IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 550 OF 2006

BETWEEN

MERCANTILE LIFE AND GENERAL ASSURANCE

COMPANY LIMITED.....1ST PLAINTIFF

MOHAMMAD HASSIM PONDOR (Suing on behalf of

The International Air Transport –IATA) .....2ND PLAINTIFF

AND

DILIP M. SHAH..... 1ST DEFENDANT

PANAKAJ MEGHJI SHAH ..... 2ND DEFENDANT

KAMAL M. SHAH ..... 3RD DEFENDANT

FIVE CONTINENTS TRAVEL LTD ..... 4TH DEFENDANT

RULING

Introduction

1. In this ruling I am called upon to determine the 2nd Plaintiff's Chamber Summons dated 12th February 2020 made under **sections 36** and **37** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking, *inter alia*, to adopt an Arbitral Award dated 13th August 2019 ("the Award") as a decree of the court. The 4th Defendant filed a Notice of Motion dated 24th February 2020 made under **section 35** of the ***Act*** seeking to set aside the Award. The 2nd Plaintiff ("the Plaintiff" unless the context otherwise admits) has also raised a preliminary objection to the 4th Defendant's application on the ground that Notice of Motion dated 24th February 2020 was filed out of time.

Background

2. This case was commenced by a plaint dated 3rd October 2006 in which the Plaintiffs claimed Kshs. 4,408,407.85 and USD 443,642.35 arising, inter alia, from the sale of air tickets, from the Defendants. By an amended plaint filed in October 2006, the 4th Defendant was joined to the suit. On 30th November 2006, the 4th Defendant filed an application seeking referral of the dispute to arbitration. The suit was referred to arbitration on 19th October 2010

3. On 14th May 2015, the court dismissed the suit. The Plaintiff filed an appeal in the Court of Appeal; ***Civil Appeal No.146 of 2015 Mercantile Life & General Assurance & Another v Dilip M. Shah & Others***. By a judgment dated 26th May 2017, the Court of Appeal reinstated the suit on that ground that the suit had been stayed pending the hearing and determination of the arbitral proceedings which were

still pending at the material time.

4. After the suit was reinstated, the Plaintiff applied to the court for the appointment of an arbitrator after the 4th Defendant refused to concur on the mutual appointment of an arbitrator. On 27th September 2018, the court appointed Mr Collins Namachanja as the sole arbitrator. He concluded the arbitration and on 13th August 2019, informed parties that the Award was ready. The Plaintiff paid the Arbitrator's fee on 4th September 2019. Since the 4th Defendant refused to pay its share of fees, the 2nd Plaintiff now requests that it be ordered to refund the nominal sum of Kshs. 36,500.00 paid by the Plaintiff's advocates to the arbitrator.

5. The parties agreed to canvass the application by written submissions. Since the applications seek to set aside and enforce the Award, the application to set aside the Award must be determined first since its success would render the application to enforce the Award redundant. In response to the application to set aside the award, the Plaintiff has filed a notice of preliminary objection. Since the preliminary objection may determine that application, I will proceed to deal with it first.

Preliminary Objection

6. The 4th Defendant's Notice of Motion dated 24th February 2020 is made under **section 35** of the ***Act*** which provides as follows:

> *35 (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).*
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> *(2) An arbitral award may be set aside by the High Court only if-*
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> *(a) the party making the application furnishes proof-*
>
> *(i) that a party to the arbitration agreement was under some incapacity; or*
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> *(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*
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> *(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption*
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> *(b) the High Court finds that-*
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> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*
>
> *(ii) the award is conflict with the public policy of Kenya:*
>
> *(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.*
>
> *(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.* [Emphasis mine]

7. The Plaintiff's preliminary objection to the 4th Defendant's application to set aside the award is grounded on the provisions of **section 35(3)** of the ***Act*** which provides that an application to set aside an arbitral award may not be made after 3 months have elapsed from the date on which the party making that application has received the arbitral award.

