



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 538 OF 2015

PHILIP BLISS ALIKER.....APPLICANT

VERSUS

GRAIN BULK HANDLERS LIMITED.....1ST RESPONDENT

MISTRY JADVA PARBAT & COMPANY LIMITED.....2ND RESPONDENT

IN THE MATTER OF AN APPLICATION UNDER SECTION 14 OF THE ARBITRATION ACT TO DETERMINE THE MATTER OF A CHALLENGE TO THE ARBITRATOR

AND

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT 1995(AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT NO.11 OF 2009

AND

IN THE MATTER OF AN ARBITRATION UNDER THE 2012 RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH) ('the Rules')

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITED.....CLAIMANT

AND

GRAIN BULK HANDLERS LIMITED.....RESPONDENT

RULING

1. The Notice of Preliminary Objection dated 30th May 2017 invites a determination as to whether this Court, the High Court, can Review its own decision made pursuant to Section 14(6) of the Arbitration Act (**hereinafter the Act**).
2. Section 13 of the Arbitration Act sets out and limits circumstances under which parties can challenge an appointed Arbitrator or Arbitration Tribunal. These include doubts as to the impartiality or independence of the Arbitrator.
3. Section 14 provides for the challenge procedure in the following terms-:
 - (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
 - (2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
 - (3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.
 - (4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the

High Court determines the application.
(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.
(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.
(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.
(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

4. So that the crux of the matter now for determination is not lost in too much detail, I set out this short background.

5. A dispute between Grain Bulk Handlers Limited (**GBL**) and Mistry Jadva Parbat & Co. Ltd (**MJP**) was referred to Arbitration before Phillip Bliss Aliker (**hereinafter, the Arbitrator**). GBL raised a challenge before the Arbitrator but unhappy with how it was dealt with sought the intervention of the High Court in an Originating Summons dated and filed 11th December 2015.

6. The Summons sought the following prayers:-

a. This Honorable Court be pleased to uphold the challenge lodged by the applicant Grain Bulk Handlers Limited before Philip Bliss Aliker, sole Arbitrator (“the Arbitrator”) on 21st October 2015 and remove the Arbitrator from the arbitration between Mistry Jadva Parbat & Company Limited and the Applicant.

b. This Honourable Court be pleased to order that the arbitral award dated 30th September, 2015 and issued by the Arbitrator on 21st October, 2015 is void.

c. This Honourable Court be pleased to order and direct that the Arbitrator do refund fees and expenses paid to him by the applicant herein, in the arbitration.

d. The costs of this application be provided for.

7. In a Ruling dated 8th December 2016, Hon. Ogola J. determined the Summons and issued the following Orders:-

a. The challenge lodged by the Applicant before the Arbitrator on 21st October 2015 is hereby upheld.

b. The Arbitrator is hereby removed.

c. The Arbitral award dated 30th September 2015 and issued by the Arbitrator on 21st October 2015, is hereby declared void.

d. The Arbitrator shall refund one half of total fees and expenses paid to him by GBH in the Arbitration; and

e. The Costs of this application shall be for GBH.

8. The Arbitrator is aggrieved by that Decision and asserts that the Court erred in assuming jurisdiction to hear and determine the said Motion. The Arbitrator brings the Application for Review in a Notice of Motion Application dated 30th April 2017. It is said to be brought under the auspices of Section 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules and Section 10 of the Arbitration Act and Rule 11 of the Arbitration Rules.

9. That Motion was confronted by the Preliminary Objection which is the subject of this Ruling. The Preliminary objection is as follows:-

1. The Arbitrator is barred by Section 14 of the Arbitration Act, 1995 (as amended by the Arbitration Amendment Act NO.11 of 2009)(“the Act”) from bringing any application challenging the Court’s decision of 8th December 2016.

2. The Court is precluded by Section 10 of the Act from considering this application and/or interfering with the Ruling of 8th December 2016.

3. As such this application does not lie and this Honorable Court has no jurisdiction to hear and/or determine the Application.

10. It is common ground that power of the Court to intervene in matters governed by the Act is circumscribed and is only to the extent provided in the Act. The restrictive provisions of Section 10 reads:-

“Except as provided in this Act, no Court shall interfere in matters governed by this Act.”

11. The stance taken by MJP is that the decision of 8th December 2016 is final and is neither amenable to an Appeal or Review and leans on Section 14(6) which provides:-

“The Decision of the High Court on such an application shall be final and shall not be subject to an appeal.”

