**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIV APPLI 792 OF 2004**

**MAHICAN INVESTMENTS LIMITED……..……..….1ST APPLICANT**

**KATMAI INVESTMENTS LIMITED..…..…….…….2ND APPLICANT**

**KUBADILISHANA LIMITED…….…….…….. 3RD APPLICANT**

**GIAN CARLO FERRARI ……....…….…….4TH APPLICANT**

**AND**

**GIOVANNI GAIDA & 79 OTHERS…….……..RESPONDENTS**

**CALUWA LIMITED……..……RESPONDENT**

**AND**

**IN THE MATTER OF THE ARBITRATION ACT, 1995**

**BETWEEN**

**GIOVANNI GAIDA & 79 OTHERS ……..……..……..…CLAIMANTS**

**VERSUS**

**MAHICAN INVESTMENTS LIMITED……..……1ST RESPONDENT**

**KATMAI INVESTMENTS LIMITED……...……..……2ND RESPONDENT**

**CALUWA LIMITED……..……3RD RESPONDENT**

**GIAN CARLO FERRARI ……..…….... 4TH RESPONDENT**

**KUBADILISHANA LIMITED…….....…..……..……5TH RESPONDENT**

**RULING**

There are two applications before me the first a chamber summons of the 21.6.2004 to enforce an arbitral award and the second a Notice of Motion of the 23.8.2004 for the following orders:-

1. That paragraph 2,6,7,16,18 20,21 and 23 of the final award dated 14th April, 2004 be set aside by this Honourable Court.

2. That the award of Kshs.1,000,000.00 as general damages be set aside.

The Arbitral award being sought to be set a side was given on the 23.8.2004.

In this Ruling, I will refer to the Claimants in the arbitration as the Claimants and the Respondent in this matter as the Respondents.

The Claimants in response to the application to set aside the arbitral award submit that the application is time barred as it was not brought within 30 days after receipt of the arbitral award contrary to the provisions of Section 35(3) of the Arbitration Act (The Act).

The Arbitration Award is dated the 14.4.2004. This is not disputed by the respondent as is deponed to by the 4th Respondent in his affidavit in support of the second application sworn on the 23.8.2004.

The Respondents say they did not receive the award on that day but on the 25.5.2004 and that the three months period referred to in Section 35(3) of the Act only started to run 3 months after the party making the application, in this case the Respondent, had received the arbitral award.

The question arises as to the meaning of "had received" the arbitral award.

This question was raised before Mr. Justice Nyamu in the case of ***Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003*** where he held that in order to comply with Sec 35(3) the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection.

In its normal meaning "receipt" means the actual obtaining of the arbitral award.

In his ruling Nyamu, J has this to say about "receipt": at page 27 B

> ***"Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality".***

The passage to which he referred and cited with approval was a passage from the English case of ***Bulk Transport Corporation v Sissy Steamship Co. Ltd Lloyd's Law Report 1979 Vol. 2 p. 289*** where Paker, J stated:

> ***"…… publication was something which was complete when the arbitrator became functus officio but so far as the time for moving under the statute was concerned, it was notice that mattered. He does not say in that passage, so far, that notice necessarily means notice of actual contents."***

Mr. Justice Nyamu also cited with approval the first holding in the Bulk Transport case (supra), which states:-

> ***"The submission that item should be calculated from the date of receipt of the copies of the award would be rejected in that it had been accepted as good law for 140 years that time ran from the date upon which the award was made and published to the parties and publications to the parties was completed by notice'.***

I would with respect adopt the reasoning in the Bulk Transport case (Supra) and also the reasoning of Mr. Justice Nyamu that "receipt" means when notice is given that the arbitral award is ready for collection.

As was pointed out in the ***Bulk Transport case (Supra***) that a person wishing to set aside an arbitral award could wait indefinitely before collecting the award and therefore seek to set it aside.

For this reason I would dismiss the application to set aside the arbitral award.

However I will deal with the other matters raised by the respondent against the award.

The application to set aside is based on the following grounds:-

> **(a) "The arbitral award deals with matters not contemplated by the terms of reference to arbitration thus occasioning grave injustice to the applicant.**
>
> **(b) There are errors of law and fact on the face on record.**
>
> **(c) The Arbitral award deals with disputes beyond the scope of reference to arbitration.**
>
> **(d) The arbitral proceedings were not in accordance with the agreement of the parties.**
>
> **(e) The award is inconsistent, uncertain and ambiguous.**
>
> **(f) That the award is contrary to public policy.**
>
> **(g) That the Arbitrator has misconducted herself in the consideration of the evidence and making of the award.**
>
> **(h) The award is unrealistic, outrageous and has been improperly procured, as there has been non-compliance with section 69 of the Evidence Act."**

Section 35(2) of the Act sets out the reasons on which an arbitral award can be set aside. The relevant provisions of this sub section are the following:-

> ***35 (2) An arbitral award may be set aside by the High Court only if –***
>
> ***(a) the party making the application furnishes proof –***
>
> ***(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 decision son matter referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decision on matters not referred to arbitration may be set aside; or***
>
> ***(b) The High Court finds that –***
>
> ***(ii) The award is in conflict with the public policy of Kenya"***

What is it that the Respondent alleges was not contemplated by the terms of reference to arbitration.

