REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CAUSE NO.E 094 OF 2018

IN THE MATTER OF ARBITRATION ACT, 1995

IN THE MATTER OF ARBITRATION RULES, 1997 RULES 2

BETWEEN

EASY PROPERTIES LIMITED .....PLAINTIFF

VERSUS

EXPRESS CONNECTIONS LIMITED…...CLAIMANT/1ST RESPONDENT

RULING

Before this Court is the Originating Summons dated **27th September 2018** by which **EASY PROPERTIES LIMITED** (the Applicant herein) seeks Orders as follows:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. THAT this Honourable Court do issue an order adopting the Applicant's expert evidence MAGA STRUCTURAL ENGINEERS REPORT already on the record of the tribunal.**
>
> **4. THAT the High Court do issue a warrant compelling ENGINEER ANTHONY MACHARIA GATUNE to appear before the tribunal and testify.**
>
> **5. THAT in the alternative this Honourable Court do issue an order allowing the Applicant to provide an alternative expert witness to produce the report by Maga Structural Engineers.**
>
> **6. THAT the costs of this application be in the cause."**

The application was premised upon **Articles 50(1), 165(b) and 165(7)** of the **Constitution of Kenya, Sections 3, 3A** of the **Civil Procedure Act, Order 351 Civil Procedure Rules and Sections 7, 27 and 28 of the Arbitration Act,** and **Rule 2 Arbitration Rules 1997** as well as all other enabling provisions of the law. The same was supported by the affidavit sworn on **27th September 2018** by **PAMELLA ONYAMBU** a director of the Applicant Company.

The 1st Respondent **EXPRESS CONNECTIONS LIMITED** filed Grounds of Opposition dated **18th October 2018**, whilst the 2nd Respondent **MR ALLEN WAIYAKI GICHUHI**, the sole Arbitrator indicated to the court that he did not intend to participate in these proceedings, but could abide by the decision of the court.

The Court directed that the matter proceed by way of written submissions. The Applicant filed their written submissions on **30th October 2018**, whilst the Respondent filed their written submissions on **29th October 2018**. The parties appeared before the court on **31st October 2018** to highlight these written submissions.

BACKGROUND

The Applicant and the 1st Respondent in this matter are involved in arbitration proceedings before a sole arbitrator (the 2nd Respondent herein). The Applicant avers that in the course of the ongoing arbitral proceedings specifically on **1st August 2018**, the matter was scheduled for hearing and the Applicant was to call their final witness an Engineer **Anthony Gatune** who was an expert witness. Prior to that hearing date the expert witness had informed the Applicant's Advocate of his unavailability on that date and time as he was engaged in administering examinations to university students. Despite the sole arbitrator being informed of these developments and of the unavailability of the expert witness to testify, he nevertheless proceeded to arbitrarily close the Applicants' case and directed the parties to file submissions in the matter.

The Applicant pleads that this was a crucial witness whose role was to produce an expert report prepared by **Maga Structural Engineers** and the closure of the Applicants case before this witness could testify amounted to denying them the right to present expert evidence to counter evidence which had been tendered before the tribunal, thus their constitutional right to a fair hearing had been breached on the basis of a purely technical issue. The applicant avers that it would be in the interest of justice to allow the present application.

On their part the 1st Respondent have submitted that the Originating Summons dated **27th September 2018** is misconceived, bad in law and devoid of any merit. That the application is in effect a "**backdoor appeal**" against the sole Arbitrators Interim Award dated **1st August 2018**. The 1st Respondent view is that the Applicant's case was closed not arbitrarily as alleged but for good reasons and that the Applicant cannot seek the intervention of the High Court to cure its non-compliance with the clear directions made by the sole Arbitrator. The Respondent further submits that Section 10 of the Arbitration Act restricts the manner in which the Court can intervene in arbitration matters and that this court has no jurisdiction to interfere with the Arbitral proceedings or with the powers of the Arbitrator in the discharge of his mandate under the Arbitration Act. Finally the respondent submits that this application is merely a delaying tactic aimed at hijacking the speedy conclusion of the arbitral proceedings and ought to be dismissed in its entirety.

ANALYSIS AND DETERMINATION

I have carefully considered the rival submissions in this matter as well as the relevant law and the authority cited. In my view only one matter arises for determination. That is whether this court has the jurisdiction to interfere with ongoing Arbitration proceedings.

In urging this application the Applicant has sought to rely upon **Article 165(b)** and **165(7)** of the Constitution of Kenya 2010, which provisions bestow upon the High Court the powers to call for the record of any proceedings including proceedings before an arbitration tribunal to ensure the fair administration of justice. The applicant has additionally sought to rely upon **Section 27(2)** of the Arbitration Act which allows a party to present expert witnesses before an arbitral tribunal. The applicant contends that the decision by the sole arbitrator to close their case before the testimony of their experts witness was received, meant that the report prepared by "**Maga Structural Engineers"** was locked out, which amounted to a gross violation of the Applicants right to prevent evidence before the tribunal.

