REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E776 OF 2020

LANTECH (AFRICA) LIMITED.....APPLICANT

-VERSUS-

GEOTHERMAL DEVELOPMENT COMPANY.....RESPONDENT

RULING

Background

1. On 1st July 2013, the applicant and respondent herein entered into an agreement for a fixed term of 2 years for the provision of maintenance services at Menengai Geothermal Project. Two years after the termination of the contract, a disagreement arose between the parties wherein the Applicant (hereinafter **'Lantech'**) blamed the Respondent (hereinafter "**Geothermal"**) for financial loss arising out of Geothermal's failure to observe its obligations under the contract. Following the disagreement, a dispute was declared that led the appointment of the Sole Arbitrator, **Mr. Kyalo Mbobu** who found in favour of Lantech in the final Award dated 12th November 2019.

2. The Award resulted into the filing of two applications, namely; -

a) The Application dated 3rd June 2020 (hereinafter "**the Adoption Application**") wherein Lantech seeks orders for the recognition and adoption of the award made on 12th November 2019 and corrected on 20th May 2020.

b) The Application dated 12th June 2020 (hereinafter **"the Setting Aside Application"**) wherein Geothermal seeks orders to set aside the Final Award of the Arbitrator **Mr. Kyalo Mbobu**, dated 12th November 2020.

The Adoption Application.

3. The application is supported by the affidavit of Lantech's Chief Executive Officer **Mr. Aquinas Wasike** and is premised on the grounds that Geothermal is truly indebted to Lantech in terms of the Award but has failed, refused and/or neglected to settle the amounts due to Lantech despite service with a demand notice.

Setting Aside Application.

4. The application is supported by the affidavit of Geothermal's Legal Officer **Mr. Adrian Topoti** and is premised on the grounds that: -

a) The Award of USD 18,206,548.72 is contrary to public policy.

b) That the arbitrator neglected to examine the pleadings and to make his decision on the basis of what was pleaded.

c) The case that was pleaded in respect of the sum of USD 18,206,548.72 was that it was the balance due in respect of consultancy services rendered.

d) The Arbitrator had a duty to examine the evidence.

e) The Arbitrator misconducted himself by determining an issue that was not before him.

f) The Award is published in doubtful circumstances. There was a subsisting dispute between the Applicant and the Tribunal on

the Tribunal's fees, interest applied thereon and amounts of withholding tax. While this is pending, the respondent procured a loan facility and settled the amount.

g) The Award deals with disputes not contemplated by the reference to arbitration and contains decisions on matter beyond the scope of the dispute captured in the pleadings before the Arbitrator.

h) The Award disregards basic and fundamental principles of law when determining the issue of proof of loss and awarding of special damages. The Arbitrator selectively applies basic principles of law in determining similar issues. This is in conflict with the public policy of Kenya.

i) The astronomical award is inimical to the public policy of Kenya. It shall occasion unjust enrichment of the respondent at the expense of taxpayers' money.

5. Lantech opposed the setting aside application through the Replying Affidavit of its Chief Executive Officer **Mr. Aquinas Wasike** who avers, *inter alia*, that the application is founded on an ulterior motive and is based on grounds that are patently false, misleading and plainly unsustainable.

6. He further states that the application is incompetent, bad in law, statute-barred and that this court lacks the jurisdiction to entertain it in light of the salient provisions of Section 35(3) of the Arbitration Act (hereinafter "**the Act**").

7. He states that Geothermal had already conceded that the Arbitrator's decision that is the subject of the setting aside application was meritoriously made after due consideration of the evidence and submissions.

8. He avers that the portion of the Award that bespeaks of the Counterclaim is available to be set aside by this court without affecting the entire outcome of the Final Award as long as a valid application is filed within the confines of the law especially considering the strict timelines set by the Act. He further states that the Arbitrator did not act against the public policy of Kenya and that the Award is not in conflict with the public policy.

9. Lantech also filed a Preliminary Objection to the setting aside application on the ground that it is statute barred and that the court is therefore without jurisdiction to entertain it pursuant to Section 35(3) of the Act.

