



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. E145 OF 2021**

**MASHIN CONSTRUCTION LIMITED.....APPLICANT**

**-VERSUS-**

**VILLA CARE LIMITED.....RESPONDENT**

**RULING**

This ruling relates to the respondent's Notice of Preliminary Objection dated 31<sup>st</sup> May 2021 in response to the applicant's Notice of Motion dated 1<sup>st</sup> April 2021 and supported by the affidavit of **ABDINASIR MOHAMUD NUR**, a Director of the applicant's Company, sworn on 1<sup>st</sup> April 2021 which sought the following orders:

- 1) Spent.**
- 2) THAT leave be granted to the Applicant to file an Appeal out of time.**
- 3) THAT the Honourable Court deems the Applicant's Memorandum of Appeal as duly filed.**
- 4) THAT costs of this application be provided for.**

The respondent's Notice of Preliminary Objection raises the following grounds:

- 1) THAT this Honourable Court lacks jurisdiction to grant the Orders sought as there exists no prior agreement between the parties under Section 39 of the Arbitration Act ergo, the Applicant has no right of appeal against the Award dated 1<sup>st</sup> December 2020 and no such appeal lies in law.**
- 2) THAT the Applicant's Application is fatally defective and bad in law as this Honourable court lacks jurisdiction to enlarge or extends the time limits within which a challenge or an appeal may be made against an arbitral award under section 35 & 39 of the Arbitration Act.**
- 3) That this Honourable Court has no jurisdiction to intervene in arbitral proceedings in any manner not specifically provided for in the Arbitration Act 1995 and the Applicant's application offends the principle of finality in arbitration.**
- 4) THAT this Honourable Court being without the requisite jurisdiction to determine the Applicant Notice of Motion dated 1<sup>st</sup> April 2021 be obliged to strike out the same with costs to the Respondent.**

On June 2, 2021, the case was set for hearing, and both Mr. Gachugi for the respondent and Mr. Nura for the applicant consented to have the Preliminary Objection canvassed by way of written submissions. According to the applicant, the only question for this court to determine is whether the applicant's late filing of the appeal was warranted. The applicant argues that Section 10 of the Arbitration Act permits the court to intervene in arbitration cases, and that because the case is based on the Constitution, this court should administer justice without regard to procedural and statutory technicalities.

On whether this court can extend the deadlines for setting aside an arbitral award, counsel for the applicant states that Section 39(4) of the Arbitration Act states that an appeal against an arbitration award must be filed within the deadlines set by the Court of Appeal or the High Court. As a result, the applicant claims that Section 79G of the Civil Procedure Act applies, allowing for an extension of time to file an appeal. Section 79G has the following proviso;

**“...Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

According to the applicant, the intended Memorandum of Appeal squarely falls within this court’s jurisdiction as it relates to grounds laid down by the Supreme Court in the case of **NYUTU AGROVET LIMITED VS AIRTEL NETWORKS KENYA LIMITED; CHARTERED INSTITUTE OF ARBITRATORS-KENYA BRANCH (INTERESTED PARTY) [2019] eKLR**. Moreover, counsel submitted that each dispute ought to be decided on its own merits and that it is against the principles of fair trial for the arbitrator’s decision to be a factor on whether or not an aggrieved party can enforce the right to appeal under Section 39 of the Arbitration Act. To buttress this position, the applicant relied on the case of **ESSANJI AND ANOTHER V SOLANKI (1968) EA** at page 224:

**“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuit of his right.”** [George C.J (Tanzania)]

Similarly, in the case of **UNIVERSITY OF NAIROBI V MULTISCOPE CONSULTING ENGINEERS (2020)eKLR** the Court of Appeal held that;

**“An issue has been raised by the applicant regarding the interpretation of section 35(3) and this is a jurisprudential issue that ought to be addressed. The striking out of the applicant's motion has also resulted in the applicant being shut out from the seat of justice, and there is an issue whether the learned Judge of the High Court properly directed himself in striking out the applicant's motion or whether the learned judge made a decision that is so manifestly wrong and which has completely closed the door of justice to the applicant. We find that these are exceptional circumstances and it is appropriate that leave to appeal to this Court be granted so that these pertinent issues are fully ventilated and addressed by the Court.”**