The application is supported by the affidavit of the 4th Respondent Gian Carlo Ferrari. In paragraph 20 of his affidavit he states:-

> ***"That the learned Arbitrator also went out of the scope of reference by failing to restrict herself to the issues that were to be determined".***

And para 22

> ***"That I am advised by my advocates on record which advise I verily believe to be true that***

***the learned arbitrator dealt with issues that are not contemplated by the Lease Agreement".***

And in para 23:

***"That the learned arbitrator purported to vary the lease agreement that conferred authority on both parties to go for arbitration thus purporting to impose terms that amounted to making a new contract for the parties".***

The arbitration clause contained in the lease of the 17.11.1998 between the parties at page 14 states as follows:-

***"(b) Any dispute arising between the parties hereto in connection with this Lease or the construction or application thereof or any clause herein contained or on the right or liabilities of any party hereunder, shall be referred to the award of a single arbitrator to be appointed by the parties hereto, by mutual assent or, in default of such an agreement, said dispute shall be referred to a legal counsel, appointed by Chairman, currently in office, of the Law Society of Kenya, in accordance with the provisions of the Arbitration Act or any Act or Acts amending or replacing the same. The award shall be final and binding upon the parties.***

***"(c) Any notice provided for herein shall be sufficiently served on the LESSEES if forwarded to him by registered post to his last known postal address; any notice shall be sufficiently served on the COMPANY if delivered to the COMPANY'S registered office or sent by registered post to its registered postal address. A notice given by post shall be deemed to have been served twenty days from the date of posting."***

Whether the decision of the arbitrator went outside the reference depends on what issues the parties raised in their pleadings. The specific awards the Respondents object to are under orders 6,16,18,20,22 and 23.

The main objection of the Respondents is that the above awards are not capable of definition or enforcement.

The answer is that if that is the case, the Respondents can ignore what is not capable of being implemented. It is not however shown to the satisfaction of this court that the matters objected to are outside the scope of the reference to arbitration.

In order to succeed the applicant must show beyond doubt that the arbitrator has gone on a frolic of his or her own to deal with matters not related to the subject matter of the dispute. This the applicant has failed to show.

The parties have sought the assistance of the arbitrator to deal with matters in dispute between them and arising out of the lease between them. Having read the Arbitration Award and Ruling I am satisfied that this is what she has done.

The last objection to the award is on the ground of public policy.

Public policy was considered by Ringera, J (as he then was) in the case of Christ for all Nations v Apollo Insurance Co. Ltd (2002) 2 E.A. 366 in which he stated that in Kenya an act is contrary to public policy if it was either.

***" (a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) intimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya.***

***In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals".***

I would with respect agree that there is not an all embracing definition which exhaustively defines what public policy includes. Suffice it to say that what is contrary to public policy will be a matter to be determined by a judge in any case where it alleged to have been infringed.

In this case the Respondents submits that the award is contrary to public policy as it is alleged it is inconsistent with the laws of Kenya.

The applicants claim that certain of the awards made are contrary to public policy. In particular: -

***1. Award No.2, which states:***

***"That the service contracts remain valid for the duration of the Lease and may not be terminated or otherwise varied by mere change of Lessor, Lessee or Management Company"***

It is submitted that the award is contrary to the Law of Contract. The award states a fact found by the arbitrator that the contracts remain valid for the duration of the lease.

The reference to termination is only in respect of the particular circumstances, which does not mean the contracts cannot be varied or terminated for some other reasons.

Award No. 6, which states:

***"That the Claimants are free to engage servants and employees to work in their villas and further that such servants and employees may work in different villas as they may from time to time be directed by their employers".***

And Award No. 7 which states:

***"That the respondents should allow unconditional access to and egress from the complex by the claimants, their servants and licensees as provided for under the provision of clause 3 of the Lease".***

It is submitted that these awards are detrimental to the promotion of tourism mainly in Kenya.

These awards merely state the rights of the Claimants. There is nothing either against public policy in these awards nor are they contrary to law. It may well be that the Respondents are not very happy with these awards but they appear to be an honest attempt by the Arbitrator to determine the rights of the parties in accordance with the Arbitrators interpretation of the terms of the contracts.

A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.

This reasoning also applies to the award of damages that was solely in the jurisdiction of the Arbitrators to determine. The courts will not and cannot interfere with such an award.

Having considered the submission of the Respondent I find nothing in them in respect of which I can set aside the Arbitrator's Award. In the result I dismiss this application with costs to the Respondent.

Coming to the application of the 21.6.2005 I am satisfied that there is no reason to refuse to register the

award for any of the reason set out in Section 37(1) of the Act and therefore allow the application as prayed with costs to the Applicant.

Dated and delivered at Nairobi this 11th day of October, 2005.

**P.J RANSLEY**

**JUDGE**