REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO.1 OF 2018

ALBATROSS AVIATION LIMITED.....1ST APPELLANT

PENIAL AIR LIMITED.....2ND APPELLANT

VERSUS

PHOENIX OF EAST AFRICA

ASSURANCE COMPANY LIMITED.....RESPONDENT

R U L I N G

Before this court are two applications for determination. One is the Notice of Motion dated **28th February 2018** and filed in court on **9th March 2018** in which the 1st Appellant/claimant **ALBATROSS AVIATION LIMITED** and the 2nd Appellant/Claimant **PENIAL AIR LIMITED** sought for orders **THAT**

> **"1. The Honourable Court be pleased to enlarge the time for filing an appeal against the award of 27th July 2017 and Additional Award of 20th December 2017 both by MR JOHN M. OHAGA, sole Arbitrator.**
>
> **2. The instant appeal be deemed as filed within the prescribed period.**
>
> **3. The Appellants shall bear the costs of this application**."

The application was premised on **Section 39(4) of the Arbitration Act No.4 of 1995, Sections 1A, 1B,3A and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 50 Rule 6 of the Civil Procedure Rules** and all other enabling provisions of the law and was supported by the affidavit of **MARY WAMBUI MUNGAI**, the Chief Executive Officer of the 1st Appellant sworn on **1st March 2018.**

The Respondent **PHOENIX OF EAST AFRICA INSURANCE COMPANY LIMITED** filed Grounds of Opposition to this first application dated **16th April 2018**, in which they opposed the application on grounds that

a. Admission of an appeal out of time is governed by **Section 39(4)** of the Arbitration Act and **Section 79G** of the Civil Procedure Act, thus the provisions the Appellant have relied upon are not relevant.

b. The appeal should have been filed within 30 days of **27th July 2017** that is on or before the **26th August 2017.**

c. The appellants have failed to show good and sufficient cause for not filing the appeal in time as required by **Section 79G** of the Civil Procedure Act as filing the application under **Section 34(4)** is not sufficient cause for this failure.

d. The application for an additional award did not impact on the Appellants ability to file an appeal as 8 out of the 9 grounds of appeal related to the original award and only one to the Additional Award. In addition, the arbitrator's decision of **20th December 2017** where he refused to make an additional award is not an award from which an appeal lies as the decision of the arbitrator was factual, and raises no points of law therefore no right of appeal arises under **Section 39.**

e. The application has been unreasonably delayed, being made 7 months after the award and 2 months after the Additional Award and it would be prejudicial to reopen the award in these circumstances.

The Respondent also filed their Notice of Motion dated **5th March 2018** seeking orders that:-

> **"1. The Memorandum of Appeal herein be struck out.**
>
> **2. The Appellants do pay to the Respondent its costs of this application".**

This application was premised upon the inherent power of the Court; **Section 79G of the Civil Procedure Act** and **Section 39 of the Arbitration Act** and was supported by the affidavit of **LILLIAN SIMIYU** the Deputy Manager, legal services of the Respondent.

The 1st and 2nd Appellants opposed this second application by way of the Grounds of Opposition dated **18th May 2018** on the grounds that:-

a. The Appellants request for an additional award was made within 30 days as prescribed by **Section 34(4)** of the Arbitration Act and relates to a plea of rectification omitted from the Arbitral Award. It is a continuity of the Award and the jurisdiction to determine this request vests solely in the Arbitral Tribunal.

b. The Memorandum of Appeal was filed within the prescribed time in view of the date of receipt of the Arbitral Award and the Additional Award.

c. The Notice of Motion for enlargement of time for the Appellants to file the appeals is yet to be heard and determined. The court's policy is to sustain rather than strike out pleadings and matters ought to be determined on merit.

The Court gave directions that the two applications would be argued together and would be disposed of by way of written submissions. The parties duly filed their written submissions and the matter came up for highlighting of those written submissions on **3rd July 2018**.

BACKGROUND

The undisputed facts of this case are as set out below. At all material times the 1st Appellant was the owner whilst the 2nd Appellant was the operator of an aircraft identified as **a Cessna 208B 31045 Registration Number 5Y-WMM** (hereinafter referred to as **"the aircraft").** The Respondent through a broker provided insurance cover for the aircraft. There was some discussion between the parties as to the question whether South Sudan was to be included in the territory to be covered by the Insurance Policy.

Unfortunately on **8th December 2015** the aircraft was involved in an accident in **Kodok** in **South Sudan** and the Respondent repudiated its liability on the grounds that the accident occurred outside the geographical cover of the Insurance Policy. The Respondent declined to honour the insurance claim lodged by the Appellant on the basis that the policy did not extend to cover the territory of the territory of South Sudan.

