IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

MISC. APPLICATION NO. E1130 OF 2020

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBITRAL AWARD

BETWEEN

WILL DEVELOPERS AND CONSTRUCTION LIMITED.....APPLICANT

AND

THE GOVERNMENT OF THE REPUBLIC OF KENYA

PERMANENT SECRETARY, VOCATIONAL TRAINING,

MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY.....1ST RESPONDENT

KENYA TECHNICAL TEACHERS COLLEGE.....2ND RESPONDENT

RULING

Introduction and Background

1. The Applicant has moved the court by the Chamber Summons dated 7th October 2020 under **section 35(2)(a)(iv)(vi)** and **(b) (ii)** of the ***Arbitration Act, 4 of 1995*** ("the ***Arbitration Act"***), **Order 46 Rule 16(1)(a)** of the ***Civil Procedure Rules*** ("the ***Rules"***) and **Articles 23, 47, 48, 159(2)(c)** and **165** of the Constitution seeking the following orders:

> 1. THAT the Honourable Court be pleased to extend and enlarge time for filing the Application to set aside the Arbitral Award dated 11th May 2020 and received on 7th August 2020
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> 2. THAT an Order for STAY OF RECOGNITION AND ENFORCEMENT of the Arbitral Award of the Sole Arbitrator KIMANI A. G (FCIArb) Dated 11th May 2020 and received on 7th August 2020 (hereinafter referred to as "The Award") in the matter of the Arbitration between the Applicant and the Respondents do and hereby issue pending the hearing and determination of this Application.
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> 3. THAT an Order to SET ASIDE the Arbitral Award of the Sole Arbitrator KIMANI A. G (FCIArb) dated 1st May 2020 and received on 7th August 2020 in the matter of the Arbitration between the Applicant and the Respondents, be and is hereby granted.
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> 4. THAT costs of this Application be borne by the Respondent.
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> 5. THAT this Honourable Court be pleased to make such further or other order(s) as it may deem appropriate including remitting the Award to an alternative Arbitral Tribunal for corrective action.

2. The application is supported by the grounds set out in the face of the application and the affidavits of the Applicant's Executive Chairman,

Johnstone Mwanzia Wambua, sworn on 7th October 2020 and 25th February 2021 respectively. The application is opposed by the 2nd Respondent through the replying affidavit of Dr. Edwin Tarno, its Chief Principal, sworn on 5th December 2020. It is also opposed by the 1st Respondent through the replying affidavit sworn on 8th December 2020 by the its counsel, Emmanuel Kiarie.

3. The application was canvassed by way of written submissions with the parties advancing their respective positions.

4. The facts giving rise to the dispute are largely common cause. The 2nd Respondent entered into a contract dated 26th April 2011 ("the Contract") with the Applicant after the Applicant was awarded a tender to construct two standard workshops/laboratory complexes for the contract price of KES. 53,421,480.00 at the 2nd Respondent's Nairobi Campus. The Contract comprised of the following documents: Letter of Acceptance, Form of Tender, Conditions of Contract part I, Conditions of Contract part II and Appendix to Conditions of Contract, Specifications, Drawings and Priced Bills of Quantities.

5. Following a dispute over payment and completion of works, the parties referred it to arbitration in accordance with **Clause 37.1** of the Contract. The Applicant lodged a claim for, inter alia, interest on delayed payment on various certificates amounting to KES. 39,681,942.42. while the 2nd Respondent filed a counterclaim seeking, inter alia, that the Applicant be compelled to complete the Contract works or in the alternative it be ordered to refund the monies paid to it. The 1st Respondent denied the claim on the ground that it was not party to the Contract, never participated in its execution and that it never participated in the appointment of the Arbitrator and that the Arbitrator did not have jurisdiction over it.

6. After hearing the matter, the sole Arbitrator, A. G. Kimani, FCIArb ("the Arbitrator"), published the Final Award dated 11th May 2020 ("the Award"). He found that the parties to the Contract were the Applicant and the 2nd Respondent and that the 1st Respondent was not liable to the Applicant for acts of the 2nd Respondent. The Arbitrator found, inter alia, that the 2nd Respondent made all payments for Certificates Nos. 1, 2, 3, 4, 5 and 7 within the required 45 days of the issue of the Project Manager's Certificate and therefore there were no delays in payment. That the application for payment for Certificates Nos. 6 and No 8 was not validly made under the Contract hence they were not payable by the Employer. The Arbitrator further held that the 2nd Respondent was not entitled to recovery of mesne profits in respect of loss of use of the workshop nor the refund of the payments made to the Applicant or any interest arising therefrom. In conclusion, it made the following orders:

> a. The tribunal has no jurisdiction over the first Respondent.
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> b. All claims of the Claimant are dismissed.
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> c. An order is issued to the Claimant to complete the contractual Works within 14 days AFTER providing the necessary performance security and Insurances for the works. The Claimant shall provide, within fourteen (14) days of receipt of this Award a Performance Security and necessary Insurances in accordance with the contract conditions.
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> d. All other counterclaims of the Claimant, first and second Respondent are dismissed.

