REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 7 OF 2018

M/S PATHOLOGIST LANCET KENYA LIMITED.....PLAINTIFF

VERSUS

CHRISTA MARIANNE MISSION HOSPITAL.....DEFENDANT

RULING

1. The plaintiff sued the defendant vide a plaint dated the 1st August 2018 seeking special damages of Kshs. 53,733,428/- and general damages for breach of contract, exemplary/punitive damages, interest at the rate of 18% and costs of the suit.

2. The defendant filed an application for an order or reference on the 16th of August 2018. The defendant sought to be guided by Clause 7 of the Plaint by the plaintiff in which they expressly stated their reliance to the Agreement to its full meaning and purpose.

3. On the 29th October 2018 the parties recorded a consent that the dispute be referred to arbitration in terms of clause 14 of the contract dated 22nd April 2014. That the parties to agree on an arbitrator within 14 days in default, the Arbitrator shall be appointed by the Chartered Institute of Arbitrators of Kenya in terms of clause 14.2 of the agreement and that costs of the proceedings in the arbitration be in the cause.

4. The parties complied with their consent. The Arbitrator was Mr. Kamau Karori, who awarded a sum of Kshs. 49,084,170.50 to the claimant on the 21st of January 2020.

5. On the 4th February 2020 the plaintiff filed an application for leave to enforce the final Arbitral award dated the 21st January 2020 and issue a Decree in terms of the said final Arbitral award.

6. Before this application could be heard the defendant filed Originating Summons on the 9th July 2020 seeking the following orders;

   i. That the Court be pleased to enlarge time for filing the application.

   ii. That the Arbitral Award of Kamau Karori FCIArb (Sole Arbitrator) of 21st January 2020 be set aside.

   iii. That the applicant be at liberty to apply for any other Orders it may deem fit and just

   iv. That costs of the application be provided for.

7. The subject of this ruling is the applicant's plea for enlargement of time for filing the application. The application is opposed. The plaintiff / respondent filed a Notice of Preliminary Objection stating that this Court lacks jurisdiction to grant prayer 1 of the Originating Summons by dint of the provisions of section 35 (3) of the Arbitration Act No. 4 of 1995, that the Originating Summons is bad in law and an abuse of the court process and the same should be struck off for offending the provisions of the Arbitration Act No. 4 of the 1995 and that the Originating Summons is fatally defective and the same ought to be dismissed in limine.

8. Since the preliminary objection was challenging this court's jurisdiction I directed that it be heard first. Mrs. Wambugu submitted as follows on the preliminary objection; that section 35(3) of the Arbitration Act No. 1995(the Act) only clothes the High Court with jurisdiction to set aside an arbitral award where the court has been moved within 3 months of making the award. That the award was made on the 21.1.2020 and by the 1.4.2020 3 months had lapsed. That the applicant has not explained what stopped them from moving the court earlier. That advocates were granted special passes to render services to their clients. That the applicant's counsel came on record in December 2019 and was aware of the date the award was rendered. That the court's hands are tied by dint of the provisions of the Act which is a complete code. Section 10 of the Act provides the procedure and section 35 (a) of the Act gives a window to see why the Act is codified. That enlargement of time powers is donated by the Civil Procedure Act and is excluded for the Act for reasons that Arbitration speaks to finality and reopening the proceedings negates the arbitration proceedings. That the court lacks jurisdiction to enlarge the time.