Subject to the arbitration clause in the contract, this dispute was referred to arbitration. On **27th July 2017**, **Mr. John Ohaga** the sole arbitrator delivered his award in which he dismissed the appellants' claim. Following that dismissal the appellants applied for an Additional Award, which also was dismissed by the arbitrator on **20th December, 2017**. On **15th January 2018** the Appellant filed in the High Court their Memorandum of Appeal dated **11th January 2018** against both the Original Award and the Additional Award. Based on the above mentioned facts the two applications were filed in court.

The Appellants filed their submissions in court on **21st June 2018** in which they submitted that the Memorandum of Appeal was filed within the prescribed time as the 30 day time limit for filing of the appeal should be counted from the date of delivery of the Additional Award and not from the date of delivery of the Original Award. In the alternative the Appellants submit that should the court find otherwise then any delay in filing the appeal is excusable and there exists sufficient cause to justify the enlargement of time for filing the appeal in the circumstances.

The Appellants submitted that the right of appeal reserved to the parties under **Section 39(1) of the Arbitration Act**, is distinct from the right to apply for an additional award under **Section 34(4) of the Act** but the two provisions ought to be construed harmoniously. They further assert that their request for an Additional Award was based on their right to amend their claim before the Arbitral Tribunal.

It was submitted for the Appellants that under the **Arbitration Act,** an Additional Award should be construed as part of the Arbitration Award, thus the statutory 30 days ought to start running as from the date of delivery of Additional Award and not from the date of the original Award. That simultaneous enforcement of the right to appeal and the right to apply for an Additional Award would result in competing decisions on the same question and would be a waste of valuable judicial time and resources. Therefore the Appellants Memorandum of Appeal which was filed on **15th January 2018** was filed within thirty (30) days of **20th December 2017** when the delivery of the Additional Award was made, and met the statutory timelines.

In the alternative the Appellants submit that any delay in filing their appeal was excusable as the delay was occasioned by their pursuit of the Additional Award, before the Arbitrator. The request for the Additional Award was made within the prescribed time. Further it was submitted that no prejudice would be suffered by the Respondent if this request for enlargement of time was granted.

On its part the Respondent in its submissions filed on **2nd July 2018** submit that the Arbitral Tribunal made its Award on **27th July 2017**. Even if the Appellants maintain that they only received the Award on **21st August 2017**, the Memorandum of Appeal filed on **15th January 2018** is still four months out of time and ought to be dismissed for that reason.

The Respondent drew a distinction between an "**Arbitral Award"** as defined by **Section 3 of the Arbitration Act** and an "**Additional Award**". The Respondent posits that there is no requirement in the Act that all awards made during the course of an arbitration process be treated as one Award. Thus the Respondent submits that the right of appeal accrued separately for the Award on the one hand and the Additional Award on the other.

The Respondents position is that the Appellants opted to pursue the remedy of an Additional Award instead of pursuing an appeal. This fact did not however stop the 30 days period for filing of an appeal from running.

The Respondent disagreed with the contention that conflicting decisions would arise from an application for an Additional Award and an appeal as the former is a request made on the basis that something was omitted from the Award whilst the latter amounts to a challenge of the findings of the Award.

The Respondent submitted that the document entitled "**Additional Award**" is not an Award under **Section 34(5),** there is only an Additional award if the Arbitral Tribunal considers the request under **sub Section (4)** to be justified. In this case the tribunal did not consider the request for an Additional Award to be justified. The omission to plead for rectification of their claim was made clear to the Appellants during the arbitration proceedings, yet they still failed to amend their claim appropriately.

ANALYSIS

I have considered the application before me, the written submissions filed by both parties as well as the annextures thereto. I find that the following two issues arise for determination by this court.

1. Was the Appeal dated **11th January 2018** and filed in court on **15th January 2018** filed on time.

2. If not, has the appellant shown good cause for the delay.

I will proceed to consider each issue individually.

1. Was the Memorandum of Appeal filed in time?

Section 39 of the Arbitration Act, grants to the High Court jurisdiction to hear and determine appeals filed against Arbitral Awards on questions of law, provided that the parties have agreed to this remedy.

In the present case the parties have all agreed to exercise the right to appeal to the High Court.

Section 39(4) of the Arbitration Act also provides that any appeal shall be filed within the timelines prescribed by the Court of Appeal or the High Court as the case may be. **Section 79G of the Civil Procedure Act** states that an appeal shall be filed within thirty (30) days of the decision being appealed against. **Section 79G** contains the following proviso

> **"Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time".**

The appellants' submission is that the 30 day timeline ought to be counted from the date of delivery of the Additional Award that is from **20th December 2017** and **not** from **27th June 2018** being the date of the Original Award. They submit that the Additional Award forms and should be considered as part of the Award as defined by **Section 3 of the Arbitration Act.**

The Respondent however holds a totally different view and submits that the 30 day timeline runs from the date of delivery of the Original Award. The Respondent draws a stark distinction between an Arbitral Award as defined by **Section 3 of the Act** and an Additional Award.

