REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPL. NO. E679 OF 2020

BETWEEN

CAPTURE SOLUTIONS LIMITED.....APPLICANT

AND

NAIROBI CITY WATER AND

SEWERAGE COMPANY LIMITED.....RESPONDENT

RULING NO. 2

Introduction

1. This matter was originated by the Applicant filing an application for recognition and enforcement of an arbitral award against the Respondent. Since the application was exhausted by the ruling adopting the award as a judgment of the court, the Respondent ought to have filed a separate cause for extension of time to lodge an appeal. As this point was not taken and neither party has suffered prejudice, I shall leave the matter. I shall refer to the parties in their original capacities for ease of reference.

2. The Respondent has now moved the court by a Notice of Motion dated 30th September 2020 made pursuant to several provisions of the law but more importantly **section 79G** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** and **section 39 (4)** of the ***Arbitration Act*** seeking, inter alia, the following orders:

> *[3] THAT this Court be pleased to Extend Time within Which the Intended Appellant/Applicant may File an Appeal from the **FINAL ARBITRAL AWARD Dated 27th December 2019** By Professor Ike Ehiribe on The Dispute Between Capture Solutions Limited and Nairobi City Water and Sewerage Company Limited.*
>
> *[4] THAT this Court be pleased to Stay the Issuance of a Decree from and the Execution of the **FINAL ARBITRAL AWARD Dated 27th December 2019** By Professor Ike Ehiribe on The Dispute Between Capture Solutions Limited and Nairobi City Water and Sewerage Company Limited pending the hearing and determination of the Appeal therefrom.*

3. The application is supported by the affidavit of Assumpta Reuben, the Respondent's Senior Legal Officer, sworn on 30th September 2020 and her further undated affidavit. The application is opposed through the replying affidavit of Lorenzo Boncompagni, a director of the Applicant, sworn on 9th October 2020. Both parties filed written submissions in support of their respective positions.

Background matters

4. As this is the second ruling in the matter, it is important to set out a brief history of the matter. The parties entered into two contracts ("the Contracts"). The first one was a Contract NWSC/72/16 for supply, delivery, development, installation, implementation and commissioning of GIS enabled system and meter census at a contract price of Kshs. 39,996,000.00 inclusive of Value Added Tax (VAT). The second one was Contract NWSC/73/16 for design, supply, delivery, development, installation and commissioning of workforce management at a contract price of Kshs. 118,802,000.00 inclusive of VAT. Save for the subject matter, the terms of the Contracts were the same in material terms. Following a dispute on the amount due under the Contracts, the Applicant invoked the arbitration clause at Clause 7.2 of the Contracts

and the disputes were referred to Professor Ike Ehiribe as the Sole Arbitrator.

The Final Award

5. After hearing the matter, the Arbitrator published the Final Award and found in favour of the Applicant as follows:

> *a) The Tribunal Declares that the Respondent is in breach of the two contracts dated 31st August 2017.*
>
> *b) The Tribunal Orders the Respondent to pay to the Claimant the total sum of Kshs. 57,729,720 inclusive of VAT at 16% being cost of remedying the Respondent's breached of contracts within thirty days of the date of the award.*
>
> *c) The Tribunal Orders the Respondent to pay to the Claimant the accrued interest at simple interest of 12% per annum on the said sum of Kshs 57,729,720 from the commencement of proceedings being 01 November 2018 until payment in full.*
>
> *d) The Tribunal Orders the Respondent to reimburse the Claimant for initial Kshs 20,000 paid to the Chartered Institute of Arbitrators Kenya Branch for the arbitrator appointment and the reimbursement of 50% of the arbitrator's fee and expenses in the sum of UKP7500.00 with simple interest at 12% per annum from the date of publication of the award until payment in full.*

6. Upon publication of the Final Award, the Applicant filed the Chamber Summons dated 18th July 2020 under **section 36** of the ***Arbitration Act*** seeking orders that the Final Award published by Prof. Ike Ehiribe dated 27th December 2019 ("the Final Award") be recognised, adopted and enforced as a decree of this court. I heard the application and by a ruling dated 27th August 2020, I allowed the application. Consequently, the Applicant extracted a decree and proceeded to apply for execution.

Respondent's Case

7. The Respondent now seeks to exercise its right of appeal reserved under Clause 17 of the subject Contracts as follows:

> *17.3 Either party shall upon the conclusion of the arbitration be at liberty to appeal to the High Court against the decision of the arbitrator.*

8. Counsel for the Respondent addressed the court on two aspects of the intended appeal. First, the right of appeal and second, whether the respondent has made out a case for the extension of time to file the appeal out of time.

