



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 536 OF 2015

NAIROBI FLYING SERVICES.....APPLICANT

VERSUS

KENYA AIRPORT AUTHORITIES.....RESPONDENT

RULING

1. The court is moved via a Preliminary Objection dated 11.12.2015 to strike out the instant application on the ground that “*the court lacks jurisdiction under the provisions of the Arbitration Act to grant the Orders sought in the Applicant application dated 9.12.2015*”.
2. The parties agreed to canvas preliminary objection via submissions which they filed and exchanged. To support the preliminary objection the Respondent submits that the application seeks principally for extension of time for the period of lodging an application to set aside arbitral award subject herein.
3. According to the Respondent, S. 35(3) such applications ought to be lodged within 3 months from the date parties making application receives award. The Applicant thus failed to comply with the aforesaid provisions and admits to such extent. Further, the Respondent contends that the application also offends the provisions of S.36 as there is neither original agreement nor original award annexed thereto.
4. The Respondent submits that the provisions of S.48 of the Civil Procedure Rule cited to invoke court’s jurisdiction are not applicable in the provisions of the Arbitration Act and Arbitral proceedings. The aforesaid position is buttressed by the case of **HINGA VS. GATHARA (2009)eKLR**. Further in the case of **KAA VS. NRB FLYING SERVICES HC MISC.914/2001**, the court held that relying on Hinga Case supra, thus;“

“An application involving Arbitration proceedings only provisions of Arbitration Act and rules apply thereto”.

5. The court went ahead to hold that, there are no provisions for extension of time in the Arbitration and consequently held that the court had no jurisdiction to hear the application for extension of time.

On the Applicant side, it is admitted that the time of seeking to set aside arbitral award lapsed thus making it necessary to lodge instant application. The justification in lateness is that the initial application was lodged erroneously but in time but had to be withdrawn. By the time of withdrawal of the same, the time to seek to set aside an award had lapsed thus necessity of lodging instant application.

6. The Applicant submits that since it was a mistake of the advocate the court ought to exercise discretion and allow orders sought. The case of **MURAI WAINAINA NO.4 (1982) KLR 38** is cited ,where the court held that;

“the door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate”.

7. The Applicant submits that S. 35 (3) of Arbitration Act does not prohibit court from granting orders to extend time. Thus the Applicant submits that it is relying on provisions of the Article 48 of the constitution on access to justice. It also relies in the case of **Republic Vs. Treasury Cabinet & 4 others (2014) KLR** where in a judicial review court invoked inherent powers. Applicant also cites other authorities on that point. See also **MASHRU LTD VS. TOTAL KENYA (2013)eKLR**. Where Odunga J. held that extension of time is a matter of court’s discretion. Also **NBK Ltd Vs. ANAJ WAREHOUSING LTD (2015) eKLR**.

8. After going through the materials before the court, pleadings and submissions, the court finds only one singular issue arising, namely;

- **Whether the court has jurisdiction to extend time as prayed? S.35 (3) of the Arbitration Act** provides the award to be filed within 3 months from the date the party applying receives the award?

9. The HINGA Case which is a 2009 authority prescribed that the provisions of CPA/CPR on extension of time do not apply in the Arbitral proceedings/matters. Havelock J. in **KENYA AIRPORT AUTHORITY CASE** reiterated same position while holding that the court has no jurisdiction to extend time provided by **S. 35(3) Arbitration**.

10. **S.10 of Arbitration Act** provides that *“except as provided in this Act, no court shall intervene in matters governed by this Act”.*

11.The question is then is, *‘Can this court in the circumstances above cited in HINGA Case, KAA Case AND S.10 of the Act interfere and extend time?* The applicant submits that via the mandate under the inherent powers and access to justice principle, provided under Article 48 of the Constitution, the Court can extend time. However, the provisions of Article 159(2) b and d, requires justice to be expedited. The policy of court is to give latitude and autonomy to arbitral proceedings. A party seeks the same mode of settling disputes and so the court must honour their resolve.

12.That is why even the issue of appeal against the setting aside an award has been restricted to give finality to the arbitral proceedings. I therefore agree with Havelock J. in **KENYA AIRPORT AUTHORITY Case** that the court has no jurisdiction to extend time to lodge application to set aside an award under S.35(3). The court thus makes the following orders;

1. **The Notice of Motion dated 9.12.2015 is struck out.**
2. **Costs to the Respondent.**

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE