REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. E049 OF 2019

MOBINETS SAL LIMITED..... APPLICANT

VERSUS

SAFARICOM LIMITED.....RESPONDENT

RULING

1. The ruling relates to a chamber summons application dated 18th March 2019, brought under the Sections 36 and 37(2) of the Arbitration Act, 1995, (as amended by Arbitration (Amendment) Act Number 11 of 2009) and Rules 6 and 9 of the Arbitration Rules, 1997 and all other enabling provisions of the law.

2. The Applicant is seeking for orders that;

> *(a) The Honourable court do enlarge the time within which the Arbitral Tribunal may correct the award herein dated 23rd April 2018; in the alternative,*
>
> *(b) The Applicant be granted leave to enforce the Final Award made on 23rd April 2018 by the sole Arbitrator herein, Justice (Rtd) A.G. Ringera, as a decree of the Honourable court;*
>
> *(c) The costs of the application be paid by the Respondent;*
>
> *(d) The said Respondent be ordered to pay all costs and expenses incidental to the enforcement and execution of the decree aforesaid.*

3. The application is based on the grounds thereto and the affidavit in support of the even date sworn by John Wambugu, an Advocate of the High Court of Kenya, and a donee of the Power of Attorney, by the Claimant herein.

4. The background facts of the matter is that, the parties herein entered into a contract dated 3rd June 2014, whereby the Respondent awarded the Applicant the contract for; the supply, implementation, maintenance and support of; an umbrella performance management network planning, configuration, tools inventory and work flow management system for a term of three (3) years.

5. According to the Respondent, the Applicant commenced performance of its obligations under the contract sometime in February 2014. However, by a letter dated 1st September 2014, the Respondent terminated the contract with immediate effect on account that the Applicant engaged in collusive practice contrary to clause 5.2 of the contract.

6. As a result of the termination, the Applicant invoked the dispute resolution clause in the contract, pursuant to which, Honourable Mr. Justice (Rtd) Ringera, was appointed by the Chairman of the Chartered Institute of Arbitrators Kenya Branch, as the sole Arbitrator to hear and determine the dispute between the parties.

7. The dispute was subsequently heard and the Final Award published on 23rd April 2018, to the Advocates for the parties.

The Arbitral Tribunal found in favour of the Applicant as against the Respondent and directed the Respondent to pay Claimant/Applicant, the sum of; USD 542,402.80, together with simple interest thereon at 0.5% per month from 22nd September 2014 until payment in full; and the

Respondent pay the Claimant/Applicant the costs and expenses of the arbitration in the sum of Kshs. 10,502,962.50. In the event that any party shall have paid more than its apportioned share of the Tribunal's fees and expenses, the other party shall re-imburse that other party the amount of the excess payment.

8. By a letter dated 7th May 2018, the Applicant's advocates wrote to the Respondent's advocate on record and forwarded what it considered to be the computation for the amounts due to the Applicant as ordered in the final award. The principal amount, was computed to be; USD 664,605.99 at the material time, whilst for Arbitration costs and expenses was computed the same to be Kshs. 14,456,887.50.

9. On 9th May 2018, the Respondent responded to the Applicant's Advocate letter of 7th May 2018 and disputed the computation with respect to costs, and indicated that computation of costs was captured at paragraph 183 and 184 of the final award and payment of Kshs. 10,502,962.50 would discharge the Respondent's obligations except that the Respondent would be required to re-emburse the Applicant its share of the Arbitrator's final fee invoice.

10. That on 11th May 2018, the Applicant's advocates wrote to the Respondent's advocate and agreed with computation of interest as per the Respondent's advocate's letter of 9th May 2018, but disputed the computation on costs provided for at paragraph 183 of the final award.

11. On 13th June 2018, the Respondent fully settled the amount as ordered in the final award, by paying a sum of; USD 663,982 being principal sum together with interest and Kshs. 11,621,321.50 as costs. The payments were acknowledged by the Applicant in its letter dated 19th June 2018.

12. The Applicant on it e part avers that, it duly settled the entire lot of the Arbitrator's fees on 27th April 2018 and was issued with the Arbitral Award on 23rd April 2018. That as a result of disagreement on the subject computation, the Applicant on 9th July 2018, to the Tribunal requesting for the correction of the published award under Section 34(1) of the Arbitration Act.

The Arbitral Tribunal vide its letter of 24th July 2018, confirmed the existence of the error, but regretted that it could not do much since it had become funtus officio.

13. That, the Applicants has written severally to the counsel for the Respondent and explained the error on the face of the record, but the Respondent has buried its head in the sand and refused to cooperate with the Claimant/Applicant. That, despite the demand having been made as aforesaid, the Respondent has refused, neglected and/or otherwise failed to top up the unpaid portion of the costs in the sum of; Kshs. 1,317,975 as demanded by the Applicant herein.

14. The Applicant argues that, it is imperative that the Respondent be compelled by order of the Honourable court to pay the outstanding balance of the award of costs in the sum of Kshs. 1,317,975 in order to bring the matter to closure. In the alternative, the Applicant the Honourable court do enlarge the time provided by; Section 33 of the Arbitral Act, 1995 to enable the Arbitral Tribunal to correct its own mistake.

