REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 227 of 2009

PACIFIC INSURANCE BROKERS (EA) LTD. …….. PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA LTD. ..…… DEFENDANT

R U L I N G

The application before the Court is brought by a Chamber Summons dated 11th June, 2009, and taken out under **Order VI Rule 13 (1) (b)** and **(d)** of the **Civil Procedure Rules.** By the application, the Defendant/Applicant seeks from the Court orders that the plaint herein dated 24th March, 2009, be struck out with costs to the Defendant, and that the Plaintiffs do pay the costs of the application.

The application is supported by the annexed affidavit of Joseph Kania, a Legal Services Manager of the Defendant Company, and is based on the following grounds –

1. ***That the plaint herein offends the express provisions of the Arbitration Act, Act No. 4 of 1995, and is contra statute ab initio.***
2. ***That the parties herein have gone through an arbitration process, which process resulted in an award dismissing the Plaintiff's claim in toto.***
3. ***That the procedure for filing a plaint to challenge an award by a panel of arbitrators is unknown in law.***
4. ***That the plaint herein is time barred under the express provisions of the Arbitration Act.***
5. ***That the Plaintiff's purported cause of action is Res Judicata.***
6. ***That the Plaintiff's purported cause of action is scandalous, frivolous, vexatious and amounts to gross abuse of Court process.***

Opposing the application, the Plaintiff Company's Chairman, Mr. Karanja Kabage, swore a replying affidavit on 13th October, 2009, which was filed on the same day. In that affidavit, he concedes that the parties herein entered into a contract dated 13th December, 1994, which contract provided for arbitration. He contends, however, that contrary to the averment contained in paragraph 3 of Joseph Kania's supporting affidavit, the award delivered on 20th June, 2008, was neither in full nor final settlement of the dispute between the parties as alleged. He further maintains that having been involved in the pre-contractual negotiations between the parties herein, he knows as matter of fact that the parties contemplated, and indeed reserved the respective rights to approach the High Court regardless of the exhaustion of the option of arbitral proceedings and/or the outcome thereof. He also avers, on advice from his Advocate, that striking out pleadings, either for being frivolous or for whatever reason, is a draconian remedy which the Courts resort to where the matter at hand is plain and obvious. Consequently, he deposes that he believes that due to the complex nature of this matter, it is only fair and just that the evidence be heard in full in Court in order to pave way to a determination of the issues raised on their merits rather than by way of the summary procedure sought herein.

At the hearing of the application, Mr. Sagana submitted on behalf of the Applicant that pursuant to the contract entered into between the parties in 1994, a dispute arose consequent upon which the matter was referred to arbitration where it was considered exhaustively and a full and final award was given on 20th June, 2008. The claim before the arbitrators is the same as the one now before this Court. In his submission, the said claim is contrary to the Statutes and offends the **Limitation of Actions Act** as it was dismissed by the arbitrators in toto. He also submitted that the procedure for challenging an arbitral award by a plaint is completely unknown to the law and with the award, the issue is now settled and the Defendant therefore relies on *res judicata* and *estoppel*.

Finally, Mr. Sagana argued that whereas the High Court can set aside an award pursuant to the provisions of **Section 35 (2)** of the **Arbitration Act,** none of those provisions apply to this action. He also referred to **Section 10** of the **Arbitration Act** which he argued is express as to the extent to which the Court intervene, and that the circumstances spelt out therein do not apply to this case. He finally referred to **Section 35 (3)** which limits the time frame within which an application to set aside an arbitral award may be made. In the instant case, he submitted that the claim was filed almost ten months after the award was made which was well out of the three month limitation period. He therefore submitted that nothing can be done to set aside the award and that the application was vexatious and frivolous and should be struck out.

In opposition to the application, Mr. Kaluu for the Plaintiff argued that striking out pleadings is a draconian measure to be exercised with circumspection in clear cases, and that this was not one of those cases. While conceding that the parties, indeed, went through the arbitral process, he submitted that the award was neither binding nor final. The parties contemplated coming to Court notwithstanding the arbitral process. If the position taken by the Defendant that the agreement between the parties was illegal, then the parties should be able to come to Court and the Defendant cannot have its cake and eat it. Counsel then submitted that if the arbitral award was not binding on the parties, then they can come to Court. It was also his contention that the arbitral award was not final and that these are matters that need to be canvassed orally.

