



PZ Cussons East Africa Limited v PMS Innovateus Limited & another (Commercial Case 019 of 2020) [2024] KEHC 671 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 019 OF 2020
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

PZ CUSSONS EAST AFRICA LIMITED PLAINTIFF

AND

PMS INNOVATEUS LIMITED 1ST DEFENDANT

CHRISTINE KABAKA (ARBITRATOR) 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 13th December, 2019 under the provisions of Article 159 of the *Constitution*, Order 12 Rule 7, Order 46 Rule 2, Order 50 Rule 5 & Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A & 3A of the *Civil Procedure Act* and all enabling provisions of the law seeking the following orders –
 - i. Spent;
 - ii. That this Honourable Court be pleased to grant leave to the applicant to apply for setting aside out of time, the final Arbitral Award made on the 18th day of January, 2019 directing the applicant herein to pay the respondent the principle (sic) sum of Kshs. 1,660,692.00, interest of 14% per annum on the principle (sic) amount of Kshs. 1,549,979.80 and other consequential orders there too (sic);
 - iii. That this Honourable Court be pleased to make and/or issue any such further orders as it may deem fit and necessary to safeguard the interest of justice and fairness to the applicant; and
 - iv. That the costs of this application be provided for.



2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 13th December, 2019, by Irumba Ismael, the learned Counsel for the plaintiff. In opposition thereto, the 1st defendant filed a replying affidavit sworn on 11th February, 2020 by Joanne Mwangi, the Chief Executive Officer of the 1st defendant.
3. The application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of H.M. Mudeizi & Company Advocates, whereas the 1st defendant's submissions were filed by the law firm of Maina & Maina Advocates.
4. Mr. Irumba, learned Counsel for the plaintiff submitted that the plaintiff never participated in the proceedings that gave rise to the final Arbitral Award dated 18th January, 2019 since its Preliminary Objection to the Arbitral Tribunal objecting to the process through which the Arbitrator was appointed was ignored and dismissed, which in the plaintiff's view, was tantamount to denying it, its right to a fair hearing guaranteed under Article 50(1) of the Constitution of Kenya, 2010 which embodies the principle of natural justice. Counsel further submitted that the delay in filing an application to set aside the Arbitral Award was occasioned by the fact that the plaintiff was pursuing a Judicial Review application
5. Ms. Mouti, learned Counsel for the 1st defendant cited the provisions of Article 165(6) of the Constitution of Kenya, 2010 and submitted that it is trite that a High Court Judge cannot supervise another Judge of concurrent jurisdiction. She cited the case of Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 others [2008] eKLR and submitted that the plaintiff challenged the decision of the Arbitral Tribunal in the Judicial Review Court and failed, and it is clear from its affidavit and the grounds in support of the application herein that what the plaintiff seeks to deal with is the decision of the Judicial Review Court in Miscellaneous Judicial Review Application No. 241 of 2018. Counsel contended that since the plaintiff is aggrieved by the said decision, it should seek redress from the Court of Appeal.
6. Counsel referred to the provisions of Section 7 of the Civil Procedure Act and the Court of Appeal case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR and contended that the instant application is res judicata as there is no new and important matter that could not have been produced by the plaintiff at the time when the judgment in Miscellaneous Judicial Review Application No. 241 of 2018 was made. She also contended that the issues raised herein are similar to the ones raised in the aforementioned Judicial Review application.
7. Ms. Mouti stated that the instant application was filed one year after the Arbitral Award was issued and/or published contrary to the provisions of Section 35(3) of the Arbitration Act. She submitted that the plaintiff has not demonstrated any reasons why this Court should issue a decision in its favour hence the application herein should be dismissed with costs to the 1st defendant.

Analysis And Determination.

8. I have considered the application filed herein, the grounds on the face of the Motion and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 1st defendant as well as the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiff should be granted leave to file an application for setting aside the Arbitral Award dated 18th January, 2019, out of time.
9. In the plaintiff's supporting affidavit sworn by its Counsel Mr. Irumba Ismael, he deposed that on or about the 14th June, 2018 he fled a Judicial Review application by way of a Chamber Summons dated 13th June, 2018 on behalf of the plaintiff seeking leave to file a Judicial Review application



on grounds that the Arbitral Tribunal was not legally constituted and the contract under which the Arbitral proceedings were instituted was time barred amongst other grounds.