8. It was contended by the Plaintiff that the Award was published on 13th August 2019 and the Notice of Motion dated 24th February 2020 seeking to set aside the Award filed more than 6 months after publication. Consequently, it is time barred and should be struck out with costs. Counsel referred to the decision by Tuiyott J., in ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **HC COMM Misc. No. E083 of 2019 [2020] eKLR** where the court held that under **section 35(3)** of the ***Act***, notice to the parties that an award is ready for collection is sufficient delivery and receipt of the award to the parties and that the time for filing the application to set aside starts running

once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses. Counsel also cited the decisions in ***Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others*** **NRB Misc. Civil Appl. No. 792 of 2004 [2005] eKLR**, ***Transworld Safaris Ltd v Eagle Aviation Ltd & 3 others*****. H.C Misc. Application No. 238 of 2003 (UR)** and ***Bulk Transport Corporation v Sissy Steamship Co. Ltd*** **Lloyd's Law Report 1979 Vol. 2 289** which buttress that position.

9. In response to the Preliminary Objection that the application to set aside the award is time barred having been filed 6 months after the publication of the Award, counsel for the 4th Defendant submitted that the decision in ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **(Supra)** relied on by the Plaintiff, being a decision of a court of concurrent jurisdiction is only persuasive and not binding. Counsel cited other cases in which High Court Judges have reached a different conclusion. He cited ***Farm Engineering Industries Limited v Patel Kalyanji Premji & Co.*** **HCOMM No. 270 of 2018 [2019] eKLR**, where Muigai J., held that calculation of the 90 days contemplated in **section 35(3)** of the ***Act*** commenced from the date when the applicant received the award as opposed to the date when the arbitrator published the Arbitral Award. He also cited the decision of Kasango J., in ***United (EA) Warehouses Limited v Care Somalia and Southern Sudan*** **HC Misc. Appl. No. 182 of 2013 [2015] eKLR** where the learned judge held that under **section 35 (3)** of the ***Act***, time should start running from the date the applicant received the award.

10. Counsel for the 4th Defendant further submitted that the wording of **section 35(3)** of the ***Act***, "*had received the arbitral award*" is unambiguous and cannot be subjected to any other rule of statutory interpretation other that the literal rule. In the circumstances, the 4th Defendant contended that the decision in ***University of Nairobi vs Multiscope Consultancy Engineers Limited*** **(Supra)** and the decisions relied on by the Plaintiff are inconsistent with the clear reading of the statute.

11. The Court of Appeal in ***Ann Mumbi Hinga v Victoria Njoki Gathara*** **NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR** was categorical 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."* Resolution of the preliminary objection hinges on the meaning of "*received*" used in **section 35(3)** of the ***Act*** given that the natural and ordinary meaning of receive as defined in the ***Oxford Concise English Dictionary*** means, *"be given, presented with, take delivery of …"* all of which imply actual obtaining of the award.

12. The Plaintiff's position is centred on the preponderance of legal authority within this jurisdiction which posits that under **section 35(3)** of the ***Act***, the 3 months for setting aside award is reckoned from the date the parties are notified by the arbitral tribunal that the award is ready for collection irrespective of the date when the award is actually received by the party. In ***Transworld Safaris Limited v Eagle Aviation Limited and 3 Others*** **(Supra)**, 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.*

13. That same view was taken in ***Mahican Investments Limited and 3 Others v Giovanni Gaida and 80 Others*** **(Supra)**. In arriving at the conclusion that "*received*" for purposes of the ***Act*** means notification of the award, the courts have considered the object of arbitration under the ***UNCITRAL Model Law on International Commercial Arbitration*** which include speedy resolution of disputes and finality as illustrated by Warsame J., in ***Mahinder Singh Channa vs. Nelson Muguku & Another*** **ML HC Misc. Application No. 108 of 2006 [2007] eKLR** where he observed that:

> *Publication is something which is complete when the arbitrator becomes functus officio but so far as the time for moving under the statute is concerned, it is the notice that matters. It is wholly untenable that the time would not begin to run for a wholly indefinite period if neither side takes up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the period has only just started to run and the fact that he could have had his award by walking round the corner at any moment from the date upon which he received notice of its availability cannot be held against him. Such a construction of the rule appears to be entirely unreasonable. It has never been applied and there is no reason to hold that it applies now … As the parties in this matter were aware that the award was published and this information was supplied to the applicant after it made an inquiry as to the effective date of publication of the award, the letter stating that the award had been issued cannot change the earlier factual and legal position. Any other interpretation or holding would result in dilatory tactics that would defeat the arbitral process denying it of the virtues associated with it such as speed and cost effectiveness…*

