GLENCORE GRAIN LTD.....APPLICANT

VERSUS

TS.S.S GRAIN MILLERS LTD.....RESPONDENT

RULING
INTRODUCTION

1. These have been protracted proceedings. They may yet have some more mileage. They exemplify the pitfalls of protraction, peripheration and obfuscation common in litigation that are easily obviated by resort to alternative dispute resolution processes. The ultimate question raised before me in the application herein is simply whether an arbitration award, sought to be recognized and enforced through the court, is caught out by limitation because the court processes did not serve up a directional judgment expeditiously enough to avail the award holder the fruits of his award.

The History of the matter.

2. In 1998 there was a dispute between the applicant Glencore Grain Limited of Bermuda as seller and TSS Grain Millers Limited of Mombasa the respondent, as purchaser. It involved the sale and purchase of 10,000 metric tons of white corn. Upon a dispute arising, a contractual reference under the Grain and Feed Trade Association (GAFTA) was commenced in London. An award was then rendered there on 22nd March, 2000, by a panel of three arbitrators. Under our law, such an award is considered to be an international arbitration award.

3. On 21st August, 2000, the Applicant filed an application in the High Court for enforcement of the international award. They relied on Section 36 of the Arbitration Act 1995 and the Arbitration Rules 1997. The application was resisted on a number of grounds which it is not necessary to go into here. On 22nd September, 2000 the Respondent also filed an application. It sought that the courts decline to enforce the award, and instead to set it aside. Both applications were heard separately, but the court issued a consolidated ruling on 5th July, 2002.

4 The court dismissed the claimant’s application for and recognition and enforcement. It allowed the Respondent\'s application, and set aside the Award. Amongst the grounds given by the court for disallowing the arbitral Award were the following:

§ The claimant’s application had no supporting affidavit

§ Neither an original nor certified copy of the arbitration award was filed

§ An authenticated copy of the arbitration agreement was not filed, nor were the GAFTA Arbitration Rules

§ The Award had not been stamped under the Stamp Duty Act

§ The award was against the public policy of Kenya in that it involved importation of maize unfit for

human consumption.

5. Given the outcome in the High Court the claimant filed Civil Appeal Number 268 of 2003 on 11th September, 2003 in Mombasa, pursuant to a Notice of appeal filed on 18th July, 2002. The court's Certificate of Delay issued on 24th July, 2003, certifies that the Applicant's counsel:

"applied to the court for certified copies of proceedings and ruling in the above case on 18th July, 2002 and the same were delivered on the 9th day of July, 2003. The period from 18th July 2002 to 9th July, 2003 was required for the preparation and delivery to them of the said copies."

6. Eventually, the Court of Appeal issued its judgment dated 30th November, 2007. Allowing the appeal, it held that the superior court had erred in setting aside the arbitration Award. Instead, the court, should have struck out the application for recognition of award for non-compliance not set aside the award. Judges of Appeal Omolo, O\'kubasu and Onyango Otieno found:

"…The application dated 9thSeptember 2000 was brought under section 36 of the Arbitration Act 1995 and rules 4(1) and 9 of the Arbitration Rules. Under those provisions, all the court could do if the court felt the award could not be recognized and enforced, was to refuse to recognize it and refuse to enforce it but it could not, in our view, dismiss it, reject it or set it aside. <u>All that the court was asked to do and could be asked to do was to recognize and enforce it.</u> If it did not do so, it could not set it aside for it still remains an award in the state in which it was made. The application dated 22nd September 2000 was premised under Section 35 and 37(1) (a) (iv) and (b) (iii) of the Arbitration Act 1995. Section 35 deals with recourse to the High Court against arbitration award and has a provision for setting aside a domestic arbitral award. It has nothing to do with issues involving foreign awards. The learned judge of the superior court, in considering the arbitral award that was before him under that section and ordering the setting aside of the award which was a foreign award, was, in our view plainly wrong and that order setting the award aside is, as we have stated erroneous. Having considered the matter at length, we have come to the conclusion that the orders of the learned Judge of the superior court dismissing the application dated 9th August 2000 and setting aside the award are erroneous. The two orders are set aside. We substitute for the same an order striking out the application dated August 2000. As for the application dated 22nd September 2000, we have already stated that the order given in respect of it, namely setting aside the arbitration award was erroneous. We set that order aside and substitute it with an order refusing to register the award and making it a judgment of the court. The appeal succeeds to that extent only…" (See the appellate judgment between the parties herein being Civil Appeal No. 268 of 2003, Court of Appeal at Mombasa, on pg 30 to 31)

