect of the Contract dated 21st February 1991."*** A plain reading of this text reveals that it was not a strict requirement that the arbitrator was to notify the Respondent of the award. It would have been the logical consequence yes, but even so, the Respondent could get notice of the award from the Applicant or even Chartered Institute of Arbitrators. It is also evident from the proceedings that the Respondent was aware that the award had been released. *See the letter dated 5th August 2013 from the Respondent's office.* In any case, the Respondent was aware there was an award even before they entered into the consent of 19th March 2013. It is therefore not clear what kind of notification the Respondent expected. Besides, it is not just enough for the Respondent to state that the lack of notification denied them the right to challenge the award without providing any grounds upon which they would challenge the same.
18. In view of the foregoing, this Court is of the view that the Respondent has not provided sufficient reasons to warrant this court to refuse to recognise and enforce the award dated 22nd February 2011.

DISPOSITION

19. In the upshot, I hereby allow the Applicant's Chamber Summons dated **13th October 2014** and

filed in Court on **14th October 2014** as prayed with costs in the cause.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Arwa for Applicant

M/s Ndirangu holding brief for M/s Kilei for Respondent

Teresia – Court Clerk



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