14. In ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **(Supra)**, Tuiyott J., took the position that in the context of **section 32(5)** of the ***Act*** which provides that,

> *32(5) Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.*

The act of delivery is simply making the signed copy of the award available for collection to the parties. The learned judge was of the view that the aforesaid provision does not require the arbitral tribunal to send a signed copy of the award to the parties hence for purposes of **section 35(3)** of the ***Act***:

> *[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.*

15. The decision of Muigai J, in ***Farm Engineering Industries Limited v Patel Kalyanji Premji & Co*** **[2019] eKLR** did not deal with the meaning of "received" but dealt with the matter on the basis of the objection raised by the respondent in that case that the award had been released to the parties on 8th May 2018 as opposed to the date of publication which was 19th February 2018. The court held that in that event the application seeking to set aside the Arbitral Award ought to have been filed on or before 6th of August 2018 and as such the application

was filed out of time.

16. In ***United (EA) Warehouses Limited v Care Somalia and Southern Sudan*** **(Supra)**, the respondent contended that the application to set aside the award was time barred under **section 35(3)** of the ***Act*** as the award was published on 23rd April 2012. It is not clear from the decision that the court dealt with the issue whether the parties were notified by the arbitrator that the award was ready for collection. The court observed as follows:

> *Clearly, the foregoing averment under oath confirms the Claimant's position that the Arbitral Award was dated 23rd April 2013 but was received by the parties on 12th July 2013. I do not understand the about turn made by the Respondent to later claim that the Claimant received the award on 23rd April 2013. Since Section 35 (3) provides that time should start running from the date the applicant received the award, the Claimant's application was filed within time. The Respondent's challenge to the Respondent's application on the basis that the same was filed out of time should therefore be rejected.*

17. 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.*

18. The Court then proceeded to state that, "*The three months' period within which an application for setting aside an arbitral award may be made is to be computed from the date the award is received."* The Court, however, left the issue when the award is received open.

19. I am in agreement with the previous decisions culminating in ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **(Supra)** for two reasons. First, once the arbitrator has signed off the award and notified that parties that the it is ready for collection upon payment of fees and expenses, the act of delivery is within the power and control of the parties. Second and flowing from the first reason, the object of the entire ***Act*** would be undermined if a contrary meaning were given to the to the provision.

20. I am of the view that consistent with the object of the ***Act***, the only logical interpretation of **section 35(5)** of the ***Act*** is that an application to set aside must be made within 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. In this case, the award was received on 13th August 2019 and the Notice of Motion dated 24th February 2020 filed outside the 3 months prescribed. It is therefore struck out.

Application to enforce the award

21. The Plaintiff's application dated 12th February 2020 is made under **section 36** and **37** of the ***Act*** and it seeks orders for leave to enforce the Award as a decree of the court. The Plaintiff also seeks an order directing the 4th Defendant to reimburse Kshs. 36,500/- being costs paid by the Plaintiff's Advocates' firm on account of the 4th Defendant's share of the arbitrator's fee. There is no dispute that that award was published and the same has been furnished to the court.

22. The 4th Defendant has opposed the application on the ground that the award is against public policy as the arbitral tribunal entertained a claim that was statute barred under the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***. It invoked **section 37(1)(b)** of the ***Act***, which states as follows;

> *37(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—*
>
> *(a) ----------*
>
> *(b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.*

23. The Plaintiff's case against the 4th Defendant's case is that the cause of action against it arose between 2005 and 2006 when it failed to remit ticket sales. The Amended Plaint against it was filed on 2nd October 2006 whereupon the 4th Defendant filed an application under **section 6** of the ***Act*** to refer the matter to arbitration. The application was allowed by consent of the parties on 19th April 2010. The Plaintiff then sent a letter to the 4th Defendant dated 12th July 2017 seeking concurrence on the appointment of an arbitrator and since there was no concurrence, the Plaintiff filed another application dated 18th September 2019 seeking appointment of an arbitrator. The application was allowed on 27th September 2020 and Mr Collins Namachanja was appointed as arbitrator.

