



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

MISC APPLICATION NO. 270 OF 2018 CONSOLIDATED WITH

MISC APPLICATION NO. 349 OF 2018

IN THE MATTER OF THE ARBITRATION ACT NO.4 OF 1995 & IN THE ARBITRATION RULES 1997

AND

IN THE MATTER OF SETTING ASIDE OF THE ARBITRATION AWARD

BETWEEN

FARM ENGINEERING INDUSTRIES LIMITED.....APPLICANT

VERSUS

PATEL KALYANJI PREMJI & CO.....RESPONDENT

RULING

PRELIMINARY OBJECTION

The Applicant filed a Notice of Preliminary Objection dated 16th October 2018 raising the following question(s) of law against the Respondent's application;

1. The application dated 6th August 2018 was filed by the Respondent after 3 months elapsed from the date when the Applicant received the arbitral award in accordance with **35(3) of the Arbitration Act** and hence it is time barred.

The grounds for the preliminary objection were;

- a) **The Arbitral Tribunal notified the parties of the Arbitrator's award on 19th February 2018. The Respondent paid its apportionment of Kshs 552,500/- via a cheque on the 21st of March 2018 to the Arbitrator, and went on to pay the Applicant's portion the said applicant refused to pay its portion of Kshs 552,500/-.**
- b) **The Respondent on the 8th of May 2018 after paying the full arbitrators fees forwarded the original award to the applicant on the same date.**

The Respondent also filed a replying affidavit opposing the Applicants notice of motion dated 6th August 2018.

The Respondent stated that the arbitral tribunal notified the parties on the 19th of February 2018 that the award was ready for collection upon the payment of arbitrator's fees, Kshs 1,105,000/= to be apportioned to all parties in the sum of Kshs 552,500/-

The Respondent paid his portion of Kshs 552,500/- on 21st March 2018 and waited upon the Applicant to make good of its portion of the arbitrators fees which was in vain hence forcing the Respondent to pay for the Applicant's portion of the fees as per document marked in **PKP 5&6.**

APPLICATION DATED 6TH AUGUST 2018

The Applicant approached the court and sought orders;

a. The court stays/ sets aside the enforcement of the arbitral award dated 19th February 2018

On the grounds that;

b. The impugned arbitral award deals with a dispute not falling within the scope of arbitration

c. There was no cause action that necessitated arbitration as there was no notice given to the Applicant of any dispute within 90 days of the discovery of the issue giving rise to the dispute as provided for under clause 45.3 of the Agreement and Conditions of Contract for Building Works.

d. There was no payment certificate issued to the Applicant or a demand on the balance of work done valued at kshs 2,436,428.00 hence no interest can be levied on the said amount.

e. There was no basis for ascertaining the rationale of the demand for the balance of work done as no Quantity Surveyor had issued a valuation for work done pursuant to **clause 34.1** of the Agreement and Conditions of Contract for Building Works

f. The arbitral award is contrary to public policy in the construction industry as there was no certificate of practical completion issued by the Respondent yet the Arbitrator in his final account at par.26.0 of the Award held that the Architect's Report was conclusive evidence that works were properly done.

CLAIMANT'S SUBMISSIONS TO THE APPLICANT'S PRELIMINARY OBJECTION

The Claimant relied on **Section 35(3) of the Arbitration Act** which provides that;

“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.”

The Claimant went further to state that both the Applicant and the Respondent were notified of the Arbitrator's award on the 19th of February 2018 subject to the arbitrator's fees of Kshs 1,105,000/-

Due to the Respondent's failure to pay its portion of the arbitrator's fees, the Applicant went ahead and paid the Respondent's portion of the fees, after which it received the original award on 8th May 2018 and the Respondent acknowledged receipt on the same day.

The Claimant argued that by virtue of **Section 35(3) of the Arbitration Act**, 90 days ended on 5th August 2018 whereas the Respondent filed its Notice of application seeking to stay the enforcement of the arbitral award which was filed on 9th August 2018.

The Claimant urged the court to be guided by the case of *Anne Mumbi Hinga vs Victoria Njoki Gathara [2009]eKLR*, where the court stated that,

“it is quite clear to us that it was wrong for the court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995.”

The case of *Kenyatta International Convention Centre (KICC) vs Greenstar Systems Ltd [2018] eKLR* sought that the Arbitration Act should be strictly followed as the court held that;

*“Thus, there being no provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35(3) of the Act is imperative, and comports well with the principle of finality in arbitration. Indeed in the *Anne Mumbi Hinga Case*, the Court of Appeal proceeded to hold, in no uncertain terms, that Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award. And, it is now well settled that the time of delivery and receipt of Award is equivalent to the date of notice by the Arbitrator. In *Transworld Safaris Limited vs. Eagle Aviation Limited & 3 Others* for instance, Nyamu J. expressed this view thus upon an analysis of relevant precedent, with which I am in agreement:*

“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.”

