



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 538 OF 2015

PHILLIP BLISS ALIKER.....APPLICANT

VERSUS

GRAIN BULK HANDLERS LIMITED.....1ST RESPONDENT

MISTRY JADVA PARBAT & COMPANY LIMITED....2ND RESPONDENT

RULING

1. The Court is asked to review the Ruling and Order issued by Ogola J on 8th December 2016 and to determine that the Court lacked jurisdiction to hear and determine the Originating Motion dated 11th December 2015 and, as a consequence, to strike out the said motion.

2. The mover of the Application for Review is Philip Bliss Alier (Alier) who constituted the Arbitral Tribunal which heard a dispute between Grain Bulk Handlers Limited (Grain Bulk or GBH) and Mistry Jadva Parbat & Co. Limited (MJP). The Originating Motion that gave rise to the current controversy was filed by GBH in which it sought the following prayers:-

a) This honourable court be pleased to uphold the challenge lodged by the applicant Grain Bulk Handlers Limited before Philip Bliss Alier, sole Arbitrator (“the Arbitrator”) on 21st October, 2015 and remove the Arbitrator from the arbitration between Mistry Jadva Parbat & Company Limited and the Applicant.

b) This honourable court be pleased to order that the arbitral award dated 30th September, 2015 and issued by the Arbitrator on 21st October, 2015, is void.

c) This honourable court be pleased to order and direct that the Arbitrator do refund fees and expenses paid to him by the applicant herein, in the arbitration.

d) The costs of this application be provided for.

3. The Ruling now sought to be reviewed determined that Motion by allowing it in its entirety.

4. Upon presentation of the current application, GBH raised a preliminary objection on three related grounds. In it GBH argued that the Arbitrator is barred by Section 14 of the Arbitration Act, 1995 from bringing any application challenging the Court’s decision of 8th December 2016. Second, that the Court is precluded by Section 10 of the Act from considering this Application and/or interfering with the Ruling of 8th December 2016 and lastly, that the application does not lie and the Court has no jurisdiction to hear and/or determine the Application.

5. Giving deference to the Court of Appeal decision in Kamconsult Ltd v Telkom Kenya Ltd & Another [2010] Eklr this Court held that the High Court could not review its own decision made under Section 14 of the Act.

6. However, the Court observed as follows:-

[23] There is a legion of Decisions that a Court has inherent jurisdiction, under what is popularly known as the slip rule, to recall a Judgment “in order to give effect to its manifest decision” (See for example *Lakhamshi Brothers Ltd vs. R. Raja & sons* [1966] EA 313. In the Civil Procedure Act this slip Rule is embedded in Section 99:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

[24] It would be stretching the principle of finality to absurdity if the Court was to be barred from correcting a glaring slip in its Decision so as to give effect to its Pronouncement. I very much doubt that the Decision in *Kamconsult* excluded the exercise of the Courts inherent jurisdiction under the slip Rule. Save in this limited sense and in deference to the decision in *Kamconsult*, this Court reaches a decision that it cannot review a final Decision it has rendered under the provisions of Section 14(6) of the Act.

[25] Whether or not the Notice of Motion dated 3rd April 2017 is a request to this Court to travel beyond the confines of the Slip Rule is a matter that will await the hearing of that Motion on merit. Otherwise to the extent of the observations made herein, the Preliminary Objection succeeds but an Order of Costs will abide the outcome of the Motion.

7. The Motion therefore survived the preliminary objection, somewhat.

8. The Applicant’s Counsel has characterized the substantive issues raised in the Application as being that the Court lacked jurisdiction to hear and determine the Originating Motion dated 11th December 2015 in view of there being no decision by the Applicant from which the 1st Respondent could move to the Court for determination under Section 14(3) of the Act and that the Court purported to intervene and make a determination contrary to the provisions of Section 10 of the Arbitration Act, 1995.

9. It is all about jurisdiction and the Applicant urged the Court to use its inherent powers to recall and review an order made without jurisdiction and not to compound errors made by the Court in excess of its jurisdiction.