The applicant submitted that an order for extension of time is an equitable remedy within the court’s discretion. The principles guiding the courts in exercising this discretionary power was highlighted in the case of **FIRST AMERICAN BANK OF KENYA LTD VS. GULAB P SHAH & 2 OTHERS NAIROBI (MILIMANI) HCCC No. 2255 of 2000 (2002) 1 EA 65**. The principles were also stated by the Supreme Court in **NICHOLAS KIPTOO ARAP KORIR SALAT VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR** and in a recent case of **BRITISH AMERICAN INSURANCE CO. LTD -VS- FRANCIS MBURU GICHIMU [2017] eKLR**, where the Court in considering the provisions of Section 79G of the Civil Procedure Code applied the principles set out by the Court of Appeal in **MWANGI -VS- KENYA AIRWAYS LTD [2003] 486**. These principles are as follows;

**(i) the explanation if any for the delay;**

**(ii) the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;**

**(iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.**

Counsel for the applicant states in support of its requests for an extension of time to file an appeal that the reason for the delay is sufficient because the firm was unaware of the status of the arbitration case. The arbitral award was issued at a time when the advocate handling the file was transitioning out of the firm and the applicant was out of the country and out of reach. Mr. Nura, representing the applicant, sought to rely on the case of **FEROZ BEGUM QURESHI AND ANOTHER V. MAGANBHAI PATEL AND OTHERS [1964] EA 633**, in which the court held that an applicant seeking an extension of time to file an appeal or admission of an already filed appeal must demonstrate good cause.

Counsel further submitted that the court in **FEROZ BEGUM** further made a clarification that there is no difference between “ Sufficient reason” and “good cause”. While in the case of **DAPHNE PARRY V MURRAY ALEXANDER CARSON [1963] EA 546** the court held that although the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. It is the applicant's contention that if the preliminary objection is upheld and or its application is denied, it will suffer prejudice, making it a suitable candidate for the grant of the prayers sought, especially since the respondent has not demonstrated what prejudice it will suffer if the application is granted and the appeal proceeds to hearing.

In opposition, counsel for the respondent submitted on the court’s jurisdiction and made reference to the case of **OWNERS OF MOTOR VESSEL LILLIAN V CALTEX OIL (KENYA) LTD [1989] KLR 1**. According to the respondent, the basis of the preliminary objection is that Section 35 of the Arbitration Act bars any challenge after three (3) months from the date of delivery of the Arbitral Award. The respondent in its further affidavit sworn on 18<sup>th</sup> October, 2021 by DANIEL OJIJO, averred that it received the original copy of the Award dated 1<sup>st</sup> December, 2002 after settling the Arbitrator’s fees. Subsequently, it sent a scanned copy of the Award to the applicant’s advocate via an email on 7<sup>th</sup> December, 2020 requesting settlement of the same. Similarly, there is no right of appeal to the High Court or the Court of Appeal against an Arbitral Award except in the circumstances set out in Section 39 of the Arbitration Act. The respondent has relied on the Court of Appeal decision in the case of **ANNE MUMBI HINGA V VICTORIA NJOKI GATHARA [2009] eKLR**:

**“... Besides the issue of jurisdiction as explained above, Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award... Arising from the above findings concerning the competency of the application the next logical question to address is whether this appeal is properly before us. In our view no appeal lies to this Court in the circumstance of this case.**

**It is clear from the above provisions, that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to Section 39 (2) of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else..”**

The respondent’s further submission is that the Arbitration Act does not provide for the extension of time within which a challenge to an Arbitral Award can be made. Consequently, the respondent states that it is imperative that the strict timelines set out under Section 35(3) of the Act be complied with to ensure the principle of finality in arbitration is upheld. To buttress this position, the respondent cited the case of **M/S PATHOLOGIST LANCET KENYA LIMITED V CHRISTA MARIANNE MISSION HOSPITAL [2020] eKLR** where Ougo J. held;

