REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CAUSE NO. 442 OF 2017

IN THE MATTER OF THE ARBITRATION ACT, CHAPTER 49 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ARBITRATION RULES, 1997

THE HON. ATTORNEY GENERAL…..RESPONDENT/APPLICANT

-VERSUS-

BEA INTERNATIONAL LIMITED……CLAIMANT/RESPONDENT

RULING

By a Notice of Motion Application dated 19th December 2018, brought under **Section 1A, 1B, 3A of the Civil Procedure Act, Section 75 of the Civil Procedure Act, Order 43 and 51 of the Civil Procedure Rules, 2010** and all other enabling provisions of the Law, the Applicant sought orders;

a. That this court grants leave to the Respondent/Applicant to file an Appeal against the decision dated 6th December 2018 delivered by the Hon. Lady Justice Rachel Ng'etich;

b. That the decision of the Hon. Lady Justice Rachel Ng'etich delivered on 6th December 2018 be stayed pending the hearing and determination of this application;

c. That the decision of the Hon. Lady Justice Rachel Ng'etich delivered on 6th December 2018 be stayed pending appeal;

d. That the costs of this application be in cause.

The Application is grounded on the Final award delivered by Sole Arbitrator Mr Kyalo Mbobu on 5th September 2017. The Applicant filed Notice of Motion of 3rd November 2017 seeking to set aside the Arbitral award. The Claimant filed Notice of Motion dated 29th November 2017 seeking orders to enforce the award. The Trial Court L.J.R.Ngetich delivered Ruling on 6th December 2018 and granted recognition and enforcement of the Arbitral award. The Applicant intends to appeal the Ruling and hence seeks stay of execution of Ksh 379,500,000/=

RESPONDENT'S REPLYING AFFIDAVIT

The Application is opposed vide an affidavit dated 5th February 2019, sworn by Munyalo Nthuli the advocate for the Respondent. He asserts that this Court lacks jurisdiction to grant leave to appeal against the Ruling or even stay of execution of the ruling dated 6th December 2018 declining to set aside the award for the following reasons;

a. That the **Arbitral Clause No. 12** the Consultancy Agreement dated 4th April 2011 provided for Arbitration as the method of resolving disputes. The clause further expressly provided that Arbitral Award shall form the final decision and that it would not be subject to appeal. It provides;

> **"Any dispute arising out of the contract which cannot be amicably settled between the parties shall be referred by *either party to the arbitration and final decision of the person to be agreed between the parties".***

b. That a party to an agreement providing for arbitration as a form of dispute resolution waives his or her right to object the terms agreed upon by parties when arbitration proceedings arise.

c. That **Article 159(c) of the Constitution** enjoins the Judiciary to promote alternative forms of dispute resolution including reconciliation, mediation and arbitration. To that extent, arbitration is constitutionally recognized as one of the methods of resolving disputes and where parties choose that route, the guiding law is the Arbitration Act. Courts cannot intervene in arbitration matters except as provided for in law. **Section 10 of the [Arbitration]Act** is explicit that;

> **"except as provided in this Act, no court shall intervene in matter governed by this Act."**

d. That the Applicant's allegation at **ground J** if its application and paragraph 8 of its supporting affidavit that an appeal lies of right under **Section 75 of the Civil Procedure Act** as read with **order 43 of the Civil Procedure Rules** is wrong and misconceived as the said Provisions do not apply in arbitral matters. The other provisions of the Civil Procedure Act including **Section 1A, 1B, 3A and 51** that the Applicant also relies on are also inapplicable.

e. That the Application is not only premised on the wrong sections of the law but is also defective and a nonstarter as it would only have been brought under **Section 39 of the Arbitration Act** if there was an agreement. The parties in these proceedings have not agreed to such intervention.

f. That no court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act.

g. That the overriding objectives under **Section 1A, 1B, and 3B** of the **Civil Procedure Act** do not and cannot confer jurisdiction. The gist of those provisions is that the overriding objective is to facilitate the just, expeditious, proportionate and affordable determination of cases that are rightly before and pending in court.

h. That the Applicant had further contradicted himself in alleging leave to appeal was automatic yet he had approached this Hon. court to seek for the same leave, which cannot be granted.

i. That it is now a well-established principle in law that a court's jurisdiction flows from either the Constitution or legislation or both. Thus a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the Legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

He stated that the grounds, which the Applicant is attempting to challenge the award, are the same grounds canvassed before the Arbitrator as well as the High Court. For instance

a. The allegation that the award went beyond the scope of the reference to Arbitration has already been determined and found to be baseless and unfounded. Both the Arbitrator and the High Court have dealt with the issues submitted by the parties. It is thus the Respondent's right to execute its judgment and execution *per se* and not whether the parties are happy with a judgment. It is not enough reason to be granted leave to appeal where there is no jurisdiction to.

b. The Applicant's assertions that the award is against the public policy of Kenya has already been found to be unfounded and with no merit by both the Arbitrator and the High Court. The Applicant did not demonstrate at all how the Award is in conflict with the Public Policy of Kenya. Public Policy is a wide concept that the Applicant must demonstrate specifically and with evidence how the award is said to be in conflict with public policy. The final Arbitral award therefore dealt with a dispute that was contemplated by the parties and within the arbitral clause as it arose out of the performance of the contract.