7. It is the Award above that the Applicant now seeks to stay and set aside. The matter was canvassed by way of written submissions which I shall now consider. From the depositions and submissions, the Respondents raise the following two preliminary issues which I must consider as they go the jurisdiction of this court to grant relief:

> a. Whether the application to set aside the award is filed out of time under **section 35(3)** of the ***Arbitration Act***.
>
> b. Whether the court has jurisdiction to extend time for filing the application to set aside the Award and if so, whether the applicant has made out a case.

Setting Aside the Award

8. The Applicant does not deny that it has filed the application out of the time limited by **section 35(3)** of the ***Arbitration Act*** which provides as follows:

> 35(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. [Emphasis mine]

9. It is not in dispute that the Award was published on 11th May 2020. Under **section 35(3)** above, the Applicant had 3 months from the date of receiving the award to apply to set it aside meaning that the application ought to have been filed by 12th August 2020 latest. The Applicant stated that it "received" the Award on 7th August 2020 after paying the Arbitrator's fees and that the period between 11th May 2020 and 7th August 2020, the world was ravaged with an unpreceded lock down and slowing of all activities due to the COVID 19 pandemic. It claims that the situation affected its business adversely and the parties had no way of raising the Arbitrator's fees considering that it is a contractor whose business was adversely affected. The Applicant submits that since there is conflicting jurisprudence as to when time for setting aside the award starts running, it applied for extension of time for abundance of caution.

10. The policy of expedition and finality that undergirds time frames including the time limit for setting aside an award under the ***Arbitration Act*** was restated in ***Ezra Odondi Opar v Insurance Company of East Africa Limited*** **KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR**, where the Court of Appeal 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 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.

11. The Court of Appeal did not resolve the meaning of the word, "received" in **section 35(3)** of the ***Arbitration Act***. The preponderance of legal authority on the meaning of "received" is that an award is received as soon as the parties are notified by the arbitral tribunal that it is ready for collection (see ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **ML HC Misc Cause No. 083 of 2019 (2020) eKLR** and ***Mercantile Life and General Assurance Company Limited & Another v Dilip M. Shah & 3 Others*** **HC COMM No. 550 of 2006 [2020] eKLR**).

12. In ***Transworld Safaris Limited v Eagle Aviation Limited and 3 Others H.C Misc. Application No. 238 of 2003***, 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. The court in ***Mahican Investments Limited and 3 Others v Giovanni Gaida and 80 Others*** **[2005] eKLR** followed the same position. In arriving at the conclusion that "*received*" for purposes of the ***Act*** means notification of the award, the courts have held that the object of speedy resolution of disputes and finality of the arbitral award under the ***UNCITRAL Model Law on International Commercial Arbitration*** is paramount. In ***Mahinder Singh Channa vs. Nelson Muguku & Another*** **ML HC Misc. Application No. 108 of 2006 [2007] eKLR,** Warsame J., observed as follows:

> 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… [Emphasis mine]

14. In ***Lantech (Africa) Limited v Geothermal Development Company*** **ML HC Misc. Appl. No. E776 of 2020 [2020] eKLR**, Okwany J., held

> [33] Delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties. [Emphasis mine]

15. As the Applicant states, there are of course other decision that take a contrary view and hold that deliver means actual delivery or physical delivery of the arbitral award. In ***Dewdrop Enterprises Limited v Harree Construction Limited*** **HC Misc. No. 684 of 2008 [2009] eKLR**, the court accepted that the time for filing the application to set aside the award is to be reckoned from the date the award was received. In ***United (EA) Warehouses Limited v Care Somalia and Southern Sudan*** **(Supra)**, **HC Misc. Appl. No. 182 of 2013 [2015] eKLR** the respondent therein contended that the application to set aside the award was time barred under **section 35(3)** of the ***Act*** but the court dismissed the objection by holding that time should start running from the date the applicant physically received the award.

