



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Miscellaneous Case 1535 of 2007**

**MALVA CONSTRUCTION LIMITED.....CLIENT**

**AND**

**ECOBANK KENYA LIMITED.....RESPONDENT**

**R U L I N G**

**1** The amended Chamber Summons by the Claimant is brought under several provisions of the **Arbitration Act 1995**, the rules made there under as well as the provisions of Section 3A of Civil Procedure Act. The claimant is seeking for the following orders:-

- 1. *THAT the part of the Award dated 11<sup>th</sup> day of July 2007 of Mr. Brian Barton, Sole Arbitrator relating to the issue of Interest and Costs and which is been challenged herein, be set aside.***
- 2. *THAT this Honorable Court may be pleased to Order a stay of Recognition and Enforcement and/or Execution of part of the said Award relating to the issue of interest and Costs been challenged herein pending the hearing and determination of this Application.***
- 3. *THAT part of the Arbitral Award relating to the issue of Interest and Costs been challenged herein be remitted to the same arbitrator for reconsideration.***
- 4. *FURTHER AND IN THE ALTERNATIVE, part of the Arbitral Award relating to the issue of Interest and Costs been challenged herein be remitted to the same arbitrator to make the Additional Arbitral Award.***
- 5. *THAT the costs of this application be costs in the Cause.***

**2.** This application is brought under the provisions of sections **19, 29(3)(4)(5), 34(4), 35(1), (2)(a)(iv), 35(2)(b)(ii), 37(1)(a)(iv), 37(1)(b)(ii), 39(1)(b), 39(3)(b)** of the **Arbitration Act, 1995** and the **Arbitration Rules 1997**. Although perhaps the relevant sections of the law is **Section 35** which gives

powers to the High Court to set aside an arbitral award. It is surprising that counsel for the claimant has not only cited irrelevant provisions of the law, but filed a multitude of documents, pleadings and other materials that make this application so voluminous. These volumes of papers are not helpful to the court, they are time consuming, a fact which was deprecated by the arbitrator and should be discouraged.

3. This application is also based on the grounds stated in the body thereto; the same grounds are reiterated by the supporting affidavit of **Hardev Singh Kalsi**, sworn on 2<sup>nd</sup> July 2009. Briefly, the matters complained about by the Claimant can be summarized as a dispute involving a building contract which was referred for arbitration before **Brian Barton Esq.**, a sole arbitrator according to a building contract entered into by the claimant and the Respondent on 11<sup>th</sup> January 1999. The matter was arbitrated upon and an award was made on 11<sup>th</sup> July 2007. The Arbitrator directed each party to bear their own costs of the reference and to bear equally the costs of the Arbitration. The claimant filed an application on 9<sup>th</sup> August 2007, seeking for additional arbitral award pursuant to **Section 34(4) of the Arbitration Act**. That matter was also fully considered by the same Arbitrator and by the award dated 28<sup>th</sup> February 2008, the additional claim was disallowed and the claimant was ordered to pay the costs of the Respondent.

4. In the present application, the Claimant contends that as per the final Arbitral award dated 11<sup>th</sup> July 2007, the Arbitrator found certificate Number 19 was correctly due for payment thus there was a finding in favor of the claimant and the Claimant should have been entitled to contractual interest from the date of default until the date of payment. The Arbitrator erred by computing interest for sixty two (62) days. Also going by the final award, and in particular the finding that the retention amount was allowed the arbitrator should have awarded interest from the date of default until full payment. The Claimant is also challenging the interest rate awarded in respect of the contractual sums and the retention money.

5. The other ground is in respect of costs for the reference which should have been awarded to the Claimant as a successful litigant. However, the arbitrator's award directed that each party to bear their own costs. It was argued this order unfairly denied costs of the reference to the Claimant and thereby occasioned substantial injustice. The Claimant was the successful party, as the Respondent's counter-claim was found to lack any basis and the costs should follow the event.