12. In limiting the intervention of the Court in matters governed by the Act, the Act specifies the nature of intervention. In almost every intervention, it makes the decision of the High Court final and expressly excludes an appeal from it. Other provisions of the Act which are worded like section 14(6) are Sections 12(8), 15(3), 17(7) and 32B(6).

13. MJP asks this Court to be persuaded by the High Court decision in Bellevue Development Company Ltd v. Vilayak Builders Limited & 2 others which dealt directly with the provisions of Section 14(6) and in which Kariuki J. held,

26. The provisions which form the base of the Court jurisdiction are order 45 CPR. Under the authority of **owner of Motor Vehicle Lilian "S"** Case Supra, jurisdiction is everything and court cannot make any step if it has no jurisdiction. It has to down its tools. In the case of **ANNE MUMBI HINGA**, Supra the court of appeal held;

"the provisions of Arbitration Act make it clear that it is a complete code except as regards the enforcement of an award/or decree where the Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate in our view rules, line, hook and sinker to regulate arbitrations under the Act, it is clear to us that no application of Civil Procedure Rules would be regarded as appropriate if its effect would be to deny any awards speedy enforcement both of which are major objectives of arbitration. It follows that all the provisions invoked except S.35 and 37 do not apply to give jurisdiction to the superior court to intervene and all the application filed against the award in the superior court should have been struck out by the court suo moto"

27. The aforesaid authority is binding to this court .Under Arbitration Act the review does not exist. S.10 of Arbitration Act states that *"except as provided in this Act, no court shall intervene in matters governed by this Act"*. The instant matter is governed by the Arbitration Act. The provision of order 45 of the CPR is not among the rules imported to the Arbitration act nor is the provision of S.80 of Cap 21.

28. The court thus cannot invoke the provisions of the CPA/CPR to entertain review as sought in the instant application.

14. Cited to Court as well was the Court of Appeal Decision in Kamconsult Limited vs. Telkom Kenya Limited & Another (2010) eKLR in which the Court in discussing the import of Section 17(7) held that an omission to provide powers of Review in the Act where a decision rendered is final is not an inadvertent omission but a means to finality to a dispute that is subject to Arbitration.

15. The Arbitrator and GBL take a contrary view. The Arbitrator submits that by dint of Rule 11 of the Arbitration Rules , the Review provisions of Order 45 of the Civil Procedure Rules can be invoked by the High Court to Review its decision. The decision of the Court of Appeal in Sadrudin Kurji & another vs. Shalimor Limited & 2 others [2008] eKLR is cited as supporting this proposition.

16. The argument by GBL is that the Court retains residual power through its inherent jurisdiction to correct its own mistake. GBL relies on the decision in Nakumatt Holdings Ltd vs. Commissioner of Value Added Tax (2011) eKLR (amongst others) in support of this position. It is asserted that it would be absurd if the Court were to hold that it lacked jurisdiction to correct what was obviously a wrong decision made without jurisdiction and therefore a nullity.

17. Section 14(6) of The Arbitration Act is as plain as could be and reads,

"The Decision of The High Court in such an application shall be final and shall not be subject to Appeal".

18. The Court of Appeal has in several decisions discussed the implication of Section 10 of The Arbitration Act and the matter is old hat. Section 10 reads,

"Except as provided in this Act, no Court shall intervene in matters governed by this Act"

The Courts have also, almost routinely, upheld the principle of finality of Arbitral awards. In Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR, for example, Musinga JA. observed,

"No Court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by The Arbitration Act".

19. Emphasis that the scope of intervention is circumscribed was made by Minoti JA in the same decision,

"In my view, the Act itself does not leave any room for implying the right of the Court, including an Appellate Court, to intervene in arbitral awards or proceedings. On the contrary, the Act expects that instances where the intervention by the Courts, including by this Court, is permitted will be expressly provided. In the absence of express grant, there is no room, in my opinion, for an implied right of intervention in arbitral proceedings. Consequently, that in some instances the Act has expressly stated that there is no Right of Appeal to this Court cannot, Ipso facto prove or establish the converse propose, namely that where the Act is silent on the Right of Appeal, the same is allowed. The express provisions of, and the policy behind the Act are sufficiently clear that the overall the right of intervention by the Courts in arbitral proceedings cannot be implied. It has to be expressly provided."