The Applicant also relied on the case of *Heva Fund LLP vs Katchy Collections Ltd[2018]eKLR* where the court held that;

“Under the provision of the Arbitration Act, there is no provision specifically providing for extension of time and in my view for extension of time to be granted the Applicant has to demonstrate sufficient cause for court to make orders for in its favour. Three (3) months period within which to file an application to set aside the final award is sufficient time to necessary take action; further in this matter the Applicant should blame no one but itself. Having considered the final submissions by the Applicant for delay in filing the application I find the same to be an afterthought, as the Applicant was aware of the decision according to it within the two months since the award was published; yet it sat down without taking any action for a period of 3 more months. I find no reason to grant extension of time to file an application out of time.”

DETERMINATION

The court has considered the above preliminary objection and has considered the main issue to be;

1. Whether the application dated 6th August 2018 was/is time barred.

This Court first mentioned the matter on 12th February 2019 *interpartes* where both Court files were consolidated and the Preliminary Objection was to be disposed of first. Each party was to file and exchange written submissions and high lighting of the same was slated for 20th March 2019. On 20th March 2019 the Court was not sitting and the Deputy Registrar handled the same and gave the date of 21st May 2019.

On 21st May 2019, Mr. Kibet Counsel for Respondent stated they filed written submissions and would not submit orally. Mr. Mikowan Counsel held brief for Mr. Gitonga for the Applicant and he also confirmed that they filed written submissions and they did not wish to submit orally.

I have not found the said written submissions by the Claimant/Applicant filed on 8th March 2019 and considered the same. Strangely, despite Counsel for the Respondent confirming in Court that they filed written submissions to the Preliminary Objection, the said submissions if filed did not find way to the Court file.

Hence the Ruling on the Preliminary Objection is suspended to allow /Respondent the filing of written submissions as confirmed in court before the Court concludes the determination of the Question of law.

COURTORDER

The matter shall be mentioned in Court in the New Term and parties through Counsel to confirm the issue of Written Submissions from the Respondents before the Ruling is completed.

On 20th September 2019 the Written Submissions were provided.

RESPONDENT’S SUBMISSIONS

The Respondent to the Preliminary Objection stated as follows;

- a) **Section 2 of the Interpretation and General provisions Act Cap 2 Laws of Kenya** refers to calendar month.
- b) **Order 50 Rule 1 Civil Procedure Rules provides;**

Where the word month occurs in any document which is part of any legal document which is part of any legal procedure... such time shall be computed by calendar month.

- c) The Respondent relied on *Migotti vs Colvill (1879) CPD 233 & Albert Mario Cordeino & Anor vs Vishram Shamji(2015) eKLR* on computation of 3months which should be by calendar days 3 months.
- d) The respondent stated that they were not aware that the Arbitral award was ready for collection and the Respondent wrote a letter dated 8th May 2018 purporting to have enclosed the said arbitral award, however the same was not enclosed and upon inquiry the Arbitral award was finally received on 10th May 2018.

DETERMINATION

The Arbitrator’s award was/is of 19th February 2018

The Applicant to the Preliminary Objection stated that upon the Arbitrator’s notice of the award on 19th February 2018 to both parties, the Applicant paid its apportionment of the Arbitrator’s fees on 21st March 2018 and paid the Respondent’s portion after the Applicant failed and/or refused to pay its share.

Evidence of these facts are annexed to Notice of Preliminary Objection as follows;

- a) Letter dated 7th May 2018 from the Applicant’s Advocate

- b) Letter of 9th February 2018 from the Arbitrator to both parties of the Arbitrator's award ready for collection.
- c) Copy of cheque dated 20th March 2018 of Ksh 552,500/- Applicant's portion of Arbitrator's fee
- d) Letter of 21st March 2018 from Applicant's advocate to Arbitrator enclosing cheque for part payment/share payment.
- e) Copy of Receipts that the Arbitrator was fully paid by the Applicant of both portions of Arbitrators fee.

It is borne out by the above annexures that the Arbitrator notified both parties of the Arbitral award on 19th February 2018 contrary to the Respondent 's claim that they not notified and made aware Arbitral award as claimed at **paragraph 18 & 19** of the submissions

The Respondent admits at paragraph 22 of the submissions that Arbitrator's fees were paid on their behalf by the Applicant.

The Respondent states that he was served with the Arbitral award on 8th May 2018 but the Arbitral award was not included and it was finally received on 10th May 2019.

The Applicant's letter of 7th May 2019 which was received on 8th May 2018 by the Respondent reads;

'The awards for both parties were thus released to him. We enclosed herein your client's copy.'

The Respondent has not produced any document to prove receipt of the award on 10th May 2019. He who alleges must prove.

The time begun to run on 8th May 2018 counting calendar days the **90 days** ended on 6th August 2018 and the application was filed on 9th August 2018. Therefore, by the time of filing the application, the mandatory 3 months had elapsed and legally there is no provision in arbitration that allows for extension of time.

The Preliminary Objection is upheld that the Respondent's application is time barred.

DELIVERED SIGNED & DATED IN OPEN COURT ON 27th SEPTEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. ECHESA HOLDING BRIEF KIBET FOR APPLICANT

MR KIRWA FOR THE RESPONDENT

COURT ASSISTANT - JASMINE