10. The two applications were, at the hearing thereof, consolidated and canvassed by way of written submissions.

11. **Mr. Mogere and Mr. Angwenyi** Advocates represented Geothermal during the highlighting of submissions while **Mr. Masika and Mr. Ohaga SC** appeared for Lantech. **Mr. Mogere** indicated that Geothermal's application for setting aside ought to be treated as a response to the enforcement application.

12. A summary of Geothermal's submissions were that the Arbitrator did not explain how he came up with the issue of a Counterclaim in the Award when no Counterclaim was pleaded. It was submitted that owing to the Arbitrators reference to a non-existent counter claim, the award ought to be set aside as it is vulnerable to speculation, is inherently unsafe and borders on misconduct. Counsel argued that the Arbitrator's misconduct infects the entire award thus compromising its integrity.

13. Counsel also faulted the Arbitrator for awarding special damages without addressing his mind to the adage that special damages must be specifically pleaded and proved. It was submitted that the Arbitrator made an award of USD 18 million despite the fact that the claimant had amended the claim and removed the prayer for 18 million and further presented a witness who testified that no loss was suffered on account of apportionment of the award/contract.

14. It was Geothermal's case that the Arbitrator should have compared the contract that Lantech had and the tender's terms of reference. It was submitted that since Lantech had been paid for all the work done, it was not entitled to the award made in its favour.

Lantech's submissions.

15. **Mr. Ohaga SC**, learned counsel for Lantech submitted that the application does not fall within the purview of Section35(2) of the Act on the circumstances under which a court can set aside an arbitral award. Counsel emphasized that alleged misconduct of an Arbitrator is alien to the Act and not one of the grounds for setting aside an award.

16. Counsel submitted on the finality of an arbitral award and argued that this court cannot be invited to look at the Arbitrator's transcripts and consider, afresh, what the witnesses stated.

17. It was submitted that the setting aside application is a '**disguised appeal'** not permissible within the confines of the law. For this argument, counsel referred to the case of ***Superior Enterprises Ltd v The Kenya Union Insurance Company of Kenya Ltd*** HCCC 5239 of 1990 wherein it was held: -

"Although it is only parties to an award who can enforce it, it would <u>be contrary to the policy of the law to recognize it</u> and allow the litigation of the same matters where he attempts to back out of the binding force of the award. <u>It is also frivolous, vexatious and an abuse of the court process for him to relitigate on matters covered by an award of which he was voluntarily a party-</u> See HALSBURYS LAWS OF ENGLAND 4TH Edition vol 16 page 862.

> ***"Where a cause of action is held not to fall within the scope of estoppel, it may nonetheless be struck out as vexatious or frivolous; to litigate a question which in substance has already been determined is an abuse of the process…."***

18. Reference was also made to the decision in ***Century Oil Company Ltd v Kenya Shell Ltd*** HC Miscellaneous Civil Application No. 1561 of 2007 wherein the court held: -

> ***"In determining whether or not to set aside the award, this court is not required to consider the merits or otherwise of the issues in dispute that was referred to arbitration by the parties to the application. The court can only make inquiry in regard to the complaints made by the applicant in light of the applicable statutory provisions."***

19. Counsel argued that if the Counterclaim infected the award, then Section 35(4) of the Act can be invoked to remit the award back to the Arbitrator so that he can remove any reference to the Counterclaim instead of wiping out an entire process on the basis of an academic premise.

20. Counsel also submitted that the setting aside application is statute barred having been filed 7 months after the Award was published contrary to the provisions of Section 35(3) of the Act which stipulates that any party seeking to set aside an Arbitral Award must do so within 3 months from the date of the publication of the Award. On public policy, counsel submitted that the Act applies evenly to all parties irrespective of whether they are statutory bodies or private entities.

Analysis and determination

21. I have considered the two applications, the submissions by counsel, together with the law and the authorities that they cited. I find that the first issue for determination is whether Lantech's Preliminary Objection (P.O.) to the setting aside application is merited. I will therefore tackle the Preliminary Objection first and, depending on its outcome, delve into determining the merits of the setting aside application which will then pave way for the determination on whether or not the Award should be enforced.

