REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 16 OF 2017

BOLEYN MAGIC WALL PANEL LTD.....APPLICANT/PLAINTIFF

VERSUS

NESCO SERVICES LTD.....RESPONDENT/DEFENDANT

RULING

1. On 30th October, 2017 this Court, **(Nyamweya, J)** referred the dispute the subject matter of this suit to arbitration based on the terms of the arbitral clause 44 contained in the agreement entered between the parties herein on 17th July, 2015.

2. This ruling arises from the proceedings undertaken consequent to the said order and it is the subject of the Notice of Motion dated 18th March, 2020 made by the Plaintiffs herein, **Boleyn Magic Wall Panel Ltd**, in which the Plaintiff substantially seeks an order that the arbitral award issued on 9th October, 2019 be set aside on the grounds that the same is contrary to public policy and that the orders made therein are not capable of being made in arbitral proceedings. It was therefore sought that this court makes further or other order(s) as it may deem appropriate including remitting the Final Award for corrective action as regards the dates.

3. The grounds upon which the said application was made were that pursuant to the aforesaid reference of the dispute to arbitration, the final award was issued on 9th October, 2019 and the Applicant was handed a copy thereof on 19th December, 2019 upon payment of the arbitrator's fees. However, the applicant was dissatisfied with the said award on the ground that the same does not reflect the actual account of events, is contrary to public policy, fails to strictly apply the provisions of the contract between the parties and fails to appreciate the conduct of the parties in the performance of the said contract. It was further contended that the said award is skewed and not suitable for adoption by the court since the Arbitrator failed to answer a key question posed by the applicant as to whether by failing to make payments to a contractor (the applicant) as per the certificate of payment, the employer (the respondent) had breached the contract. By failing to deal with the said issue, it was contended that the Arbitrator ended up making an erroneous conclusion that the applicant was in breach of the agreement when it was in fact the respondent who was in breach hence entitling the applicant to suspend the works for non-payment. According to the applicant, it is contrary to public policy for an arbitrator to fail to answer a question raised by one party while answering those raised by the other party as that amounts to segregation in the dispensation of justice. It was further contended that the award was in conflict with public policy by failing to appreciate that despite the lapse of the contractual term, the parties continued to perform their obligations thereunder as if the agreement subsisted hence the award did not reflect the will of the parties thereto. According to the applicant the award was contrary to public policy when it assumed that when one party is deemed to be in breach, the other party is deemed to be on the right.

4. The Arbitrator was accused of awarding additional liquidated damages for repairs despite the same being specifically excluded under the contract hence rewriting the contract between the parties. According to the applicant, the award was in conflict with the established principles on award of general damages by awarding the maximum award available as per the contract without factoring in the contributory breach by the Respondent. It was the applicant's case that the award amounted to double compensation.

5. The application was supported by an affidavit sworn by **Liu Weijun**, the applicant's director in which the above issues were adumbrated.

6. To that application the Respondent took a preliminary objection contending that this court lacks jurisdiction to hear and determine the said application as the same was filed outside the ninety (90) days statutory period. According to the Respondent, the dispute was on 31st July, 2017 referred to arbitration by a single Arbitrator who on 9th October, 2019 informed the parties hat the final arbitral award was ready and set 11th October, 2019 as the date of the collection of the award which was conditional on full settlement of his costs. Each party was pay a sum of Kshs 884,122/- towards the same and the Respondent duly settled its balance. On 14th October, 2019. However, the Respondent never received the said award since its release awaited the applicant's payment. On 3rd December, 2019 being tired of waiting for the applicant to settle the said payment, the Respondent decided to pay the applicant's balance of the said amount and on 16th December, 2019 the Respondent received its copy of the award.

7. It was therefore the Respondent's case that pursuant to section 35(3) of the ***Arbitration Act, 1995***, any party wishing to challenge the award in this Court had 90 days to do so from 11th October, 2019 which period lapsed on 11th January, 2020. However, the present application was not filed till 18th March, 2020, a period of 67 days after the lapse of the statutory period. Accordingly, the application is incompetent and a nullity and the court lacks the jurisdiction to hear and determine it.

8. It was contended that the date of receipt of arbitral award starts running from the date of notification of collection of the award by the arbitrator. That the final award was issued on 9th October, 2019 is admitted by the applicant who further admits having received its copy on 19th December, 2019 when it went to pay the arbitrator.

9. In support of the objection the Respondent relied on **Mahinder Singh Channa vs. Nelson Muguku & Another High Court Miscellaneous Application No. 108 of 2006 [2007] eKLR**, **P N Mashru Limited vs. Total Kenya Limited [2013] eKLR, Kenyatta International Convention Centre (KICC) vs. Greestar Limited HCMisc Application No. 278 of 2017 [2018] eKLR and Ann Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR**.

