REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.E052 OF 2018

AS CONSOLIDATED WITH MISCELLANEOUS CIVIL APPLICATION NO. 341 OF 2018 AND FURTHER CONSOLIDATED WITH MISCELLANEOUS CIVIL APPLICATION NO. 170 OF 2019.

DIGITAL DIVIDE DATA KENYA LTD..……..APPLICANT

VERSUS

CORETEC SYSTEMS AND SOLUTIONS LTD …….RESPONDENT

RULING

Introduction

1. On 30th July 2014, the parties herein entered into a Sub-contract Agreement wherein the respondent (hereinafter **"Coretec Systems"**) sub contracted the Applicant (hereinafter **"Digital Divide"**) for the provision of digitization services specifically sorting, unbinding, scanning, digitizing cleaning, cropping, binding, data entry/indexing and uploading the documents in the destination database.

2. It is alleged that Coretec Systems failed to settle the sums of money due to Digital Divide for the services it had provided. It is further stated that pursuant to the dispute Resolution Clause in the Sub contract Agreement, Digital Divide invited Coretec Systems to appoint an arbitrator but that they ignored the request after which Digital Divide wrote to the Chairman of the Chartered Institute of Arbitration (Kenyan Chapter) to appoint an arbitrator for the purposes of determining the dispute.

3. Digital Divide claims that Coretec Systems did not participate in the Arbitral proceedings despite service of all correspondence and pleadings.

4. The final Arbitral Award dated 4th May 2018 was delivered in favour of the Applicant/Digital Divide thereby triggering the filing of the application dated 12th July 2018 for the enforcement of the said Award which application was allowed through a ruling delivered on 27th September 2018 and a Decree issued on 28th September 2018.

5. Coretec Systems filed an application dated 1st August 2018 to set aside the Arbitral Award being Miscellaneous 314 of 2018. The court then directed that Miscellaneous 341 of 2018 be consolidated with this matter (Miscellaneous 052 of 2018) which matter had already been determined at the time of the said consolidation.

6. Coretec Systems sought and obtained orders for stay of execution of the decree issued on 28th September 2018 on the basis that they were not served with application for Enforcement of the Award dated 12th July 2018. Coretec Systems also filed a Notice to Cross Examine deponent of the affidavit of service which notice was allowed. The cross examination of the process server engaged by Digital Divide was conducted on 18th June 2018.

7. Through an application dated 28th February 2019, Digital Divide sought orders for the deposit of security in court as a condition for the extension of the stay of execution orders issued on 28th September 2018.

8. This ruling is therefore in respect to the following applications and issues:-

i. Whether service of the application dated 12th July 2018 to enforce the Arbitral Award was effected on Coretec Systems.

ii. Application dated 1st August 2018 to set aside the Arbitral Award.

iii. Application by Coretec Systems dated 4th October 2018 to stay the execution of the decree.

iv. Application by Digital Divide dated 28th February 2019 for an order for the deposit of security.

Service of application dated 12th July 2018

9. Following the successful application by Coretec Systems to cross examine the process server on service of the application dated 12th July 2018 to enforce the Arbitral Award, **Mr. Sammy Munywoki**, a licensed court process server on 15th July 2019 and testified that he served the application on one **Mr. Peter Juma** the representative/agent of Coretec Systems on 18th July 2018. Coretec Systems did not tender any evidence to contradict the testimony of the process server but maintained that service was not effected on the respondent as alleged.

10. I have considered the testimony of the process served **Mr. Munywoki** regarding the issue of service of the subject application on the respondent and I am satisfied that he established, on a balance of probabilities, that service of the application was effected on the respondent. I also note that in his ruling delivered on 27th September 2018, Makau J. found that service was properly effected on the respondent before allowing the application dated 12th July 2018. I find no reason to depart from the said ruling as the evidence of the process server was not impeached by respondent.

Application dated 1st August 2018.

11. Through this application, the respondent (Coretec Systems) seeks orders to set aside the Arbitral Award dated 4th May 2018 on the basis that the said award was made in blatant disregard and/or contravention of public policy in Kenya as the respondent (Coretec Systems) was not given notice of appointment of the Arbitrator or the Arbitral proceedings. According to the respondent, it did not participate in the Arbitral proceedings and was thus condemned unheard.

12. The applicant (Digital Divide) opposed the application through the replying affidavit of its Chief Accountant **Ms Joyce Githua** who avers that as a result of the breach of their contract the applicant engaged the respondent in negotiations, in good faith, with a view to settling the dispute which negotiations did not bear any fruits as the respondent remained adamant and frustrated the consultation meetings. She states that the respondent also blatantly failed to participate in the appointment of the arbitrator thereby leaving the applicant with the no option but to request the Chairman of Chartered Institute of Arbitrators to appoint an arbitrator.

