REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 538 OF 2015

PHILLIP BLISS ALIKER ..... APPLICANT

-VERSUS-

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

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

IN THE MATTER OF AN APPLICATION UNDER SECTION 14 OF THE ARBITRATION ACT TO DETERMINE THE MATTER OF A CHALLENGE TO THE ARBITRATOR

AND

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT 1995(AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT NO.11 OF 2009

AND

IN THE MATTER OF AN ARBITRATION UNDER THE 2012 RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH) ('the Rules')

BETWEEN

MISTRY JADVA PARBAT &COMPANY LIMITED.....CLAIMANT

AND

GRAIN BULK HANDLERS LIMITED.....RESPONDENT

RULING

1. An Application brought by Phillip Bliss Aliker (the Applicant or Aliker) presents an opportunity for this Court to reflect on an aspect of the landmark decision of the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR.

2. In the Application dated 23rd March 2018, Aliker seeks leave of this Court to appeal against its Ruling (the impugned Ruling) of 9th March 2018.

3. In the decision for which leave to Appeal is sought, this Court held:-

> "22. The Court of Appeal's Decision in Kamconsult (*Supra*) directly focused on the question whether the High Court could review its decision made pursuant to Section 17(6) of The Act. The language of Section 17(6) is word for word the provisions of Section 14(6) and this Court is bound by the Court of Appeal Decision in answering the question that has been placed before it by the Preliminary objection. Yet I still must consider whether there are instances when a Court can revisit a Decision made under Section

14(6) or such similar provision without it affronting the design of finality of the Act.

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."

4. A short background. Aliker was appointed the arbitrator to hear and determine a dispute between Grain Bulk Handlers Limited (GBH) and Mistry Jadva Parbat & Co. Ltd (MJP). In the course of the proceedings (more accurately at the tail end) GBH raised a challenge against Aliker. Unhappy about how the challenge was dealt with by Aliker, GBH sought the intervention of the High Court in an Originating Summons dated and filed on 11th December 2015. To be noted this early is that the Originating Summons were proceedings under Section 14 of the Arbitration Act which provides:-

"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."

5. The summons were heard and determined by Hon. Ogola J who made the following orders:-

a. "The challenge lodged by the Applicant before the Arbitrator on 21st October 2015 is hereby upheld.

b. The Arbitrator is hereby removed.

c. The Arbitral award dated 30th September 2015 and issued by the Arbitrator on 21st October 2015, is hereby declared void.

d. The Arbitrator shall refund one half of total fees and expenses paid to him by GBH in the Arbitration; and

e. The Costs of this application shall be for GBH."

6. Dissatisfied with that outcome, Aliker sought its review through an application dated 30th April 2017. That application was said to be anchored under the provisions of section 80 of the Civil Procedure Act, order 45 rule 1 of the Civil Procedure Rules, section 10 of the Arbitration Act and rule 11 of the Arbitration Rules. It is the impugned Ruling that determined the Application.

7. GBH objects to the grant of the leave maintaining that no Appeal can lie against the impugned decision.

8. Although this Application was filed prior to Nyutu (supra), that decision certainly has an impact on this matter.

9. The Applicant submits that its dismissed application was anchored on order 45 rule 1 of the Civil Procedure Rule which reads:-

> "[Order 45, rule 1.] Application for review of decree or order.
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> 1. (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed,
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> and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

10. The Applicant argues that under the provisions of order 43 (2) of the Civil Procedure Rules an Appeal against a decision made pursuant to an order 45 application only lies with leave of the Court. Order 43 has the catalogue of orders and rules from which appeals lie as of right, leaving the rest to requiring permission.

11. Counsel emphasizes that the Application for Review was not brought under section 14 of the Civil Procedure Act. And that in any event the Application for Review under Order 45 can be brought even where no appeal is allowed (See Rule 1(a)).

