



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
MISCELLANEOUS CAUSE NO 208 OF 2015
PROVINCIAL CONSTRUCTION CO. LTD.....CLAIMANT
VERSUS
THE HON. ATTORNEY GENERAL ON BEHALF OF
THE MINISTRY OF HEALTH.....RESPONDENT

RULING

[1] The Claimant/Applicant, **Provincial Construction Company Limited**, approached the Court through the Chamber Summons dated **7 May 2015** seeking orders that:

- [a] The Final Award of the sole Arbitrator, **Norman Mururu**, dated **11 February 2003** be recognized as binding and thus be adopted as the Judgment of the Court;
- [b] That leave be granted to the Claimant to enforce the Award as a decree of the Court;
- [d] That the Court be at liberty to grant any such further orders as it deems fit and appropriate in the circumstances;
- [d] That the Respondent do pay the costs of the application.

[2] The application was filed pursuant to **Sections 36(1) and Section 40(a) and (d) of the Arbitration Act, Chapter 49 of the Laws of Kenya** and **Rules 4(1), 6, 9 and 11 of the Arbitration Rules, 1997**, on the grounds that the Arbitrator made an Award against the Respondent on **11 February 2003**, and that despite correspondence with the Respondent demanding payment of the sums awarded, the Respondent has failed to pay the amount due and owing to the Claimant. The application is supported by the Affidavit of **Lalji V. Hirani** annexed thereto, in which it was deponed that the Claimant company was contracted in 1979 to undertake the construction of certain facilities at the **Nyeri Provincial Hospital** by the **Ministry of Health** at a cost of **Kshs. 12,000,000**. It was further averred on behalf of the Claimant that it was a term of the Contract that any dispute arising between the parties pursuant to the Contract would be referred to arbitration.

[3] **Mr. Hirani** further deponed that a dispute did arise between the parties with regard to the construction of the kitchen, laundry and boiler house facilities at **Nyeri Provincial Hospital** which was referred to **Mr. Norman Mururu** for arbitration on **27 January 1993**. Thereafter, on **29 January 2003**,

the parties entered into an agreement to compromise the claims and counter-claims presented for arbitration. It was therefore the case of the Claimant that the only issue left for determination was the rate of increase of the tax payable during the currency of the contract. It was further averred by **Mr. Hirani** that, after hearing the parties on this issue, the Arbitrator made an award on **11 February 2003** in favour of the Claimant in the total sum of **Kshs. 13,653,683.50** together with interest at the simple rate of 14% per annum until payment in full. The Claimant's complaint herein is that the aforesaid amount remains unpaid from **11 February 2003** to date, hence the application for recognition and enforcement of that Award.

[4] In response to the application, the Respondent filed a Notice of Preliminary Objection dated **8 June 2015**, contending that it is time-barred by dint of **Section 4(1)(c) of the Limitation of Actions Act**, which requires that an action to enforce an arbitral award be brought within **six years** from the date of the Award. Accordingly, the Respondent urged for the dismissal of the application dated **7 May 2015**.

[5] The Claimant thereafter filed a Supplementary Affidavit sworn by **Lalji V. Hirani** on **29 June 2015** with a view of controverting the Preliminary Objection. It was deponed therein that the parties have had long and meaningful consultations on the matter of the Award by **Mr. Norman Mururu** dated **11 February 2003**, and pointed out that the Respondent acknowledged the debt in writing and even prepared some payment vouchers in favour of the Claimant. It was thus the contention of the Claimant that the Respondent is merely intent on denying it its dues, and should therefore not be entertained by the Court.

[6] The Preliminary Objection was canvassed by way of written submissions. The Claimant filed its written submissions on **26 June 2015** while the Respondent's written submissions were filed on **27 July 2015**. The submissions are restricted to the Preliminary Objection raised by the Respondent pursuant to **Section 4(1) of the Limitation of Actions Act**. According to the Respondent, the application for recognition and enforcement of the Award that was filed herein by the Claimant is time-barred by statute and therefore incompetent, for the reason that it was filed outside the limitation period of **6 years** without any order for extension. The Respondent's argument is that, in the premises, the Court lacks the jurisdiction to entertain the chamber application dated **7 May 2015**. Counsel cited the cases of **Thuranira Karauri vs. Agnes Ncheche [1997] eKLR**; **Fredrick Kiura Nyaga Waweru & 2 Others vs. Justino Njue M'Mbuchi & 24 Others [2013] eKLR** and **E.M.S. vs. Emirates Airlines [2012] eKLR**, in support of his submissions, and urged the Court to dismiss the Claimant's application with costs.