7. Thus, the orders of the High Court on both applications were set aside. The Applicant was left holding its Award, which had been refused registration more properly described as recognition to in the Arbitration Act. The refusal was on mostly procedural grounds. The Applicant thus deemed it appropriate that it should start the process of re-applying for recognition and enforcement of the Award under the Arbitration Act. That is how the present application arises.

<u>The Present Application</u>

8. Before taking steps to actually lodge a fresh application for recognition and enforcement of its Award, the Applicant was aware that a total of seven (7) years and three (3) month's had lapsed between the filing of the application for enforcement on 21st August, 2000, and the reading of the Court of Appeal's decision on 30th November, 2007. In light of those circumstances, it filed its present application on 10th March, 2008 seeking *exclusion* of the time consumed in litigation proceedings when reckoning the running of time for purposes of Section 4 of the Limitation of Actions Act.

9. The Applicant's notice of motion under Section 4 and 34 (5) of the Limitation of Actions Act Chapter 22 and Section 3A of

the Civil Procedure Act seeks the following orders:

"1. That this Honourable Court be pleased to grant an Order that the period between the filing of the Notice of Appeal on the 18th June, 2002 and the delivery of the judgment of the Court of Appeal on 30thNovember, 2007 be excluded in computing the period of limitation prescribed for the bringing of an action for the enforcement of an Arbitral Award dated 22nd March, 2000;

2. ***That this Honourable Court be pleased to further grant an Interim Order that the period from filing of this application until it is heard and determined shall be excluded in computing the period of limitation prescribed as above."***

10. The application is supported by an affidavit deponed by Diane Galloway, Solicitor, of Reed Smith Richards Butler LLP Solicitors. She depones that she had conduct of the Applicant\'s matter in London. She has set out the chronological background to the application in a fair amount of detail. Finally, she depones that the application has been brought without unreasonable delay.

11. The Respondent opposes the application through the Replying Affidavit of Tahir Sheikh Said, the Managing Director of the Respondent, deponed on 6thOctober, 2008. Essentially he states, amongst other things:

§ That the application has been brought after a long and unreasonable delay, and will cause prejudice to Respondent;

§ That the application for enforcement should have been brought on or before 21st March, 2006, the award having been made on 22nd March, 2000;

§ That the award is a non-starter as the Court of Appeal found it incompetent and lacked legal basis to be recognized, and therefore refused to register it;

§ That it took the Applicant more than a year to file the Record of Appeal demonstrating lack of seriousness in prosecution of the appeal;

§ That the decision of the Court of Appeal does not expressly or impliedly revert to the date of the High Court decision;

§ That once time starts to run it is a rule that it will continue to run notwithstanding occurrence of subsequent events which make it impossible for an action to be brought;

§ That the enforcement period of the Award lapsed two years ago.

12. Parties filed written submissions, which they highlighted orally in court, in addition to filing lists of authorities relied upon.

Parties' Contentions

13 Both in the application and submissions, the Applicant has relied on Section 4 and 34(5) of the Limitation of Actions Act, and Section 3A of Civil Procedure Act. Section 4(1) stipulates that an action to enforce an award should not commence after six years from the date when it arose. With regard to Section 4(1) (c) both parties seem to be in agreement that the time for enforcement of the Award commenced running on 22nd March, 2000, and that over six (6) years have lapsed since that date. The applicant considers a large chunk of that time should be excluded, but the Respondent thinks that limitation time runs irrespective of intervening circumstances.

