



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 573 OF 2014

PATRIOTIC GUARDS LIMITED.....PLAINTIFF

- VERSUS -

SAFARICOM LIMITED.....1ST RESPONDENT

NG'ANG'A MUNENE (ARBITRATOR).....2ND RESPONDENT

RULING

1. On 27th November 2014 the Applicant commenced these proceedings by way of an Originating Summons.
2. Primarily, the proceedings seek the setting aside of the Arbitral Award dated 15th August 2014.
3. Upon being served with the Originating Summons, the Respondents put forward a Preliminary Objection.
4. It is the position of the respondents that the claim was time-barred, because it was made after the lapse of more than 3 months.
5. Miss Ogula, the learned advocate for the 1st Respondent, Safaricom Limited, submitted that pursuant to the provisions of Section 35 (3) of the Arbitration Act, any application seeking to set aside an arbitral award, ought to be brought within 3 months.
6. In answer to the Preliminary Objection, Mr. Wachakana, the learned advocate for the Applicant, submitted that the issue being raised herein did not constitute a Preliminary Objection. In his considered view, it was a question of fact, concerning the date when the Applicant obtained the arbitral award.
7. The Applicant submitted that a Preliminary Objection could only be sustainable if it was based on a plain demur on the face of the record.
8. If the Applicant's said submission means that the basis of a Preliminary Objection should be a matter expressly pleaded by the party or the parties, the Respondent points out that in this case, there had been raised a defence founded upon limitation of actions.
9. Of course, there is no literal Defence on record. What the Respondent filed was the Preliminary Objection. Nonetheless, as it provided an answer to the claim, it may be deemed to be a defence to the action.
10. The Replying Affidavit filed by the Respondent, also provides the same line of defence.
11. The Applicant's next line of submissions was that Article 159 of the Constitution of Kenya stipulates that Justice must be dispensed without undue regard to technicalities. Therefore, the Applicant urged this court to perceive previous decisions in that light.
12. Finally, the Applicant argued that the Replying Affidavit raised matters of fact, which would, presumably, require to be interrogated.

13. But the Respondent emphasized that this court need not delve into issues of fact. The Respondent says that there was no dispute about the fact which the Applicant had presented. Therefore, in the understanding of the Respondent, the only issue being raised was one of law.
14. In determining this matter, I begin by setting out the provisions of Section 35 (3) of the Arbitration Act, which reads as follows;

“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 the 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”.

15. Clearly, the operational date is the date on which the applicant received the arbitral award.
16. In the Originating Summons, the Applicant stated that it was notified of the award on 18th August 2014.
17. The Respondent is not challenging the Applicant, regarding the date when the Applicant was notified of the arbitral award. If anything, the Preliminary Objection is premised on the correctness of the Applicant’s own statement. Therefore, there is no doubt or dispute about the fact that the Applicant was notified of the award on 18th August 2014.
18. That would mean that any application to set aside the arbitral award should have been made before the lapse of 3 months, from 18th August 2014.
19. By my calculations, the application ought to have been brought to court by 17th November 2014.
20. However, the application in this case was only brought to court on 27th November 2014. It was therefore brought about **TEN (10) DAYS** later than was permitted by the law.
21. In **MUKISA BISCUITS MANUFACTURING Co. LTD Vs WEST END DISTRIBUTORS LTD [1969] E.A 696 LAW J.A** held as follows;

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration”.

22. As the learned Judge said, a preliminary objection is not necessarily limited to what had been expressly pleaded; it can also arise from a clear implication from the pleadings.
23. In this case, it was expressly pleaded. Secondly, it is a point of law which, if argued as a preliminary point, may dispose of the suit.
24. But is the issue of limitation not a technicality, which ought not therefore to be permitted to stand in the pathway to substantive justice?
25. The answer was provided by D.K.N Marete J. in **KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS Vs. WATER RESOURCES MANAGEMENT AUTHORITY & ANOTHER ELR No. 1 of 2015**, wherein he said;

“The claimant told the court that limitation is a matter of technicality which can be easily tackled under Article 159 (2) (d) of the Constitution, 2010. I do not think so. As held by the Court of Appeal in the case of Thuranira Karauri Vs Agnes Ncheche [1997] e KLR, the issue of limitation goes to jurisdiction and whenever it is raised, the court must deal with it before proceeding further”.

26. I am in complete agreement with my learned brother. And in any event, the High Court is bound by the decisions of the Court of Appeal.
27. Courts derive their jurisdiction from the Constitution and the statutes. Therefore, when the Constitution or a statute prescribes the period within which a party may move the court, that becomes a substantive matter, which goes to the jurisdiction of the court. I so hold because if a court were to entertain a case which was brought to it after the lapse of the period prescribed by law, the court would be hearing and determining the case, outside its jurisdiction.

28. This case was lodged in court after the lapse of the period of time which Section 35 (3) of the Arbitration Act stipulated. Therefore, the court lacks the necessary jurisdiction to hear the case. Accordingly, the Preliminary Objection is upheld.

29. The Originating Summons is hereby struck out, with costs. The Respondent is also awarded the costs of the Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Wachakana for the Applicant

Miss Ogula for the 1st Respondent

No appearance for the 2nd Respondent

Collins Odhiambo – Court clerk.