



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1 OF 2021

INTOUCH SPORTS LIMITED.....PLAINTIFF

VERSUS

KENYA RUGBY UNION.....DEFENDANT

RULING

1. The Plaintiff, Intouch Sports Limited instituted this case against the Defendant, Kenya Rugby Union on the 28th February, 2017 in the Employment and Labour Relations Court seeking judgment for the principal sum of Ksh.USD35,125 with interest at 12% p.a. from 1st November, 2014 till payment in full. The claim was opposed.

2. Vide a letter dated 27th February, 2018 and filed in court on 13th April, 2018 the advocates for the respective parties wrote to the court requesting for adoption of their consent as follows:

“By consent,

1. The Claimant and Respondent have hereby agreed to refer this dispute for hearing and determination by a sole Arbitrator.

2. The sole Arbitrator to be appointed shall be agreed upon by the parties herein within 14 days of the filing of this consent, failure to which the said Arbitrator shall be appointed by the Chairperson of the Chartered Institute of Arbitrators (CIARB) [Kenya branch].”

3. The consent was adopted as an order of the court on 26th June, 2018 and the matter referred to arbitration. The Arbitrator found in favour of the Plaintiff.

4. The Plaintiff subsequently filed the Application dated 29th January, 2020 seeking the following orders:

1. The Arbitration Award dated 30th July, 2019 made by Arthur K. Igeria and reviewed on 30th October, 2019 be adopted as the judgment of the court

2. The decree do issue for a sum of USD 37125 plus interests from the date of the award until payment in full

3. Costs of this suit as well as such costs and expenses as are incidental to Arbitration enforcement and execution of this Application be provided for.

5. The application is based on the grounds set out in the application and in the supporting affidavit. The gist of the application was that the Arbitration Award dated 30th July, 2019 was made by Mr. Arthur K. Igeria and reviewed on 30th October, 2019 wherein the Plaintiff was awarded the sum of USD37,125 plus costs of the Arbitration and interest from date of the Award until payment in full but that the Defendant had failed to pay the same.

6. The Defendant filed the Preliminary Objection dated 2nd March 2020 on grounds that the court lacked jurisdiction to hear and determine the application dated 29th January, 2020 contemporaneously with the filing of the Preliminary Objection, the Defendant filed the application

dated 2nd March, 2020 seeking order that:

- 1. That there be a stay of proceedings herein pending the hearing and determination of this application.**
- 2. That this honourable court be pleased to set aside the final Award delivered on 30th July, 2019 by the Arbitrator Mr. Arthur K Igeria.**
- 3. That costs be in the cause.**

7. It was contended that the order referring the matter to an Arbitrator was made by a court without jurisdiction and that therefore the Award was unenforceable.

8. On the other hand, the Defendant's Notice of Motion Application dated 2nd March 2020 substantially seeks for an order that the Final Award delivered on the 30th July, 2019 by Arthur K. Igeria be set aside for want of jurisdiction.

9. The Preliminary Objection was heard and the Employment and Labour Relations Court downed it's tools for lack of jurisdiction and transferred the case to this court. The two applications were heard together by this court by way of written submissions.

10. Section 35 of the Arbitration Act Cap 49 Laws of Kenya gives power and guides this court on setting aside Arbitral Awards and it provides;

“Application for setting aside arbitral award

(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).

(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.

(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.”

11. Under Section 35(3) of the Arbitration Act, such applications may not be brought after three months of notice to parties that the award is ready. It provides;

“(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.”

12. The Court of Appeal, in *Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR* as cited by the Plaintiff 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.”

13. Similarly, in *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:

*“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.”*

14. The Arbitral Award was made on 30th July 2019 and reviewed on 30th October, 2019. The Defendant’s Application was filed on 2nd March, 2020. Clearly, this is beyond the statutory three months. The Defendant’s explanation is that the Plaintiff had approached the wrong court to have the award enforced. This is not plausible. The Plaintiff moved the court vide a Chamber Summons Application dated 29th January, 2021 and filed on 5th of February, 2021. By the time the Plaintiff’s Application was filed, time had already lapsed. Nothing stopped the Defendant from filing the instant Application before the Plaintiff moved the wrong court.

15. On the question of this court’s jurisdiction, the Court of Appeal stated in **The Owners of Motor Vessel “Lillian s” v Caltex Oil Kenya Ltd [1989] KLR 1** thus:

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and 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.”

16. Similarly, in *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011*, it was observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

17. In the instant case, the court has no jurisdiction to entertain this Application as it is statute barred. The Court of Appeal in the Ann Mumbi Case (Supra), states that even for a valid reason, Section 35 will not entertain such applications past the three months limit. I have no option but to dismiss the Defendant’s Application dated 2nd March, 2020 for being statute barred.

18. Having determined the Defendant’s Application, I now move to determine the Plaintiff’s Application dated 29th January, 2020. For an award to be recognised and enforced, it has to satisfy the requirements under Section 36 of the Arbitration Act unless the court is satisfied by an application that there exist grounds warranting refusal of recognition. Section 36(3) provides;

“36. Recognition and enforcement of awards

(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—

(a) the original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.”

19. In the Plaintiff’s Application, attached and marked as Exhibit-A are the Original and Copy of the Final Arbitral Award dated, 30th July, 2019, and a Corrected Version dated 30th October, 2019, together with the Consent of parties to refer the matter to arbitration which in this case amounts to an arbitration agreement. Having dismissed the Defendants Application to set aside the award herein, and having been satisfied that the Plaintiff has satisfied the provisions of Section 36 of the Act, I hereby allow the Plaintiff’s Application dated 29th January 2021 with costs.

20. Consequently, the Final Award made on 30th July, 2019 and reviewed on 30th October, 2019 is hereby recognized and adopted as the judgment of this court with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPT., 2021

B. THURANIRA JADEN

JUDGE