13. On its part, the respondent maintained that it was not aware of the existence of the Arbitral proceedings as no notice of the said proceedings was served upon it. The respondent added that it only became aware of the said proceedings on 8th June 2018 when it received a letter notifying that the subject Award had been issued on 4th May 2018.

14. The main grounds for seeking the setting aside of the Arbitral Award is the claim that the respondent was not aware of the arbitral proceedings or the appointment of the arbitrator. I note that Clause 1.7 of the Sub contract Agreement (DD1) stipulates as follows:

Arbitration

> ***In case of disagreement on the interpretation and application of this agreement, the parties shall take an arbitration board composed of 3 members 1 designated by each one of the two parties and the third selected by the two designated members. The decision of the board will be binding to both parties. In case of no accord, the case will be presented to the chairperson of the Chartered Institute of arbitrators (Kenya Chapter) for further arbitration in accordance with the provisions of Arbitration Act of Kenya 1996.***

15. I have also considered the correspondence contained in the letters attached to the applicant's replying affidavit and marked as annexure "**DD3" "DD4"** and **"DD5"**. The annexures indicate that the respondent was invited to participate in the appointment of the arbitrator but that he did not honor the invitation.

16. I further note that after the appointment of the Arbitrator by the Chairman of Chartered Institute of Arbitrators, the appointed arbitrator QS **1. M. Gitura** on 12th April 2017 invited all the parties to a preliminary meeting slated for 20th April 2017 at 9.00am through a letter that was also duly received and stamped by the respondent. The respondent did not however attend the said preliminary meeting. On 25th April 2017, in yet another letter that was received by the respondent on the same day, the said arbitrator once again invited the parties for the preliminary meeting slated for 3rd May 2017. The respondent did not attend the said preliminary meeting.

17. Section 5 of the Arbitration Act stipulates as follows;

> ***Waiver of right to object***
>
> ***A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.***

18. In the present case, I note that the respondent did not raise any objection to the appointment of the arbitrator and neither did it attend the preliminary meetings as requested by the Arbitrator despite having been duly served with the letters as I have noted hereinabove. In the directions issued on 18th September 2017 (annexure **"DD12"**) the arbitrator noted that the respondent had not availed itself for the pre-

hearing meetings and proceeded to allow the applicant to present its case.

19. Taking into account the above highlighted sequence of events preceding the arbitration process and the arbitration, I find that contrary to the respondent's claim that it was not informed of the appointment of the arbitrator, there is ample and uncontroverted evidence to show that it was, on several occasions, invited to participate in the appointment of the arbitrator, was informed of such appointment and was invited for the pre-hearing meetings which invitation the respondent did not heed. I therefore find that by ignoring correspondence and notices to appear for the pre-hearing meetings, the respondent gave up its right to participate in the arbitral proceedings. Having opted not to participate in the arbitral proceedings, I find that the respondent has not made out a case for the setting aside of the setting aside of the Arbitral Award.

20. I further note that the respondent was also served with the pleadings as shown in annexure **"DD10".** The respondent admitted that he was served with the Award. My finding is that it is an act of bad faith for the respondent to allege that it was not aware of the arbitral proceedings when it is abundantly clear that it was all along aware of the said proceedings. In ***National Oil Corporation of Kenya Ltd v Priscko Petroleum Network Ltd*** 2014 eKLR it was held:

> ***"44] I shall now turn to the issue of whether the respondent was denied the right to be heard contrary to Article 50 of the Constitution. In this instance, what must be established is that the party complaining was not afforded the opportunity to present its case. An examination of the Award dated 3rd June 2013 and filed in court on 28th January, 2014 clearly shows that the respondent was fully informed of the whole arbitration process. From the commencement of the same; letters dated 23rd February, 2012, 7th March 2012 and 13th March 2012 were sent to the respondents on the appointment of the Arbitrator. The said letters did not yield any response from the respondents prompting the appointment of the sole Arbitrator under Section 12(3) (c) of the Arbitration Act. The respondent was also served with the respective pleadings and the Award. From the foregoing, it is a legal transgression to allege the respondent was not afforded an opportunity to participate or be heard in the arbitral proceedings. It was invited to participate in the selection of the arbitrator, to file a response to the applicant's statement of claim and call evidence in support of its position. I also note that the Arbitrator adjourned the proceedings several times to accommodate the respondent. However, despite all these, the respondent failed to participate in the proceedings. No plausible reasons were offered as to why the respondent elected not to participate in the proceedings.***
>
> ***Accordingly, the issue that the respondent was denied the opportunity to be heard cannot arise since Section 26(c)of the Act is explicit that when a party to arbitration fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. To encourage such ill-advised conduct to thrive amongst parties to a proceeding will defeat the purpose of adjudication of cases and the duty to comply with court summons of process. Indeed, arbitration will be hurt most by such discordant conduct of parties to an arbitration agreement."***

21. My finding is that the failure by the respondent to take part in the Arbitral proceedings despite service amounted to a waiver of its right to apply to set aside the Award under Section 35 and 36 of the Arbitration Act which stipulates as follows:-

> ***35. Application for setting aside arbitral award.***
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> ***(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***
>
> ***(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***
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> ***(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***
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> ***(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***
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> ***(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 in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3months 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.