**“I therefore find that the applicant having committed itself to the arbitration process had an obligation to adhere to the strict timelines provided by the Arbitration Act. Despite the existence of a worldwide pandemic, I take judicial notice of the fact that with the current technological advancement, it is not necessary for businesses to be conducted based on face to face meetings. Things have changed clients need not visit their advocate’s offices to give them instructions. Instructions could have been given via phone or email. I reject the applicant’s argument it was not in a position to file the application in time as it could not access its advocate in Nairobi because of the regulations limiting movements in and out of the Nairobi Metropolitan area. In any case the applicant had the option of instructing any another counsel not within the Nairobi Metropolitan region to file his application challenging the award within the 3 months’ period provided under section 35 (3) of the Arbitration Act.”**

Similarly, reference was made to the decision of Justice Sewe in the case of **KENYATTA INTERNATIONAL CONVENTION CENTRE (KICC) V GREENSTAR SYTEMS LIMITED [2018] eKLR** held;

**“[23] Thus, there being no provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35(3) of the Act is imperative, and comports well with the principle of finality in arbitration. Indeed in the Anne Mumbi Hinga Case, the Court of Appeal proceeded to hold, in no uncertain terms, that Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award. And, it is now well settled that the time of delivery and receipt of Award is equivalent to the date of notice by the Arbitrator.”**

On the second limb of the Preliminary Objection, the respondent claims that this court lacks jurisdiction to grant the Orders sought because there is no right of appeal by prior agreement between the parties, as provided for in Section 39 of the Arbitration Act. Finally, the respondent contends that, in the absence of a valid prior consent between the parties, an application or appeal on questions of law, and provisions for time extensions, the respondent requests that this court dismiss the applicant’s Notice of Motion dated 1st April, 2021 for lack of jurisdiction to grant the prayers sought.

#### **Analysis and Determination;**

##### ***i) Whether there is a competent Preliminary Objection before the court;***

The law with regards to Preliminary Objection was settled by the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD. (1969) EA 696**, at the Court of Appeal for East Africa, where Law J.A. and Newbold P. held as follows:

**Law, JA.:**

**“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

**Newbold, P.:**

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”**

In the case of **HASSAN ALI JOHO & ANOTHER V SULEIMAN SAID SHAHBAL & 2 OTHERS, PETITION NO. 10 OF 2013, [2014] eKLR** the Court held thus:

**“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”**

Much more recently, the Supreme Court again reconsidered the position of parties resorting to the use of Preliminary Objections and

pronounced itself as follows in the case of **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION –V- JANE CHEPERENGER & 2 OTHERS [2015] eKLR.**

**“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”**

From the above authorities, the Supreme Court has taken a more liberal approach to how courts should handle Preliminary Objections. Its view is that disputes ought not be summarily resolved. However, if a Preliminary Objection serve the public purpose of effective utilization of judicial time and other resources, then the court ought to entertain the Preliminary Objection. I am of the opinion that although the dictum in **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION –V- JANE CHEPERENGER & 2 OTHERS** is progressive and will indeed utilize judicial time, it should be applied on undisputed facts that would not need the calling of additional evidence.

The respondent’s Preliminary Objection is with regards to the jurisdiction of this court, I will therefore endeavor to dispense with the same forthwith. Noting that jurisdiction is everything and the court or Tribunal derives its power, authority and legitimacy to entertain any matter before it from its jurisdiction. Jurisdiction has been defined in **Halsbury’s Laws of England (4<sup>th</sup> Ed.) Vol. 9 at page 350** as **“...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”**

*The preliminary objection is hinged on the ground that this Court has no jurisdiction under section 35 of the Arbitration Act to entertain an appeal and/or an application for setting aside of the arbitral award subject matter of the suit and secondly, that this court has no jurisdiction to extend time for filing an application for setting aside the arbitral award. A recourse against an arbitral award is provided for under Section 35 of the Arbitration Act which allows an unhappy party to set aside or vary the Arbitral Award under the specific grounds listed under Section 35(2) of the Act.*

