1. NANCY NYAMIRA

2. RICHARD WAMBUGU NGIBUNI…….. PLAINTIFF/APPLICANT

VERSUS

ARCHER DRAMOND MORGAN LTD…. DEFENDANT/RESPONDENT

RULING

1. There are two applications and two preliminary objections before the Court. By an agreement of the parties, all four were canvassed simultaneously by way of written submissions before *Justice Kihara*. *Justice Kihara* left the Machakos station before delivering a ruling. It fell upon me to deliver the ruling.

2.It is important to briefly state the facts of the case. On **20/04/2009**, the Plaintiffs herein commenced a suit against the Defendant seeking an order for specific performance of an Agreement for Sale dated **01/02/2008** with the Defendant for the sale of a Maisonette known as **Unit No. 8 on L.R. No. 27317, Phase 1, Hillcrest Park Estate, Off Mombasa Road** ("*Suit Property*"). The Plaintiffs also sought a permanent injunction aimed at ensuring they will enjoy vacant possession and full ownership of the Suit Property.

3. In a Statement of Defence filed in Court on **29/04/2008**, the Defendant resisted the Plaintiffs' claims and, in essence, claimed that it was the Plaintiffs who had materially breached the Agreement for Sale and were therefore undeserving of the prayers sought.

4.On **05/05/2009**, the Plaintiffs and Defendant, through their respective advocates entered into a consent on the following terms:

BY CONSENT:

a)The suit herein be referred to arbitration by the Chairman, Chartered Institute of Arbitrators (Kenya);

b)The orders issued on 20/04/2009 be extended pending arbitration;

c)The Arbitral award be filed in court within 60 days from the date of filing of this consent.

5.The orders referred to in **paragraph (b)** of the consent order are those of injunction restraining the Defendant from selling or disposing of the Suit Property.

6.On **06/05/2009,** the Plaintiff wrote to the Chairman, Chartered Institute of Arbitrators (Kenya Chapter) to appoint an arbitrator to hear the dispute. The response came on **28/05/2009** vide a letter dated **26/05/2009** appointing *Paul T. Gichuhi* as the arbitrator ("*Arbitrator").*

7.At the prompting of the Plaintiffs, the Arbitrator wrote to the parties confirming his appointment and

calling for a first preliminary conference of the parties. That preliminary meeting was held on **08/06/2009** pursuant to the mutual convenience of both parties and the Arbitrator. During that meeting, the parties agreed on the arbitration time-table. Pursuant to that agreement, the hearing was eventually held on **04/08-05/08/2009.**

8.On **28/08/2009,** the Arbitrator wrote to the parties to inform them that the award was ready for lifting subject to payment of **Kshs. 580,000/=** in fees. The Plaintiffs promptly paid their portion of the fees. Apparently, the Defendant declined to pay its portion of the fees. Faced with non-publication of the award due to failure to pay the fees, the Plaintiff reluctantly elected to pay the Defendant's portion of the fees as well on 16/12/2009. This was after the Plaintiffs had filed an application in Court to compel the Defendant to pay its portion of the fees. That application was never heard on its merits because the Court file disappeared soon thereafter leading to a subsequent application by the Plaintiffs to reconstruct the Court file.

9.The arbitral award was lifted on 18/12/2009 and was lodged in the Court's registry on 23/02/2010. The arbitral award was favorable to the Plaintiffs. In particular, the Arbitrator ordered specific performance of the Agreement for Sale as prayed by the Plaintiffs and an order injuncting the Defendant from selling, alienating, disposing of, transferring or otherwise dealing with the Suit Property.

10.The Plaintiffs filed their application for enforcement of the award on **19/10/2010** (*"Enforcement Application")* vide a Chamber Summons dated 03/08/2010 following the reconstruction of the Court file through a Court Order.

11.The Defendant responded to the Enforcement Application by filing its Notice of Preliminary Objection and Grounds of Opposition – both dated 09/11/2010.

12.Meanwhile, on 19/07/2010, the Defendant had filed a Chamber Summons Application dated 22/03/2010 supported by the Affidavit of **Evans Wachira**, Advocate sworn on even date to supersede the arbitration and proceed with the suit *(*"*Application to Supersede*").

13.The Plaintiffs filed a Notice of Preliminary Objections to the Defendant's Application to Supersede on 19/10/2010.

14.It is obvious that the two applications – the Enforcement Application and the Application to Supersede – run parallel to each other and are mutually exclusive. One is the mirror image of the other: the one seeking to enforce the arbitral award; the other seeking to supersede it or set it aside. It is therefore logical to analyze the merits of both applications simultaneously.

15.The question presented, then, is whether the arbitral award should be enforced or whether it should be set aside and the Court resumes the hearing of the suit.