10. It is the Applicant’s case that GBH was notified of the publication of a final award on 30th September 2015. GBH purported to notify the Applicant of its intention to challenge him on 21st October 2015 and the final award dated 30th September 2015 was sent by the Applicant to the parties on 21st October 2015. The Applicant further contends that GBH purported to give written reasons for its challenge pursuant to Section 14(2) of the Act on 3rd November 2015.

11. Emphasized throughout is that by time the notification of the challenge was made on 21st October 2015, the Applicant had already published the final Award on 30th September 2015 albeit it actually being sent to the parties on 21st October 2015. That the final Award being effective on 30th September 2015, the Arbitrator was *functus officio* and could not hear and determine the challenge by GBH made on 21st October 2015 within the scope of Section 14 of the Act.

12. It is common cause that the Arbitrator, purported to make a “without prejudice” Ruling. That in itself attracted a controversy. It is explained by counsel for the Applicant that makes sense because the Applicant, as Arbitrator, could not as a matter of law hear and determine the challenge on its merits having published his final Award on 30th September 2015 and in so doing had divested himself of jurisdiction to entertain the challenge.

13. The Applicant maintains that there is a statutory dichotomy as to the Courts jurisdiction to interfere with an arbitral process between statutory remedies available to parties only during the Arbitral process (Section 14) and those remedies available only after termination of the Arbitral process (Section 35). The Court which made the determination of 8th December 2016 is criticized as purporting to exercise statutory powers pursuant to Section 14(3) after the end of the Arbitral process using powers which are only available to the Court during the Arbitral proceedings.

14. The Court is now asked to correct the position because the current proceedings, the Applicant argues, is not an appeal to which Section 14(6) would be applicable because the orders in respect to which review is sought were themselves made without jurisdiction.

15. MJP supports the Motion and makes a basis for which this Court should, in its view, review its decision. MJP argues that like the Supreme Court, this Honourable Court is the final Court of adjudication on many matters before it under the Arbitration Act save for the circumstances provided by the Supreme Court recently in *Nyutu Agrovet v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch(Interested Party) 2019 eKLR.*

16. This Court is asked to draw from two decisions of the Supreme Court on the Court’s powers of review under its jurisdiction. The decisions are *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and *Peter Odiwuor Ngoge t/a O.P. Ngoge & Associates v Josephine Akoth Onyango & Others* Supreme Court Petition of Appeal No. 18 of 2015.

17. I am asked to find that the core question relates to this Court’s jurisdiction to have entertained the application by GBH and which question was not addressed and/or determined by the Court. The Court is urged that it would be absurd if it were to hold that it lacked jurisdiction to correct what was obviously a wrong decision made without jurisdiction and therefore a nullity.

18. On its part GBH, contends that the slip Rule cannot be invoked as all issues currently raised, were determined in the impugned decision of Ogola J. That this is simply an attempt by the Applicant and MJP to have a second bite at the cherry.

19. The Court is warned that the slip rule has a limited application and cannot be used to change a decision in a manner that departs from the

substantive holding. The objective of the rule being simply to give effect to the intention of the decision. It is submitted that the Applicant is asking this Court to depart from its decision. And further, that an error of law is not within the scope of the slip rule and is a ground for appeal.

20. The lessons to be learnt from Supreme Court decisions is that any Court, never mind the level, has inherent jurisdiction to correct obvious and non-controversial errors under the Slip Rule. In addition, Courts which are of final jurisdiction in a matter have inherent power, in certain circumstances to review their own decisions. On this latter category, the Supreme Court in *Fredrick Otieno Outa*(supra) gave the instances:-

[92] Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- (i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- (ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- (iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- (iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of , a deliberately concealed statutory provision.

These principles are no doubt informed by various judicial authorities, in other jurisdictions, such as the ones we have cited from Nigeria, United Kingdom, India and South Africa.

21. An argument can therefore be made that the High Court has power, beyond the Slip Rule and in exceptional circumstances, to review its decisions in matters under the Arbitration Act in which it is the final Court. But in view of the Court of Appeal decision in *Kamconsult* (Supra) that debate will have to be resolved elsewhere.

22. As I turn to determine the matter it is worth setting out the provisions of the Law that were squarely before *Ogola J* when he determined the Originating Motion. That may help the Court understand, as a first order of business, whether the impugned decision determined the matter that rears its head again.

