



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
MISC. CIV. APPLN. NO. E683 OF 2020

AND

IN THE MATTER OF THE ARBITRATION ACT, NO. 4 OF 1995
ROYAL NGAO HOLDINGS LIMITED.....APPLICANT
-VERSUS-
N.K. BROTHERS LIMITED.....RESPONDENT

R U L I N G

1. This is a ruling on the applicant's Motion on Notice dated 12/11/2020. The same was brought under **Section 80 of the Civil Procedure Act; Order 45, Rules 1,2 & 3(2) and Order 51 Rule 1 of the Civil Procedure Rules 2010.**
2. In the Motion, the applicant sought a stay of further proceedings before the Arbitrator, **Mr. Steven Oundo** and the taxation proceedings of the respondent's Bill of Costs dated 19/10/2020. In addition, the applicant sought the review of the Order given by **Kasango J** on 13/10/2020 and substitute the same with an order allowing the applicant's Originating Summons dated 24/04/2020 in its entirety with costs.
3. The grounds for the application were contained in the body of the Motion and the Supporting Affidavit of **David Jo Nyakang'o** sworn on 12/11/2020. These were that; the matter was previously heard, by way of Affidavit evidence and written submissions. It was determined on 13/10/2020 when **Kasango J**, dismissed the Originating Summons dated 24/04/2020 which had challenged the jurisdiction of the arbitrator, **Mr. Steven Oundo** to hear and determine the dispute between the parties.
4. It was averred that there was sufficient reason to review the orders of Kasango J as elaborated in the Motion.
5. The application was opposed by the respondent vide a replying affidavit of **Rajesh Rathod** sworn on 17/12/2020. It was contended that; the application lacked merit, was fatally defective and offended the provisions of the **Arbitration Act**. It was an attempt to frustrate, delay and circumvent the Arbitral proceedings and that the Court lacked jurisdiction to sit on appeal or review of the decision made by the Court pursuant to **section 14(6) of the Arbitration Act**.
6. That even if the Court had jurisdiction to review, the applicant had not met the threshold for review orders set out in **section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**.
7. In addition to the replying affidavit, the respondent filed a Notice of Preliminary Objection dated 14/12/2020 objecting to the application on the grounds that: -
 - a) The application offends the provisions of **section 14 of the Arbitration Act** and the Court lacks jurisdiction to entertain the same
 - b) The remedy of Review is not available for a decision made pursuant to **section 14 of the Arbitration Act**.
8. The Court has considered the record in its entirety, the depositions of the parties and the submissions on record.
9. It was the respondent's objection that the application before Court offends **section 14 of the Arbitration Act**. That consequently, the Court lacks jurisdiction to determine the same.
10. **Section 14 of the Arbitration Act**, provides, *inter – alia* that: -

“(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.”

11. **Section 14 of the Arbitration Act**, deals with challenges to an arbitrator for removal. The Originating Summons that was dismissed sought to set aside the ruling of the arbitrator dated 10/12/2019 by which he had ruled that he had jurisdiction to hear the arbitral proceedings before him.

12. **Section 17 of the Arbitration Act** provides for competence of arbitrators and their decisions on jurisdiction. A decision by an arbitrator as to his jurisdiction is challengeable under the **section 17. Sub – section 7** thereof provides: -

“(7) The decision of the High Court shall be final and shall not be subject to appeal.”

13. The judgment of **Kasango J** that is being challenged, was a decision under **section 17** aforesaid. There is no right of appeal against a decision under that section.

14. In **Kamconsult Ltd v Telkom Kenya Ltd & Another [2016] eKLR**, the Court of Appeal observed that the **Arbitration Act** does not provide for review of High Court decisions on questions of jurisdiction made pursuant to **section 17 (6)**. It stated: -

“... the omission [in the Act] to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation”

15. The applicant relies on **section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80(1)(b) of the Civil Procedure Act** provides: -

“Any person who considers himself aggrieved –

a) by a decree or order from which an appeal is allowed this by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed this by this Act, may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”

16. Further, **Order 45 Rule 1 of the Civil Procedure Rules** operationalizes the said section. It also confers jurisdiction for review on orders that appealable only.