Arbitral proceedings in Kenya are governed by the **Arbitration Act CAP 49**, **Laws of Kenya**. The powers of an Arbitral Tribunal are anchored in this Act. The High Court has no business supervising an arbitrator in the discharge of his/her mandate under the law. Section 10 of the Arbitration Act clearly provides:-

> **".. Except as provided in this Act, no court shall intervene in matters governed by this Act.**

In **KAY CONSTRUCTION CO. LTD –VS- AG. & Another, HCC APP No.130 of 2011 Justice Ogolla** held as follows:-

> **"…the court under Section 10 of the arbitration act had a limited role in intervening in matters where parties have agreed to refer matters to arbitration except where the act specifically provided for such intervention. The court consequently held that the said provision was mandatory and <u>that the Court's role in arbitration matters was merely a facilitative one</u>".** [own emphasis]

The Key object of Alternative Dispute Resolution which includes Arbitration is to afford to parties the fair resolution of disputes without unnecessary delay and/or expense. ADR exists to reduce from the courts the pressure from the ever increasing number of litigants turning to the courts for redress. Therefore Section 10 of the Arbitration Act correctly in my view excludes from the jurisdiction of the High Court matters which fall within the mandate of the Arbitrator under the Act. It would defeat the purpose of ADR for parties to rush to court to challenge every single decision/award made by an arbitrator. In **EPCO BUILDERS LIMITED –VS- ADAMS MARJAN – Arbitrator & Another, Civil Appeal No 248 of 2005, Justice Deverell** (as he then was) observed as follows:-

> **"If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during an arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the Arbitration Act 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR."**

Likewise in **SAMUEL KAMAU MUHINDI –VS- BLUE SHIELD INSURANCE COMPANY LTD 2010 eKLR,** it was held that:-

> **"When parties enter into an arbitration agreement they have essentially agreed that they will have autonomy in regard to**

how any dispute arising out of the agreement shall be determined. <u>That autonomy excludes intervention by the Court unless under the specific circumstances provided under the Arbitration Act</u>." (own emphasis)

Section 7 of the Arbitration Act upon which this application is premised provides as follows:-

> **"7 Interim measures by Court**
>
> **(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.**
>
> **(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."**

The import of this provision is that the Act only envisages the intervention of the High Court in an arbitration process for the aim only of preserving the subject matter of the arbitration proceedings so as not to render the entire arbitral process nugatory. Section 7 would only come into play where there exists some urgency requiring protection.

In **CETELEM -VS- ROUST HOLDINGS [2005] EWCA CW 618** the Court held as follows:-

> **"The whole purpose of giving the court power to make such orders [injunctive orders] is to assist the arbitral process in cases of urgency before there is arbitration on foot… Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, <u>that the substantive questions are reserved for the arbitrator or arbitrators</u> [**own emphasis**]**

The Court should resist calls to delve into the Arbitral process by making orders which go towards resolving the dispute between the parties as these are matters which lie exclusively within the mandate of the arbitrator.

There has been no allegation by the Applicant in this matter that the subject matter of the arbitral proceedings is in any danger of being dissipated. The Applicants grievance is that the arbitrator failed to hear their expert witness and thereby the report by **Maga Structural Engineers** was not adopted. The Arbitrator did make a ruling in this regard being the Interim Award dated **1st August 2018**. If litigants are allowed and/or encouraged to rush to court every time a decision made by the arbitrator displeased them, then the whole object of arbitration would fail.

The Applicant in urging his position sought to rely on the Constitution of Kenya as well as on **Section 3A** of the Civil Procedure Act. The Arbitration Act is a complete code which vide Section 19 exhorts arbitrators to conduct their proceedings impartially. Regarding the inherent powers of the Court provides by **Section 3A**. I am in full agreement with the finding of **Hon Onyango Otieno who in PROVINCIAL INSURANCE COMPANY LTD –VS- JOSEPH MURIUKI KENYATTI & ANOTHER 1998 eKLR** as follows:-

> **"My understanding of this Section [3A] is that it gives powers under the act to ensure justice and four play. It does not give the Court powers to ignore provisions which clearly state what ought to be done in certain circumstances. In this matter Section 10 [of the Arbitration Act] is clear and states clearly as I have quoted above that except as provided by the Arbitrators Act, no court shall intervene in matters governed by the Act. Thus I cannot use Section 3A of the Civil Procedure to ignore this provision…"**

Based on the foregoing I find that this application does not raise a matter which requires the courts intervention in the ongoing arbitral process. The Arbitration Act is a complete code and party autonomy ought to be respected. Outside of Section 10 of the Arbitration Act, this Court has no jurisdiction to interfere with the arbitration process. Accordingly I do dismiss in its entirety the application dated **27th September 2018** and award costs to the Respondent.

Dated and Delivered in **Nairobi** this **21st** day of **FEBRUARY** 2019.

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Justice Maureen A. Odero