14. The Applicant argues that Section 34(5) read together with Section 39(5) Arbitration Act give the court adequate powers and discretion to make the orders sought as they relate to the doctrine of "**relation**

back" whereby all decisions of the Court of Appeal which reverse or vary decisions of the superior court automatically, by operation of law, revert back to the date of the High Court decision which has been varied or reversed by the Court of Appeal. Counsel for the Applicant, argued that Section 39 (5) is an example of the doctrine. I will consider those sections hereafter.

15. The Applicant further argues that it took all reasonable steps and is not guilty of any delay in submitting the Award for enforcement. The delays caused in the appeal being eventually heard and determined were entirely beyond their control. Further some of the delay in January to March 2008 was occasioned by the post-election violence which affected all parts of the country.

16. The Respondent argues that Sections 4 and 34(5) of the Limitation of Actions Act and Section 3A of the Civil Procedure Act cannot be invoked in the application. This is because Section 10 of the Arbitration Act clearly provides that:

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

Section 3A is also excluded, argues counsel, because Rule 11 of the Arbitration Rules is clear that the Civil Procedure Rules are applicable and does not mention the application of the provisions of the Civil Procedure Act.

17. Further, counsel argues that in light of **Wanjau vs Muraya** [1983] KLR a section should not be cited where there is an appropriate Order under the Civil Procedure Rules to cover the relief sought. Here, Order 50 Rule for enlargement of time should have been invoked.

18. Counsel dismissed as taken out of context, the applicability of Sections 34(5) and 39(5) of the Arbitration Act. These, he said, are relevant only to a situation where a court is sitting in respect of the arbitral matter to set aside the award, and for orders related to the period between the commencement of the arbitration and the date of the award, but not for excluding time in computing the period of limitation. In any event with regard to the Court of Appeal decision, if the Court of Appeal had intended it to revert back to the date of the High Court decision, it would have specifically said so.

Further, Section 39 (5) relied on by the Applicant concerns only domestic arbitrations whilst this was an international award.

19. On the issue of prejudice, counsel argued that litigation must come to an end; that an application coming up after 8 to 10 years cannot be said to have been brought without undue delay, especially since the law of limitation itself has limited the action to six (6) years. To continue the litigation and to extend time herein would work to deprive the Respondent of the very protection the law was designed to afford it.

20. I have carefully considered the submission of the counsel and the documents and authorities availed.

In my view, the issues for determination are as follows:

1. Whether application is competent

2. Whether the application has been brought without unreasonable delay.

3. Whether the prayers sought are prejudicial to the Respondent.

I will now deal with each issue as follows:

Whether the application is competent

21. This question necessarily subsumes the subsidiary questions as to whether Sections 4 and 34 (5) of the Limitation of Actions Act and Section 39(5) of the Arbitration Act and Section 3A of the Civil

Procedure Act can avail to the Applicant.

22. Section 34(5) provides as follows:

"34 (5) where the court orders that an award be set aside or orders, <u>after the commencement of an arbitration</u> that the arbitration shall cease to have effect with respect to the dispute referred, the court <u>may</u> further order that the period between the commencement of the arbitration and the date of the order of the court be excluded in computing the period of limitation prescribed for the bringing of an action or commencement of arbitration proceedings with respect to the dispute referred."

23. Clearly that Section relates to only two situations, none of which have occurred here. The first, is where the court orders that an award be set aside, which has not occurred in this case. The second is where after commencement of an arbitration, if it ordered to cease to have effect with respect to the dispute referred. In these two situations only may the court order exclusion of time in computing the period of limitation.

Counsel for Applicant recognized this when he stated in his submissions at page 8.

"***Although the section does not entirely apply on all fours to the facts of our present application we submit it is most relevant especially when the High Court sets aside the foreign arbitral reward when it has no jurisdiction to do so.***

24.In effect, counsel was saying that the High Court was found to have erroneously interfered with the award, and having fought that off successfully in the Court of Appeal, lots of time has passed. Thus, they cannot be locked out on grounds of limitation when there is nothing they could do about it. Hence the reliance on the doctrine of "**relation back**", and the invocation of Section 39 (5) of the Arbitration Act.

25. Section 39(5) Arbitration Act provides as follows:

"39 (5) when an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned."

