



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS CIVIL CASE NO.378 OF 2017**

**IN THE MATTER OF THE ARBITRATION ACT CHAPTER 49 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN ARBITRATION FOR SETTING ASIDE IN ARBITRATION AWARD**

**BETWEEN**

**D. MANJI CONSTRUCTION LIMITED.....CLAIMANT/RESPONDENT**

**VERSUS**

**ASSOCIATED CONSTRUCTION COMPANY (K)**

**LIMITED.....RESPONDENT/APPLICANT**

**R U L I N G**

Before this Court is the Notice of Motion Application dated 23<sup>rd</sup> February, 2018 brought under Section 37(1)(iv) of the Arbitration Act and all other enabling provisions of the law in which ASSOCIATED CONSTRUCTION COMPANY (K) LTD the Respondent/Applicant herein seeks the following orders:-

(1) [Spent]

(2) **THAT** the Honourable court be pleased to set aside the part of the Arbitral Award that deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, and/or that contains decisions on matters beyond the scope of reference to arbitration.

(3) **THAT** the costs of this application be provided for”.

The claimant/Respondent **D. MANJI CONSTRUCTION LIMITED** filed by way of response to the application a Notice of Preliminary Objection dated 27<sup>th</sup> February, 2018, which Preliminary Objection is premised on the following grounds

“1. **THAT** the said Application is bad in law and does not lie for offending the provisions of Section 35(3) of the Arbitration Act.

2. **THAT** Section 37(i) of the Arbitration Act on which the Application is premised is overtaken by events since this Honourable Court, on 9<sup>th</sup> February, 2018 gave leave to the claimant to enforce the Arbitral Award dated 3<sup>rd</sup> August 2016 as a Decree of this Honourable Court”.

On 28/2/2018 the **Hon Lady Justice Olga Sewe** gave directions that grounds in the Notice of Preliminary Objection be canvassed in opposition to the Notice of Motion dated 23<sup>rd</sup> February, 2018. Parties were both directed to file their written submissions.

The matter then came up before me on 3<sup>rd</sup> July, 2018 for highlighting of the written submissions. **MS KOECH** for the claimant indicated that they would be relying solely on the grounds in their Notice of Preliminary Objection whilst **MR AMEYO** stated that they would rely on their written submissions filed in court on 12<sup>th</sup> June, 2018.

The genesis of this matter is the Final Award dated **3<sup>rd</sup> August, 2016** delivered by the sole Arbitrator **Stanley Kebathi** in the arbitration between the Applicant and the Respondent. The sole Arbitrator made his final award in the following terms:-

**“96.00 I AWARD AND DIRECT that the Respondent shall pay the Claimant the sum of Kshs.54,128,084.97 in full and final settlement of all the claims and counterclaims made in this arbitration within 21 days of the date of this my award.**

**97.00. I FURTHER AWARD AND DIRECT that this sum of Kshs.40,020,765.23 shall carry simple interest at the rate of 18% p.a from the date of this my award until payment is received by the claimant in full.**

**98.00 I FURTHER AWARD AND DIRECT that my fees for this Arbitration together with VAT, shall be paid by the Respondent, but if and in so far as any part thereof may have been paid by the claimant, the claimant shall be entitled to recover such payment from the Respondent and that such amounts shall carry compound interest at the rate of 2% per month from the date this award is taken up until payment is made in full.**

**99.00 FINANLY I AWARD AND DIRECT that the Respondent shall pay the Claimant costs of this arbitration reference on party to party basis and to be taxed by me not agreed”**

In their application dated 23<sup>rd</sup> February 2018 the Respondent urged the court to set aside the part of the Arbitral Award that they allege dealt with a dispute not contemplated by or falling within the terms of the reference of Arbitration and/or that contained decisions on matters beyond the scope of the reference to arbitration.