23. It is not in dispute that by an email dated 21st October 2015 sent at 10.47am, the erstwhile Advocate for GBH, Mr. Nagpal made a challenge to the Arbitrator and on 3rd November 2015 at 3.35pm forwarded the written statement of reasons for challenge. The challenge procedure provided by the provisions of Section 14 of Arbitration Act which reads:-

“Challenge procedure

- (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
- (2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.
- (4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.
- (5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.
- (6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.
- (7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.
- (8) While an application under subsection (3) 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 an award shall be void if the application is successful.”

24. In the Originating Summons MJP took the position that the Arbitral proceedings between the parties terminated on 21st October 2015 and it therefore challenged the jurisdiction of the Court to hear the matter. The Judge set out MJP’s position in that respect in paragraph 47 of the decision:-

“[47] MJP maintains that the arbitral proceedings between the parties hereto terminated on 21st October 2015 when the final Award was handed down by the Arbitrator when the mandate of the Arbitral Tribunal also terminated. Consequently, the Arbitral Tribunal was ‘functus officio’ as of that date. It is MJP’s case that this Court has no jurisdiction to hear and determine the Applicants’ present application under Section 14 of The Arbitration Act (No.4 of 1995). MJP then proceeded in its Replying Affidavit on entirely without prejudice to the allegation that this court has no jurisdiction to entertain this matter. MJP stated that it would in the course of these proceedings raise a Preliminary Objection to these proceedings on a point of law, but that never happened at all.”

25. This Court has taken time to carefully read the decision of Ogola J. Paragraphs 132 to 155 of that decision is an extensive discussion by the Judge as to why he came to a conclusion that it was not conceivable the Arbitrator had published his award on 30th September 2015. The Judge found that up until 12th November 2015 the Arbitrator did not consider himself *functus officio* and, importantly, the “without prejudice” ruling of 14th November 2014 was indeed the Arbitrator’s decision on the challenge.

26. Just to make the point, I reproduce portions of his Lordship’s decision. In respect to when the Arbitrator first considered himself *functus officio*, the Judge observed:-

“[145] The court’s attention is drawn to the recitals of this Procedural Order in which having noted in recital No. 7 that “the claimant asserting in its email dated 6th November 2015 at 10.36 that the Tribunal is *functus officio* that the challenge is misconceived, reserving its right to raise further or other objections and thereby expressly not agreeing to the challenge” the arbitrator continued to deal with the Challenge. It is obvious that if the Arbitrator had even for one moment considered himself to be *functus officio* he would have declared it so and thereby put an end to the Challenge. The fact that he did not do so and rushed forward to deliver an award, means that the award was delivered in breach of the Act and is therefore void.

[146] On 9th November 2015 OPN wrote to the Arbitrator an email sent at 16: 53pm protesting the fact that the Applicant had not been given an opportunity to make written submissions in support of its Challenge. The Arbitrator then issued an amending Procedural Order 7 (N) on 12th November 2015 allowing the Applicant to make submissions.

[147] It is obvious therefore that up to Thursday 12th November 2015 the Arbitrator did not consider himself *functus officio* and on the contrary issued Procedural Order No 7 (N).”

27. This was a conscious finding by the Judge.

28. As to whether the Award was published before the challenge was made on 21st October 2015, in addition to what he states in the preceding paragraphs, the Judge stated why he did not believe that the Award was published on 30th September 2015. The following is the Judge’s evaluation of events:-

“..... 143. The letter from Inamdar & Inamdar seems to suggest that the Arbitrator became *functus officio* on 21st October 2015 on which date it gave the Award. This court finds that the interpretation by Inamdar & Inamdar is incorrect and untrue given that on 6th November 2015 OPN wrote to the Arbitrator at 18:07pm and with reference to the letter from Inamdar & Inamdar of 6th November 2015 and stated that **“With reference to the letter from Inamdar & Inamdar of today’s date we would point out that the objection was lodged before the Award was handed down which is why you are dealing with it as you are”**.