16.In favor of setting it aside and rejecting the Plaintiffs' Enforcement Application, the Defendant makes three major arguments. First, the Defendant argues that the arbitral award must be superseded for the simple reason that it was filed out of time. The Defendant relies on the Provisions of **Order XLV, Rule 8** of the (Old) **Civil Procedure Rules**. **Order XLV** is entitled "*Arbitration Under Order of a Court*" and **Rule 8** provides as follows:

8 (1) The Parties may, by filing an agreement in writing, extend the time for the making of the award, whether or not at the date of the agreement time has expired, and whether or not an award has been made since the expiry of the time allowed

(2) On application made by a party, arbitrator or umpire on notice, the court may either extend the time for the making of the award, whether or not at the date of the application time has expired, and whether or not an award has been made since the expiry of the time allowed, or make an order superseding the arbitration in which case it shall proceed with the suit.

17.The Defendant argues that the consent order which sent the matter for arbitration was categorical: arbitration was to take place within **60 days**. Those 60 days ended around **05/07/2009** and, therefore, the publication of the arbitral award on **16/12/2009** was six months out of time. The only option open to the Plaintiffs by then would have been to apply to the Court to enlarge time to file the arbitral award. Having failed to do so, the arbitral award is null and void and the Court should supersede the arbitration and proceed with the suit.

18. Secondly, the Defendant argues that the Plaintiffs' Enforcement Application is fatally and incurably defective, is incompetent and does not lie. The Defendant pegs two separate arguments on this heading. First, it complains that the Enforcement Application is expressed, at least in part, to be brought under **Order XLIV, Rule 17**. The Defendant argues that such a rule simply does not exist, and, it therefore follows that the Enforcement Application is incompetent and defective. Second, the Defendant complains that the Enforcement Application should have been brought by way of Notice of Motion and not Chamber Summons as prescribed by **Order L, Rule 1**. The Defendant's argument in this regard is that since there is no prescribed procedure for bringing an Enforcement Application, the correct procedure should have been by way of Notice of Motion **under Order L, Rule 1** of the **Old Civil Procedure Rules.**

19.In support of both these technical points, the Defendant argues that procedure must be strictly followed. The Defendant's counsel cites the case of *Salume Namukasa v Yozefu Bukya* (1966) EA 433 where Sir Udo Udoma CJ, as he then was observed:

Counsel must understand that the Rules of this Court were not made in vain. They are intended to regulate the practice of the court. Of late, a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out?

20.Thirdly, the Defendant relies on the provisions of section **37(1)(a)(vi)** of the **Arbitration Act** of **1995** to argue that the arbitral award in this case "*has not yet become binding on the parties*" because it was filed out time without leave to enlarge time and that the same is, therefore, invalid and ought to be set aside.

21.On their part, the Plaintiffs argue that the arbitral award ought to be enforced as there is nothing that warrants it being set aside. In the first place, they argue that the Arbitration Act is the controlling law in this case and therefore the Defendant must bring itself within **sections 35** and **37** of the **Arbitration Act.** None of the grounds for setting aside the arbitral award thereunder has been satisfied here, and hence the Defendant's attempt to supersede the Arbitration must fail.

22.The Plaintiffs also argue that the Defendant's Application to Supersede the Arbitration is, in any event, time barred since it ought to have been brought within 3 months of the publication of the arbitral award in accordance with section 35(3) of the Arbitration Act.

23.Overall, the Plaintiffs argue that the Defendant's over-reliance on the provisions of the Civil Procedure Rules in the face of the Arbitration Act renders its application incompetent.

24.It is important to set up the procedural context of this case as the appropriate way to frame the analysis which will lead us to a proper determination in this case. That context is one of arbitration. The analysis must begin by reminding ourselves that the prime objective of the Arbitration Act is to advance arbitration as a desirable alternative to litigation. The idea is not to transform arbitration into another form of litigation. The objective is to enforce private arbitration agreements not to defeat them. The Arbitration Act, therefore, endeavours to ensure that the arbitration process is efficient, expeditious, and economical yet conducted in a manner which is fair to the parties, and which promotes finality of the decision of the dispute submitted to arbitration.

25.To this end, it is imperative that the Court reads the various provisions of the Arbitration Act in this

light. As the Court of Appeal held in *Anne Mumbi Hinga v Victoria Njoki Gathara* (Civil App. No. 8 of 2009), one such interpretation that breathes this objective into the provisions of the Arbitration Act is the transcendent principle that the Arbitration Act is a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: *Except as provided in this Act no court shall intervene in matters governed by this Act*. As the Court of Appeal said in the *Anne Mumbi Hinga case:*

In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration.