On 11<sup>th</sup> August, 2017 the Court struck out the respondent’s application dated **22<sup>nd</sup> December, 2016** seeking a stay of the enforcement of the Award dated **3<sup>rd</sup> August 2016**, including any intended execution. They submitted that the court had no jurisdiction over the matter as no enforcement application had at the time been filed by Claimant and therefore the Respondent’s application was premature. Thereafter the Claimant filed an ex-parte application dated **20<sup>th</sup> September, 2017** asking that the court grant them leave to enforce the Arbitral Award.

That application dated **20<sup>th</sup> September 2017** was allowed by the court in the Ruling delivered by **Hon. Justice Olga Sewe** on **9<sup>th</sup> February 2018**. The Claimants were therefore granted leave to enforce the Final Award dated **3<sup>rd</sup> August 2016**.

In their written submissions filed in court on **12<sup>th</sup> June, 2018**, the Respondents indicated that the court was faced with two applications for consideration.

- (i) The claimants ex-parte application dated 20<sup>th</sup> September 2017 seeking enforcement of the Arbitral Award dated 3<sup>rd</sup> August 2016, and
- (ii) The Respondents application dated 29<sup>th</sup> September 2017 seeking the setting aside of that same award.

This however is not the correct position. My perusal of this file reveals that the **Hon. Lady Justice Olga Sewe** did hear the Notice of Motion application dated **20<sup>th</sup> September 2017** and delivered her Ruling dated **9<sup>th</sup> February 2018** granting leave to the claimant to enforce the Final Award dated **3<sup>rd</sup> August 2016** as a decree of the court.

In the circumstances the application dated **20<sup>th</sup> September, 2016**, is not for determination before this court, the same having already been heard and determined by a court of competent and concurrent jurisdiction. No application has been made to have that decision of **Justice Sewe** set aside or reviewed. No appeal has been filed against that Ruling. As such that decision still stands as a valid order of the court. The application of **20<sup>th</sup> September, 2017** is therefore “**res judicata**” and I will not touch upon it in any manner whatsoever.

Similarly the application dated **29<sup>th</sup> September 2017** has also been dealt with. Although in their written submissions the Respondents referred to a Notice of Motion **dated** 29<sup>th</sup> September 2017, a perusal of the file reveals that there is no Notice of Motion **dated 29<sup>th</sup> September, 2017**. What is on record is the Notice of Motion **dated 28<sup>th</sup> September 2018** which was **filed in court** on **29<sup>th</sup> September, 2017**. Contrary to the submission that this application was seeking the setting aside of the arbitral award, the application actually sought to stay the enforcement of the Arbitral Award. That application was heard simultaneously with the Notice of Motion dated **20<sup>th</sup> September 2016**.

In the circumstances the application dated **28<sup>th</sup> September 2017** having already been heard and determined vide the Ruling delivered on **9<sup>th</sup> February 2018** cannot be said to be pending before this court. From the record the application which is before this court for determination is the Notice of Motion dated **23<sup>rd</sup> February 2018** seeking to set aside part of the Arbitral Award of **3<sup>rd</sup> August 2016**.

The respondents in their submissions place reliance upon **Section 37 of the Arbitration Act** which sets out the grounds upon which recognition and enforcement of an Arbitral Award may be refused. It is submitted that an arbitral award may be denied recognition and enforcement on the basis that the matters contained in the arbitral award were neither contemplated by the parties nor did they fall within the terms of reference of the parties to arbitration. The respondent urges the court to refuse recognition and enforcement of that part of the Arbitral Award that was not contemplated by the terms of reference of the Arbitration Agreement. The Arbitration Agreement sets out the jurisdiction of the Arbitral Tribunal. As such the matters dealt with by the Arbitral Tribunal must be confined solely to the jurisdiction granted to it by the parties.