12. The crux of the resistance to the current Application is that the Review Application was in the first place an attempt by the Applicant to get around the express bar of an appeal by Section 14 (6) of the Act. That the Review application was in essence an appeal disguised as an application for review.

13. When this Court, in its impugned Ruling, dismissed the Applicant's decision for Review, it was paying homage to the doctrine of precedent. See the portion of the Court's decision reproduced early.

14. **Nyutu** is now with us, and its importance to this matter is that while there would be exceptional circumstances where leave can be granted to a litigant to file an Appeal to the Court of Appeal against a decision of the High Court in a section 35 application, such lee way may not be available where the Arbitration Act provides that the decision of the High Court is final. These are the words of the Court:-

> "**[71]** We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.
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> **[72]** Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an *unfair determination* by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in ***AKN and another*** (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle."
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> **(my emphasis)**

15. Those proceedings were initiated as a section 14 application and a decision on it made by Ogola J on 8th December 2016. That decision would have to be final in terms of section 14(6)of the Act which reads:-

> **"(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal."**

16. If such a decision is final, then no appeal lies against and it would be futile for the Court to even entertain an application for leave in its respect. Should it be any different here because the Applicant choose not to Appeal against the decision (perhaps because an appeal did not lie) and instead sought its Review under the provisions of order 45 of the Civil Procedure Code. Should this Court, which invoked the principle of finality that is embodied in section 14(6) and also paid heed to a Court of Appeal decision to hold that it could not review that decision, now grant leave to appeal against its Ruling.

17. I think not, because while order 45 rule 1(b) permits a person to seek Review of a decision from which no Appeal is allowed, that provision, found in subsidiary legislation, cannot be deployed to circumvent the finality rule of section 14 or such other provision of the Arbitration Act. Indeed such an outcome would be directly at odds with the holding of the Court in Kamconsult Limited Vs Telkom Kenya Limited and Another (2016) eKLR in which the Court held:-

> **"17] As noted above the notice of motion seeking review of the ruling by the superior court was brought under Orders XLIV Rule 1, XXI Rule 22 of the former edition of the Civil Procedure Rules *(now repealed*), as well as Sections 3A, 63e, 80 of the Civil Procedure Act and Rule 11 of the Arbitration Rules.**
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> **Under Rule 11 of the Arbitration Rules, Orders XLIV Rule 1, XXI Rule 22 of the former edition of the Civil Procedure Rules (*now repealed*) could be held to be applicable to the Arbitration Rules in so far as the same may be appropriate. However the Arbitration Act does not provide for review of High Court decisions made pursuant to Section 17 (6) of the Act, and therefore under Section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases, a rule cannot override a substantive law. Sections 3A, 63e and 80 of the Civil Procedure Act are also not applicable pursuant to Section 10 of the Arbitration Act.**
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> **[18] We take note of the fact that arbitration proceedings are intended to provide a faster and less technical process for resolution of disputes. Thus the omission to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation. No doubt the case of Abdi Rahman Shire (*supra*), which overturned the decision of Ringera J on interpretation of Section 23 (3) of the Limitations of Actions Act would have a bearing on the propriety of the orders made by Ringera J on 17th September 2001 on the jurisdiction of the arbitral tribunal. Nevertheless, this Court has no jurisdiction to entertain an appeal in that regard as this court only exercises jurisdiction conferred by statute. The parties having chosen to proceed by way of arbitration, the Arbitration Act and Rules bind them."**

18. If leave cannot be granted to appeal against a section 14 decision because an appeal is barred under the finality principle, then much less can leave be granted to appeal against a review application ruling which rejected an attempt to reopen a section 14 decision.

19. In reaching this outcome, the Court does not disrespect or trivialize the seriousness of the matters that the intended Appeal would have raised. The Court is simply walking the straitjacket that Section 14 of the Arbitration Act has prescribed.

20. The application of 23rd March 2018 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 30th Day of November 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:

Oyoo for Gachuhi for the Applicant.

Omondi for the 1st Respondent.

No appearance for 2nd Respondent.