24. The 4th Defendant's case was grounded on the argument that the Arbitrator misapprehended the law regarding limitation of actions in

reference to the time the arbitration proceedings commenced and in particular **section 34(3)** of the ***Limitation of Actions Act*** which provides as follows:

> *34(3) For purposes of this Act and any other written law relating to the limitation of actions, an arbitration is taken to be commenced when one party to the arbitration serves the other party a notice requiring him to appoint an arbitrator or to concur in the appointment of an arbitrator or, where the submission provides that the reference shall be to a person name or designated in the submissions, requiring him to submit the dispute to the person named or so designated.*

25. The 4th Defendant submitted that based on the forgoing provisions, the cause of action arose in 2006 and only froze on 12th July 2017 when the Plaintiff made the request for arbitration which was 11 years later.

26. The Arbitrator dismissed the objection on limitation and held that once a party has referred the matter to arbitration through the court, an order of the court under **section 6(1)** of the ***Act*** suffices to commence the arbitration and no further notice is required. In his view, the arbitration commenced when the court issued the order on 19th October 2010 and that the letter of 12thJuly 2017 was simply to agree on an arbitrator as any other interpretation would render the order of 19th October 2010 superfluous. The Arbitrator found the suit remained alive courtesy of the decision of the Court of Appeal and the High Court suit having been stayed meant that its life had been extended and held in abeyance pending determination of the dispute before the Arbitral Tribunal.

27. The 4th Defendant relied on the ground of public policy under **section 37(1)(b)(ii)** of the ***Act***. In ***Christ for all Nations v Apollo Insurance Co. Ltd*** **[2002] EA 366**, which was quoted with approval by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR**, Ringera, J., (as he then was) elucidated the meaning of public policy under **section 35** of the ***Act*** as follows:

> *An award could be set aside under page 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.*

28. While public policy, as defined above, is a broad, infinite and malleable concept, when considering it, the principle that parties who enter into an arbitration agreement expect a level of finality must be remain in the foreground. As Ringera J., in the ***Christ for All Nations Case*** **(Supra)** observed:

> *[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act.*

29. Even the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **(Supra)** held upheld the principle of finality of arbitral awards:

> *We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy.*

30. This is a case where the issue of limitation was a matter framed for trial and determination by the arbitrator. Under **section 17(5)** of the ***Act***, the arbitral tribunal may rule on a plea on jurisdiction either as a preliminary question or in an arbitral award on merits. In this case the arbitrator took the latter option and cannot be faulted for proceeding accordingly (see ***Kenya Bureau of Standards v Geo-Chem Middle East*** **HC COMM Misc. 455 of 2016 [2017] eKLR**).

31. When parties agree to have an arbitrator determine a dispute within the arbitration clause, they must take the consequences that the decision may be for or against one of the parties and that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. The court when called upon to decline enforcement of an arbitral award under **section 37** of the ***Act*** does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish. As Tuiyott J., held in ***Mahan Limited v Villa Care*** **ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR**:

> *[9] It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them .It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act.*

32. I therefore hold that the Award is not contrary to public policy and since the Plaintiff has met the pre-conditions for the enforcement of the Award it is now recognised and shall be enforced accordingly.

Disposition

33. The final orders are as follows:

> *(a) The Notice of Motion dated 24th February 2020 be and is hereby struck out with costs to the 2nd Plaintiff.*

(b) The Chamber Summons dated 12th February 2020 is allowed on the following terms: (i) Leave be and is hereby granted to the 2nd Plaintiff to enforce the Arbitral Award dated 13th August 2019 as a decree of this court.

(ii) The 4th Defendant shall reimburse the 2nd Plaintiff Kshs. 36,500 with interest at court rates until payment in full.

(iii) The 4th Defendant shall bear the costs of the application.

34. I apologise to the parties for the delay in delivering this ruling caused by my heavy work load and other unavoidable circumstances.

DATED and **DELIVERED** at **NAIROBI** this **15th day of JANUARY 2021.**

D. S. MAJANJA

JUDGE

Mr Gichuhi instructed by Wamae & Allen Advocates for the Plaintiffs.

Mr Wandabwa instructed by Wandabwa and Company Advocates for the 4th defendant.