[7] The Claimant, on its part, contended that its application has been brought under the **Arbitration Act**, which is a specific legislation and therefore the **Limitation of Actions Act** is inapplicable thereto. Counsel relied on the cases of **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR** and **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR** in support of this argument. He further urged the Court to uphold the principle of finality of arbitral awards, contending that **Section 36 of the Arbitration Act**, being couched in mandatory terms as it is, does not leave room for court intervention, save as otherwise stipulated in the Act. In support of this argument, Counsel for the Claimant relied on **Dilshad Sadrudin Mohamed vs. K & A Self Selection Stores Limited and 3 Others (Winding Up Cause No. 57 of 2001)** and **Transworld Safaris Limited vs. Eagle Aviation & 3 Others [2003] eKLR**.

[8] In the alternative, Counsel urged the Court to find and hold that there is a conflict between the **Arbitration Act** and the **Limitation of Actions Act**, and to uphold the provisions of the **Arbitration Act**, not only for the reason of it being the latter statute, but for the reason also that it is a specific statute, as opposed to the **Limitation of Actions Act**, which is a general statute. He hinged this argument of the maxim *Generalia Specialibus Non Derogant* as explained in the cases of **Secretary General of the East African Community vs. Angella Amudo [2013] eKLR** together with a number of decisions by the Indian Court of Appeal and Supreme Court.

[9] Further to the foregoing, the Claimant also argued that all it ever did was to promote alternative forms of dispute resolution as is required by **Article 159 of the Constitution**, and was never at any time indolent in the pursuit of this Award; which is why the Respondent prepared payment vouchers and wrote

acknowledgments of its indebtedness under the subject contract. In this regard, the Claimant urged the Court to find that the clock had been reset from the date of the last such acknowledgement, pursuant to **Section 23(3) of the Limitation of Actions Act**, the last acknowledgement being the letter dated **17 May 2010**.

[10] In the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. Westend Distributors (1969) EA 696**, it was stated that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion." Per Charles Newbold, P)

[11] I have carefully considered the Notice of Preliminary Objection and the written submissions made herein in respect thereof in the light of the Chamber Application filed herein on **12 May 2015**. It is not in dispute that the parties entered into a contract on **20 January 1979** for the construction of certain facilities at **Nyeri Provincial Hospital** and that thereafter a dispute arose between them, which was referred to arbitration. The Arbitrator, **Norman Mururu**, accordingly facilitated an amicable settlement and an agreement was signed by the parties to that effect dated **29 January 2003**. The only outstanding question was whether the loss incurred by the Claimant due to increase in the rate of sales tax during the currency of the contract was claimable. That single issue was then inquired into by the Arbitrator and an Award made on **11 February 2003** encompassing the agreement and the tax element. The total award was thus in the sum of **Kshs. 13,653,683.50**, payable in 45 days of taking up the award, failing which interest would accrue thereon at 14% until full payment. The Claimant has now moved the Court for enforcement of that Award.

[12] Section 4(1) of the Limitation of Actions Act provides that:

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued--

(a) ...

(b) ...

(c) actions to enforce an award..."

The Claimant did not dispute that it moved the Court for enforcement of the Award dated **11 February 2003** outside the 6 year period aforementioned. It was however contended that the parties have all along been on talking terms, for which reason the Claimant was not averse to waiting longer for his payment. The Claimant attached various documents to the Supplementary Affidavit sworn on its behalf by **Lalji V. Hirani** to prove its contention that the debt was thereafter acknowledged by the Respondent, thereby resetting the clock for purposes of the limitation period.

[13] **Section 23(3) of the Limitation of Actions Act** does recognize that:

"Where a right of action has accrued to recover a debt or other pecuniary claim ...,and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment..."

In the premises, since these are matters that are yet to be proved and verified by evidence, it would follow that this is not a suitable case for disposal by way of preliminary objection. As pointed out herein above, a preliminary objection raises a pure point of law which is argued on the assumption that **all the facts** pleaded by the other side are correct, and therefore cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. It is manifest therefore that the Preliminary Objection

was wrongly taken.

[14] The foregoing being my view of the matter, I would direct that the Chamber Application dated 7 **May 2015** be fixed for hearing for disposal on the merits.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF OCTOBER, 2016

OLGA SEWE

JUDGE