6. This application was opposed by the Respondent; reliance was placed on the affidavit of

**DIGVIJAY BANSIDHAR MEHTA** sworn on the 28<sup>th</sup> September 2009. Firstly this application is challenged as an afterthought for reasons that it was filed 8<sup>th</sup> October 2007 but for non-explained reasons, it was served upon the Respondent on 27<sup>th</sup> February 2009. This was after a lapsed of approximately one year and six months between the time of filing, and the service upon the Respondent. The Respondent contends that the Claimant has failed to disclose to this court that a similar application by way of a request for an additional arbitral award was made to the sole arbitrator **Brian Barton Esq...** That Application was disallowed by an additional award published on 28<sup>th</sup> February 2008 which makes the matter now *resjudicata*. The Claimant is barred by the doctrine of estoppel to raise the same matters.

7. Secondly on 24<sup>th</sup> July 2007, the Respondent paid the Claimant the sum Kshs.17,340,171.25 being the amount awarded to the claimant as per the final award dated 11<sup>th</sup> July 2007. Thus the dispute between the Claimant and the respondent ended with additional award of the arbitrator published on 28<sup>th</sup> February 2008. The merit of the application was also faulted as there are no averments in the affidavit to support the allegations that parties to the arbitration were not treated with equality or they were not given full opportunity to present their respective cases. The dispute was determined by the arbitrator in accordance with the rules chosen by the parties. The arbitrator was guided by the provisions of the Arbitration Act and there are no facts set out in the affidavit to support the allegations of non-compliance of the provisions of Sections, 19, 29 and others of the Act.

8. Lastly, it was argued that this court has no jurisdiction to entertain this application, there is no right of appeal from an award of an arbitrator nor is there any power to review an arbitral award except as provided for under Section 39 which is not applicable in this case because the parties have not agreed. The order seeking for part of the arbitral award relating to issue of costs to be remitted to the same arbitrator for reconsideration and the issue of interest has no basis since the Claimant remitted the same application by way of an additional arbitral claim which has been determined. This application is therefore an abuse of the court process. Counsel for the Respondent argued the court to dismiss it with costs.

9. Both Counsel for the Claimant and the Respondent filed voluminous submissions and cited several authorities to support their respective prepositions. According to the counsel for the claimant, there were

specific findings that the Respondent defaulted in the payment of certificates of completion, thus interest should have been paid for the delayed certificates up to 30th September 2001. This should have been Kshs.1,997,443.63 in addition, the claimant was entitled to further interest at the rate of 1.75% per month (21%) per annum from 21<sup>st</sup> October 2001 up to 31<sup>st</sup> December 2006 (i.e. 63 months) which is Kshs.1,997,443.63x1.75%= Kshs.2,202,181.60. Also the interest on the retention sum of Kshs.12,100,000.00.

**10.** Counsel relied on Civil Procedure Act Sections 26 and 27 which deals with the award of interest awarded on the principal sum adjudged and to be paid from the date of the suit to the date of the decree at a rate that the court deems reasonable. The provision of the Judicature Act, especially Section 3(c) which provides that the jurisdiction of the High Court, the Court of Appeal and the subordinate court shall be exercised in conformity with:

**“(a) the Constitution;**

**(b) subject thereto, all other written laws, including the Acts of Parliament for the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of the that Schedule;**

**(c) Subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in courts of justice in England at that date;”**

The text by **Russell on Arbitration** Twenty-second Edition was cited to support the proposition that the tribunal has discretion to award interest and the tribunal should keep in mind that the purposes of interest, is to compensate the successful party for not having had at its disposal the amount awarded for the period of time. Several English authorities were also cited as per the list of authorities. In the interest of judicial time, it is not possible to recite all those authorities, but as much as possible, I will refer to them if need be in the analysis of the issues.

**11.** The Respondent also filed written submissions in support of their objection that the matters raised in this case are resjudicata, the court lacks jurisdiction and the prayers sought are a complete non starter. In regard to prayer number one, **Mr. Nagpal** submitted that the matter was dealt with by the Arbitrator and there was a specific finding that the Respondent could not be expected to pay interest, unless if it was claimed in the form of an invoice by the Claimant or a calculation of interest was provided

in the architect's payment certificate. It was found that interest was first claimed in the arbitral proceedings. This particular holding is not challenged anywhere by the Claimant's affidavit. Moreover under the **Arbitration Act 1995**, part of an award can not be set aside except in very limited extent as specified under **Section 35(2)(4)** of the Act.

