REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC CIVIL APPLICATION NO. 126 OF 2018

S & M PROPERTIES LTD..............................APPLICANT

VERSUS

VINAYAK BUILDERS LTD.......................RESPONDENT

RULING

The Application

1. This ruling is in respect of the Applicant's Amended Notice of Motion application brought under ***Sections 3, 10, 14(6), 16, 19A, 22, 32A and 35 of the Arbitration Act, 1995 as amended by Act No. 11 of 2009,*** dated **6th August, 2021**, seeking the following orders: -

> **(a) That this Honourable Court be pleased to review and/ or set aside the Ruling dated 22nd July 2021 rendered by the Honourable Lady Justice G. W. Ngenye and the resultant orders.**
>
> **(b) That the arbitral proceedings between the parties do proceed to their logical conclusion before QS Onesimus Mwangi Gachuiri.**
>
> **(c) That the costs of this Application be provided for.**

2. The application is premised on the grounds on the face of it and supported by the affidavit of **Shobha Mulji** sworn on even date. The grounds for the application were, among others that on 2nd November, 2020, the Respondent filed an application seeking to reverse and/or set aside the ruling of the learned Arbitrator delivered on 21st October, 2020 in which the Arbitrator declined to recuse himself as an arbitrator; that on 22nd July, 2021, this Court ordered that the arbitral proceedings between the parties hitherto handled by **QS Onesimus Mwangi Gichuiri** do commence *de novo* before an arbitrator other than **QS Onesimus Mwangi Gichuiri**; that the said Ruling and the order did not take into account the existence of an Interim Award dated 2nd December, 2019 which has never been set aside under **Section 35 of the Arbitration Act**; that the consequence of ordering that the arbitral proceedings to commence *de novo* is tantamount to setting aside the Interim Award without adhering to the provisions of the Arbitration Act particularly **Section 35** thereof; and that the Court also erred by making an order that the parties agree on a replacement arbitrator or in the alternative a substitute arbitrator be appointed by the Chairman of the Chartered Institute of Arbitrators yet the parties' agreement dated 3rd October, 2014 does not constitute the Chartered Institute of Arbitrators as an appointing authority.

3. In response, the Respondent filed a Preliminary Objection dated 9th August, 2021 seeking that the Applicant's amended application be struck out with costs on grounds that the Court lacks jurisdiction to hear and determine this application as the Arbitration Act does not provide for review of the decision of the High Court made under **Section 14 (5) of the Arbitration Act** and that the application is vexatious and an abuse of the process. The Respondent also filed a Replying Affidavit sworn by **Premji Vekaria** 9th August, 2021.

Submissions

4. The application was canvassed by way of written submissions which were duly filed by the advocates for the Applicant, **Nyaanga & Mugisha Advocates**, and the advocates for the Respondent, **Ngeresa & Okello Associates**, on 11th August, 2021 and 12th August, 2021 respectively.

Applicant's submissions

5. The Applicant submits that this Court has the jurisdiction to determine its application on the basis that Rule 11 of the Arbitration Rules, 1995 provides that the Civil Procedure Rules shall apply to all proceedings under it. For this proposition, the Applicant cites **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules** which are the statutory basis for an application for review. The Applicant also relies on the case of **Kanyabwera vs Tumwebaze [2005] 2 EA 86** where the Court set out the principles to be followed by a Court before which an application for review is made, on the ground of an error apparent on the record is made.

6. The Applicant also submits that the Court erred in the impugned ruling by making an order that the proceedings commence *de novo* and in effect setting aside an arbitral award without adhering to **Sections 10 and 35 of the Arbitration Act**. The Applicant further states that the only challenge to an arbitral award permitted by Kenyan law is on the instances set out in **Section 35 of the Arbitration Act**. To buttress this point, the Applicant relies on the case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR** where the Court of Appeal held that a party cannot ground an application to set aside an award outside **Section 35 of the Act.** The Applicant also cites the case of **Christ for All Nations vs Apollo Insurance Co Ltd [2002] EA 366 (CCK)** where **Hon. Ringera J.** (as he then was) expressed that:-

> ***"…the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right."***

7. Further, the Applicant submits that the Court's direction that the Chartered Institute of Arbitrators appoints an arbitrator in default of agreement by parties was in error in that it introduced a new appointing authority not in accordance with the procedure in the parties' agreement dated 3rd October, 2014. For this proposition, the Applicant relied on **Section 16(1) of the Arbitration Act** which provides that when a mandate of an arbitrator is terminated under **Section 14 or 15**, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.

8. The Applicant urges this Court to find that the *de novo* hearing as directed by it should commence from the point after delivery of the Interim Award published on 2nd December, 2019. The Applicant contends that in directing the *de novo* hearing of the Arbitral proceedings, the Court set aside an Interim Award published on 2nd December, 2019 therefore there was an error on the record, warranting the setting aside of the impugned Ruling.