The power of an Arbitral Tribunal to review its own decision is internationally accepted and is embodied in the **International Centre for Settlement of Investment Disputes (ICSSID) Arbitration Rules [2006]** as well as the **United Nations Commission on International Trade on International Trade Law (UNCITITL) Arbitration Rules** on which the **Kenya Arbitration Act No.4 of 1995** was based.

Section 34(a) of the Arbitration Act allows an Arbitral Tribunal to correct errors, clarify ambiguities or complete an award by deciding any questions that it may have omitted to decide in its award. This is an exception to the **"functus officio"** principle which binds a tribunal upon delivery of the final award.

However **Section 34** does not comprehensively settle the question of whether an Additional Award forms part of the Arbitral Award. **Section 34(2)** is unambiguous that a rectification or clarification of an Award by an Arbitral Tribunal shall be deemed part of the Award, but it is not clear whether the supplementation of an Award under **Section 34(5),** where a claim is presented in the arbitral proceedings but omitted in the Award, would be regarded as part of the Award. One can however infer that in all cases where an Arbitral Tribunal finds a request for rectification unjustified, then that decision would not comprise part of the award.

Additionally the Arbitration Act lends no clarification to the relationship between the rights set out in **Section 34** and those provided by **Section 39** of the Act. Are they mutually exclusive or how are these rights to be exercised? This lacuna places an aggrieved party in a conundrum, where such party considers that an Award did not compressively address all the issues placed before the tribunal and more particularly in cases where the omitted matter would substantially alter the Award. Should such a party seek rectification of the Award,

enforce their right to appeal or pursue both remedies simultaneously?

There is a dearth of decisions on this question by the Kenyan courts, that is on the question of the right to appeal under **Section 39** and the right to seek review of an award under **Section 34**. In **NYUTU AGROVET LIMITED –VS – AIRTEL NETWORKS LIMITED, [2015]**eKLR the Court of Appeal weighed the question of whether a right of appeal lay against a decision made under **Section 35** of the Arbitration Act. In that case **Justice K. M'Inoti J/A** at page 31 held thus:-

> **"The provision [Section 35]empowers the High Court to suspend proceedings before it, which seek to set aside an arbitral award, so as to give the arbitrator an opportunity to rectify any faults, which would have otherwise justified intervention by the court. In this provision, one sees the court being required, as much as possible, to exercise restraint in intervening in arbitral awards and proceedings and to give the arbitration process opportunity to resolve the dispute. In other words, the courts are being requested, as much as possible , to defer to arbitration."**

In the South African case of **IMATU & ANOTHER –VS- THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL & 30 OTHERS[2010] ZALC 38**, the view taken was that an Arbitration Award is only deemed final when it is complete in all respects and has disposed of all the matters in dispute. It is only then that the arbitral tribunal becomes **"functus officio".**

In this case the sole arbitrator delivered an award on **27th July 2018** where though he found that the intention of the parties was for the insurance cover to extend to South Sudan, he never the less proceeded to dismiss the claim on the ground that the Appellants had failed to include a prayer for rectification of the claim in their pleadings. Without such a prayer for rectification, the sole arbitrator found that he could not enforce the insurance policy.

Upon collecting the Award on **21st August 2017** the Appellants then made a request for an Additional Award via their letter dated **8th September 2018**, on the basis that they had included the prayer for rectification in the oral submissions. The Appellants argued that if the prayer for rectification was a necessity, then their right to amend the claim ought not be fettered. The Arbitral Tribunal delivered **"Additional Award"** on **20th December 2017** in which the Appellants request was dismissed.

From the above it is quite clear that the Additional Award if granted had the potential to significantly alter the original award. Had the Tribunal ruled in favour of the Appellants then the Additional Award would undoubtedly have been considered to be part of the Award so as to give effect fully to the findings of the Arbitral Tribunal. The date of delivery of the **"Additional Award"** would in the circumstances quite reasonably be considered as the date when the Arbitral Tribunal rendered its decision.

In those circumstances any aggrieved party would have a right to appeal to the High Court within 30 days from the date of delivery of the Additional Award as provided by **Section 79G of the Civil Procedure Act.**

As it is the facts in this case did not unfold in the manner described above. However this court is obliged to consider the principles of fairness and justice as espoused by the **Constitution of Kenya 2010**. To hold that the outcome of the decision of a tribunal would be the determining factor as to whether or not an aggrieved party could enforce their right to appeal under **Section 39 of the Arbitration Act** goes against the Constitutional intention of granting each party equity and equal benefit under the law, and would go against the principles of a fair trial. **Section 159(2) of the Constitution of Kenya [2010]** enjoins all courts to uphold the principle of access to justice for all.