The respondent argues that this court does not have jurisdiction to entertain the applicant’s application of 1<sup>st</sup> April, 2021 as the same is time barred having being filed way after the expiry of the statutory period of three (3) months. On this point, the applicant’s contention is that it was never notified of the arbitral award while the respondent argues that the arbitrator notified the parties when the award was published and adduced evidence which calls upon this court to analyze. Additionally, while the respondent has maintained that the applicant does not have a right of appeal as there is no agreement between the parties allowing for such an appeal, the applicant is convinced that it has valid grounds to vary and or set aside the arbitral award as provided under the Arbitration Act.

The undisputed facts of the case are that indeed the parties were involved in an arbitration case of which an Arbitral Award had already been pronounced and that the applicant who was aggrieved by the Arbitral Award now wants to appeal out of time. The disputed facts are on the question of when does the three (3) months period start to run, whether the appeal is of right and whether this court can extend time for filing appeal of an arbitration award. This issues that arise are factual and therefore will require more evidence from the parties for its determination.

I find guidance in the case of **AVIATION & ALLIED WORKERS UNION KENYA V KENYA AIRWAYS LTD & 3 OTHERS, APPLICATION NO. 50 OF 2014, [2015] eKLR** where the Supreme Court stated that;

**“[15] Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”**

It is for the foregoing reasons, that I find the applicant’s preliminary objection not proper as it has failed the test laid down in the Mukisa Biscuits Case, consequently, the same is disallowed.

**Applicant’s Application dated 1<sup>st</sup> April, 2021:**

The applicant seeks an extension of time to vary and or set aside the arbitral award of 1<sup>st</sup> December, 2021. It is undisputed that this court has the requisite jurisdiction albeit restricted to set aside arbitral award as provided under Section 10 and 35(2) of the Act which provides;

**“10. Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

**“35. (2) An arbitral award may be set aside by the High Court only if—**

**(a) the party making the application furnishes proof—**

**(i) that a party to the arbitration agreement was under some incapacity; or**

**(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

The above position was further highlighted by the Supreme Court in the **Nyutu Case**, where court intervention may be invoked in arbitration to include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds. Additionally, and as rightly argued by the respondent. Section 39 of the Arbitration Act provides for court's intervention to vary and / or set aside an arbitral award. However, this can only be invoked if there was an agreement between the parties to reserve the right to appeal on any question of law arising out of the award. A careful perusing of the Applicant's application reveals no evidence that the parties agreed to a right of appeal as per section 39. Without any evidence on record, this court finds that such an agreement does not exist hence this avenue is not available to the applicant. The only avenue available for the applicant is one provided under Section 35 of the Arbitration Act, which intervention, is subject to limitation of time under Section 35(3) of the Arbitration Act which **provides that**;

*“(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.”*

The importance of the strict timelines was addressed by the Court of Appeal in **EZRA ODONDI OPAR V INSURANCE COMPANY OF EAST AFRICA LIMITED KSC CA CIVIL APPEAL NO. 98 of 2016 [2020] eKLR**, where it observed that:

**[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in Nyutu Agrovets Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015 “the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes” “in a manner that is expeditious, efficient...” while also observing that Section 35 of the Act, “also provides the time limit within which the application for setting aside should be made.**

By filing the present application, the applicant has acknowledged that indeed the application has been filed out of time. In justifying the delay, the appellant's director stated that the delay was due to the transitioning of the advocate who was conducting the matter out of the firm of advocates on record. It is evident that the applicant's counsel was made aware of the arbitral award by the sole arbitrator via a letter dated 19<sup>th</sup> October, 2020 which informed the parties of the publication of the Award, which email was acknowledged by both counsel for the parties. Additionally, a letter dated 7<sup>th</sup> December, 2020 demanding settlement of the Arbitral Award was sent to the applicant after which it filed an application for enforcement dated 11<sup>th</sup> January, 2021. This evidence has neither been refuted nor disputed hence it confirms that the applicant was indeed aware of the publication of the award.

