



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO.468 OF 2019

IN THE MATTER OF ARBITRATION ACT 1995

EPCO BUILDERS LIMITED.....APPLICANT

VERSUS

SOUTH DEVELOPMENT COMPANY LIMITED.....RESPONDENT

PRELIMINARY OBJECTION

RULING

BACKGROUND

1. The Applicant filed a Notice of Motion Application dated 9th October 2019 for orders; -
 - a) The Court to set aside paragraph 228, 229, 230 and 233 of the Final award of Architect Julius Muthui F. Mutunga dated 11th June 2019.
 - b) The Court to determine the question of whether the claim is payable and if so, order that the same be paid.
 - c) In the alternative to this the court refer paragraphs 228, 229, 230 and 233 of the Final award for re-consideration with instructions to determine them within the jurisdiction of the Arbitrator.

GROUND OF OPPOSITION

2. The Respondent opposed the Application on grounds that; -
 - a) The Applicant's application is premature, incompetent, speculative, frivolous, misconceived and constitutes a blatant abuse of the court process and otherwise a waste of the limited judicial time.
 - b) The Application does not meet the threshold for setting aside arbitral award under the provisions of **Section 35(2) of the Arbitration Act** as the arbitral award issued by the Honourable tribunal on 11th June 2019 was within the terms of the contract between the parties herein.
 - c) The Applicant's application grossly offends the explicit provisions of **Section 35(3) of the Arbitration Act** as the Applicant herein has not sought leave to file an application seeking to set aside the Arbitral Award which award was made on 11th June 2019 and lifted on 11th July 2019, more than 3 months after the delivery of the Arbitral Award.
 - d) The Applicant's application is not only grossly incompetent but also offends the ratio decidendi in ***Civil Case No 571 of 2011 Bellevue Development Company Limited Versus Vinayak Builders Limited and Another [2014] eKLR*** as it seeks orders against an entity not a party to the determined arbitral proceedings.
 - e) The prayers sought by the Applicant are implicit as the Applicant appears to approbate and reprobate at the same time on the issue of setting aside the arbitral award.

f) The Applicant is on a mission to unjustly enrich itself against the rules of fairness and natural justice.

NOTICE OF PRELIMINARY OBJECTION

3. The Respondent raised a Preliminary Objection that the Application be struck out for the following reasons; -

a) That the Court lacks the requisite jurisdiction to hear and determine the suit pursuant to the provisions of **Section 35(3) of the Arbitration Act 1995**.

b) That the Applicant's Notice of Motion Application dated 9th October 2019 is statute barred and as such, this court lacks jurisdiction to hear, determine and/or make any orders and/or grant any relief in respect of the said application.

c) That the Applicant's Application dated 9th October 2019 is fatally defective and an abuse of the court process and ought to be struck out.

RESPONDENT'S SUBMISSIONS

4. On whether the Applicant's application is statute barred, the Respondent submits that the Application has been filed out of time as set out in **Section 35 (3) of the Arbitration Act**. Further, that if at all the Applicant was aggrieved by the award made by the Arbitrator it was only prudent that they filed their substantive Application within 3 months from the date of issuance of the Award failure to which they ought to have sought leave to file the same pursuant to **Section 35 (3) of the Arbitration Act**.

5. In the **Court of Appeal case of Ann Mumbi Hinga -versus- Victoria Njoki Gathara Nairobi CA No.8 of 2009 eKLR** was very categorical on this issue in 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.”

6. On whether the Court can set aside the Arbitral Award published on 11th June 2019 the Respondent submits that the court cannot take any step without jurisdiction as was held in the Supreme Court decision in the case of **Constitutional Application No. 2 of 2011 In The Matter of Interim Independent Electoral Commission [2011] eKLR** where the apex court stated as follows;-

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution, by statute and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ - versus- Caltex Oil Limited [1989] KLR 1 which bears the following passage; -

“Further, the court is in the instance not seized of the requisite jurisdiction to set aside an arbitral award in a manner not specifically provided for in the Arbitration Act. It would be ultra vires for the court to deny an award its finality and speedy enforcement which are major objectives of arbitration and the ultimate intention of the parties.”

DETERMINATION

7. The Respondent raised a Preliminary Objection that the Application be struck out for the reasons that the Court lacks the requisite jurisdiction to hear and determine the suit pursuant to the provisions of **Section 35(3) of the Arbitration Act 1995**. **Section 35 (3)** of the Arbitration Act provides that; -

“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.”

8. The issue of jurisdiction is well settled in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1**, where Nyarangi J. of the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. The Arbitral Award was published on 11th June 2019 and the Applicant's Application was filed on 9th October 2019. Further, the Applicant in its pleadings avers that it sought for reasons, clarifications and removal of the ambiguities vide an application 8th August 2019 addressed to the Arbitrator and made in terms of **Section 34 of the Arbitration Act**.

Section 34 of the Arbitration Act prescribes as follows; -

(1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties—

(a) a party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and

(b) a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.

(2) If the tribunal considers a request made under subsection (1) to be justified it shall, after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.

(3) The arbitral tribunal may correct any error of the type referred to in subsection (1)(a) on its own initiative within 30 days after the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or (5). (7) Section 32 shall apply to a correction or an interpretation of the arbitral award or to an additional arbitral award made under this section.

10. The import of **Section 34** of the Act is that it allows any party to seek correction or clarification of an award as long as such clarification is sought within the time stipulated under the section upon notice being issued to the other party.

The issue of timelines and statute bar can only be determined at the hearing of the application(s) by parties *inter partes*.

11. A preliminary Objection is a pure point of law on agreed facts. The statute bar of filing setting aside application after 3 months is a legal requirement. However, as to the instant case, it is important to determine the statute-bar at the hearing of the application(s) on the application of **Section 34 & 35 Arbitration Act** to the instant case.

12. Preliminary Objection is dismissed; the question of statute bar shall be determined during proceedings.

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KIPROTICH H/B MACHARIA FOR RESPONDENT

MR. KAIRU FOR THE APPLICANT

COURT

ASSISTANT

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TUPET