Preliminary Objection.

22. Lantech argued that the setting aside application is a non-starter, bad in law and statute-barred in light of the express provision of Section 35(3) of the Act. According to the Respondent (Lantech), the date for the delivery and receipt of the Arbitral Award is 12th November 2019 when the Arbitrator, through a letter, notified the parties that the Award was ready for collection. The Respondent urged this court to enforce the timelines provided for in the Act and find that it lacks the jurisdiction to entertain the application.

23. On its part, the Applicant (Geothermal) submitted that since the Award was actually received by the parties on 13th March 2020 and the setting aside application filed on 12th June 2020, the 3 month's period provided for under the Act had not lapsed. Counsel relied on the decision in ***Dewdrop Enterprises Ltd v Harree Construction Ltd*** [2009] eKLR where the court held that: -

> ***"Whereas it is true that Arbitrator notified the parties that award was ready for publication as early as November 2007, it was evident that Arbitrator did not publish or avail copies of the said award to the parties on account of failure by the parties herein to pay the outstanding balance of the Arbitrator's fees. The Arbitrator withheld publication of the said award till 11th August 2008. I therefore hold that the date of publication of the said award was 11th August 2008. The applicant stated that it received the award on 15th August 2008. Taking either dates as the date on which the award was published, under Section 35(3) of the Act, the applicant was required to file the application to set aside the arbitral award before this court required to file the application to set aside the arbitral award before this court by either 11th November 2009 or 15th November 2008. The present application was filed on 23rd September 2008. The application was therefore presented to court within the period provided under the Arbitration Act 1995. I find no merit with the respondent's objection in this regard."***

24. The applicant further submitted that in the event that the court is convinced that time started to run on 12th November 2019, the court ought to turn and consider the second part of Section 35(3) which provides for when computation of time should commence if a request has been made under Section 34 of the Act. Counsel submitted that since the applicant made an application under Section 34 of the Act on 26th March 2020 which was disposed of on 6th April 2020, Section 35(3) contemplates such an application and provides that the 3 months' period shall commence when that application is disposed of in which case, the 3 months would run until 6th July 2020.

25. Section 35(3) of the Act stipulates as follows regarding the timelines for filing an application to set aside an award: -

> ***"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."***

26. Section 32(5) of the Act stipulates that: -

> ***"Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party."***

27. Section 32 (B) (3) on the other hand permits an arbitral tribunal to withhold the delivery of an award to the parties, as was the case in the instant application, until full payment of the Arbitrator's fees and expenses.

28. Having regard to the above cited sections of the Act, I will now turn to determine if the PO raised by the respondent is merited. As was stated in the oft cited case of ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1968] EA 697*** an objection taken up as a preliminary objection must proceed on the assumption that all facts pleaded by the applicant are uncontested.

29. In the instant case, it was that the Arbitrator issued a letter dated 12th November 2019 notifying the parties that the Award was ready for collection upon payment of the balance of the Tribunal fees. The said letter was worded, in part, as follows: -

> ***"This is to inform you that the Arbitral Award herein has been published in accordance with Section 22(1) Arbitration Act No. 4 of 1995. The same may be collected from my chambers upon payment of the attached final fee note."***

30. It was not disputed that the Award was eventually collected by the parties on 13th March 2020 and the instant application filed on 12 June 2020. The question which then arises is when, under the above circumstances, the 3 months' period stipulated under Section 35(3) started to run and what is expected of the Arbitral Tribunal under Section 32 (B) in terms of delivery of the Award to the parties. In other words, what does delivery mean on the context of Section 32(5)?