15. That, the Honourable court has the inherent jurisdiction to extend time where the time provided to an Arbitral Tribunal to correct a mistake in the proceedings has elapsed. The delay in lodging the present application was caused by the fact that the parties had been in discussions on this very issue until the 18th January 2019, when the Respondents gave its final position.

16. By a letter dated 30th January 2019, their Advocates on record caused a certified copy of the final award herein to be filed in court. Therefore, for the ends of justice to be met and for the honour and integrity of the entire Kenyan justice system, the orders sought in the present application ought to be granted. That unless the same is granted as prayed, the whole object of Arbitration and the final award rendered therein will be rendered nugatory.

17. However, the Respondent opposed the application vide grounds of opposition dated 15th April, 2019, which states as follows: -

> *a) the application is misconceived, incompetent, bad in law and is an abuse of the process of court to the extent that it seeks to rectify alleged computation errors at paragraph 183 and as read together with paragraph 185 of the Arbitral Award;*
>
> *b) the true purpose of the application is to seek correction of a computation error in the award, the award having been fully satisfied by the Respondent;*
>
> *c) the Applicant herein did not apply to the Arbitral Tribunal within thirty (30) days of receipt of the Arbitral Award or at all for correction of any computation errors in the Arbitral Award in terms of Section 34 (1) of the Arbitration Act No. 4 of 1995;*
>
> *d) the Honourable court lacks the jurisdiction to interpret and correct computation errors in an Arbitral Award in view of the express provisions of Section 10, 32(a) and 34 of the Act; and*
>
> *e) the application to the extent that it seeks correction of alleged computation in the Arbitral Award is unmeritorious and ought to be dismissed with costs to the Respondent.*

18. The Respondent also relied on a replying affidavit sworn by ite legal counsel; litigation, Mr Daniel M. Ndaba, dated 24th April, 2019, in which he deposed to most of the factual matters outlined in the background facts herein. However, he further deposed that; a party seeking clarification or correction of computation errors in an arbitral award is enjoined to apply to apply to the Arbitral Tribunal for the same, within thirty (30) days of receipt of the Arbitral Award in terms of; Section 34(1) of the Arbitration Act No. 4 of 1995.

19. That, in view of the Applicant's letters of 7th and 11th May 2018, as well as the Respondent's advocates on record letter dated 9th May 2018 and admission by the Applicant that it was issued with the final award on 23rd April 2018, the Applicant was enjoined to apply to the Arbitral Tribunal for clarification or correction of computation errors in the final award within thirty (30) days from 23rd April 2018 that is on or before 22nd May 2018.

20. That evidently at the time the Applicant wrote letters of 7th and 11th May 2018, the Applicant's right to seek clarification or correction of computation of errors under paragraph 34(1) of the Act, had not lapsed but the Applicant failed and/or neglected to seek clarification or correction of computation errors with the Arbitral Tribunal. The court is only permitted to intervene in the manner specifically provided for under the Act.

21. The application was disposed of by filing of submissions. The Applicant submitted that it is correct that, section 34(1) of the Arbitration Act, 1995, provides explicitly that an application for correction of an award can only be made within thirty days of the publication. However, in the case of; *Pangea Development Holdings Limited vs Hacienda Development Limited & Another (2019) EKLR*, the court observed that; it can use its inherent powers to grant extension in exceptional circumstances.

22. The exceptional circumstances have been considered in the case of; *Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another (2018) EKLR*, while relying on *Mwangi vs Kenya Airways Limited (2003) KLR* and held to include; the period of delay, the reason of delay, the arguability of the application, prejudice it might cause the Respondent should the application be allowed, importance of compliance with the time limits and the effect on the administration of justice.

23. The Applicant requested the Tribunal vide a letter dated 19th July 2018 to make the correction, the award having been published on 23rd April 2018, the delay in the making of the request was about three (3) months delay which is not at all inordinate

24. Further the admission of the error by the Tribunal validates the prayer sought should be granted. That the Respondent is not likely to suffer any prejudice as there is no new evidence being adduced before the court or the arbitral Tribunal. These are figures that were pleaded and proved during the arbitral proceedings.

25. The Applicant submitted that there is no justification as to why the Honourable court should not adopt the said award as a decree in order to pave way for its enforcement. The Respondent has not demonstrated or established any grounds to warrant the refusal by the court to recognize and enforce the final award. The Applicant relied on; *Kenya Shell Limited vs Kobil Petroleum Limited, Civil Appeal No. 57 of 006* and *National Cereals & Produce Board vs Erad Suppliers & General Contracts Limited (2014) EKLR*, where the courts have upheld the principle of finality in arbitral matters.