The Application is further opposed vide a Replying Affidavit dated 13th March 2018, sworn by Mr. Charles Sunkuli the Principal Secretary and Accounting Officer in the Ministry of Environment and Forestry. He stated that an Arbitral Award may only be challenged once it is made and delivered pursuant to the provisions and Sections of the **Arbitration Act.**

That **Section 32(4) of the Arbitration Act** provides for the Award to state the date of the Award and the juridical seat of arbitration.

That at **Section 32(5)** of the Act, it is provided that once the Award is made, a copy shall be delivered to each Party subject to the provisions of **section 32B of the Act**.

That **section 32B (3)** allows the Arbitrator to withhold the delivery of the Award to the Parties pending payment of the arbitrator's fee.

That the delivery of an Award means delivery of an Award duly made and published pursuant to the provisions of **Section 32 of the Act** as to its form and content.

That the purport and essence of the Respondent's Supplementary affidavit dated 20th February 2018 is the withholding of the Award by the Arbitrator pursuant to **section 32 B (3)** of the Act.

APPLICANT'S SUBMISSIONS

The Applicant relied on **Section 75 of Civil Procedure Act** which provides for appeal with leave of the Court which is a matter of judicial discretion.

The Applicant submitted that in so far as the Respondent's contention is concerned as set out in the said Supplementary affidavit; to the effect that pursuant to the letter of Kyalo Mbobu- Sole Arbitrator of September 2016, time to challenge the award under **Section 35** of the Act started to run then and as such the period within which to challenge the award had lapsed and the Chamber Summons Application dated 2nd November 2017 is therefore time barred, the Applicant responded;

> **a. Section 32B(5) of the Arbitration Act** allows for the Arbitrator to withhold delivery of an Award;
>
> b. Time runs upon delivery of an award duly prepared and published as to the form and contents as per the provisions of **Section 32 of the Arbitration Act.**

That in this regard, **Section 32(3) of the Arbitration Act** provides;

> **"The arbitral tribunal may withhold the delivery of an award to the parties until full payment if the fees and expenses of the arbitral tribunal is received."**

Indeed **Section 32 (5) of the Arbitration Act** buttresses this position as follows;

> **"Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each Party."**

The Applicant submitted that the Final Award, the subject of the present action under **Section 35** of the **Arbitration Act**, states at **paragraph 215** of the Final Award as follows;

> **"THIS FINAL AWARD is made and published in Nairobi, Kenya the seat of the Arbitration this 5th day of September 2017."**

In the leading case of ***Nyutu Agrovet Limited –vs- Airtel Networks Limited (2015) eKLR*** the court stated;

> **"Though not restricted to a specific format, for an arbitral award to be acceptable, it is required to be cogent, complete, certain, final, consistent and enforceable. Cogency in this respect would mean that the award must be compelling and convincing in its reasoning; complete in the sense that all issues submitted for determination to the arbitrator have been dealt with; certainly in that it must be clear and not ambivalent, ambiguous or not capable of being performed. An award must also be compliant with Section 32 of the Arbitration Act 1995 (the Act).**
>
> **If any party is unhappy with the award, then the same can be challenged in court under Section 35(2) of the Act which has very clear provisions on the circumstances under which an award may be set aside.**
>
> **On the issue of finality, under Section 32A of the Act, unless otherwise agreed by the parties, an arbitral award should be final and shall be binding on all parties to it and that there shall be no recourse against the award except as provided for in the Act. In this matter, as noted earlier on, Clause 18.1 of the Agreement provided that the decision of the arbitrator "shall be final and binding on the parties". What this meant is that the award could only be interfered with by the court only as provided for under Section 35 of the Act. I shall advert to this issue of finality in more detail in this Ruling".**

It is the Applicants submissions that the Arbitrator never became *functus officio* until 5th September 2017, upon publication of the Arbitral Award the subject of this suit. It follows that, in view of the fact that the Final Award was published on 5th September 2017, it has not been demonstrated that as at the time of the letter dated 4th November 2016, the Arbitrator retained no power of altering the same.