10. He averred that on 13th December, 2018, he filed a substantive Notice of Motion application of even date, in the Judicial Review, which was subsequently amended on 20th March, 2019, with the aim of ensuring that the Judicial Review application was not overtaken by events since Judicial Review proceedings were running concurrently with the Arbitral proceedings.
11. Mr. Irumba stated that the Arbitral Tribunal which comprised an Arbitrator unilaterally appointed by the 1st defendant delivered its Final Arbitral Award on 18th January, 2019, in favour of the 1st defendant. Counsel further stated that judgment in the Judicial Review proceedings was delivered on 4th November, 2019, dismissing the Judicial Review application on grounds inter alia that the plaintiff had not followed the legally required procedure to set aside the Arbitral Award dated 18th January, 2019 as provided for in the *Arbitration Act*.
12. Counsel asserted that the overriding objectives of the Court will be adhered to by allowing the instant application. Further, that the plaintiff stands to suffer irreparable loss and harm in the event that the orders sought herein are not granted.
13. In the 1st defendant's replying affidavit sworn by its Chief Executive Officer Joanne Mwangi, she deposed that the Court in dismissing the plaintiff's Judicial Review application held that the said application offended the doctrine of statutory available remedies, and it had not established any grounds for Judicial Review.
14. She averred that it has been over a year since the impugned Arbitral Award was issued in favour of the 1st defendant, thus the plaintiff is time barred from filing the instant application. She stated that in any event, the plaintiff has not shown any reasons why this Court should exercise its discretion in its favour. She further averred that the plaintiff has only filed this application after being distressed by the decision of the Judicial Review Court.
15. Ms. Joanne Mwangi stated that the plaintiff was inviting this Court to review the decision of another Court of concurrent jurisdiction by filing this application. She further stated that since the plaintiff is aggrieved by the decision of the High Court, its redress lies with the Court of Appeal.

Whether the plaintiff should be granted leave to file an application for setting aside the Arbitral Award dated 18th January, 2019, out of time.

16. The plaintiff's submissions in the instant application were very lengthy but out of context since Counsel submitted on the merits of the application to set aside the Arbitral Award instead of submitting on the principles to extend/enlarge time within which to apply for setting aside of the Arbitral Award dated 18th January, 2019.
17. Section 35(3) of the *Arbitration Act* No.4 of 1995 provides the following -

“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.”
18. Inasmuch as Section 35 of the *Arbitration Act* does not make provisions for extension of time in the filing of an application for setting aside of an Arbitral Award, the use of the word “may” is permissive and not obligatory. It confers the High Court with the discretion to consider applications such as the



one before this Court. Such discretion must however be exercised judiciously, taking into account the circumstances of each case.

19. It is not disputed that the Arbitral Award in this case was published on 18th January, 2019, and served upon the plaintiff on 23rd January, 2019. This means that the plaintiff was aware of the publication of the said award, since the said award also informed the plaintiff's decision to amend its Judicial Review application on 20th March, 2019. The plaintiff has not offered any explanation and/or reasons as to what occasioned the delay in the filing of an application to set aside the Arbitral Award dated 18th January, 2019, other than the fact that it was pursuing the Judicial Review application in Miscellaneous Judicial Review Application No. 241 of 2018. It is noteworthy that it is only after the Judicial Review Court delivered its judgment dismissing the plaintiff's Judicial Review application dated 4th November, 2019, that the plaintiff filed the instant application.
20. The 1st defendant averred that the application herein is an invitation to this Court to review the decision of another Court of concurrent jurisdiction and it offends the provisions of Section 7 of the [Civil Procedure Act](#) for being *res judicata*. On perusal of the present application, it is clear that it seeks leave of the Court to file an application for setting aside an Arbitral Award out of time, an issue that was not before the Judicial Review Court hence it was not dealt with by the said Court. As such, the application herein cannot be *res judicata*.
21. The conditions to be considered when dealing with an application for extension/enlargement of time were considered by the Supreme Court in the case of [Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR as hereunder-