**12.** A claim for interest and costs were specifically prayed for in the arbitral proceedings therefore they do not fall within the above provisions. Further it was submitted that the matter cannot be referred to the same arbitrator because it is *resjudicata* which is a doctrine of common law which applies to arbitral proceedings. As regards the prayer for costs, the issue was determined by the arbitrator and he gave concise reasons why he did award costs which was perfectly within his discretion. All the English decisions cited by counsel for the Claimant were distinguished principally because the **Arbitration Act of 1995** is different from the **English Arbitration Act of 1996**. The Arbitration Act of 1995 is based on UNCITRAL law otherwise referred to as the model law on International Commercial Arbitration. The intention of the law is to keep the courts out of the arbitral causes as much as possible. **Section 10** of the **Act** provides that:

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

These submissions by the respondent have meticulously responded to all the issues and counsel also provided copies of the English Arbitration Act of 1996 and other authorities which I have found extremely helpful.

**13.** The issue for determination in this matter is, firstly, whether this application is properly before this court. That is the issue of jurisdiction, secondly, the issue of *resjudicata* and *estoppel*. Lastly, whether the prayers as sought can be granted under the Act. These proceedings are brought under the Arbitration Act, which is a self governing Act of Parliament, the civil procedure Act and its rules are not applicable. The role to be played by the High court in arbitral proceedings is also specifically provided for under specific sections of the Act. Thus Section 35 provides for the recourse to the High Court, where an application can be made to set aside an arbitral award on the grounds stipulated thereto. Similarly under section 39, the parties can agree to refer an issue of law before the High Court.

**14.** I have no doubt that the provisions of the Arbitration Act. 1995, its sole object is to promote the use of arbitration as an effective means of resolving disputes expeditiously and allowing the parties to a

dispute to have the merit of their differences determined with finality by persons with specialized knowledge in the subject matter.

**15.** This matter was finally determined by an arbitrator according to the agreed rules and according to the laid down principles as there are no substantiation of the allegations of the breaches of the law. The questions to address are whether this application can be founded under the Act. The matters complained about by the Claimant are to do with the interests rates awarded and costs for the reference. There is also another issue to determine, the Claimant seeks for the award on interest and costs to be set aside, and to be referred to the same arbitrator for reconsideration or to make further additional arbitral award. Going by the records, these prayers are unfounded because the claimant filed an additional arbitral claim for additional award which was determined. This is the same claim that has been filed before this court. It is a duplication of the same additional arbitral claim which is determined. Although the principle of *resjudicata* is articulated under the Civil Procedure Act, it is a principal under the common law, which in my view has a general application in proceedings which have been determined.

**16.** There is no dispute that this matter was properly placed before the arbitrator for determination. The sweeping allegations by way of invocation of the provisions of the Arbitration Act, and submissions by counsel for the Claimant that touch on lack of fairness are not supported by the affidavit of the Claimant. For instance there is no allegation that parties were not given equal opportunity to represent their case as set out in the provisions of **Section 19** of the **Act**. There are no allegations of failure by the arbitrator to consider the substance of the dispute in accordance to the principles of justice and fairness. The award of costs and interest are within the discretion of the Arbitrator and that discretion was exercised and reasons were given.

**17.** Firstly, the Arbitrator found the claim for interest was not supported by an invoice issued to the Respondent or a certificate issued by the Architect. It was made for the first time in the arbitral proceedings. Secondly, on costs, the reasons were given that the claimant was found not to deserve the order for costs due to its conduct which delayed the matter and multiplied the proceedings unnecessarily. Are those matters that can be brought to the High Court as provided for under Sections 35 or 39 of the Act? These are not matters which are contemplated under the Act.

**18.** In conclusion I find the prayers sought by the Claimant were fully determined by the decision dated

28<sup>th</sup> February 2008, on the application for additional arbitral award. Thus it is an abuse of the court process for the Applicant to ask this court to refer the same issues for arbitration for a third time. I also find this application is not only *res judicata* but is also not what is contemplated or provided for under the provisions of the Arbitration Act 1995. The matters complained about were fully determined by the arbitrator who conducted the proceedings and considered the substance of the matter. The reasons for the award on both interest and costs are given, that is an exercise of the arbitrator's discretion. In the upshot the application by the Claimant is dismissed with costs to the Respondent.

**RULING READ AND SIGNED ON 23<sup>RD</sup> APRIL 2010 AT NAIROBI.**

**M. K. KOOME  
JUDGE**