Again, a proper interpretation of this section shows that it applies only where an arbitral award has been varied. Here there is no such claim of a variation of award. The provision is invoked to bolster the doctrine counsel referred to as **"relation back".** Unfortunately counsel was not able to provide relevant authorities on the doctrine of relation back.

26. The Applicant's reliance on Section 3A of the Civil Procedure Act was also contested. In this regard, the Respondent cited Section 10 of the Arbitration Act by which the court is barred from interfering in matters governed by that Act. However, that blanket argument cannot hold because Section 10 specifically bars the court from intervening only in those matters which are not excepted. Examples of matters with which the court can intervene are specifically indicated in the Arbitration Rules 1997. They include matters under Sections 6, 7, 12, 15, 17, 18, 28, 35, 36 and 39 of the Arbitration Act. The Arbitration Rules in fact provide for the mentioned method by which a party in arbitration can approach the court.

27. Rule 11 referred to by the Respondent provides:

"So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under the Rules."

It was on that basis that the Respondent submitted that the Applicant should have approached the court under the Civil Procedure Rules, under Order XLIX Rule 5, for extension of time. Counsel went as far as to argue, wrongly in my view, that Rule 11 of the Arbitration Rules only permits for the invocation of the Civil Procedure Rules and not the Act. That argument cannot wash in the face of the definition of "Act" in Section 2 of the Civil Procedure Act to include **"Rules".** Thus, if **"Act"** include "**Rules,"** the provision in Rule 11 permitting the application of the Civil Procedure Rules to proceeding under the Arbitration

Act, necessarily includes the entitlement to invoke the provisions of the Civil Procedure Act where appropriate.

28. In this case, then, I find that the application made herein for exclusion of time under the Limitation of Actions Act for filing an arbitral award for enforcement does not properly fit under any of the categories provided for in the Arbitration Rules 1997. It is a unique circumstance not anticipated under the Arbitration Act.

The question therefore is whether Section 3A of the Civil Procedure Act can be invoked to fill that gap. Section 3A provides:

"Nothing in this Act shall limit or otherwise affect the power of the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court."

29. It is now well established law that where there is no specific provision or procedure by which a party may seek a remedy, the court has inherent power to make such orders as are fair and necessary in the interest of justice to enable the party to approach the seat of justice.

30. In addition, in circumstances such as these, a party should not be denied audience for failure to cite or identify the correct statutory provision which he relies on. Order L Rule 12 of the Old Civil Procedure Rules provides:

"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule."*(underlining mine).*

On this, see **Greenhills Investments Ltd vs Corporation now t/a Covec and Anor Milimani Hcc 572 of 2000** [2000] LLR 1484 (CCK). It was held in that case that by dint of Order L Rule 12 Civil Procedure Rules it was not fatal to an application that the provision of the law under which it had been brought had not been indicated.

31. Under Section 40 of the Arbitration Act, the Chief Justice has powers to make Rules of Court for:

"(a) the recognition and enforcement of arbitral awards and all proceedings consequent thereon or accidental thereto."

Only two rules on enforcement of awards have been made by the Chief Justice under the Arbitration Act. These provide as follows:

6" If no application to set aside an arbitral award has been made in accordance with Section 35 of the Act, the party filing the award may apply *exparte* ***by summons for leave to enforce the award as a decree",*** *and*

"9 an application under Section 36 [Recognition and enforcement] of the Award shall be made by summons in chambers."

32. Those two rules are clearly insufficient to deal with the various incidents and exigencies that may arise such as in this case, when a challenge to enforcement of an award has been eventually unsuccessful after a lengthy process of litigation during which the limitation for enforcement time has lapsed. Or, such as when the holder of an award being an individual person, dies after filing an application for enforcement, and his estate has to be brought in to pursue the application and the award. Numerous other examples could be given. The Civil Procedure Rules provide for most of such situations, and where there is a gap, the aid of Section 3A may be available.

33. I am further fortified in my persuasion by the fact that the Arbitration (Amendment) Act Number 11, 2009, which commenced on 15th April, 2010, now provides the new approach to enforcement of

international awards in Kenya. The new Section 36 (2) of that amended Act provides as follows:

"(2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards."

Section 36 (5) then identifies, as applicable, the New York Convention i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations General Assembly on 10th June 1958.

34. That Convention provides at Article VI as follows:

"vi) if an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers proper, adjourn the decision on the *enforcement* ***of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."***

35. The commentary by **R. Doak Bishop and Elain Martin** in their work **"Enforcement of Foreign Arbitral Awards"** accessedat*www.kslaw.com/library/pdf/or 04-08-2012* on this provision is that:

"This Article, [v] may be used to stay enforcement of the award, and avoid a ruling on the confusing issue whether the award is 'binding'. The court's authority to delay enforcement pursuant to Article VI is discretionary… it is likely that the court before which the enforcement is sought will adjourn its decision on enforcement if it is *prima facie* ***convinced that the request for setting aside or suspension of the award in the country of origin is not made on dilatory tactics, but is based on reasonable grounds."***

36. This Article clearly now avails to both an enforcer and a resisting party under the 2010 Arbitration Amendment Act to seek stay of enforcement. This is a previously non-existent procedure. Such process, in my view, would automatically have the effect of staying the running of time for purposes of limitation of time. By parity of reasoning, there is nothing in law to prohibit the Applicant from similarly enjoining a stay of or exclusion of time for purposes of limitation.

Whether the application has been brought without unreasonable delay

37. This point does not require detailed examination. The facts are clear. The award was made on 22nd March, 2000. Within four months thereafter, on 21st August, 2000, the Applicant filed its application for enforcement. After the High Court dismissed that application on 5th July, 2002, the Applicant filed a Notice of Appeal within two weeks.

38. There was a one year delay in the Applicant filing the Record of Appeal but that is explained by the Certificate of Delay, earlier mentioned, issued by the court. The hearing of the appeal and determination thereof then took four years thereafter. The court's judgment did not indict the Applicant for delay. Three months later, the Applicant filed the present Application.

39. From the above facts, I cannot see any period of alleged delay which can be attributed to the indolence, laxity or lack of dispatch on the part of the Applicant, in relation to the periods over which it had any control over the matter. A quick calculation of the periods over which the Applicant had control over the action reveals a total of 125 days or four (4) months and five (5) days. Yet the whole process from the date of the award to date has taken twelve (12) years. Graphically, the Applicant has "spent" or "used" less than two point five percent (2.5%) of the six (6) years of time which was available to it under the Limitation of Actions Act.

40. In the circumstances, I find that the Applicant was not responsible for the inordinate delay in prosecuting this matter to finality, and should not bear the brunt of the delay.

Whether the prayers sought by the Applicant are prejudicial to the Respondent

41. In his submission on prejudice, counsel for the Respondent argued that an application made after eight years to enlarge time to enforce an award dated 22nd March, 2000 would be prejudicial in that litigation must come to an end. Further, that the longer the delay the more reluctant the courts have been to allow such application because of the agony and harassment of unending litigation. Counsel queried:

"How can one call an application coming up after 8 to 10 years to have been brought without undue delay?"

42. Finally, counsel for the Respondent submitted that any extension of time would deprive the Respondent the very protection the law was designed to give it. That enforcement of the award would lead to a miscarriage of justice.

43. In response, the Applicant submitted that the Respondent having been involved in the proceedings from inception is aware of the nature of the application.

44. In my view, the prejudice of prolonged proceedings that the Respondent would suffer if the application is granted, is preferable to the injustice which the Applicant would suffer for being shut out for delays not attributed to it. The Respondent will have a chance to defend against and resist any fresh application. However not to allow the application would render the award held by the Applicant a pyrric victory. Balancing the two, I prefer to err in favour of allowing the application.

45. Accordingly, and for all the reasons given above, I hereby allow prayers 1 and 2 of the application. However, I will require that the Applicant shall proceed with dispatch in filing its application within thirty (30) days of the date hereof.

Given the nature of this matter and considering that the application for enforcement, when made will be subject to challenge, it is not appropriate to make an order granting costs to any party at this stage. Costs shall follow the ultimate eventuality. Costs are therefore to be in the cause.

Orders accordingly.
Dated, and delivered this 31st day of August, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a) ……
b) ……
c) ……
d) ……