Finally, Mr. Kaluu argued that to determine whether a suit is frivolous, one needs to look at the defence which, in this case, raises serious issues. He invited the Court to determine whether the Defendant would be prejudiced if the matter proceeds to trial and urged the Court not to strike out the application but to allow the Plaintiff his day in Court.

In a short reply, Mr. Sagana reiterated the provisions of **Section 35** of the **Arbitration Act** and submitted that the plaint does not disclose anything inequitable and does not plead any illegalities in the contract. He therefore prayed that the suit be dismissed.

I have considered the pleadings and the submissions made by the respective Counsel. The issues arising for determination are whether the arbitrators' award was final and binding; whether it was competent for the Plaintiff to come to Court by way of a plaint; and if not, what the consequences should be.

It is noteworthy that the agreement which precipitated the arbitral process between the parties contained an arbitration clause. That Clause was worded as follows –

> ***"In the event of a dispute arising from the interpretation and/or meaning of the agreement, both HFCK and K & M agree to go for arbitration to be presided over by the then Chairman of the Law Society of Kenya with each party nominating their own arbitrator. The decision will be binding to both HFCK and K & M. Otherwise, either party can determine to take the case before the High Court, should it find that the decision is inequitable. However, HFCK and K & M pledge to resolve all issues amicably and in any event no Court action will be instituted before three (3) months of arbitration's ruling to allow time for negotiation to resolve the difference."***

It is significant that the second sentence in that Clause states that **"the decision will be binding to both HFCK and K & M."** If the matter had ended there, no doubt one would say without fear of contradiction that the arbitrators' award was final. But they did not stop there. They went on to pprovide that **"… otherwise either party can determine to take the case before the High Court should it find that the decision is inequitable."**

The duty of the Court is not to make or rewrite contracts between litigants. Its duty is to interpret such contracts.

In this case, while appreciating that the arbitrators' award was final, the parties proceeded to open a window by providing that either of them can determine to take the case to the High Court should such a party find that the arbitral award was inequitable. And while pledging to resolve all issues amicably, the parties further agreed that "**… no Court action would be taken before three (3) months of arbitration's ruling to allow time for negotiation to resolve the difference."** It is clear from this wording that the intention of the parties was that whoever found the arbitral award inequitable would be at liberty to forward the matter to the High Court, provided that this was not done before the end of three (3) months after the arbitrator's award. This period was meant to accord the parties a second opportunity to

resolve the matter amicably, and if their efforts bore no fruits then take the matter to Court. In my view, the **Arbitration Act** itself opens the gates to litigants who have submitted themselves to arbitration to challenge the arbitral award in Court. Whether this was the intention of the parties or not, that is what they ought to have done i.e. to challenge the arbitral award by reference to the Court.

Section 35 (1) of the **Arbitration Act** provides that –

> ***"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)".*** Subsection (2) in turn provides, *inter alia*, that –

"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 …"

My reading of the arbitral award is that its *ratio decidendi* was that the Arbitral Tribunal found, as a matter of fact and law, that the agreement, the subject matter of the proceedings before it, was illegal, null and void *ab initio.* Consequently, the tribunal could not make an award based on such an agreement. To challenge that finding, all the Plaintiffs needed to do was to file an application under **Sections 35 (1)** and **2 (a)** of the **Arbitration Act,** but not by filing a plaint and thereby re-litigating the entire process afresh as if the matter had never been the subject of arbitration. That was erroneous.

Secondly, **Section 35 (3)** provides a time frame within which an arbitral award can be challenged. It states that –

> ***"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 …".***

The arbitral award in this matter was delivered on 28th June, 2008. The Plaintiffs did not come to Court until 9 months from the date of the award which was outside the period during which they should have come to Court to challenge the award.

From the above considerations, I find that the Plaintiffs failed to bring themselves with the ambit of the **Arbitration Act** which governs all matters of arbitration. By seeking to challenge the arbitral award by way of a plaint, the Plaintiffs have stepped out and are now wrestling outside the ring. Such a procedure does not exist. And if it existed, they came to Court too late and are time barred under **Section 35 (3).** For these reasons, I find that the application is merited and the plaint herein is struck out with costs. In the same spirit in which the arbitrators ordered each party to bear its own costs, I also direct that each party will bear its own costs of this application.

Orders accordingly.

Dated and **delivered** at **Nairobi** this 27th day of May, 2010.

L. NJAGI
JUDGE