



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**MISC. APPLICATION NO. E38 OF 2020**

**IN THE MATTER OF THE ARBITRATION ACT**

**AND IN THE MATTER OF AN**

**APPLICATION TO SET ASIDE AN ARBITRATION AWARD**

**BETWEEN**

**NATIONAL HOUSING CORPORATION.....APPLICANT**

**AND**

**CUSTOM GENERAL CONSTRUCTION LIMITED.....RESPONDENT**

**RULING**

### **Introduction**

1. What is before the court is a Notice of Motion dated 26<sup>th</sup> March 2020 by National Housing Corporation (“NHC”). It has been brought under the provisions of **section 35(1), (2)(a)(iv) and 2(b)(ii)** of the *Arbitration Act* (“the Act”) and **Rule 7** of the *Arbitration Rules, 1997* seeking the following orders;

*a. THAT the award dated 14<sup>th</sup> November 2019 and published 8<sup>th</sup> January 2020 in the Arbitral proceedings between the parties herein; CUSTOM GENERAL CONSTRUCTION LTD against NATIONAL HOUSING CORPORATION be set aside in its entirety.*

*b. THAT costs of this application be provided for.*

2. The Application is supported by the affidavit of Pius Omullo, the Applicant’s Quantity Surveyor, sworn on 26<sup>th</sup> March 2020. The application is opposed by the Respondent (“Custom General”) by way of a Preliminary Objection dated 29<sup>th</sup> May 2020.

3. It is common ground that Custom General won NHC’s tender for the construction of proposed the Kisii High Rise Housing Scheme Phase I following which the parties entered into a contract dated 12<sup>th</sup> October 2009. It is also common ground that Custom General initially tendered a sum of KES 90,476,524.50, but the same was reduced to KES 71,636,475.00 through some omissions. It is also contended that as the construction proceeded, variations increased the contract sum well beyond KES 71,636,475.00. The parties disagreed on the final accounts leading to a dispute which was referred to arbitration in accordance with the contract.

4. The reference was heard by Tom O. Oketch (“the Arbitrator”). He published his Award dated 14<sup>th</sup> November 2019 was sent to the parties on 8<sup>th</sup> January 2020. The Arbitrator awarded Custom General KES 108,646,415.20 with interest accruing at the rate of 17% per annum from 14<sup>th</sup> November 2019 until payment in full (“the Award”) which the NHC now seeks to set aside.

### **The Preliminary Objection**

5. Custom General in its Preliminary Objection relies on the following grounds;

*a. The parties hereto are bound by the agreement they entered into on 12<sup>th</sup> October 2009 that provided for Arbitration as the dispute resolution mechanism and as such they are bound to adhere to the dispute resolution mechanism provided and by the law governing the process.*

*b. The Respondent/Applicant made the application to set aside the Arbitral Award outside the three (3) months period allowed by section 35 of the Arbitration Act, 1995.*

*c. The Respondent/Applicant made no application to either the Tribunal or the High Court for extension of time within which it could apply to set aside the Arbitral Award.*

*d. The Applicant's application is misconceived and an abuse of the court process.*

6. Parties argued their respective positions by way of written submissions supplemented by brief oral highlights by their counsel. NHC relied on its submissions dated 18<sup>th</sup> May 2020 while Custom General relied on its submissions dated 26<sup>TH</sup> August 2020 and 7<sup>th</sup> October 2020.

7. At the center of the preliminary objection is **section 35** of the **Act** which I shall set out in full to provide full context. It provides as follows:

*35 (1) 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).*

*(2) 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 or, failing any indication of that law, the laws of Kenya; or*

*(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(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 decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or*

*(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or*

*(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption*

*(b) the High Court finds that-*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*

*(ii) the award is conflict with the public policy of Kenya.*

*(3) 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.*

*(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. [Emphasis mine]*

## **Submissions**

8. Custom General submits that **section 35(3)** of the **Act** provides that an application for setting aside may not be made after the lapse of three months from the date of receipt of the award. It contends that there are two schools of thought regarding what amounts to receiving the arbitral award. The first is the literal interpretation of receipt to be getting into possession of a copy of the arbitral award. The second is that the word "received" is interpreted to mean when one is notified by the arbitral tribunal that the award is ready for collection.

9. In relation to **section 35(3)** of the **Act**, Custom General takes the position that the date the Arbitrator notifies parties that the Award is ready, is the date of delivery of the award. It cited the decision in **University of Nairobi v Multi-Scope Consultancy Engineers Limited ML HC Misc Cause No. 083 of 2019 [2020] eKLR** where Tuiyott J., upheld a preliminary objection based on **section 35(3)** of the **Act** and struck out the application on the ground that the application was filed outside the time permitted from the date the parties were notified of the award. The court in that case followed decisions of similar effect; **Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others NRB HC Misc. Appl. No. 792 of 2004 [2005] eKLR** and **Transworld Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003(UR)**.