36. Recognition and enforcement of awards

(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

(2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral 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.

(4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

(5) In this section, the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June,1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation

22. The respondent also sought the setting aside of the Award on the ground that the award made was exorbitant and out of the terms of the contract. Section 17 of the Arbitration Act stipulates as follows;-

Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a)an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b)a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in subsection (2)or (3) admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and(3) either as a preliminary question or in an arbitration award on the merits.

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

23. Section 39 of the Act on the other hand stipulates as follows:

> ***Questions of law arising in domestic arbitration***
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> ***Where in the case of a domestic arbitration, the parties have agreed that—(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or (b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.(2) On an application or appeal being made to it under subsection (1) the High Court shall—(a)determine the question of law arising;(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.***
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> ***3. Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—***
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> > ***(a)if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or***
> >
> > ***(b)the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection(2).***
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> ***(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.***
>
> ***(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.***

24. In ***Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others***, it was held:

> ***"Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse he principles as outlined in the CHANNEL CASE (supra) because they are in line with the Arbitral Tribunal's jurisdiction as set out in Section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of an appeal under Section 17(b) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provision of Section 17 and in particular violated the principle known as "competence/competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is " competence to decide upon its competence" and as expressed elsewhere this ruling in German it is "Kompetenze/kompetenz and in France it is " competence de la competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrong but with jurisdiction" see also the decision in Kenya Tea Development Agency Ltd vs Savings Tea Brokers Ltd [2015] eKLR at paragraph 20."***

25. Section 10 of the Arbitration Act provides that:

> ***Extent of court intervention***
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> ***Except as provided in this Act, no court shall intervene in matters governed by this Act.***

26. In ***Kenyan Tea Development Agency v Savings Tea Brokers Ltd*** [2015] it was held:

> ***"But most importantly, I find no merit in the applicant's assertions that the Arbitrator lacked jurisdiction by reason that the agreements between the respondent and the 4th to 7th respondents were valid and so there was no valid arbitration agreement. I should state also that matters of conduct of parties are entangled in factual analysis which only the arbitrator can disentangled, for he is the master of facts. He is obliged to receive evidence, weigh its relevance and weight, and admissibility thereof, and then makes a finding upon the evidence as by law provides or agreed between the parties. The arbitrator applied the law on estoppels upon the facts of the case before him on conduct of parties, which is invariable component of his work as arbitrator. On this I agree with the respondent that the law on estoppels was available to the arbitrator to apply to the facts of the case before him. One other thing; the way I understand the law, even if there was a mistake of facts or law in the appreciation or explication of fact or the law respectively by the arbitrator, such will not found a ground to set aside an award or be corrected in an application under Section 35 of the Arbitration Act. The law and the plethora of case law I am aware of say that is within the purview of appellate jurisdiction of the court where facts and law will be evaluated. See the literary work by at pages 558-9 Mustil & Boyd. Commercial Arbitration 2nd Edition, at page 558-9 that:***
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> > ***"Mistakes by the arbitrator in the conclusions of law or fact implicit or explicit in a final award or in an interlocutory ruing do not (generally) form a ground for remission or setting aside. A mistake of law, or inconsistency of reasons, may in certain circumstances be the subject of an appeal."***

27. In the present, the respondent has not filed an appeal as envisaged under Sections 17 and 39 of the Arbitration Act and my finding is that this court cannot interfere with the Arbitral Award. My further finding is that Arbitral Award, having been recognized and adopted vide the court order of 27th September 2018, is no longer available for setting aside vide the application of 1st August 2018 which application has for

all intents and purposes been overtaken by events following the enforcement of the Award and subsequent issuance of the decree.

28. In a nutshell, I find that the application dated 1st August 2018 is not merited and I therefore dismiss it with costs to the applicant (Digital Divide). Having found that there is not merit in the application to set aside the arbitral award I find that there is no basis for granting orders for stay the execution or for the deposit of security as the applications seeking the said orders have been overtaken if not settled by the determination of the issue of setting aside of the award.

Dated, signed and delivered via skype at Nairobi this 23rd day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Otwal for the applicant.

Mr. Agwara for the respondent

C/A & DR –Hon. Tanui