26.With that in mind, the Court comes to the resolution of the instant case. First, in light of the framing above, the Court rejects the Defendant's invitation to supersede the Arbitration under **Order XLV, Rule 8** on **four** separate **grounds**. First, it is the opinion of the Court that that Order has itself been, to the extent of any inconsistency, been overturned by the Arbitration Act. The Arbitration Act is primary legislation while Order XLV is subsidiary legislation: to the extent of conflict, the primary legislation trumps. In this case, the Arbitration Act provides very specific and exhaustive grounds upon which an arbitral award can be set aside. The grounds for setting aside an award are catalogued in section 35 of the Arbitration Act. That section reads as follows:

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

(2)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 his 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 decisions on matters not *referred to arbitration may be set aside; or*

v.The compositions 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 the Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this 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 law of Kenya; or

ii. The award is in conflict with the public policy of Kenya;

(3)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 that 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.

27.As the *Ann Mumbi Hinga case* held, this list of grounds for setting aside arbitral awards is exclusive. No other ground not included in this list may be used as a ground to set aside an arbitral award. An arbitral award published outside the time limit agreed by the parties is not given as one such ground. It follows that such a ground is expressly excluded – see *Ann Mumbi Hinga case*.

28.Second, and related, as reasoned above, the Arbitration Act is treated as a self-contained code. The Court would only import the Civil Procedure Rules with great circumspection. It would certainly not do so if the effect would be to defeat the purpose of the Arbitration Act. In this case, the Defendant invites the Court to import the Civil Procedure Rules for purposes of delaying the resolution and finalization of the dispute between the parties on the technical ground that the arbitral award was published outside the time limit agreed by the parties. Given the objective of the Arbitration Act to permit a speedy and final resolution of disputes, allowing the Defendant to do so would subvert the objectives of the Arbitration Act.

29. Third, in this specific case, to allow the Defendant to rely on time as a reason to set aside the arbitral award would be to reward a party for its own faults. In an affidavit that has remained uncontroverted and uncontested on its facts, the Plaintiffs narrate about their struggle to have the Defendant timeously adhere to its obligations during the arbitration process. The Defendant turned very uncooperative, and in the end delayed the arbitral award for more than three months owing to his refusal to pay the Arbitrator's fee without explanation or justification. The Defendant cannot now invoke that delay to victimize the Plaintiffs further.

30.But suppose **Order XLV** is still applicable? I would hold that nothing in **Rule 8(1**) and **(2)** thereof really restricts the power of the Court to enlarge time upon an application by one of the parties to supersede the arbitral award. In the circumstances of this case, rather than accede to the Defendant's request to supersede the arbitration, the Court would, instead, enlarge time and to deem the arbitration enforcement application as having been duly filed within time.

31.Next, the Defendant argues that the Plaintiffs' application must fail because it cites the wrong provisions of law. The Enforcement Application cites **Order XLIV, Rule 17**. The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma's remarks *Salume Namukasa v Yozefu Bukya* (1966) EA 433, invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitau v Muriuki* [1986] KLR 211 which I now follow to hold that in as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded.

32.The Defendant's objection to the Plaintiffs' Enforcement Application on the ground that it should have been brought by way of Notice of Motion not Chamber Summons meets the same fate. The answer to this technical objection was provided by the Court of Appeal in *Johnson T. Kinyanjui v Rachel W. Thande & Another* (Civil Appeal No. 284 of 1994). There, the Court of Appeal stated:

It can be seen that no application is to be defeated by use of wrong procedural mode and a judge has discretion to hear it either in court or in chambers.

33.I would also dismiss the Defendant's Application to Supersede for being time-barred. Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act. In 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 on which the party making the application received the arbitral award. Here, evidence suggests and the Defendant admits in various Court documents (for example, the face of the Application to Supersede, the Supporting Affidavit of **Evans Wachira** and the

Written Submissions of the Defendant) that the award was delivered or published on **16/12/2009.** The Defendant had until **16/03/2010** to set aside the arbitral award. The Application to Supersede was not filed until **22/03/2010** – outside the time permitted to bring such an application.

34.Lastly, since the Court has found the grounds relied on by the Defendant to seek to set aside the arbitral award to be wanting, and since the Defendant was relying on these secondary grounds as the foundation to erect its ground to refuse to enforce the arbitral award under **section 37(a)(vi),** it follows that the Defendant cannot succeed in its quest to resist enforcement under that section.

35.The upshot is that there is no legitimate ground to set aside the arbitral award under **section 35** of the **Arbitration Act,** and none either to refuse to enforce it under **section 37** of the same Act. Consequently, the Enforcement Application dated **03/08/2010** is hereby allowed in terms of **prayers (b)** through **(d):**

a. Judgment in the suit is entered in terms of the Arbitral Award dated 16/12/2009;

b. The Arbitral Award dated 16/12/2009 will be enforced as a decree of this Court; and

c. Costs of this Application and the suit are awarded to the Plaintiffs.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **15TH** day of **FEBRUARY 2012**.

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J.M. NGUGI
JUDGE