31. Black's Law Dictionary "Ninth Edition" defines delivery as follow: -

> ***"1. The formal act of transferring something, such as a deed, the giving or yielding possession or control of something to another. 2. The thing so transferred or conveyed."***

32. It is worth noting that as opposed to the delivery of judgments/rulings before our mainstream civil courts where Order 21 Rule 8(1) of the Civil Procedure Rules is specific that a decree shall bear the date of the day on which the judgment was delivered, Section 32(5) of the Act merely stipulates that the signed copy of the arbitral award shall be delivered to each party. A simple reading of the said section shows that it does not require the Arbitrator to send or dispatch the signed copy to the parties. To my mind, our legal regime regarding delivery of awards is different and distinguishable from the scenario that obtained in the cases cited by the respondent herein being; ***Union of India v Tecco Tricky Engineers*** CASE NO. Appeal (civil) 1784 of 2005, where the award was *physically delivered* to the office of the General Manager and ***Matter of Lowe (Erie Insurance Co.)*** 2008 NY Slip OP07735 where the statute there required the Arbitrator to deliver a copy of the award to each party *"in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested"*. In those cases, the Court held that delivery had to be construed as the date on which the award was received.

33. **My finding is that the applicable law in the above cited cases of *Union of India*** (*Supra*), and in ***Matter of Lowe*** (*supra*) contrasts with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, I find that delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties. (See ***University of Nairobi v Multiscope Consultancy Engineers Limited*** [2020] eKLR).

34. I am also guided by the decision in ***Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others*** **[2005] eKLR,** wherein Ransley J identified with Nyamu J on the meaning of the word 'delivered' and observed as follows: -

> ***"The question arises as to the meaning of "had received" the arbitral award.***
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> ***This question was raised before Mr. Justice Nyamu in the case of Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003 where he held that in order to comply with Sec 35(3) the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection.***
>
> ***In its normal meaning "receipt" means the actual obtaining of the arbitral award.***
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> ***In his ruling Nyamu, J has this to say about "receipt": at page 27 B***
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> ***"Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."***

35. What would then happen in the case where the arbitral tribunal withholds the delivery of the Award on the basis that the Arbitrators fees has not been paid as provided for under Section 32B of the Act which allows the tribunal to withhold the delivery of the award until full payment of such fees? Courts have held that in such an eventuality, time does not cease to run simply because parties have not taken steps to pay the Tribunal's fees so as to be able to get the Award. This was the finding in ***University of Nairobi v Multiscope Consultancy Engineers Limited*** (supra) where the court observed that: -

> ***"Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not***

delay or postpone delivery."

36. What of the applicant's argument that the court should consider the second part of Section 35(3) which provides for computation of time when a request has been made under Section 34 of the Act? According to the applicant, since it made an application under Section 34 of the Act on 26th March 2020 which was disposed of on 6th April 2020, then Section 35(3) contemplates that the 3 months' period commenced when that application is disposed of which means that the 3 months would run until 6th July 2020. With all due respect, I am not persuaded that the applicants argument is relevant or applicable in this case. I say so because a computation of 3 months from 12th November 2019 means that time lapsed on 11th February 2020 in which case, the applicant's application made under Section 34 of the Act on 26th March 2020 was made long after the 3 months' window period had expired.

37. My considered view is that the finality of arbitral awards and the expeditious nature of dispute resolution before an arbitral tribunal are the very reasons why parties opt to include arbitration clauses in their agreement. To this end, it would be foolhardy to have a law that provides for strict timelines and for parties to go for arbitration only to stall the process after notification of the delivery of the Award on the basis that either the arbitrator's fees has not been paid or that an application has been made under Section 34 of the Act.

38. Having regard to the findings and observations that I have made in this ruling, I uphold that preliminary objection dated 23rd June 2020 and hereby strike out the Notice of Motion filed by Geothermal and dated 12th June 2020. In view of the order striking out of the setting aside application, I find that nothing stands in the way of the enforcement of the Award. Consequently, I allow Lantech's enforcement application dated 3rd June 2020. I award the costs of the application to respondent (Lantech).

Dated, signed and delivered via Microsoft Teams at Nairobi this 16th day of December 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Angwenyi for respondent.

Mr. Masika for Lantench Respondent.

Court Assistant: Sylvia