



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**MISCELLANEOUS CIVIL APPLICATION NO. 237 OF 2014.**

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

**MASINDE MULIRO UNIVERSITY OF**

**SCIENCE AND TECHNOLOGY :::::::::::::::::::: CLAIMANT**

**VERSUS**

**ALFATECH CONTRACTORS LIMITED ::::::::::::::::::::RESPONDENT**

**RULING**

**INTRODUCTION.**

1. By the Notice of Motion dated 7<sup>th</sup> April, 2016 the respondent sought for orders to review this court's order dated 30<sup>th</sup> November, 2015 which set aside the Award of the Arbitral Tribunal in favour of the respondent amounting to Ksh. 1,874,571.43.
2. The application was certified urgent on 12<sup>th</sup> April, 2016 and served upon the claimant. The claimant apart from filing its replying affidavit sworn on the 27<sup>th</sup> April, 2016 filed a Notice of preliminary Objection.

**The Preliminary Objection**

3. The claimant seeks the dismissal of the said Notice of Motion for the reason that this honourable court does not have jurisdiction neither under the Arbitration Act, Cap 49 of the Laws of Kenya nor the Civil Procedure Rules 2010 to review the ruling/decision made by the court on 30<sup>th</sup> November, 2015.

**Submissions and Determination**

4. Parties agreed to dispose the preliminary objection first before hearing the Notice of Motion dated 7<sup>th</sup> April, 2016. They canvassed the same by filing their respective written submissions.
5. In their submissions, the respondents submit that this honourable court has jurisdiction to entertain their application. They have relied on various decisions by the Court of Appeal in support thereof whose contents have been noted.
6. On their part the claimant contends that this court does not have jurisdiction to review its orders. They too have relied on various authorities to support their claim which this court has taken note of.

7. A look at the respondent's Notice of Motion, the same is brought under section 1A, 1B and 3A of the Civil Procedure Act, Order 45 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules and all enabling.

8. These are provisions under the Civil Procedure Act and Rules which are not applicable to the Arbitration Proceedings. This finding is informed by the five bench Court of Appeal case of **NyutuAgroveto Limited vs. Airtel Networks Limited [2015] eKLR** where the court held as follows at page 15:-

*“Flowing from this is the question whether this proceedings can be subjected to our Civil Procedure Act. I hold the view that they are not. The clear provisions in the Arbitration Act cannot be displaced by the provisions of the Civil Procedure Act and Rules except as provided for in the act itself as succinctly provided in section 10 thereof. Moreover rule 11 of the Arbitration Rules states that the Civil Procedure Rules shall apply to arbitral proceedings under the act “so far as is appropriate”. This would apply where there is lacuna particularly in the rules of procedure but cannot in my view override clear statutory provisions such as section 10 and 35 of the Act.”....*

9. **Havelock J. in KENYA AIRPORT AUTHORITY CASE** reiterated same position while holding that the court has no jurisdiction to extend time under **S. 35(3) Arbitration Act**. **S.10 of Arbitration Act** provides that;

**“Except as provided in this Act, no court shall intervene in matters governed by this Act”.**

10. In the case of **KAA VS. NRB FLYING SERVICES HC MISC.914/2001**, the court held that relying on **HINGA Vs. GATHARA (2009) e KLR** thus;

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

11. It is trite therefore that Rule 11 of the Arbitration Rules does not give substantive right of review by importing the provisions of the Civil Procedure Act and Rules made there under.

12. Jurisdiction under the Arbitration Act is special and the court does not have jurisdiction to review its orders. This court was properly seized of all facts as presented by both parties, they both had the Arbitral Award and submitted on it during the hearing.

13. As properly laid out in the case of **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR:-**

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law.”*

14. What the court noted in its ruling of 30<sup>th</sup> November, 2015 was that the award made was however above that claimed by the respondent. The court set aside the additional arbitral award that was made over and above the sum that was claimed by the respondent and this is what aggrieved the respondent who now wants a review.

15. The discovery by the court of the excess amount awarded is not a new and important matter. It is not an erroneous view of evidence. What was awarded again was more than what was claimed and this is what the court remedied.

16. In conclusion, I find that there are no circumstances that warrant this court interference on its ruling. As properly stated it will be tantamount to this court sitting in appeal on its own judgment which is not permissible in law.

The preliminary objection is therefore allowed with costs to the claimant.

**SIGNED, DATED AND DELIVERED** at **KAKAMEGA** this **27<sup>TH</sup>** day of **SEPTEMBER**, 2016.

**C KARIUKI**

**JUDGE.**

**In the presence of:-**

.....**N/A**.....**for the Claimant.**

.....**SHIFWOKA BURUGU**..... **for the Respondent.**

.....**ANUNDA**.....**Court Assistant.**