16. I accept the position that the "delivery" of the award is from the time of notification by the arbitral tribunal that the award is ready for collection which accords with the policy of expedition and finality of underlying the ***Arbitration Act***. My view is further fortified that an applicant has 90 days to file the application. This period is longer than that normally accorded to in other areas of civil litigation. For example, filing a notice of appeal and lodging of an appeal under the **Court of Appeal *Rules*** is 14 and 60 days respectively or the filing of the memorandum of appeal in the High Court from the Subordinate Court is 30 days. This provides sufficient time for an application to file the application for setting aside judgment.

17. I therefore hold that the Award was received on 11th May 2020. The application was filed on 9th October 2020, which is beyond the 3 months contemplated under **section 35(3)** of the ***Arbitration Act***. I therefore find and hold that that the application seeking to set aside the arbitral award is time barred.

Extension of time to apply for setting aside the award

18. Since it admits that the application is filed out of time, the Applicant seeks condonation of the delay in filing the application. In response to the application, the 2nd Respondent contends that there is no provision for extension time under the ***Arbitration Act*** and that the Applicant has not shown any exceptional circumstances warranting the court to extend time for filing the application.

19. Resolution of the issue whether the court has jurisdiction to extend time for lodging an application to set aside an arbitral award out of time proceeds on the basis that the arbitration under the ***Arbitration Act*** is wholly consensual at *inception* and parties who agree to this mode of dispute resolution also agree that the court of intervention in the process is limited as provided under the ***Act***. This is the meaning of **section 10** thereof which provides that, ***"Except as provided in this Act, no court shall intervene in matters governed by this Act".***

20. Further and in respect of an award, section 32A of the *Arbitration Act* provides that, *"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties, and no recourse is available against the award otherwise than in the manner provided by this Act."* Part VI of the *Arbitration Act* encompassing section 35 which provides the basis for setting aside an arbitral award sets out the conditions under which court may set aside an award including the time limit under which this may be done. It does not provide for an extension of time in the event a party fails to act within the time prescribed.

21. The Applicant has called in aid the provisions of the *Civil Procedure Act* and *Rules* which provide for extension of time. 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 *Ann Mumbi Hinga v Victoria Njoki Gathara* NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR the Court of Appeal considered a situation where the applicant had invoked provisions of the *Civil Procedure Act* and *Rules* and held as follows:

> A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: "Except as provided in this Act no court shall intervene in matters governed by this Act".

22. Likewise, in ***Kamconsult Ltd v Telkom Kenya Ltd and Another*** **NRB CA Civil Appeal No. 92 of 2009 [2016] eKLR**, the Court of Appeal observed that the ***Arbitration Act*** does not provide for review of High Court decisions under **section 80** of the ***Civil Procedure Rules*** on questions of jurisdiction made pursuant to ***section 17(6)*** *as the, "… the omission [in the Act] to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation". Finally,* in ***Nyutu Agrovet Limited v Airtel Networks Limited*** **NRB CA Civil Appeal (Application) No. 61 of 2012 [2015] eKLR,** 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.

23. The Applicant has also invoked the provisions of the Constitution as a fallback position to make its case. In ***Goodison Sixty One School Limited v Symbion Kenya Limited*** **ML Misc. Civil Appl. No 131 of 2016 [2017] eKLR**, the applicant cited the provisions of the Constitution to buttress it application for review under **section 80** of the ***Civil Procedure Act***, Mwongo J., rejected the argument, stating that, *"In my view, the applicant's reliance on* ***Articles 50, 169*** *and* ***165*** *of the* ***Constitution*** *to achieve a review, is untenable as there is nothing in them to suggest that those articles do in fact require promotion of arbitration outside of its fundamental character and essence".* The fundamental character and essence of arbitration under the ***Arbitration Act*** is consensual in nature and in order to promote it, as required by **Article 159(2)(c)** of the Constitution, court intervention is kept to the minimum necessary to complement and support the arbitral process.

24. It must now be clear that the Court, under **section 35** or any other provision of the ***Arbitration Act***, does not have jurisdiction to extend the time limited for filing an application for setting aside the award. To imply such a provision permitting the court to extend would amount to re-writing the ***Arbitration Act***, when its own provisions do not permit any manner of interference of the arbitral process or the award except as specified therein. Since the court lacks jurisdiction to proceed any further, no purpose will be served by examining the reason why the Applicant filed its application to set aside the award late.

Disposition

25. For the reasons I have outlined above, the Chamber Summons dated 7th October 2020 is hereby struck out with costs to the Respondents.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY 2021

JOHN M. MATIVO

JUDGE

Court Assistant: Mr M. Onyango

Ms Makori instructed by Mogeni and Company Advocates for the Applicant.

Ms Kamende instructed by Kamende D. C. and Company Advocates for the 2nd Respondent.

Mr Kiarie instructed by the Office of the Attorney General for the 1st Respondent.