10. Custom General submits that an interpretation that will support physical collection of the award is one that is bound to create absurdities and defeat the principle aim of arbitration which is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. It further submits that actual physical collection is also open to abuse and can be perverse as the same can be physically collected after any period of time.

11. Counsel for NHC was emphatic that the plain and obvious meaning of the word “received” means actual receipt of the arbitral award. Counsel contends that the plain meaning of statute is to be considered and applied unless it leads to absurdity. Counsel cited the decision in **Alcoholic Beverage Association of Kenya v Kenya Film Classification Board & 2 Others NRB Pet. No. 10 of 2017 [2017] eKLR** where the court observed as follows regarding interpretation of statutes;

*There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of any expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.*

*The duty of the Court is neither to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.*

12. NHC therefore submits that there is no vagueness or confusion in **section 35(3)** of the **Act** as the meaning of delivery is clear. It relied on the Indian case of **India v Tecco Trichy Engineers & Others Supreme Court No. 20446 of 2002** where the Supreme Court of India held as follows:

*The delivery of an arbitral award under sub-Section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be “received” by the party. This delivery by the arbitral tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceeding.* [Emphasis mine]

13. NHC concludes the court should adopt the position that **section 35(3)** of the **Act** implies actual delivery of the award and that any other interpretation would negate the rights of a party to an arbitration process to access justice protected by **Article 48** of the Constitution.

## **Determination**

14. A preliminary objection was defined in the well-known case of **Mukisa Biscuits Manufacturing Co., Ltd [1969] EA 696**. It is based on a pure point of law or uncontested facts. In that case, Law JA., observed that, “So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection may dispose of the suit.”

15. In this case, the Arbitrator wrote to the parties a letter dated 18<sup>th</sup> November 2019 informing them that the Award was published and ready for collection but the same was subject to settling of his fees. By the letter dated 8<sup>th</sup> December 2019, the Arbitrator wrote to the parties acknowledging receipt of payment from Custom General. He informed them that there was still a balance of his fees due. By a letter dated 7<sup>th</sup> January 2020, NHC wrote to the Arbitrator enclosing a cheque for the balance of his fees. The Arbitrator wrote to the parties a letter dated 8<sup>th</sup> January 2020 wherein he enclosed a copy of the Award.

16. The question for determination is whether the time for filing the application started running from 18<sup>th</sup> November 2019 when the parties were notified of the Award or on 8<sup>th</sup> January 2020 when the Arbitrator delivered the award to the parties.

17. Reiterating the contents of **section 35(3)** of the **Act**, the Court of Appeal in **Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR** was categorical that, “Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award.” In the recent case of **Ezra Odondi Opar v Insurance Company of East Africa Limited KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR**, the Court of Appeal reiterated that:

*[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in **Nyutu Agrovat Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015** “the*

Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes” “in a manner that is expeditious, efficient...” while also observing that Section 35 of the Act, “also provides the time limit within which the application for setting aside should be made.

The Court then proceeded to state that, “The three months’ period within which an application for setting aside an arbitral award may be made is to be computed from the date the award is received.” The Court, however, left the issue when the award is received open. It is this issue that I turn to resolve bearing in mind that the natural and ordinary meaning of receive as defined in the **Oxford Concise English Dictionary** means, “be given, presented with, take delivery of...” all of which imply actual obtaining of the award.

18. This issue is by no means novel. In **Transworld Safaris Limited v Eagle Aviation Limited and 3 Others (Supra)**, Nyamu J., after reviewing various decisions, expressed the view that:

*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.*

19. The court in **Mahican Investments Limited and 3 Others v Giovanni Gaida and 80 Others (Supra)** followed the same position. In arriving at the conclusion that “received” for purposes of the Act means notification of the award, the courts have held that the object of speedy resolution of disputes and finality of the arbitral award under the **UNCITRAL Model Law on International Commercial Arbitration** is paramount. In **Mahinder Singh Channa vs. Nelson Muguku & Another ML HC Misc. Application No. 108 of 2006 [2007] eKLR**, Warsame J., observed as follows:

*Publication is something which is complete when the arbitrator becomes functus officio but so far as the time for moving under the statute is concerned, it is the notice that matters. It is wholly untenable that the time would not begin to run for a wholly indefinite period if neither side takes up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the period has only just started to run and the fact that he could have had his award by walking round the corner at any moment from the date upon which he received notice of its availability cannot be held against him. Such a construction of the rule appears to be entirely unreasonable. It has never been applied and there is no reason to hold that it applies now ... As the parties in this matter were aware that the award was published and this information was supplied to the applicant after it made an inquiry as to the effective date of publication of the award, the letter stating that the award had been issued cannot change the earlier factual and legal position. Any other interpretation or holding would result in dilatory tactics that would defeat the arbitral process denying it of the virtues associated with it such as speed and cost effectiveness...*

20. More recently in **University of Nairobi v Multiscope Consultancy Engineers Limited (Supra)**, Tuiyott J., had the opportunity to consider the same issue. The learned Judge took the position that in the context of **section 32(5)** of the Act which provides that,

