REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2018

WALTRAUD MELICHAR……..……. APPLICANT

VERSUS

JACOB M. NGUTHU

T/A KASHESHE CONSTRUCTION COMPANY ……. RESPONDENT

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

JACOB M. NGUTHU

T/A KASHESHE CONSTRUCTION COMPANY ……. CLAIMANT

VERSUS

WALTRAUD MELICHAR…….. RESPONDENT

RULING

1. The brief facts of this case are that there arose a dispute between the Applicant and Respondent in relation to an Agreement dated 17th July, 2018 which was referred for arbitration before MR. ERICK NYONGESA OF SHERMAN NYONGESA & MUTUBYA, ADVOCATES, a sole Arbitrator. The final award thereof was published on 16th March, 2018.

2. The Originating Chamber Summons application dated 18th June, 2018 brought pursuant to Section 35 of the Arbitration Act No. 4 of 1995 and Rule 3(2) and (7) of the Arbitration Rule, 1997 and under Article 159 of Constitution and all enabling provisions of law, the Applicant seeks for the following orders;

(a) That this Honourable Court be pleased to set aside the Arbitral Award made by Mr Erick Nyongesa Wafula, a sole Arbitrator dated 16th March, 2018 in so far as the said award allowed the Respondents claim and dismissed the Applicant's counter claim.

(b) That this Honourable Court be pleased to set aside the Arbitral Award made by Mr. Erick Nyongesa Wafula, a sole Arbitrator dated 16th March, 2018 in so far as the said award allowed the claimants claim in lieu thereof the Applicant's counter claim be allowed.

(c) Costs.

3. The application is supported by the grounds on its face and the applicant's supporting affidavit sworn on 18th June, 2018 where she deponed that the learned Arbitrator delivered the final award in which the claimant's claim was dismissed. Dissatisfied with the said award, the applicant seeks to have the same set aside because it flagrantly contravened public policy in that the learned Arbitrator failed to realize and appreciate that she was under severe incapacity since she could not express herself fully in English language and neither was she able to properly argue her case or even instruct the advocate so that the Respondent had undue and unfair advantage of her.

4. The Respondent opposed the application via a Replying Affidavit sworn on the 20th July, 2018. He averred that the Applicant's application was an afterthought and it offended Section 35(3) of the Arbitration Act, 1995 because it was filed late.

The Respondent also averred that the Arbitral Award was regular and should be treated in all its respect as the Applicant through her advocate fully participated in the Arbitration process and vigorously defended/opposed/disputed the claim and even called two witnesses who gave inconsistent and contradicting evidence but unfortunately lost and had her counter claim dismissed.

5. He further argued that the Applicant ought to have sought for a review instead of attempting to relitigate issues already dealt with in the Arbitration process.

6. The parties agreed to have the application considered and determined through written submissions, whereby filing of the same was confirmed on 15th October, 2018.

7. It is the applicant's submissions that the Arbitrator erred in allowing the Respondent's claim and dismissing the Applicant's counter claim and totally failed to determine the core issues of time being of the essence in the contract.

8. It is also the applicant's submissions that the Arbitrator failed to analyze the evidence before him and selectively applied distorted facts and figures which resulted to an award that was not in consonance with the evidence on record and was inconclusive since it never determined the dispute between the parties.

9. It is further the Applicant's submission that the Arbitrator erred in not realizing that there was no handing over of the completed house by the Respondent to her as per the contract since the Respondent was in total breach of the contract.

The Applicant contended that the Respondent misrepresented, and the Arbitrator misunderstood the issue of extra work and the incidental costs thereof.

10. The Applicant then submitted that the Arbitrator failed to express the fact that the Applicant was forced to engage another contractor to correct the shoddy and incomplete job done by the Respondent.

11. The Respondent on the other hand submitted that in compliance with Section 23 of the Arbitration Act, 1995, the Arbitrator held a preliminary meeting on 22nd day of November, 2016 attended by both parties and other respective advocates. The parties then agreed on their "*modus perandi*" in relation to the Arbitration and at no point did the issue of the Applicant's linguistic incapacitation come up. That it is a fact that the Applicant is fluent in English since during the term of contract they communicated in English language.

12. The Respondent went ahead and submitted that the incapacity alleged by the Applicant is not the same as the one contemplated under Section 35(2)(c)(1) of the Arbitration Act, 1995. In closing, the Respondent in his submission claimed that the Applicant's application has failed to demonstrate how the Arbitral award was contrary to public policy.

13. Having read through the;

(a) Applicant's application and supporting affidavit dated.

(b) The respondent's Replying affidavit dated 20th july, 2018;

(c) Written submission by both parties.

it clearly comes out that the main issue for determination is whether the Applicant met the conditions required to warrant an arbitral award set aside or not.

14. It is not in contention that an agreement for construction existed between the parties whereby the Respondent was to construct a three (3) bedroomed house for the Applicant at Mtogwe, which contract also contained an Arbitration clause.

15. It is also not in dispute that a dispute arose between the parties with regard to the said contract which they referred to Arbitration and both parties submitted to the jurisdiction of the sole Arbitrator. Both parties attended the preliminary meeting on 22nd November, 2016 where they agreed on how the Arbitration was to be conducted. Later the parties vigorously prosecuted and or defended their respective cased before the Arbitrator who arrived at an award.

16. The Respondent in response has raised an objection touching on the competence of the Application, which requires consideration as a preliminary issue. The Respondent's challenge of the award is that it has not been brought under the provisions of Section 35(2) of the Arbitration Act which lists the instances that would vitiate an award for the court to interfere.

17. The Respondent submits that the application ought to be dismissed contending that it was also brought in contravention of Section 35(3) of the Arbitration Act, that is, outside the three(3) months window provided for in the said Section.

18. Section 35(1) and (2) of the Arbitration Act provides for the mechanism a party to an arbitration, who is not satisfied with an award would use to approach the High Court for the purposes of having the Arbitral award set aside.

"Section 35(1)" provides as follows;

"Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under Subsection (2) and (3).

"Section 35 (2)" then provides;

"An arbitral award may be set aside by the High Court only if;

(a) The party making the application furnishes proof,

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it; or failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration provided that if the decisions on matters referred to arbitration can be separated from those not so referred. Only that part of the arbitral award which contains decision on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with the Act; or

(vi) the making of the award was induced or affected by fraud, bribery undue influence or corruption.

(b) The High Court finds that ;

(i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

19. From the face of the applicant's originating chamber summons application dated 17th July, 2018, it is clear that she relies on the provision of Section 35 of the Arbitration Act among other provisions of the law.

20. Upon going through the pleadings, it is clear that the arbitral award was delivered and published on the 16th March, 2018, meaning an application for setting aside, the same, if at all there was any, ought to have been filed within 90 days from then, being by, on or before the 14th June, 2018. The Applicant's application seeking to set aside the arbitral award of 16th March, 2018 was filed on 19th July, 2018.

21. The Respondent, in his replying affidavit dated 20th July, 2018 averred that the said application was time barred. And dispite having been given leave to respond, the Applicant never responded to the issue of her application being time barred or explain the late filing through a further affidavit. The consequence of this is that the contention that applicant's application is time barred remains uncontroverted and the award absolute and binding.

22. The applicant opted to submit on the issue via her written submissions dated 18th September, 2018, alleging that the award was served upon her on the 20th March, 2018. But the record clearly shows that the Arbitral award was delivered in the presence of the Applicant's counsel on 16th March, 2018 as per the annexed Arbitral Award.

23. The role of submission and to an extent authorities was clarified by the Court of Appeal in **DANIEL TOROITICH ARAP MOI VERSUS MWANGI STEPHEN MURIITHI & ANOTHER (2014) eKLR** as hereinunder:

"Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not come constitute evidence at all. Indeed there are many cases delivered without hearing submissions but based only on evidence presented."

24. Under Section 35(3) of the Arbitration Act, a party can only bring an application to set aside the arbitral award within 3 months from the date which the party making the application received the arbitral award.

25. The applicant also premised her application on Article 159 of the Constitution. Section 35(3) is absolute and any challenge to award ought to comply with the provisions of the Act and no party can be aided by Article 159 of the Constitution.

Section 10 of the Arbitration Act provides;

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

In the case of **ANNE MUMBI HINGA VERSUS VICTORIA NJOKI GATHARA (2009) eKLR,** the Court of Appeal stated;

> "Besides the issue of jurisdiction as explained above, 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. The last date for the challenge was 15th February, 2008. All the application filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction. Arising from the above findings concerning the competency of the application the next logical question to address is whether this appeal is properly before us."

26. Having considered the facts in the pleadings and guided by the provisions of the law and findings in the cited authorities, I find the application by Originating Chamber Summons dated 17th June 2018 has no legs to stand on and dismiss the same with costs.

DELIVERED, DATED and SIGNED at Mombasa this 29th day of November, 2018

D. CHEPKWONY

JUDGE.