REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 230 OF 2017

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF THE ARBITRATION

BETWEEN

PANGEA DEVELOPMENT HOLDINGS LTD.....CLAIMANT/APPLICANT

VERSUS

HACIENDA DEVELOPMENT LIMITED.....1ST RESPONDENT

ADAM TULLER .....2ND RESPONDENT

RULING

1. The Motion before Court is dated 27th July 2018 for the following Orders:-

    1. THAT the Honourable Court be pleased to grant an Order for enlargement of the thirty (30) day limitation period from the making of the Final Arbitral Award within which the Sole Arbitrator can amend the Final Arbitral Award delivered on the 30th day of September 2016.

    2. THAT the Honourable Court be pleased to grant the Sole Arbitrator, Mr. Njoroge Regeru leave to amend out of time the Arbitral Award delivered on the 30th day of September 2016 pending recognition and enforcement of the said Arbitral Award as a Decree of the Court.

    3. THAT the Honourable Court be pleased to grant any other orders it may deem just and necessary.

    4. THAT costs of this Application be in the cause.

The Application is said to be brought under the provisions of Article 159(2)(d), Section 34 of the Arbitration Act (hereinafter the Act), Order 51 Rule 1 of the Civil Procedure Rules 2010 and other enabling provisions of the Law.

2. Let me give a short backdrop to this request by Pangea Development Holdings Limited (The Claimant or Pangea). A dispute between Pangea on the one part and Hacienda Development Holdings Limited (Hacienda or the 1st Respondent) and Adam Tuller (The 2nd Respondent) on the second part, was referred to Arbitration before Counsel Njoroge Regeru as the Sole Arbitrator. The Sole Arbitrator delivered a Final Arbitration Award in the matter on 30th September 2016.

3. By an application dated 4th July 2017, the Claimant sought leave of Court under the provisions of Section 36 of the Act to enforce the Arbitration Award. On the other hand, the Respondents by an application dated 28th August 2017 sought to have the Award set aside and declared null and void. This latter application was declined by Court on 13th April 2018.

4. But on 19th January 2018, in the course of arguing both applications, it became apparent to Counsel for the Claimant that there was an error in paragraph 12.2 of the Award and Counsel sought to have the hearing of the Claimant's application stayed. This would give the Claimant an opportunity to request the Arbitrator to correct it through the procedure provided under Section 34 of the Act.

5. Paragraph 12.2 of the Award reads; "*I hereby declare, find and hold that any change of shareholding in Hacienda Development Holdings Limited after 30th August 2016 is null and void*". The Claimant states that the year is erroneous and ought to be 2006. The Claimant seeks its correction so that this Order would be in accord with the spirit of the Award and points out to paragraph 7.1.6(b) of the Award in which the Arbitrator set out one of the Prayers sought by the Claimant to be;-

> "*A declaration that any change of shareholding in Hacienda Development Holdings Limited after 30th August 2006 (The date of the shareholding agreement is null and void*)"

6. The Claimant takes the position that the error is detrimental to its Claim as the changes in shareholding in Hacienda Development Holdings Limited since 30th August 2006 was the subject of the dispute and the effect of the error would be to validate them. Something that would be inconsistent with the spirit of the Award!

7. In support of the application, Crispine Odhiambo Counsel for the Claimant, swore an affidavit on 27th July 2018 in which he depones that the typographical error was inadvertently missed out before the 30 day period provided under Section 34 of the Act. It is also deponed that the Sole Arbitrator himself has acknowledged the existence of the error in an Affidavit sworn on 7th November 2017.

8. The Respondents oppose the application for, amongst other reasons, that the Court has no power to extend the time provided under Section 34 of the Act. And that in any event, even if such discretion existed, it should not be made in favour of the Claimant.

9. At the heart of this matter are the provisions under Section 34 of the Act which provides:-

> "(1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties—
>
> (a) a party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and
>
> (b) a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.
>
> (2) If the tribunal considers a request made under subsection (1) to be justified it shall, after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.
>
> (3) The arbitral tribunal may correct any error of the type referred to in subsection (1)(a) on its own initiative within 30 days after the date of the arbitral award.
>
> (4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.
>
> (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or (5).
>
> (7) Section 32 shall apply to a correction or an interpretation of the arbitral award or to an additional arbitral award made under this section".

10. As would be clear from these provisions, an Arbitral Tribunal can make corrections of its Arbitral Award either on its own motion or at the instance of a Party to the Arbitration. This power to correct is akin to the power granted to Court in respect to slips under the provisions of Section 99 of The Civil Procedure Code. The power, however, is limited to correction of computation errors, clerical, typographic errors or errors of similar nature.

11. The period within which a party can move Court to make a correction is within 30 days after receipt of the Award. Where the Tribunal acts on its own motion or initiative then the correction must be effected within 30 days. The prescription of relatively short timelines seems to this Court to be in tandem with the spirit that one of the virtues of Arbitration is speedy resolution of disputes.

12. The statute does not provide for extension of time under the provisions of Section 34. That said, it can be argued that, notwithstanding the absence of express provisions to permit extension, a Court can use inherent powers to grant extension in exceptional circumstances. But even if the Court was to accept that proposition, the extension of time should not negate on speedy resolution of a dispute which ought to be a hallmark of Arbitration. And the Court must add that given the strict timelines of Section 34, a party to an Arbitration ought to be extremely vigilant in reading and understanding the Arbitral Award so that any errors can be noticed on time and remedial steps taken within

the constrained time frame prescribed.

13. What are the circumstances of the matter at hand? The Arbitral Award was delivered on 30th September 2016. By his admission, Counsel for Claimant asserts that Mr. Njoroge Regeru (The Arbitrator) had at least by 7th November 2017 noticed the error sought to be corrected. Of importance is that this was in an Affidavit filed in this Court on 8th November 2017 and on the face of it shows that the firm of Kiptiness & Odhiambo Associates received a copy thereof on 9th November 2017 at 11.16am. Kiptiness & Odhiambo Associates were and are still the Advocates on record for the Claimant.

14. If, for some excusable reason, the Claimant and his advocates had failed to notice the error within 30 days of 30th September 2016 (the date of the Award), then it is expected that they should have noticed it so soon after they were served with the Arbitrators affidavit on 9th November 2017.

15. Still there was no action on the part of the Claimant to have the error rectified. Further still by the time when, on 19th January 2018, the error was pointed out to Court by Mr. Kinyua appearing for the Respondents and in the presence of Counsel for the Claimant, no action had been taken.

16. The chronology of events shows that even if the period before 9th November 2017 can be excused, no reason has been given why the present application for extension was not filed by 19th January 2018, more than 2 months thereafter. Worse still it took the Claimant another six months, from 19th January 2018 to 27th July 2018 to file the current application. That further delay is again not explained.

17. The only conclusion to be drawn is that the delay is extremely inordinate. The application comes 27 months after the statutory deadline and no explanation or good explanation is given for this lengthy inaction. The delay is not excusable. While the Claimant tells Court that the error is fatal to the Claim, the Claimant has not acted diligently in the matter and only has itself to blame.

18. The Notice of Motion of 27th July 2018 is hereby dismissed with costs.

Dated, delivered and signed in open Court at Nairobi this 25th day of January, 2019.

……..

F. TUIYOTT

JUDGE

Present:-

Omondi for Kubo for Claimant

Kinyua for Respondent

Nixon – Court Assistant