*32(5) Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.*

The act of delivery is simply making the signed copy of the award available for collection to the parties. The learned judge was of the view that the aforesaid provision does not require the arbitral tribunal to send a signed copy of the award to the parties hence for purposes of **section 35(3)** of the Act:

*[24] ..... Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.*

21. In **Lantech (Africa) Limited v Geothermal Development Company ML HC Misc. Appl. No. E776 of 2020 [2020] eKLR**, Okwany J., held

*[33] [D]elivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties.*

22. There are decisions that take the position advanced by the Respondent. In **Dewdrop Enterprises Limited v Harree Construction Limited HC Misc. No. 684 of 2008 [2009] eKLR**, the court accepted that the time for filing the application to set aside the award is to be reckoned from the date the award was received. The court observed as follows:

*Whereas it is true that Arbitrator notified the parties that award was ready for publication as early as November 2007, it was evident that Arbitrator did not publish or avail copies of the said award to the parties on account of failure by the parties herein to pay the outstanding balance of the Arbitrator’s fees. The Arbitrator withheld publication of the said award till 11<sup>th</sup> August 2008. I therefore hold that the date of publication of the said award was 11<sup>th</sup> August 2008. The applicant stated that it received the award on 15<sup>th</sup> August 2008. Taking either dates as the date on which the award was published, under Section 35(3) of the Act, the applicant was required to file the application to set aside the arbitral award before this court required to file the application to set aside the arbitral award before this court by either 11<sup>th</sup> November 2009 or 15<sup>th</sup> November 2008. The present application was filed on 23<sup>rd</sup> September 2008. The application was therefore presented to court within the period provided under the Arbitration Act 1995. I find no merit with the respondent’s objection in this regard.*

23. In *United (EA) Warehouses Limited v Care Somalia and Southern Sudan (Supra)*, HC Misc. Appl. No. 182 of 2013 [2015] eKLR the respondent therein contended that the application to set aside the award was time barred under **section 35(3)** of the **Act** as the award was published on 23<sup>rd</sup> April 2012. In dismissing the objection, the court observed as follows:

*Clearly, the foregoing averment under oath confirms the Claimant's position that the Arbitral Award was dated 23<sup>rd</sup> April 2013 but was received by the parties on 12<sup>th</sup> July 2013. I do not understand the about turn made by the Respondent to later claim that the Claimant received the award on 23<sup>rd</sup> April 2013. Since Section 35 (3) provides that time should start running from the date the applicant received the award, the Claimant's application was filed within time. The Respondent's challenge to the Respondent's application on the basis that the same was filed out of time should therefore be rejected.*

24. The reasoning of the Supreme Court of India in *India v Tecco Trichy Engineers & Others Supreme Court No. 20446 of 2002* is attractive as it adopts the natural and ordinary meaning of the deliver. However, that may be distinguished as it concerned an application of the India **Arbitration and Conciliation Act, 1996**. Although it has similar provisions on setting aside, it allows the parties to apply for condonation of late filing. The issue in the case was whether the award had to be “received” by the party to the arbitration for delivery to be effective. The award was served on the General Manager but the court held that for delivery to be effective, it had to be served on the Chief Engineer who had entered into the agreement under dispute. The case is therefore distinguishable to this case as the court did not decide whether service of the notification of the award amounted to delivery.

25. In resolving this matter, I take the position I had espoused in *Mercantile Life and General Insurance Company Limited and Another v Dilip M. Shah and 3 Others ML HCCC No. 550 of 2006 [2020] eKLR* where I stated as follows:

*[19] I am in agreement with the previous decisions culminating in **University of Nairobi v Multiscope Consultancy Engineers Limited (Supra)** for two reasons. First, once the arbitrator has signed off the award and notified that parties that it is ready for collection upon payment of fees and expenses, the act of delivery is within the power and control of the parties. Second and flowing from the first reason, the object of the entire **Act** would be undermined if a contrary meaning were given to the to the provision.*

### **Conclusion and Disposition**

26. I find and hold that consistent with the object of the **Act**, the only logical interpretation of **section 35(5)** of the **Act** is that an application to set aside must be made within 3 months from the date the award is received and for this purpose, the date of receipt is the date which the parties are notified of the award. Once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the signed copy of award. Failure of the parties to collect it does not delay or postpone the delivery.

27. In this case, the Award was received on 18<sup>th</sup> November 2019 when the parties were notified by the Arbitrator that it was ready for collection. The Notice of Motion dated 26<sup>th</sup> March 2020 having been filed outside the 3 months prescribed period in **section 35(3)** of the **Arbitration Act**, is incompetent. It is therefore struck out with costs to the Respondent.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of FEBRUARY 2021**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mwangi instructed by Macharia-Mwangi and Njeru Advocates for the Applicant.

Ms Lumallas instructed by Lumallas, Achieng' and Kavere Advocates for the Respondent.