Respondent's submissions

9. On the other hand, the Respondent urges this Court to find that there is no jurisdiction to entertain this application. The Respondent cites the case of ***Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd Civil Appeal 50 of 1989*** for the proposition that where there is no jurisdiction, the court is called upon to down its tools.

10. The Respondent submits that the impugned ruling was in respect of an application brought under **Section 14 of the Arbitration Act** and that under **Section 14(6) of the Act,** the decision of the High Court on such an application shall be final and shall not be subject to appeal. The Respondent contends that there being no right of appeal, the application for review of the impugned ruling is disguised as an appeal. In this respect, the Respondent cites the case of **Royal Ngao Holdings Limited vs NK Brothers Limited [2021] eKLR.**

11. The Respondent submits that **Section 10 of the Arbitration Act** stipulates for limited court interference in arbitration matters and that one of those instances is under **Section 14**. The Respondent further contends that had the drafters had it in their minds to provide for review of the decision of the High Court, they would have expressly stated so in the Act. In this regard, the Respondent cites the case of **Gooodison Sixty One School Limited vs Symbion Kenya Limited [2017] eKLR** where the court expressed that review of the High Court's decision does not lie in an application under **Section 14 of the Arbitration Act**.

12. The Respondent argues that applications for review are brought under **Order 45 of the Civil Procedure Rules** yet the Applicant has brought the Application under **Sections 3, 10, 14(6), 16, 19A, 22, 32A and 35 of the Arbitration Act** which do not deal with review orders.

13. The Respondent further points out that the grounds upon which the application is based are not grounds that are amenable for review in that there is no discovery of new important material, no error apparent on the face of the record and no other sufficient reason adduced by the Applicant to warrant the court to exercise discretion in its favour. In this respect, the Respondent relies on the Court of Appeal case of **National Bank of Kenya Ltd vs Ndungu Njau {1996} KLR 469 (CAK) at Page 381 cited in Republic vs Public Procurement Administrative Review Board & 2 others [2018] eKLR.**

14. As to the question of the interim award, the Respondent argues that the Court was fully appraised of the history of the matter including the fact that an interim award had been delivered in the matter. Additionally, the Respondent submits that the interim award is subject to challenge at the stage when an award on all the issues is made as there is no final award on all issues yet. This is in consonance with the decision of **Hon. Nzioka J**, who declined to set aside the award made on 2nd December, 2019 upon an application dated 20th December, 2019 by the Respondent made under **Section 35 of the Arbitration Act**.

15. Moreover, the Respondent submits that the Applicant's argument that the Chartered Institute of Arbitrators is not an appropriate appointing authority is premature as the parties have not yet attempted to agree on the appointment of an alternative arbitrator. Finally, the Respondent further contends that the Applicant is estopped from raising this issue now as it had an opportunity to raise the same when responding to the Application dated 2nd November, 2020.

Analysis and determination

16. I have considered the application, the grounds in support thereof, the Preliminary Objection, the rival affidavits, the submissions and the law. The Applicant's amended application is an application for review of this Court's ruling on an application challenging the arbitrator. It is brought under **Sections 3, 10, 14 (6), 16, 19A, 22, 32A and 35 of the Arbitration Act**. However, the Applicant did not expressly cite

Section 80 of the Civil Procedure Act as well as **Order 45 Rule 1 of the Civil Procedure Rules** which provide for review.

17. To my mind, it is important to first address the Preliminary Objection as it raises a question of law, namely whether this Court has jurisdiction to entertain an application for review of a Ruling emanating from an application made under **Section 14 of the Arbitration Act** to challenge the arbitrator.

18. **Section 14 (6) of the Arbitration Act** provides that:-

"The decision of the High Court on such an application shall be final and shall not be subject to appeal."

19. Although the Arbitration Act prohibits an appeal emanating from an application for challenging an arbitrator, it is silent as to whether a review is possible. However, this question has previously been interrogated in depth by this Court in the case of ***Gooodison Sixty One School Limited vs Symbion Kenya Limited [2017] eKLR***, **Misc. Civil Cause No. 131 of 2016**. The observed as follows:-