The respondent submitted that the pertinent clause of the Arbitration Agreement between the parties was clause 45 which provided as

follows:-

**“In case any dispute or difference shall arise between the Employee or the Architect on his behalf and the contractor either during the progress or after the completion or abandonment of the works. Such dispute shall be noticed in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties...”**

This clause contemplated a dispute between the employer or the Architect acting on the employers behalf (the Respondent herein) on the one hand and the contractor (the Claimant herein) on the other hand. The privity of contract was exclusively between these two parties and the arbitration agreement could only inure for the benefit of those two parties.

In the Arbitral Award at Paragraph 46 the tribunal observed and admitted that it was **“Booth Extrusion”** the subcontractor who delayed in the completion of their works and were therefore responsible for the delay which was then attributed to the Claimants. From the record by the tribunal it was clear that a subcontract existed between the Claimant and **Booth Extrusions Limited**.

The Respondent submitted that no privity of contract existed between itself and Booth Extrusions Ltd and the latter was not privy to the contract between the Claimant and the Respondent. As such Booth Extrusion Ltd could not be deemed to have been a party to the Arbitration Agreement between the Claimant and Respondent for the resolution of any dispute and in the circumstances Booth Extrusion Ltd ought not to be permitted to enjoy any direct benefit from proceeds of that arbitration process.

At paragraph 74 read with paragraph 76 of the Final Award the Tribunal factored in the sum of **Kshs.1,947,112/23** from the Interim Certificates due and payable to the nominated sub-contractor (Booth Extrusions Ltd) which brought the final amount due and payable under the final certificate to the **Kshs.40,020,765/35** awarded to the Claimant.

The Respondent/Applicant submitted that by factoring in and by making an award to a third party, the arbitrator dealt with a dispute that was neither contemplated by or fell within the terms of reference of the Arbitration Agreement and ran counter to the provisions of **Section 37(1)(Vi)** of the Arbitration Act.

Finally, it was submitted that the Arbitrator also concealed a further sum of **Kshs.2,941,991/60** payable to Booth Extrusion Ltd, which amount was also included in certificate No.20 contrary to **Section 37(i)(vi)** of the Act.

The second ground upon which the Notice of Motion dated **23<sup>rd</sup> February, 2018** was predicted was that the tribunal did not afford the Respondent a fair and reasonable opportunity to present its case on the issue of extension of time. It was argued that the tribunal unilaterally granted the Claimant an extension of time without the approval of the Architect and the Respondent as envisaged by the contract contrary to section 19 of the Act.

Based on the above submissions the Respondent prayed that the court

- (a) Refuses to both recognize and enforce those parts of the Award as above stated.
- (b) Grants the Respondents costs.

The claimant in response to this application filed the **Notice of Preliminary Objection** dated **27<sup>th</sup> February 2018** which Preliminary Objection was predicated on the following grounds:-

1. **THAT the said Application is bad in law and does not lie for offending the provisions of section 35(3) of the Arbitration Act.**
2. **THAT Section 37(1) of the Arbitration Act, on which the Application is premised is overtaken by events since the Honourable court on 9<sup>th</sup> February 2018, gave leave to the claimant to enforce the Arbitral Award dated 3<sup>rd</sup> August 2016 as a Decree of this Honourable court”.**

The respondent also placed reliance on the Replying Affidavit dated 10<sup>th</sup> April 2018 sworn by **HARJI PATEL** the Managing Director of the Claimant.

I will first consider the merits or otherwise of the Preliminary Objection dated 27<sup>th</sup> February, 2018. The legal ambit of what constitutes a Preliminary Objection was set out in the celebrated case of **MUKHISA BISCUIT MANU-FACTURING CO. LTD –VS- WEST END DISTRIBUTORS** where it was held that

**.....a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.** [own emphasis].

Likewise in **GEORGE ORARO –VS- BABAK ESTON MBAJA [2005]** eKLR the court held as follows:-

**“A Preliminary Objection” correctly understood is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event , to be proved through the processes of evidence. Any**

**assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...**[own emphasis]

Has this threshold as set out in the above cited cases, been met in the present circumstances.