RESPONDENT'S SUBMISSIONS

The Respondent vide Written submissions filed on 14th May 2019 reiterated the contents of the Respondent's Replying affidavit filed by Mr Munyalo Mulli on 5th February 2019 outlined above.

The Respondent relied on the following case-law;

Talewa Road Contractors Ltd vs Kenya National Highway Authority [2019] *eKLR* where the Court cited Court of Appeal decision of ***Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR*** as follows;

> **"I do not agree that was the intention of Parliament in drafting Arbitration Act, if that was so, it should have expressly stated so and such Rule cannot override Statute, the Arbitration Act. The provisions of Arbitration Act make it clear that it is a complete Code except as regards the enforcement of the award /decree where Arbitration Rules 1997 apply Civil Procedure Rules where appropriate….**

It is also clear that CPR would not be regarded as appropriate if its effect would be to deny an award finality and expeditious enforcement, both of which are objectives of Arbitration. It follows that all provisions invoked except Sections 35 & 37 of Arbitration Act do not give jurisdiction to the superior Court to intervene and any application filed in the Superior Court other than provided does not give the superior Court jurisdiction. Without jurisdiction Courts should strike out such applications, for want of prosecution."

In the case of ***Kenyatta International Conference Centre vs Greenstar Systems Ltd [2018] eKLR*** enumerated the 3 instances of an appeal;

"My construction of the above provision (Section 39 of Arbitration Act) is that there are 3 ways in which a party can access the Appellate jurisdiction of this Court [Court of Appeal] in a matter arising from an arbitral process;

i) The first by way of provision of an agreement to that effect in the Arbitration clause contained in the agreement pursuant to which the arbitral process is anchored, that a right of appeal exists.

ii) Secondly, through leave granted by the High Court under the same provision

iii) Thirdly, through leave granted by the Court of appeal under the same provision."

DETERMINATION

The issue for determination is whether this Court can/may grant leave to appeal and stay of execution of the award of Hon. L.J. Rachel Ngetich's Trial Court's Ruling of 6th December 2018.

The applicant relied on right of appeal arising from **Section 75 of Civil Procedure Act** that provides for Orders from which appeal lies

"(1) **An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-**

(a) **an order superseding an arbitration where the award has not been completed within the period allowed by the court;**

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

The Court may exercise judicial discretion where the Civil Procedure Act is applicable in conjunction with the Arbitration Act 1995.Yet in

Nyutu Agrovet Limited –vs- Airtel Networks Limited (2015) eKLR

Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR

Kenyatta International Conference Centre vs Greenstar Systems Ltd [2018] supra

These authorities among others bind this Court on instances that an appeal lies from Final Arbitral Award without importing the Application of **Civil Procedure Act** and/or Rules. The Court of Appeal considers the **Arbitration Act** a complete Code.

Case-law also draws this Court's attention to the provisions of **Sections 32, 35 37 & 39 of the Arbitration Act** on how a party to the Arbitration process may challenge the Final Award.

32A. Effect of award

Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available

against the award otherwise than in the manner provided by this Act.

35. Application for setting aside arbitral award

(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)

…….

37. Grounds for refusal of recognition or enforcement

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

……..

39. Questions of law arising in domestic arbitration

(1) Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

The arbitration Agreement/Clause housed in the contract for Consulting services at Clause 12 reads in part;

"Any dispute arising out of the Contract which cannot be amicably settled between parties shall be referred to arbitration and final decision of a person to be agreed between the parties."

The Arbitration Clause bound the parties to the Final Arbitral Award as it did not cater for provision of an appeal in the Arbitration Clause.

Sections 35 and 37 of the Arbitration Act were considered at the time this Court by Hon. L.J Rachel Ngetich dealt with both applications; Notice of Motion Application of 29th November 2017 that sought orders to enforce the award and the Notice of Motion Application of 3rd November 2017 that sought to set aside the award and culminated to the Court's Ruling of 6th December 2018. The same provisions and subject applications cannot legally be revisited and/or reconsidered again in this Court as it lacks appellate powers as it is a Court of similar and equal and competent jurisdiction with the Trial Court.

Section 39 of the Arbitration Act would only be successfully invoked if there is/was consent by the parties to place before Court a question of law to heard and determined.

In the absence of any other legal provision under the **Arbitration Act** that is a complete code that enables the Court to consider granting leave to appeal against the decision by the Court vide Ruling of 6th December 2018 under the **Arbitration Act 1995** and also grant stay of execution pending appeal, this Court finds the Application filed on 19th December 2018 lacks merit and is dismissed with Costs.

The Applicant is at liberty to pursue leave to file appeal in the Court of Appeal.

DELIVERED SIGNED & DATED IN OPEN COURT ON 13TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR KIHARA FOR THE APPLICANT

MS WAWERU FOR THE RESPONDENT

COURT ASSISTANT- TUPET