

HC. COMM/597/2002
DAVID CHABEDA & ANOTHER v FRANCIS INGANJI

Ruling Date: 17th August 2007

SUMMARY OF FACTS

One of the parties in the case sought to enforce an arbitral award. However, they were yet to furnish a duly authenticated original arbitral award or a duly certified copy of it as required by section 36 (3) of the Arbitration Act. They sought to invoke the inherent powers of the court under Section 3A of the Civil Procedure Act which empowers the court to make the orders that they deem fit for the purposes of achieving justice or to prevent an abuse of the court process.

ISSUES

Whether the inherent powers of the court allowed it to enforce an arbitral award despite the applicant failing to produce a duly authenticated original arbitral award or a duly certified copy of it.

ANALYSIS AND DETERMINATION

The court held that the inherent powers of the court did not preclude an applicant from complying with the mandatory statutory obligation of furnishing a duly authenticated original arbitral award or a duly certified copy of it when seeking to enforce the said award. This requirement is stipulated under section 36 (3) of the Arbitration Act. The court provided that the inherent powers of the court did not include the jurisdiction to ignore express statutory requirements. Thus, the obligation of the parties to produce the required documents superseded the inherent powers of the court to make any order with regards to the arbitral award.

HOLDING

The court dismissed the application to enforce the award because the applicant failed to comply with section 36 (3) of the Arbitration Act which mandates all parties seeking to enforce an arbitral award to bear a duly authenticated original arbitral award or a duly certified copy of it.

RATIONALE

From the ruling, it is apparent that the court followed section 10 of the Arbitration Act which prevents courts from intervening in matters governed by the act unless otherwise provided. Under section 36 of the Act, there is no provision for the court to use their inherent powers to enforce an arbitral award where the mandatory requirements for such enforcement have not been complied with. Thus, the court could not use the inherent powers of the Court under section 3A to cure the failure of the applicant to comply with mandatory statutory requirements.

CASE RELEVANCE

Section 3A of the Civil Procedure Act allows the court to use their inherent powers to achieve the ends of justice or prevent the abuse of the court. However, these inherent powers do not allow the court to overlook mandatory statutory requirements, such as the ones enumerated under section 36 (2). Thus, a party who seeks to enforce their award but derogates from section 36 (2) by failing to produce a duly authenticated original arbitral award or a duly certified copy of it will not have their arbitral award enforced, irrespective of the inherent powers of the court.



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 597 of 2002

1. DAVID CHABEDA

2. TRUPHENA CHABEDAPLAINTIFFS

V E R S U S

FRANCIS INGANJIDEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

In this application (by chamber summons dated 20th September, 2004) the Plaintiffs seek two main orders:-

1. That the noticed of motion dated 18th March, 2004 be withdrawn from the court records and the current chamber summons application be adopted.
2. That the court do receive, recognise and enforce the arbitral award made on 6th November, 2003 which was delivered and read on 7th January, 2004.

The application dated 18th March, 2004 sought to be withdrawn seeks the same order as is sought in prayer No. 2 of the present application.

When the present application came up for hearing on 3rd May, 2006 learned counsel for the Defendant raised a preliminary objection as per notice dated 2nd February, 2006. There are two grounds of that preliminary objection.

(a) That there is no jurisdiction for this court to entertain the claimant's application dated 20th September, 2004 while the application dated 18th March, 2004 has not been determined and/or withdrawn as provided by the Civil Procedure Rules.

(b) That the application dated 20th September, 2004 is incurably incompetent for being in breach of the

mandatory provisions of the section 36 of the Arbitration Act, 1995.

I have considered the submissions of the learned counsels appearing. The first ground of the preliminary objection is not well taken because in prayer 1 of the application the Plaintiffs seek leave of the court to withdraw the earlier application by notice of motion dated 18th March, 2004. That objection therefore is raised merely to defeat prayer No. 1 of the application. I will overrule it. The second ground of objection is, in effect, that the second prayer of application is incurably incompetent for being in breach of the mandatory provisions of section 36 of the Arbitration Act, 1995. It was submitted for the Defendant that no duly authenticated original arbitral award or a duly certified copy of it has been furnished by the Plaintiffs. This is a statutory requirement couched in mandatory terms. Indeed, the Plaintiffs have not furnished a duly authenticated original arbitral award or a duly certified copy of it. Failure to comply with an express statutory provision cannot be cured under section 3A of the Civil Procedure Act. The inherent powers of the court do not include the jurisdiction to ignore express statutory requirements. Prayer No. 2 of the application is therefore incompetent and cannot be heard. It is hereby struck out. That leaves only prayer No. 1 of the application which shall proceed to hearing.

The preliminary objection has therefore partly succeeded and partly failed. The parties shall bear their own costs of the preliminary objection. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED ON THIS 17th DAY OF AUGUST, 2007



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