It is argued that the application dated **23<sup>rd</sup> February 2018** does not lie as it offends **Section 35(3)** of the Arbitration Act. Section 35(3) provides

**(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the parties making that application had received the arbitral award, or if request had been made under section 34 from the date on which that request had been disposed of by the arbitral award”.**

In this case no formal request was made under **Section 34** of the Act and therefore the latter part of **Section 35(3)** is not applicable. This Arbitral Award was made and published on **3<sup>rd</sup> August, 2016**. The Respondents therefore had 3 months (or 90 days) from the date thereof to any challenge to the Arbitral Award (or any part thereof). The period for any challenge to this award expired on **3<sup>rd</sup> November 2016**. This very point was dealt with by **Hon. Justice Olga Sewe** in her ruling on the Originating Summons filed by the Respondents dated **22<sup>nd</sup> December, 2016** seeking the setting aside of the Arbitral Award. In that Ruling the Honourable Judge rendered herself thus

**“Accordingly, it is my considered finding that the failure by the Applicant to comply with Section 35(3) of the Arbitration Act is fatal to the application and the Originating Summons”.**

The **Honourable Justice Sewe** reiterated this finding in her Ruling dated **9<sup>th</sup> February, 2018** on the claimant’s application dated **20<sup>th</sup> September, 2017** seeking to enforce the Arbitral Award. All that the Respondent has done is to try to dress the same application in a different outfit. This will not wash at all. The position remains the same.

The present application seeking to stay enforcement of a **“Portion”** of the Arbitral Award suffers the same fate as their summons dated **22<sup>nd</sup> December 2017**. The present application offends the provisions of **Section 35(3)** of the Arbitration Act as it was not filed within three (3) months of the date when the Award was published. Indeed this application comes almost **1 ½ years after** the said Award was published. It is hopelessly time barred.

The failure to comply with Section 35(3) of the Arbitration Act is fatal to this application. This ground of the Preliminary Objection succeeds and on this basis alone the application is for dismissal.

The second limb of this Preliminary Objection is that the Notice of Motion dated **23<sup>rd</sup> February 2018** has been over taken by events given the existence of the Ruling dated **9<sup>th</sup> February, 2018** delivered by **Hon. Justice Olga Sewe** in which the Claimant was granted leave to enforce the Arbitral Award as a decree of the court. I have carefully perused the said Ruling. The Respondents did oppose that application for enforcement of the award. In her Ruling the Honourable Judge in dismissing the Respondents prayer stated

**“Nevertheless, the fact remains that an application for stay of enforcement has no place for refuge under the Arbitration Act or the Rules thereunder....”**

The court proceeded to allow the application dated **20/9/2017** and granted to the Claimant leave to enforce the Final Award dated **3<sup>rd</sup> August 2016**.

The Respondents have now come to court seeking the very same orders under a different disguise. This constant filing and re-filing of applications by the respondent in this manner amounts to an abuse of the court process. They have not appealed against the various rulings made by **Justice Sewe** but opt to continue to engage the court in endless applications in an attempt to frustrate the Claimants from enforcing the Final Award made in their favour. This cannot be allowed to continue.

I find that the present application has indeed been overtaken by events as leave to enforce the Arbitral Award of **3<sup>rd</sup> August 2016**, has already been granted vide the ruling of **9<sup>th</sup> February 2018**. The application of **23<sup>rd</sup> February 2018** is ill conceived. It is time barred, incompetent and bad in law. The Preliminary Objection dated **27<sup>th</sup> January 2017** has merit and the same is hereby allowed.

Accordingly the application dated **23<sup>rd</sup> February, 2018** is struck out with costs to the Claimant.

**Dated in Nairobi this 31st day of July, 2018.**

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**JUSTICE MAUREEN A. ODERO**

**Ruling delivered at the Nairobi High Court this 31<sup>st</sup> day of July, 2018.**

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**JUDGE**