144. If the award had already been given then, as has been submitted above, the Arbitrator should not have been seeking any “clarification” from MJP or issuing any Procedural Orders in respect of the Challenge as by that logic he had already become *functus officio*. It is clear therefore that despite the said interpretation from Inamdar & Inamdar on 6th November 2015 the Arbitrator did not consider himself *functus officio* and he in fact continued to deal with the Challenge as evidenced by his email **7th November 2015** at 00:57 pm forwarding his Procedural Order 6 (N) to the parties.

145. The court’s attention is drawn to the recitals of this Procedural Order in which having noted in recital No. 7 that **“the claimant asserting in its email dated 6th November 2015 at 10.36 that the Tribunal is *functus officio* that the challenge is misconceived, reserving its right to raise further or other objections and thereby expressly not agreeing to the challenge”** the arbitrator continued to deal with the Challenge. It is obvious that if the Arbitrator had even for one moment considered himself to be *functus officio* he would have declared it so and thereby put an end to the Challenge. The fact that he did not do so and rushed forward to deliver an award, means that the award was delivered in breach of the Act and is therefore void”

29. It is accepted that for the jurisdiction of the Court to be triggered under the provisions of Section 14(3), the Arbitrator must first make a decision rejecting the challenge. That is the true effect of Section 14(3) of the Act. The Arbitrator had before Judge Ogola, as he does now, taken the position that there was no decision from which GBH could make move the Court.

30. In support of the current application the Applicant deposes :-

“That I am advised by my advocates on record which advise I verily believe to be correct, that having delivered my final Award, I could not as a matter of law, hear and determine the 1st Respondent’s challenge on its merits having divested myself of jurisdiction to do so (and as agreed by the Parties) on the basis that the Tribunal was *functus*. There was consequently no decision from which the 1st Respondent could prefer an Application before the Honourable Court for determination pursuant to the provisions of section 14(3) of the Arbitration Act, 1995 and therefore a fortiori, no basis which the Court itself could make such determination.”

31. And so it can be asked what about the purported “without prejudice” ruling? This is what Judge Ogola made of it;

“The Arbitrator seems to have gratefully accepted the suggestion put forward by Mr. Muchiri in his email of 13th November 2015 sent at 11.13am as a way out of his dilemma. One would ask; his ruling of “without prejudice’ was without prejudice to what?”

32. For myself, and in support of the position taken by the Judge, I find the letter of 22nd February 2016 which was written by the Applicant “in lieu of entering an appearance” to the Originating Summons revealing. He stated quite unequivocal that:-

“I consider that I have fairly and properly considered the Applicant’s challenge and rejected the challenge as wholly without merit. I am of the view that the issues in dispute are now matters for the Honourable Court.”

33. I take it that the Arbitrator’s “without prejudice” ruling was his decision in respect to the challenge. It matters not that it was a decision based on a technicality, it remained a decision in respect to the challenge and its effect was to reject the challenge. Thereafter GBH was at liberty, under the provisions of Section 14(3), to apply to the High Court, as it did, to determine the matter.

34. Having considered the issues raised by the Applicant, its response and the decision of the Court of 8th December 2016 I reach a conclusion that, the Judge consciously, upon his understanding of the matter before him, decided that the call made by the Arbitrator that he was *functus officio* was a decision under Section 14 of the Act. The Judge, however, found that the challenge came before the decision was published. The Judge thereby assumed jurisdiction under the provisions of Section 14(3) of the Act and had therefore answered the jurisdiction question put to him. That was the substance of the findings this Court has discussed and its full effect is not made any less indeterminate merely because the word jurisdiction was not used.

35. To ask this Court to now reconsider the matter with a view to reaching a different outcome is to request it to sit on appeal over the decision. It is not a proper invocation of the Court’s remit under the slip Rule or it’s even more expansive inherent jurisdiction to review its decisions so as to right a wrong that should not be allowed to stand, if this latter jurisdiction exists in this matter.

36. The Application of 3rd April 2017 is without merit and is hereby dismissed.

Dated, Signed and Delivered in Court at Nairobi this 26th Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mr Kahora holding brief for Mr Gichuhi for the Applicant.

Ms Mwango and Omondi for the 1st Respondent

Mr Khagram for the 2nd Respondent