10. On its part, the applicant submitted in respect of the preliminary objection that from the specific wording of section 35(3) aforesaid, time starts running when one receives the arbitral award and that the Applicant received the award on 19th December, 2019 as evidenced by the annexture to the supporting affidavit of Mr. Liu dated 18th March, 2020. It therefore follows that three months from then would lapse on 19th March, 2020.

11. It was further submitted that pursuant to Order 50 of the ***Civil Procedure Rules*** the running of time from 21st December, to 13th January of the subsequent year is suspended and removing this duration from the computation, the timelines permitted to the Applicant to file the present Application would have lapsed on April 10th 2020. Having filed the present application on 18th March, 2020, it follows that the applicant was within time and therefore the application is properly before this court.

12. It was the Applicant's position that the contention by the Respondent that the award was published on 9th October, 2019 is unfounded and the same is not supported by any evidence whatsoever. The fact that the award is dated 9th October 2019 does not mean that the same was published on this date. It was submitted that the ***Evidence Act*** in sections 107, 108, 109 and 112 is express that he who alleges must prove and it is incumbent upon the Respondent to prove with proper documentary evidence that the award was received by the Applicant any earlier than 19th December, 2019. Furthermore, the rules of interpretation of statute in Kenya are now well settled that so far as the wording of statute is concerned, the court should strictly apply the statute as it is worded and that at any one time, the court must apply the literal construction of the statute and apply the same as it is. The other rules of interpretation are called in whenever there is an ambiguity. According to the Applicant, the wording of Section 35(3) of the ***Arbitration Act*** No. 4 of 1995 is plain, simple, and express that the application to set aside should not be made 3 months from the date the party making that application received the award and the same is not ambiguous at all.

13. It was contended that nothing would have been simpler than to specifically state say; 3 months from the date of the award, or from the date of publication or from any other date. in fact, why would Parliament go to the lengths of specifying ***… from the date on which the party making that application had received the arbitral award?*** Why specify it to the party making the application rather than leave it generally if parliament intended otherwise? In support of the submissions, the Applicant relied on the case of **Apollo Mboya v Attorney General & 2 others [2018] eKLR** and **Law Society of Kenya vs. Kenya Revenue Authority & another [2017] eKLR** and submitted that the application herein is properly before this court, having been filed within the time as specified in section 35(3) of the ***Arbitration Act*** and thus the same should be disposed on its merits.

Determination

14. I have considered the foregoing.

15. The law governing timelines for filing applications to set aside the arbitral award, as appreciated by the parties herein, is section 35(3) of the ***Arbitration Act*** which provides that:

> ***(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.***

16. The point of contention is however what amounts to receipt of the award.

17. The issue was the subject of the decision in **P N Mashru Limited vs. Total Kenya Limited [2013] eKLR** where the court expressed itself as hereunder:

> **"It is therefore clear that an application for setting aside an award ought to be made within 3 months from the date of the receipt of the award or within 3 months from the date on which the request for correction or interpretation of an award was disposed of...Section 35(3) aforesaid talks about "receipt' of the award as opposed to the publication of the award. Accordingly, I am not satisfied that the two terms can be used interchangeably. Where however, the step taken is not a mere publication but a notification to the parties that the award is ready, I would agree with the decision of Nyamu, J (as he then was) in Transworld Safaris Ltd vs. Eagle Aviation Ltd (supra) that a notice to the parties that an award is ready is sufficient delivery since any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality. The respondent has annexed a copy of the letter dated 17th July 2011 addressed to both advocates informing them that the award was ready for collection. Further to that there is a copy of a letter written by the respondent's advocates**

addressed to the applicant's advocates which on the face of it indicates that on 12th July 2011 the applicant's advocates were made aware of the existence of the final award."

18. Going by the applicant's own affidavit in support of its application, the final award was issued on 9th October, 2019. The Respondent has exhibited a letter dated 9th October, 2019 from the Arbitrator informing the parties that the final arbitral award was ready and set 11th October, 2019 as the date of collection of the award. In my view going by the Arbitrator's communication, the award was ready for collection on 11th October, 2019 and from that date any party was at liberty to receive the same. The conditional release of the same to the parties had nothing to do with the availability of the award itself. By parity of reasoning a judgement of a court is delivered on the day it is pronounced and not on the date it is collected since the collection of a copy of the judgement may well be conditioned on payment of court fees.