The question for determination is whether the time for filing the application started running from 19<sup>th</sup> October, 2020 when the parties were notified that the Award was ready for collection subject to payment of the arbitrator's fees or on 1<sup>st</sup> December, 2020 when the award was signed. In the recent case of **EZRA ODONDI OPAR V INSURANCE COMPANY OF EAST AFRICA LIMITED KSC CA CIVIL APPEAL NO. 98 OF 2016 [2020] eKLR**, the Court of Appeal reiterated that:

*[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in NYUTU AGROVET LIMITED VS. AIRTEL NETWORKS KENYA LIMITED AND ANOTHER, SC PETITION NO. 12 OF 2015 “the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes” “in a manner that is expeditious, efficient...” while also observing that Section 35 of the Act, “also provides the time limit within which the application for setting aside should be made.*

In **TRANSWORLD SAFARIS LIMITED V EAGLE AVIATION LIMITED AND 3 OTHERS H.C MISC. APPLICATION NO. 238 of 2003(UR)**, Nyamu J., after reviewing various decisions, expressed the view that:

**“Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35**

**must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration Act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality.”**

More recently in **UNIVERSITY OF NAIROBI V MULTISCOPE CONSULTANCY ENGINEERS LIMITED (SUPRA)**, Tuiyott J., had the opportunity to consider the same issue. The learned Judge took the position that in the context of **Section 32(5)** of the Act which provides that;

**“[24] ..... Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.”**

In interpreting **Section 35(5)** of the *Arbitration Act*, the court’s objective is to ensure speedy resolution of disputes and finality of the arbitral award. Therefore, an application to set aside must be made within three (3) months from the date the award is received and for this purpose, the date of receipt is the date which the parties are notified of the award. Once the parties are notified of the award, it is within their power to collect it. In the present suit, the arbitrator discharged his obligation of delivery on 19<sup>th</sup> October, 2020 when he notified the parties that the award was ready for collection. The applicant’s application dated 1<sup>st</sup> April, 2021 was filed outside the three (3) months prescribed period in **section 35(3)** of the *Arbitration Act*.

The other issue before this court for determination is whether this court has the jurisdiction to extend time set under Section 35 of the Arbitration Act. The applicant has sought to rely on the provision of Section 79G of the Civil Procedure Act and the Constitution. The respondent has maintained that there is neither a provision for extension of time under the Arbitration Act nor any exceptional circumstances warranting the court to extend time for filing the application. It is now settled that section 10 of the Arbitration Act excludes the application of the Civil Procedure Act and Rules. Several decisions affirm this position including the Court of Appeal in **NYUTU AGROVET LIMITED V AIRTEL NETWORKS LIMITED NRB CA CIVIL APPEAL (APPLICATION) NO. 61 of 2012 [2015] eKLR**, where Mwera JA observed as follows on the same issue;

**Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil-like litigation, I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:**

**“11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules.”**

**The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10.**

In the case of **DINESH CONSTRUCTION COMPANY (K) LIMITED VS KENYA SUGAR RESEARCH FOUNDATION [2018] eKLR** the High Court held that in the absence of any specific provision under Arbitration Act governing a procedure sought by a party the Court would lack jurisdiction to entertain such an application:-

**"Thus, there being no specific provision in the Arbitration Act for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either to grant stay of execution, or set aside the enforcement order of 11<sup>th</sup> July 2017, or to extend time for purposes of setting aside the Arbitral Award."**

The Arbitration Act does not provide for extension of time and in my view three (3) months period within which to file an application to set aside the final award is sufficient time to take necessary action. Section 79G provides for thirty (30) days to file an appeal. The Arbitration Act expanded such time to three (3) months which in my view is sufficient time for a dissatisfied party to file an appeal. The applicant herein was notified of the publication of the award. It is for the foregoing reasons that the application dated 1<sup>st</sup> April, 2021 lacks merit and is hereby dismissed with costs to the Respondent.

**DATED AND SIGNED ON THIS 28TH DAY OF FEBRUARY, 2022.**

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**S. CHITEMBWE**

**JUDGE**