9. The Respondent submitted that its right to appeal against the Final Award is a contractual right which has not been extinguished. That the right is wide and from a reading of the arbitration clause, it is not time bound and is only subject to the contractual limitation of time being 6 years pursuant to **section 4(a)** of the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***. Notwithstanding the contractual provisions, counsel relied on **section 39** of the ***Arbitration Act*** and in particular **section 39(2)** thereof which gives the High Court appellate jurisdiction in certain circumstances while **section 39(4)** provides for the manner in which an appeal is lodged as follows:

> *39 (4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the rules of Court applicable, as the case may be in the High Court or the Court of Appeal.*

10. Following those provisions, counsel submitted that the time limit within which an appeal may be brought to the High Court is governed by **section 79G** of the ***Civil Procedure Act*** which sets a time limit of 30 days from the date of the decree for filing an appeal to the High Court from the Subordinate Court. He pointed out that the High Court may admit an appeal out time, *"…. if the appellant satisfies the court he had good cause for not filing the appeal in time"*

11. On the issue of extension of time, the Respondent's case is that the period between the time it received the arbitral award and the time it filed this application is accounted for by the time it took to resist the Applicant's application seeking recognition and enforcement of the award. In addition, the Respondent explained that after it received the award, it could not take further action as there was delay in appointing persons to substantive positions in the management who are charged with the responsibility of giving directions on how the matter should proceed.

12. Counsel relied on the decision in ***Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others*** **SCK App. No. 16 of 2014 [2014] eKLR** to submit that the court has unfettered discretion to determine the matter and in doing so it has to consider the facts of the case.

13. The Respondent further submitted that there was a serious public interest at stake and that the appeal was arguable to the extent that the court shall be called upon to consider whether the Contracts were performed and ultimately whether the public should pay for goods and services, which it argues, were never supplied. It further argues that the Contract did not even commence in the manner contemplated and hence the rights claimed by the Applicant do not arise at all. The Respondent also referred to serious breaches of the ***Public Procurement and Disposal Act*** which should not be allowed to stand without challenging of the Final Award.

14. Counsel for the Respondent maintained that the right of appeal is not extinguished by the recognition of the Final Award as there is nothing in the ***Arbitration Act*** that prevents the Court from considering an appeal after it has heard an application for recognition and enforcement and indeed nothing prevents the Court from setting aside the award upon hearing such appeal.

Applicant's Case

15. The Applicant opposed the application on the ground that the Respondent's *"plausible and credible"* reasons are invalid as the Respondent's Board of Directors and management was properly constituted at all material times, hence competent to make decisions on the Respondent's behalf. It argued that once the Respondent received the copy of the Final Arbitral Award, it should have moved with speed to have it set aside if it disputed the outcome. It accused the Respondent of waiting for the Applicant to move to this Court to have the Final Award recognized and enforced before applying for extension of time. Counsel relied on the decision in ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **HC COMM Misc. No. E083 of 2019 [2020] eKLR** to emphasize the principles of expeditious disposal and finality that underpin the ***Arbitration Act***.

Determination

16. It is not in dispute that the Respondent has a contractual right of appeal. **Under section 39 of the *Arbitration Act***, the High Court is only permitted to intervene against arbitral award through an appeal process where, *"the parties have agreed"* to appeal and the appeal is restricted to determining, *"any question of law arising in the course of arbitration or out of the award."*

17. **Since section 39(4) of the *Arbitration Act*** provides that any appeal shall be filed within the timelines prescribed by the Court of Appeal or the High Court as the case may be, whether or not to extend time for lodging the appeal is governed by **section 79G of the *Civil Procedure Act*.** Even in the absence of an enabling provision in the ***Arbitration Act***, the ***Civil Procedure Act*** would apply by reason of **section 89** thereof which makes it a statute of general application in proceedings of a civil nature. Under the proviso to **section 79G**, an applicant who wishes to benefit from the court's discretion must demonstrate sufficient cause for not filing the appeal within the stipulated time.

18. The decision whether or not to extend time, is a discretion of the court. While the court has unfettered discretion to extend time, that discretion must be exercised judiciously. The factors the court may consider were distilled by the Supreme Court in ***Nicholas Kiptoo Arap Salat v IEBC and 7 Others*** **(Supra)** as follows:

> *1. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
>
> *2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
>
> *3. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
>
> *4. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
>
> *5. Whether the application has been brought without undue delay*; and
>
> *6. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

19. In considering the Respondent's application, I think it is important to outline the key events. The Final Award was published on 27th December 2019. Under **section 35(3)** of the ***Arbitration Act***, the Respondent had 3 months from the date of publication of the award to apply to set it aside. The Applicant filed its application seeking recognition and enforcement of the Final Award in July 2020. The application was disposed of by my ruling on 27th August 2020. The application to enlarge time was filed on 1st October 2020.

20. In the deposition in support of the application, the Respondent states that there has been a delay of 7 months and 10 days in filing a memorandum of appeal. It explains that the decision to appeal was delayed on account of changes in the management and it is only when the substantive office holders were confirmed that the matter was reviewed and instructions given for filing this application.