Based on the above, I do find that the Additional Award was a review of the original award. Since the matter was still pending before the Arbitral Tribunal, the original award **did not** constitute the final award. The Arbitral Tribunal was within its mandate to amend and/or change its findings upon request by the Appellants. To file an appeal against the original award while the request for an additional award in the same matter was still pending before the tribunal would have led to a waste of resources and judicial time.

Further limiting the intervention of the courts in arbitration is a common threat that runs through National and International arbitration laws. By instituting arbitration proceedings the parties had unequivocally demonstrated their desire to substantively settle all issues arising from their dispute, and to exhaust any remedy before the Arbitral Tribunal. It is only when and if any party remains aggrieved upon the completion of the arbitration process, that the matter would be referred to the High Court by way of an appeal. Based on the foregoing, I find and hold that the timeline for filing of the appeal ran from the date of delivery of the Additional Award that is from **20th December 2017**. In the circumstances this appeal which was filed on **15th January 2018** was filed within the 30 day timeline provided by **Section 79G** of the Civil procedure Act.

2. Was the delay in filing the Appeal out of time justified?

Even if one were to proceed on the basis that the appeal was not filed on time, and for completeness of the record I will proceed to consider the question of whether the Appellant has shown good cause for the delay.

Section 79G of the Civil Procedure Act contains a proviso that a court may allow an appeal to be filed out of time if good and sufficient cause is shown for the failure and/or omission to file the appeal within 30 days. The grant of this equitable remedy of an extension of time is based on the discretion of the court. In the case of **NICHOLAS KIPTOO ARAP KORIR SALAT –VS – INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**, the court gave elaborate guidelines on the judicious exercise of the courts discretion as follows:

> **"1. Extension of time is not a right of a party. It is equitable remedy that is only available to a deserving party at the discretion of the Court;**

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted.

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

Likewise in **BRITISH AMERICAN INSURANCE CO. LTD -VS- FRANCIS MBURU GICHIMU [2017] eKLR,** the Court in considering **Section 79G of the Civil Procedure Code** applied the principles set out in **MWANGI –VS- KENYA AIRWAYS LTD [2003] KLR 486,** where the Court of Appeal held that

"Matters which the court takes into account in deciding whether or not to grant extension of time are:-

a. The length of the delay.

b. The reason for the delay.

c. Possibly, the chances of the appeal succeeding if the application is granted and

d. The degree of prejudice to the respondent if the application is granted.

The Appellants received the copy of the Award on **21st August 2017**. Thirty (30) days hence means that the appeal ought to have been filed by **20th September 2017**. As such the appeal filed on **15th January, 2018** could be said to have been filed three months out of time. In my view this does not amount to an inordinate delay given the circumstances as described here below.

The Appellants have explained that the reason why they did not file the appeal within 30 days of delivery of the Original Award was that they were pursuing an Additional Award under **Section 34(4) of the Arbitration Act.** The request for the Additional Award made on **18th September 2018** was made in good time and was also prosecuted timeously and in good faith. The Appellants did not sleep on their rights nor did they actively set out to delay this process. They were engaged in the pursuit of a legitimate remedy under the Arbitration Act. This is seen by the fact that the Appellant filed their appeal within 30 days of the dismissal by the Arbitral Tribunal of their request for an Additional Award. I am satisfied that the Appellants have shown reasonable and sufficient cause for the delay in filing their appeal.

The Respondents have not demonstrated what prejudice they would suffer if the appeal were allowed to proceed to hearing. When the Appellant filed the request for an additional award the Respondents were notified and indeed made representations on the matter before the tribunal. The Respondents were kept fully informed at all times and participated in each stage of the arbitration process. Likewise the Respondents will be allowed an opportunity to oppose the appeal should they be inclined to do so. This appeal is based on an insurance contract thus there is no time factor that that a delay in filing the appeal will occasion any prejudice or injury to the Respondent.

Any prejudice or injury suffered by the Respondent in allowing the appeal to proceed to hearing could be adequately compensated by an award of costs. I therefore find that the Respondents do not stand to suffer any prejudice if the expansion of time sought for filing the appeal were to be granted.

Based on the analysis above, I hereby allow the Appellants Notice of Motion dated **28th February, 2018** and I dismiss the Respondents Notice of Motion dated **5th March 2018**. Both parties to meet their own costs for the two applications.

Ruling delivered at the Nairobi High Court this 21st day of September, 2018.

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JUSTICE MAUREEN A. ODERO

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JUDGE