The Right of Review is not provided for or saved in Section 14(6) of the Act or elsewhere and there would be force in the argument, that in view of this holding by the Court of Appeal, it will not be implied. It must be in parity of reasoning that the Court of Appeal in Kamconsult (Supra) held,

“Under Rule 11 of the Arbitration Rules, Orders XLIV Rule 1, XXI Rule 22 of the former edition of the Civil Procedure rules (now repealed) could be held to be applicable to the Arbitration Rules in so far as the same may be appropriate. However the Arbitration Act does not provide for review of High Court decisions made pursuant to Section 17 (6) of the Act, and therefore under Section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases, a rule cannot override a substantive law. Sections 3A, 63e and 80 of the Civil Procedure Act are also not applicable pursuant to Section 10 of the Arbitration Act.

We take note of the fact that arbitration proceedings are intended to provide a faster and less technical process for resolution of disputes. Thus the omission to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation”

20. Yet that argument is challenged by the Respondents’ Reference to Sadrudin Kurji (*supra*) that the Court of Appeal had earlier, and differently constituted, held that the provisions of Order XIIIV of the Civil Procedure Rules could be invoked where necessary to assist a party who considers himself to be in distress. The Court had held:-

“From these applications it is clear that the appellants want to challenge the judgement, for whatever reason. We find no provision in the Arbitration Act to empower the appellants to do so other than rule 11 of the Arbitration Rules. So notwithstanding the fact that there is no clear provisions in the Civil Procedure Act and Rules to deal with entry of judgement under Section 36 of the Arbitration Act, Order IXB is the nearest provision to deal with the situation, and that order applies because of rule 11 of the Arbitration Rules. Likewise the review provisions under Order XLIV of the Civil Procedure Rules would be invoked where necessary”.

The invocation would be through Rule 11 of The Arbitration Rules which reads:-

“So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under the Rules”

The difficulty that the Respondent would face is that unlike in Kamconsult Limited, the Court of Appeal decision in Sadrudin Kurji was not made in the context of the finality principle of Arbitral of Awards and proceedings.

21. Another lesson to be learnt from the Court of Appeal decisions is that whilst Rule 11 of the Arbitration Rules provides that, in so far as is appropriate, the Civil Procedure Rules apply to all proceedings under the Arbitration Rules, this does not imply a wholesale importation of The Civil Procedure Rules (See Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR). The unyielding effect of Section 10 of The Act would be to dis-apply any provisions of The Civil Procedure Rules that are inimical with the concept of the finality of Arbitral Awards and proceedings.

22. The Court of Appeal’s Decision in Kamconsult (*Supra*) directly focused on the question whether the High Court could review its decision made pursuant to Section 17(6) of The Act. The language of Section 17(6) is word for word the provisions of Section 14(6) and this Court is bound by the Court of Appeal Decision in answering the question that has been placed before it by the Preliminary objection. Yet I still must consider whether there are instances when a Court can revisit a Decision made under Section 14(6) or such similar provision without it affronting the design of finality of the Act.

23. There is a legion of Decisions that a Court has inherent jurisdiction, under what is popularly known as the slip rule, to recall a Judgement “in order to give effect to its manifest decision” (See for example Lakhamshi Brothers Ltd vs. R. Raja & sons [1966] EA 313. In the Civil Procedure Act this slip Rule is embedded in Section 99:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

24. It would be stretching the principle of finality to absurdity if the Court was to be barred from correcting a glaring slip in its Decision so as to give effect to its Pronouncement. I very much doubt that the Decision in Kamconsult excluded the exercise of the Courts inherent jurisdiction under the slip Rule. Save in this limited sense and in deference to the decision in Kamconsult, this Court reaches a decision that it cannot review a final Decision it has rendered under the provisions of Section 14(6) of the Act.

25. Whether or not the Notice of Motion dated 3rd April 2017 is a request to this Court to travel beyond the confines of the Slip Rule is a matter that will await the hearing of that Motion on merit. Otherwise to the extent of the observations made herein, the Preliminary Objection succeeds but an Order of Costs will abide the outcome of the Motion.

Dated, Signed and Delivered in Court at Nairobi this 9th day of March, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Omondi h/b Mwangi for GBL

Wafula h/b Khagram for MJP

Gachuhi for Arbitrator

Nixion - Court clerk