21. I agree with the Applicant that the reasons given for the delay in filing the appeal are not credible. The Respondent has not explained or disclosed what changes in the management prevented it from filing a memorandum of appeal. It has not disclosed what changes took place and when they took place. I raise these issues because the Respondent fully participated in the application to enforce the award and indeed resisted the application for the same reasons and the same basis it now seeks to proffer the appeal and that is why I stated in the ruling that:

> *[18] I will also add under Clause 17.3 of the Contracts, the parties reserved the right of appeal to the High Court, but the Respondent did not lodge its appeal within the time limited for appeal in line with **section 39(2)** of the **Act** but instead opted to oppose the application for recognition and enforcement of the Final Award. The court must therefore be careful to avoid entering into the arena of an appellate court by reviewing the award and correcting errors of law and fact when the parties have agreed that a determination by the Arbitrator is final ……..*

22. The Respondent argued that in the ruling I recognised the fact that it has a right of appeal and suggested that exercise of the right was still open. The only reason I alluded to the right of appeal is to disabuse the Respondent of the argument that it could argue the merits of the Final Award in resisting an application for recognition and enforcement. That decision however, reinforces the position that the Respondent was at all times aware of the Final Award, its implication and of its right to appeal under the Contracts.

23. The Respondent has argued that the award is substantial and raised several issues worthy of consideration and that it is in public interest that the Respondent be given the opportunity to ventilate its case. While I do not doubt the importance of the case and the gravity of issues raised, those issues ought to have alerted the Respondent of the need to act with speed to protect its interests.

24. I also take the view that the application must be viewed in the context of the arbitral process and the timelines applicable. This was underlined by Tuiyott J., in ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **[2020] eKLR** where he observed as follows;

> *I have had to ponder why limitation of time is imposed on a setting aside application and not that for recognition or enforcement (Section 37 of The Act). And it is instructive that the UNCITRAL Model Law on International Commercial Arbitration from which our statute heavily borrows is similar in this respect. It has to come down to, again, the finality and expeditious principles of Arbitration. Arbitration is a binding dispute resolution mechanism contracted by parties. It is expected that parties will accept the answer an arbitral tribunal gives to a dispute they place before it. If, however, any party is aggrieved then it should raise its grievance at once so that it is addressed in speedy fashion that it is not inimical to expeditious disposal of the dispute. For that reason, setting aside motions are time bound.*

25. Although the learned judge was speaking of the time lines for an application to set aside, the principles of expeditious disposal, timeliness and finality are the reasons why parties elect arbitration as a mode of dispute resolution. Even where an appeal is reserved by the parties, they are still under an obligation to act with promptness so as not to undermine the whole purpose of invoking arbitration as a dispute resolution process. I therefore reject that the proposition by counsel for the Respondent that the contractual right of appeal following an arbitral award is undetermined, open ended and co-extensive with the time limited for filing actions under the ***Limitation of Actions Act***.

26. This brings me to the final issue for resolution, whether the right of appeal is extinguished by the order of recognition and enforcement of the Final Award. In essence and by reason of the decree, the Final Award ceased to exist independently and became a judgment of this court and enforceable as such. It is said that the Final Award has therefore merged into a judgment of this court under the doctrine of merger. This doctrine was explained in ***Virgin Atlantic Airways Limited v Zodiac Seats Limited*** **[2013] UKSC 46** as follows:

> *[T]here is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon judgment ……. it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see* ***King v Hoare (1844) 13M & W 494, 504 (Parke B)***.

27. It follows that the Respondent's only recourse is against the judgment and not the Final Award and that any rights under the Contracts and indeed the right of appeal were extinguished once the Final Award merged into a judgment of this court. This goes to buttress the fact that the right of appeal is not unlimited and must be exercised within the framework of the ***Arbitration Act*** bearing in mind that the successful party had the statutory right to enforce the award after the 3-month time limited for setting aside the award has lapsed. To allow an unsuccessful party to sleep on its contractual right of appeal for an indefinite period would prejudice or indeed take away the successful party's right to insist on speedy enforcement of the award.

Conclusion

28. In conclusion, I find and hold that the Respondent has not given sufficient explanation why it failed to file its appeal within the period of 7 months. The reasons given are insufficient to tilt the court's discretion in its favour given that the Respondent knew that it had a right to appeal, resisted the application to enforce the award on the same grounds it now wishes to raise in the proposed appeal.

29. The court cannot ignore the statutory time frames, context and objects of the ***Arbitration Act***, as I have stated, in determining whether the Respondent acted within a reasonable time (see ***Vania Investment Pool Limited v Capital Markets Authority and 8 Others*** **NRB CA Civil Appeal No. 92 of 2014 [2014] eKLR**). In my view, a period of 7 months to appeal against an arbitral award is inordinate.

30. Finally, the Final Award has now merged into a judgment and decree of this court. It has ceased to have an independent existence hence the contractual right of appeal is extinguished. Having reached this conclusion, the Notice of Motion dated 30th September 2020 must be dismissed.

Disposition

31. The Notice of Motion dated 30th September 2020 is hereby dismissed with costs to the Applicant.

DATED and DELIVERED at NAIROBI this 14th day of DECEMBER 2020

D. S. MAJANJA

JUDGE

Mr Gitonga instructed by Majau Maitethia and Associates Advocates for the applicant.

Mr Marete instructed by Kithinji Marete and Company Advocates for the respondent.