26. However, the Respondent submitted that, it is a settled position in law that the court is bound by the parties' *pleadings, as stated by the Court of Appeal also in the case of; David Sironga Ole Tukaj vs Francis Arap Muge & Others Civil Appeal No. 76 of 2014.* That, Applicant did not cite section 34 of the Arbitration Act,1995 as one of the provisions upon which the application was premised and did not plead enlargement of time under the section, or at all, therefore the court lacks jurisdiction to determine an un-pleaded issue.

27. The Respondent also cited the case of; *The Owners of the Motor Vessel Lilian 'S' vs Caltex Kenya Limited (1989) KLR*, where it was held that: -

> *"By jurisdiction is meant the authority which court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means"*

28. That, the Court of Appeal in the case of; *Anne Mumbi Hinga vs Victoria Njoki Gathara Civil Appeal No.8 of 2009*, held that, the Arbitration Act is a complete code and section 10 thereto enjoins the court only to intervene in matters governed by the Act in the manner provided for in the Act. That, section 34 of the Arbitration Act does not provide for intervention by the court.

29. I have considered the application, the grounds in opposition and I find that the main issue to determine is whether; the Applicant has met the threshold for grant of the orders sought. Generally, the issue herein is whether there is an error in the computation of the party and party costs as awarded in the final arbitral award and whether the same can be rectified or not.

30. I note from a letter dated 19th July 2018, written by the Applicant wrote to the Honourble Arbitrator in relation to the subject dispute herein, that the Applicant acknowledged that, the Arbitrator was *functus officio* but all the same sought for his clarification in setting the record straight, in order to avoid a lasting sense of injustice by the Claimant.

31. The Honourable Arbitrator responded vide a letter dated 24th July 2018 and acknowledged that, he was indeed *functus officio* as per Section 34 of the Arbitration Act and could not correct the award.

32. However, the Hon Arbitrator stated as follows;-

> *"Counsel for the claimant is arithmetically correct that, the total quantum of the claimant's costs was Kshs. 15,321,925 and not Kshs. 14,003,950 and accordingly the Claimant would have been entitled to compensation in the sum of Kshs. 11,491,443.75 and not Kshs. 10,502,962.50."*

33. He concludes by stating;

"In the premises, it is my view that, the Respondent is now legally obliged to compensate the Claimant in the difference but in justice and good conscious (I do not know if corporations have a conscience), may consider doing so. The Respondent is a reputable company and should not stop to benefit from arithmetical errors in an arbitration Award.

Needless to say, the above is not and cannot be a binding correction of the award."

34. It is clear from this response that, the Honourable Arbitrator acknowledged there is indeed an error in the award that needs to be corrected but was *functus officio*.

35. The provision that relates to correction of errors in an Arbitral Award is provided for under section 34 of the Arbitration Act which states 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."

36. It is evident from these provisions that, the application for correction of an award can only be made within thirty (30) days of publication of the award. The award herein was published on 23rd April 2018 and application of the error should have been made on or before the 23rd May 2018. It was made on 19th July, 2018 when the Applicant wrote to the Honourable arbitrator. It was definitely outside the time frame set by the law.

37. The question is whether, the Applicant has offered an explanation for the delay. The Applicant alleges there was communication between the parties to try and resolve the issue. I have seen indeed the parties exchanged letters as indicated herein and probably the Applicant was of the view that issued would be solved the necessity for an application. That did not happen.

38. Be that as it were, the question is whether; this court can extend time within which that application can be made. It is clear that Section 34 of the Arbitration Act does not provide for extension of time. However, the court has the inherent power to ot be exercised to do full and complete justice between the parties before it.

39. As held in the case of; *Pagea Development Limited (supra)*, the court can grant extension of time as herein requested. The delay in this matter is slightly over two months and taking into account what the Honourable Arbitrator said and the correspondences between the parties, I find the explanation offered for the delay justifiable.

40. However, the Respondents argue the court cannot grant the prayer for extension of time because the provisions of section 34 of the Arbitration Act were not cited. As much as I agree with the sentiments expressed by the Respondents, I however take note of the provisions of; Article 159(2)(d)of the Constitution of Kenya, that justice shall be administered without undue regard to procedural technicalities.

41. Basically then, the provisions implore upon the courts to uphold substantive justice. I shall therefore not disregard the prayer seeking for extension of time, on the ground that the relevant provisions and/or section 34 aforesaid was not cited.

42. Having considered the entire arguments herein, I find that it will be in the interest of justice to allow for enlargement of time within which the Arbitral award may be corrected.

43. The grant of the prayer to enforce the final award in the manner in which it is currently, will not serve the interest of justice as the parties are completely unable to agree on the issue of the subject costs. Similarly as correctly argued by the Respondents, the award has been generally satisfied save for the issue in dispute. It will therefore only be in order to have the error rectified before enforcement.

44. I therefore enlarge the time within which the application may be made under section 34 of the Arbitration Act with a further period of thirty (30) days from the date of this order. To mitigate any inconvenience caused to the Respondent, I award them the costs of this application.

45. Those are the orders of the court.

Dated, delivered and signed in court this 22nd day of May 2020

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Kichie for the Respondent

Mrs. Kamau for the Applicant

By virtual communication