19. I agree with the position adopted by **Warsame, J** (as he then was in **Mahinder Singh Channa vs. Nelson Muguku & Another High Court Miscellaneous Application No. 108 of 2006 [2007] eKLR** that:

"A party to an arbitral proceedings cannot be allowed to derogate from the requirements under the Arbitration Act. When a party submits his cause of action to an arbitrator then if he wishes to challenge the decision or the award, he must approach the High Court using the correct gate or formula and non-compliance with the requirements of the Arbitration Act by a party clearly ousts the jurisdiction of the High Court. Time limit and the period for seeking the intervention of the High Court is prescribed under section 35(3) and the period is limited to 90 days after the lapse of the date on which the party received the arbitral award. If the aggrieved party does not file the application or proceedings before the High Court within the appropriate 90 days, the court has no opportunity or jurisdiction to determine the dispute. A party who fails to file his application within the 90 days and when no leave is sought and obtained, then he shall be deemed to have waived the right to object…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…In this case the award was delivered to the parties on 25th August and not 16th November, 2005. The award was ready in August, 2004 and it cannot be understood why it would remain on the shelves of the arbitrator for one year and 5 months when the parties made inquiry as early as August, 2004. The position of the applicants is not tenable and it is an attempt to salvage what was lost through their own negligence and/or laxity which negligence or laxity cannot be cured by the misplaced letter of the arbitrator dated 16th December, 2005… Therefore the applicant is out of time in bringing the present application which is without doubt outside the 90 days or 3 months prescribed and/or allowed under section 35(3) of the Arbitration Act. As the application was filed contrary to the provisions of section 35(3) of the Arbitration Act, it is filed without leave and therefore the court has no jurisdiction to entertain the same."

20. In my view a party to an arbitral proceeding cannot be permitted to frustrate the finality of the same by merely failing to take the necessary steps that would effectuate the delivery of the award to him. I agree with the opinion of the learned authors in ***Russell on Arbitration*** 23rd Edition at para 6.070 at page 300 that:

"A delay in taking up the award may have serious consequences in the context of application to court challenging or appealing against the award. A 28 days time limit for any challenge to the award is laid in S. 70(3) of the Arbitration Act, 1996. Time runs from the date of the award or appeal whether or not it has been notified or delivered to the parties. The Tribunal has an obligation to notify the parties of the award without delay. A party who is delaying taking of delivery of the award, perhaps in the hope that the other party will, at least initially bear the burden of any outstanding fees and expenses, should keep in mind the 28 days limit if he is likely to want to mount a challenge against the award."

21. The learned authors seemed to have had the applicant herein in mind since it is contended by the Respondent that despite being notified that the award was ready, the applicant took no steps to settle the arbitrator's fees thus leaving the Respondent with no option but to do the same. The applicant cannot therefore be permitted to take advantage of its own lethargy to its benefit and to the detriment of the Respondent.

22. In my view the 3 months' period prescribed for challenging the award started running at the latest on 11th October, 2019 so that even if the period frozen under the ***Civil Procedure Rules*** is discounted, the time prescribed lapsed on 3rd February, 2020. The instant application was not filed till 19th March, 2020 way out of time.

23. That said one needs to take note of the sentiments of the Court of Appeal in **Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 of 2009 [2009] eKLR** that:

"A careful look at all the provisions cited 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 provides that except as provided in this Act no court shall intervene in matters governed by this Act...The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of

> **the award/decree where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. *It is clear to the Court that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration*. It follows therefore all the provisions invoked except section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court, *suo moto*, because jurisdiction is everything…Had the superior court played a supportive role as contemplated in section 10 of the Arbitration Act and the other provisions in the Act which invite court's intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided…Besides the issue of jurisdiction as explained above, section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of the delivery of the award. The last date for the challenge was 15th February, 2008 and all the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction…We are concerned that contrary to the finality of arbitral awards as set out in the Arbitration Act the superior court all the same entertained incompetent applications which have in turn resulted in the 10 years delay in the enforcement of the award."**

24. In my view to uphold the view that a party who has been notified of the availability of the award but who through ingenuity delays receipt therefor with a view to obstructing the finality and promptness of the arbitral proceedings clearly obstructs the objects of the arbitral proceedings.

25. Where an application is made outside the time stipulated under the provisions of the ***Arbitration Act***, I agree with **Warsame, J** (as he then was) in **Mahinder Singh Channa vs. Nelson Muguk & Another Nairobi** (supra) that the Court would have no jurisdiction to entertain the matter. Without jurisdiction **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1,** held that:

> **"…a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. 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."**

26. I must therefore down the judicial tools in this matter at this stage and find that the Notice of Motion dated 18th March 2020 is incompetent. Accordingly, the same is struck out with costs to the respondent.

27. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 17th day of August, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munyao for Mr Eredi for the Applicant

Miss Nyakundi for Mr Oyugi for the Respondent

CA Geoffrey