“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined...A party may however, encounter some delay and the time within which he was to perform an act lapses....If one showed that he had a *bona fide* cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts...could intervene and indulge such a person if established that he was not at fault.” (emphasis added).
22. In determining whether to allow the instant application, this Court has to consider the length of the delay, the reason for the delay, the chances of the application to set aside the Arbitral Award dated 18th January, 2019 succeeding, and the degree of prejudice that will be occasioned on the defendants should the instant application be allowed. Under the provisions of Section 35(3) of the [Arbitration Act](#), the plaintiff ought to have filed an application to set aside the Arbitral Award within three (3) months of receipt of the said Award. The Arbitral Award having been served upon the plaintiff on 23rd January, 2019, the plaintiff ought to have filed an application to set it aside on or before 23rd April, 2019, which it did not do. Instead, it opted to amend its Judicial Review application in Miscellaneous Judicial Review Application No. 241 of 2018. The application herein was filed on 20th January, 2020, approximately one year after the Arbitral Award the plaintiff seeks to challenge was published, and nine (9) months from the date when the plaintiff ought to have applied for setting aside of the said Award.
23. The plaintiff has not offered any explanation for the delay but it has demonstrated that it was pursuing Judicial Review proceedings concurrently with the Arbitral proceedings. I am of the considered view that the explanation given by the plaintiff is not a satisfactory reason for the delay in applying for the setting aside of the Arbitral Award as there was no order staying any action ensuing from the Arbitral



Award being taken, pending the hearing and determination of the Judicial Review proceedings; thus there was nothing standing in the way of the plaintiff stopping it from making the said application. In addition, the plaintiff has not offered any explanation as to why it took approximately two and a half months to file the application herein after the Judicial Review Court delivered its judgment on 4th November, 2019. It is therefore this Court's finding that the plaintiff has not offered any good or plausible explanation for the delay in filing the application to set aside the Arbitral Award, to warrant this Court to exercise its discretion in the plaintiff's favour.

24. From the pleadings before me, it can be easily deduced that the plaintiff is challenging the Arbitral Award dated 18th January, 2019 on grounds that the 1st defendant's claim is statute barred and that the 1st defendant unilaterally appointed the Arbitrator who presided over this matter to the exclusion of the plaintiff. I have perused the judgment dated 4th November, 2019 delivered by the Judicial Review Court in Judicial Review Application No. 241 of 2018 and I note that these are the same grounds that the said application was anchored on. In its judgment, the Judicial Review Court discussed these two issues and/or grounds and held that the Agreement in question was not terminated as provided for under clause 6 of the Agreement, therefore, it was still in force and binding as at the time the dispute arose. As such, the provisions of the Limitation of Actions Act relied on cannot apply. The Judge in the Judicial Review matter further held that the Arbitrator was appointed in the manner provided for under clause 9 (II) of the Agreement between the parties herein and the plaintiff was duly copied.
25. In light of the foregoing, allowing the instant application will be superfluous as the issues/grounds that the plaintiff intends to rely on in its application to set aside the Arbitral Award dated 18th January, 2019 have already been dealt with by a Court of concurrent jurisdiction to this Court, thus the only remedy that lies with the plaintiff is to file an appeal against the judgment of the Court in Miscellaneous Judicial Review Application No. 241 of 2018. Furthermore, in view of the unexplained prolonged delay in filing the instant application, this Court finds that in the event the instant application is allowed, the 1st defendant will be prejudiced as it will continue being kept away from the money it awarded by the Tribunal in its Arbitral Award dated 18th January, 2019. As a result of the foregoing, this Court finds that the plaintiff has not made out a case for the grant of the orders sought in the application herein.
26. In the end, I find the application dated 13th December, 2019 being bereft of merit. I hereby dismiss it with costs to the 1st defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Ms Munjogu holding brief for Ms Mouti for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Ms B. Wokabi – Court Assistant.