> ***"39. The provisions for review are in section 80 of the CPA which the applicant cited, and Order 45 Rule 1 CPR which the applicant did not expressly cite. The question that arises is whether, in the absence of any review provision in the Arbitration Act, the Civil Procedure Act and Rules apply. As earlier noted, Section 14(6) of the Arbitration Act prohibits an appeal from a decision of the High Court on a challenge to the arbitrator. The Applicant instead invoked the review provision in Section 80(1) (b) of the CPA, which states:***
>
> ***"Any person who considers himself aggrieved –***
>
> ***a. by a decree or order from which an appeal is allowed this <u>by this Act, but from which no appeal has been preferred; or</u>***
>
> ***b. by a decree or order from which no appeal is allowed this <u>by this Act</u>, 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" (underlining added)***
>
> ***40. It is clear that the sort of review contemplated under the CPA must be a review in respect of which the CPA itself allows an appeal but where one has not been preferred, or where the CPA itself does not allow an appeal. Unless either of these two conditions can be shown in respect of the review sought by the applicant, review cannot be available. In the present case, the applicant has not referred to any provision of the CPA which either allows or prohibits an appeal from the decision of the court in respect of a challenge under section 14 of the Arbitration Act. On the contrary, what we have is a provision prohibiting appeal in the Arbitration Act and absence of a provision allowing review.***
>
> ***41. In this case, is the review requested one in which "no appeal is allowed by this Act", namely, the CPA? I note that the CPA has provisions in Section 75 touching on appeals from orders in, inter alia, court-annexed arbitration, but nothing is stated there concerning appeals in respect of consensual arbitrations. Section 66 of the CPA provides:***
>
> ***"Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of securinty as may be prescribed, <u>an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court</u> to the Court of Appeal" (underlining added).***
>
> ***42. From the foregoing, it seems plain enough that, in general, all decrees and orders of the High Court are subject to the appellate jurisdiction of the Court of Appeal, except where the CPA itself so prohibits. The instances where the prohibition is made in the CPA are set out in it and do not include decrees or orders made in respect of consensual arbitration. So, clearly, an appeal in respect of section 14 of the Arbitration Act would, but for the prohibition contained in section 14(6) of the Arbitration Act, be allowed by the CPA.***
>
> ***43. I revert now to the argument in this case on the reference by Counsel to the relevance or otherwise of the Kamconsult case to the present case. I agree with Mr Amin that the ratio in the Kamconsult case concerns section 17 of the Arbitration Act. Paragraph 8 of the court's decision clarifies that where the court states that:***
>
> ***"…the only issue for determination is whether the High Court is vested with powers to review its decision and/ or orders made pursuant to Section 17(6) of the Arbitration Act".***
>
> ***44. The court in the Kamconsult case analysed Section 10 of the Act, and considered the Anne Mumbi case which concluded that:***
>
> ***"A careful look at all the provisions of the cited in the heading in the application and invoked by the appellant in the superior court shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act"***

20. In the said **Kamconsult Limited v TecomKenya Limited & Another (2016) eKLR,** theCourt went on to state:

> ***"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 [Anne Mumbi and Nyutu Agrovet], 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"

21. The Court in ***Gooodison Sixty One School Limited (supra)*** went on to say:

> ***"So far as is appropriate, the Civil Procedure Rules shall apply to <u>all proceedings under these Rules</u>" (underlining added)***
>
> ***This rule applies the Civil Procedure Rules, where appropriate, only to proceedings under the Arbitration Rules. And since the Arbitration Rules do not provide for section 14 proceedings, 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.***
>
> ***52. 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.***
>
> ***53. 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. I so find and hold and, accordingly, the application for review herein fails."***

22. I have taken the liberty to make reference to the Civil Procedure Act and Rules as cited in the ***Gooodison Sixty One School Limited*** case because of the risk that a Party may argue that in applying substantive justice the instant application could be considered under the CPA and CPRs notwithstanding that the application was not brought under the Act or the Rules.

23. I am equally persuaded by the case of **Phillip Bliss Aliker vs Grain Bulk Handlers Limited & another [2020] eKLR, Miscellaneous Application No. 538 of 2015,** in which the court rendered itself as follows:-

> ***"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 <u>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</u>…" (Emphasis added).***

24. Additionally, in **Royal Ngao Holdings Limited vs NK Brothers Limited [2021] eKLR Misc. Civ. Appln. No. E683 of 2020** the court found that the Court has no jurisdiction to entertain an application for review of a decision made by the Court pursuant to **Section 14 (6) of the Arbitration Act** as there can be no review where there is no right of appeal.

25. Applying the above decisions to the instant matter, I find that this Court lacks the jurisdiction to entertain the application for review. As earlier mentioned, the Applicant's amended application is brought under **Section 3, 10, 14 (6), 16, 19A, 22, 32A and 35 of the Arbitration Act**. Although the Applicant did not expressly cite Section 80 of the Civil Procedure Act as well as **Order 45 Rule 1 of the Civil Procedure Rules** which provide for review, it invoked the same in its submissions.

26. The Applicant further argued that the provisions for review are applicable based on **Rule 11 of the Arbitration Rules, 1995**. However, I find that the Applicant's contention is without merit as a rule cannot override a substantive section of an Act.

<u>Deposition</u>

27. In the result, the Respondent's PO is hereby upheld. The Court has no jurisdiction to entertain the application for review. I have no doubt that review of the High Court's decision does not lie under section 14 of the Arbitration Act. Accordingly, the Applicant's Amended Notice of Motion application dated 6th August, 2021 is hereby struck out with no orders as to costs.

28. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH OCTOBER, 2021

G.W.NGENYE-MACHARIA

JUDGE

<u>In the presence of:</u>

1. Ms. Eboso for the Applicant.

2. Ms. Ngeresa for the Respondent.