9. It was further submitted that the application is bad in law. That the plaintiff moved the court by way of plaint. The application is brought by way of an originating summons. That there is a mismatch of pleadings as there cannot be two type of pleading before the court, a plaint and an originating summons. That Order 37 of the Civil Procedure Rules sets out the issues that the court can entertain by way of originating summons. Extension of time or setting aside of orders is not one of them. That the originating summons should be struck out. Reliance was made on the following cases**; Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR, D Manji Construction Limited vs Associated Construction Company (K) limited [2018], Heva Fund LLP vs Katchy Kollections Limited [2018] eKLR, Kenyatta International Convention Centre (KICC) vs Greenstar Systems Limited [2018] eKLR, Nyutu Agrovet Limited vs Airtel Networks Limited [2015] eKLR and Talewa Road Contractors Limited vs Kenya National Highway Authority [2019] eKLR.**

10. The applicant's response to the preliminary objection is as follows; that we are at extra ordinary times with a global pandemic. That the court should look at section 35 (3) and interpret the section to find out if the court has jurisdiction. That once the court finds it has jurisdiction then they will argue the application to extend time. That the applicant was in court on the 11.3.2020 and informed the court that they needed time to reconstruct the file. That on the 15.3.2020 at the advice of health officials people were advised to keep social distancing. Following the said directives, the applicant was not able to meet with its legal advisers and was under practical incapacities and could not file the application. That the word used in section 35 (3) of the Act is *'may'* and not "*shall''*. That the ordinary meaning of the word *may* is permissive and discretionary, thus it gives that applicant a chance to inform the court why it was not able to file the application on time. That the authorities relied on by the respondent are per incuriam and do not address the issue of incapacity to address the court. That the court can grant an extension of time.

11. On the procedure it was argued that the Act has no form and the Act does not state that the application is to be by way of chamber summons. That since the civil procedure does not apply then the application can be by way of originating summons or a chamber summons. That if there is a defect of form the applicant relies on Article 159 (2) (d) of the Constitution. That the court should not fall in the trap of deciding the matter on a technicality. That the respondent filed their application within 3 days yet the Act provides for 3 months within which the respondent could have filed the application. The applicant urged the court to dismiss the preliminary objection considering the public policy on and to allow them to argue their application.

12. Mrs Wambugu in response submitted that the Act does not state that a successful litigant must wait for 3 months before filing the application. That the court has no jurisdiction to enlarge time. That time runs from the time the award is given and cannot be suspended. That the originating summons is a suit and a chamber summons is for interlocutory applications.

13. Having considered the parties submissions, the provisions of the Act the two issues for determination are; whether the court has jurisdiction to enlarge time and whether the application is defective in law.

14. Although the applicant seeks to challenge the award, first it seeks an order enlarging time under **Order 50 Rule 6** of the **Civil Procedure Rules**. It is undisputed that the applicant's application has been filed after the lapse of 3 months provided by statute. The applicant's administrator, Sr. Beatrice Sabato in her affidavit dated 9th July 2020 averred that the delay in the filing of the application is attributed to Covid-19 pandemic and that the applicant was separated from their legal advisor based in Nairobi due the restriction of movement regulations.

15. The applicant has taken the view that because of the Covid- 19 pandemic this court should enlarge time because the extraordinary happenings such as travel/movement restrictions that was occasioned by the pandemic. It cited the case of **University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR** where the court observed as follows;

> *"28. Having said all these, there could be occasion when delay in collection of award is beyond the blame or control of parties. Let me give a surreal example. The present Covid 19 epidemic is a stark reminder that we can all be faced with situations that that are beyond normal contemplation. The arbitral tribunal today notifies the parties that the award is ready for collection. A few hours later, a complete lockdown of 120 days is ordered by the Government due to the Covid 19 epidemic. Neither the arbitral tribunal nor the parties can access a signed copy of the award either physically or online. Surely in such exceptional circumstances, there is justification to deem the time as running from earliest date the parties have access to the signed copy of the award.*
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> *29. This leads me to an issue raised by the Applicant. That it was late in collecting the award because it had difficulties raising its share of the tribunal fees and expenses. It then makes the submission that financial disposition should not be allowed to lead to inequality before the law. This in my view can hardly be a reason for putting off the effective day to a later date. It may perhaps be a premise upon which a request for expansion of time can be made. That is, for an application for time to be expanded. Whether or not the University will be able to persuade the court that this amounts to an extraordinary circumstance that merits an exceptional extension of time is, of course, a different matter. The Court makes this observation well aware that there is a school of thought, with large numbers, that because of the absence of specific provisions for expansion of time under Section 35(3), then the timelines set are cast in stone and can never be expanded. For those skeptical about the Court's power to expand time, even in exceptional circumstances, the decision of the Hong Kong Court of first instance in Sun Tian Gang –vs- Hong Kong & China Gas (Jilin) Limited [2016] 5 HKLD 221 cited to Court by Counsel Ngatia is a worthy read. But as this debate is beyond the scope of the controversy placed before me, i say no more."*

16. The respondent has opposed the applicant's application on grounds that this court lacks jurisdiction to enlarge the time for filing of the applicant's application.

17. It is not in dispute that the Arbitral award was delivered on 21st January 2020 and under **section 35 (3) of the Arbitration Act**, the applicant had 90 days from the date of receiving the award to challenge it. **Section 35 (3) of the Arbitration Act** provides as follows;

> *"(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."

18. The Court of Appeal has been emphatic that the timelines provided under the Arbitration Act must be strictly adhered to and that the Courts have no jurisdiction to entertain matters under the provisions of the Civil Procedure Rules where such matters are already governed by the Arbitration Act. The court of Appeal in **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR,** CIVIL APPEAL 8 OF 2009, held that;

> *"…. 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 as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1.*
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> *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 courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided.*
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> *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 delivery of the award. The last date for the challenge was 15th February, 2008. All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction."*

19. The application before me calls for this court to make a determination on enlargement of time pursuant to the provisions of the Civil Procedure Rules. The Court of Appeal in **Nyutu Agrovet Limited v Airtel Networks Limited (2015) eKLR,** CIVIL APPEAL (APPLICATION) NO.61 OF 2012, held as follows;

> *"Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil-like litigation, I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:*
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> *"11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules."*
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> *The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10."*

20. I therefore find that the applicant having committed itself to the arbitration process had an obligation to adhere to the strict timelines provided by the **Arbitration Act.** Despite the existence of a worldwide pandemic, I take judicial notice of the fact that with the current technological advancement, it is not necessary for businesses to be conducted based on face to face meetings. Things have changed clients need not visit their advocate's offices to give them instructions. Instructions could have been given via phone or email. I reject the applicant's argument it was not in a position to file the application in time as it could not access its advocate in Nairobi because of the regulations limiting movements in and out of the Nairobi Metropolitan area. In any case the applicant had the option of instructing any another counsel not within the Nairobi Metropolitan region to file his application challenging the award within the 3 months' period provided under **section 35 (3) of the Arbitration Act**.

21. I associate myself with the sentiments of Justice Olga Sewe in **Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited [2018] Eklr** when she held;

> *"[23] Thus, there being no provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35(3) of the Act is imperative, and comports well with the principle of finality in arbitration. Indeed in the Anne Mumbi Hinga Case, the Court of Appeal proceeded to hold, in no uncertain terms, 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. And, it is now well settled that the time of delivery and receipt of Award is equivalent to the date of notice by the Arbitrator."*

22. On the issue of the application being bad in law. I agree with the submissions of Mrs. Wambugu that the application is bad in law. The applicant filed an Originating Summons. The provisions of Order 37 are very clear. An originating summons is filed when one is commencing a civil action under provided under Order 37. The applicant argument that the court can apply the provisions of Article 159 (2) (d) to cure the defect is totally misplaced. The Court in the case of **KAKUTA MAIMAI HAMISI Vs. PERIS PESI TOBIKO & 2 OTHERS [2013] eKLR** held as follows;

> **…** We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation".

23. In the end, I uphold the preliminary objection. The application dated the 9th of July 2020 is struck off with costs to the plaintiff/ respondent.

Dated, signed and **delivered** at **KISII** this **24th** day of **September 2020.**

R.E. OUGO

JUDGE

In the presence of;

Mrs Wambugu	**For the Plaintiff/ Respondent**
Mr. Omollo	**For the Defendant/ Applicant**
Jackie	**Court Assistant**