17. In **Goodison Sixty One School Limited v Symbion Kenya Limited [2017] Eklr**, the court held: -

“I take it that the Civil Procedure Rules are inappropriate for application to section 14 applications. This leaves us in a quagmire regarding the applicable procedure for section 14 applications challenging the mandate of the arbitrator as to his impartiality and independence, or as to composition of the tribunal. Under section 14(6) the court’s decision on such matters is final and not subject to appeal.

It seems to me that a prudent and proper approach is to consider how other applications that may lead to the termination of the mandate of an arbitrator are dealt with under the Act and Rules, and to adopt a similar approach for challenge decisions under section 14. The first is in section 12 where a defaulting party may apply to court to set aside the appointment of a sole arbitrator by a non-defaulting party. Under section 12(8) the court may make a decision which is final and not subject to appeal. Similarly, under section 15(1) an arbitrator’s mandate may be terminated, but if there is a dispute on any ground of termination, the court’s decision thereon is final and not subject to appeal. In both cases under sections 12 and 15, the applicable rule is Rule 3 of the Arbitration Rules. I see no harm in, and would not hesitate to apply, the same rule to section 14 applications.

In light of all the foregoing, I am not persuaded that the review provisions under Section 80 of the CPA and under Order 45 of the CPR apply for review in respect of the court’s decision under section 14 of the Arbitration Act.”

18. In **Phillip Bliss Aliker v Grain Bulk Handlers Limited & another [2020] Eklr**, Tuiyott J. held: -

“If such a decision is final, then no appeal lies against and it would be futile for the Court to even entertain an application for leave in its respect. Should it be any different here because the Applicant chose not to Appeal against the decision (perhaps because an appeal did not lie) and instead sought its Review under the provisions of order 45 of the Civil Procedure Code. Should this Court, which invoked the principle of finality that is embodied in section 14(6) and also paid heed to a Court of Appeal decision to hold that it could not review that decision, now grant leave to appeal against its Ruling.

I think not, because while order 45 rule 1(b) permits a person to seek Review of a decision from which no Appeal is allowed, that provision, found in subsidiary legislation, cannot be deployed to circumvent the finality rule of section 14 or such other provision of the Arbitration Act. Indeed such an outcome would be directly at odds with the holding of the Court in Kamconsult Limited Vs Telkom Kenya Limited and Another (2016) eKLR in which the Court held:-

‘As noted above the notice of motion seeking review of the ruling by the superior court was brought under Orders XLIV Rule 1, XXI Rule 22 of the former edition of the Civil Procedure Rules (now repealed), as well as Sections 3A, 63e, 80 of the

Civil Procedure Act and Rule 11 of the Arbitration Rules.

Under Rule 11 of the Arbitration Rules, Orders XLIV Rule 1, XXI Rule 22 of the former edition of the Civil Procedure Rules (now repealed) could be held to be applicable to the Arbitration Rules in so far as the same may be appropriate. However, the Arbitration Act does not provide for review of High Court decisions made pursuant to Section 17 (6) of the Act, and therefore under Section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases, a rule cannot override a substantive law. Sections 3A, 63e and 80 of the Civil Procedure Act are also not applicable pursuant to Section 10 of the Arbitration Act.

We take note of the fact that arbitration proceedings are intended to provide a faster and less technical process for resolution of disputes. Thus the omission to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation. No doubt the case of Abdi Rahman Shire (supra), which overturned the decision of Ringera J on interpretation of Section 23 (3) of the Limitations of Actions Act would have a bearing on the propriety of the orders made by Ringera J on 17th September 2001 on the jurisdiction of the arbitral tribunal. Nevertheless, this Court has no jurisdiction to entertain an appeal in that regard as this court only exercises jurisdiction conferred by statute. The parties having chosen to proceed by way of arbitration, the Arbitration Act and Rules bind them.”

19. This Court fully associates itself with the foregoing pronouncements and applies the same here. There can be no review where there is no right of appeal.

20. Accordingly, the respondent's preliminary objection is hereby upheld. The Court has no jurisdiction to entertain the application for review. Accordingly, the application is without merit and is hereby struck out with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE