REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E052 OF 2018

AS CONSOLIDATED WITH MISCELLANEOUS CIVIL APPLICATION NO. 341 OF 2018 AND FURTHER CONSOLIDATED WITH MISCELLANEOUS CIVIL APPLICATION NO. 170 OF 2019.

CORETEC SYSTEMS AND SOLUTIONS LTD.....APPLICANT

VERSUS

DIGITAL DIVIDE DATA KENYA LTD.....RESPONDENT

RULING

Introduction

1. Through the application dated 1st August, 2018 the applicant herein (Coretec Systems and Solutions Ltd) sought orders to set aside the Arbitral Award. The applicant also filed the application dated 4th October, 2018 seeking to stay the execution of the decree issued by this court on 28th September, 2018. Prior to the filing of the application dated 1st August 2018, the respondent herein had filed an application dated 12th July, 2018 seeking the recognition of the Arbitral Award which application was allowed through a Ruling delivered by this court (differently constituted) on 27th September, 2018 and a decree issued on 28th September, 2018.

2. Through a Ruling delivered on 23rd April, 2020, this court found no merit in the application to set aside the arbitral award and further that there is no basis for granting orders for stay the execution or for the deposit of security as the applications seeking the said orders had been overtaken by events if not settled by the determination of the issue of setting aside of the award.

Application

3. The aforesaid ruling of 23rd April 2020 precipitated the filing of the application dated 20th May 2020 which is the subject of this ruling. In the said application, the applicant seeks orders that: -

> ***a) Spent.***
>
> ***b) Spent.***
>
> ***c) This Honourable court be pleased to review its ruling dated and delivered on 17th April 2020 (sic) and discharge and/or set aside the impugned arbitral award together with judgment entered herein in default of appearance.***
>
> ***d) This Honourable court be pleased to order the parties to proceed for a fresh arbitration process to determine the dispute between the parties.***
>
> ***e) In the alternative and without prejudice to the foregoing, this Honourable court be pleased to intervene and order the Applicant/Respondent to accept a payment of Kshs 5 million in full and final settlement of the dispute herein and allow the applicant to settle the same on an equal monthly instalment of Kshs 300,000/-.***

4. The application is based on the grounds that: -

> ***1. The applicant is aggrieved with the court's ruling delivered in 17th April 2020 and seeks to review the same on the following grounds: -***

i. The applicant has since discovered from the award made by the arbitrator that the same was arrived at through inducement and collusion and in absence of any lawful consideration of the claim before the Arbitrator.

ii. In making its ruling of 17th April 2020, this honourable court inadvertently failed to consider and determine whether or not the arbitration proceedings resulting to the impugned arbitral award was carried out regularly and by a competent arbitrator in view of the fact that the purported arbitrator was not appointed pursuant to the express terms of the arbitration clause as negotiated between the parties.

iii. In making its ruling of 17th April 2020, this honourable court inadvertently failed to consider and determine whether or not an application for enforcement of an arbitral award can regularly proceed for hearing and determination when there is another application pending before the same court for the setting aside of the same arbitral award.

iv. The honourable court inadvertently held at paragraph 9 of the ruling dated 17th April 2010 that the respondent/applicant did not tender evidence to contradict the process server's testimony when the actual factual position is that the respondent's witness was present in court in two occasions and it is the Honourable court which directed that it was not necessary to take the evidence of the said witness.

v. The honourable court inadvertently failed to consider the justice of the matter by allowing an unlawful award of upto Kshs 12 million when the alleged debt owed to the applicant by the respondent was only kshs 1,760,807.88/=.

vi. The honourable court inadvertently failed to realize that the effect of the ruling of 17th April 2020 is to validate an illegal process and assist the applicant/respondent on its attempt at unjust self-enrichment at the expense of the respondent/applicant.

vii. The honourable court inadvertently failed to determine whether or not an applicant seeking to enforce an arbitral award has a duty to inform the court of the existence of an application to set aside the same award and the effect such failure to disclose the existence of the said application may have on the consequent orders made by the court.

viii. The honourable court inadvertently failed to consider the fact that the net effect of the ruling of 17th April 2020 is that an arbitral award arising out of an arbitration proceedings carried out contrary to Section 35(v) is not enforceable on the sole basis that the respondent did not participate in the impugned arbitral proceedings.

2. This honourable court has a primary duty under both the Constitution and the Arbitration Act to ensure that arbitral awards are in the least reasonable and lawful at all given times and devoid of any form of arbitrariness as demonstrated in the subject award.

3. The Honourable court would have otherwise not arrived at the impugned finding if the court were cognizant of the inadvertent errors here above.

4. As a result of the above errors on the face of the court's ruling, a miscarriage of justice has been visited upon the respondent which can only be remedied by granting of the orders sought herein.

5. The Respondent/Applicant has sought to review the ruling herein primarily on the sufficient reasons set out herein. The application is made in good faith based on the very plausible grounds set out herein.

6. It is only fair, just and in the interest of the greater public that in the circumstance of this case the ruling of the honourable court dated and delivered herein on 17th April 2020 be reviewed, varied and rectified as sought herein.

7. In the alternative and without prejudice to the foregoing, the respondent is willing to pay the applicant the sum of Kshs 5 million in full and final settlement of the dispute herein. This amount had been previously proposed by the respondent in its letter of 27th September 2019 as a fair payment towards the settlement of the undisputed debt of Kshs 1.9 million.

8. In the circumstances of this case, this Honourable court ought to intervene and assist parties settle this dispute by ordering the respondent to take the proposed Kshs 5 million being a fair reimbursement of its costs together with the debt in question.

9. The Respondent's/applicant's operations have been adversely affected by the COVID -19 pandemic and it can only raise Kshs 300,000/- in settlement of the proposed kshs 5 million.

10. This application has been filed in good faith and without any delay and with the singular purpose of achieving substantive justice in the matter.

5. The respondent, **Digital Divide Data Kenya Ltd**, opposed the application through the replying affidavit of its Director **Judith Obonyo** who avers that the application lacks merit, is a relitigation of the application to set aside the Award and is meant to deny the respondent the fruits of the Arbitral Award.

6. She states that the application is supported by inadmissible documents which offend the provisions of the law as the correspondence in question was made on a "**without prejudice"** basis. She further states that even though the law empowers this court to order that monies due pursuant to a judgment may be paid in instalments where sufficient reasons are given, no reasons had been advanced by the applicant for the

proposal for payment of the amount in the Award by instalments.

7. She further states that the prayer for stay of execution is premature as there is no danger of execution in view of the fact that the costs due to the respondent are yet to be taxed. She maintains that in order to dispense justice and balance the right of the parties herein, the applicant ought to be ordered to make payment of reasonable amounts that will enable the respondent enjoy the fruits of the judgment.

8. The respondent's deponent also filed a further affidavit dated 16th June 2020 wherein she states that even though the amount owed by the applicant prior to the filing of the dispute was kshs 1,760,807.88 the applicant refused to settle the said amount thus precipitating the claim before the Arbitrator wherein an award of Kshs 6,775,236.53 together with interests was made which award has todate accrued interests and stands at Kshs 12,131,018.46.

9. Parties canvassed the application by way of written submissions.

Applicant's submissions

10. Counsel for the Applicant submitted that the courts jurisdiction to review its ruling is captured under Section 80, 63(e) and 3A of the Civil Procedure Act (CPA) and Order 45 Rule 1 of the Civil Procedure Rules (CPR).

11. It was submitted that Article 159(2)(d) of the Constitution obligates this court to administer justice without undue regard to procedural technicalities and that the primary concern of the court is to do justice to the parties before it. For this argument, counsel relied on the decision in ***Nairobi City Council v Thabiti Enterprise Ltd*** (1995-98) 2 EA 231.

12. Counsel submitted that there exists an error in the whole finding of the court which ought to be reviewed or varied since the evidence confirms that the court based the whole ruling on the erroneous ground that the applicant refused to participate in the arbitral proceedings. It was submitted that in the presence of the express and clear evidence confirming that the dispute contractual debt owed to the respondent and the subject of these proceedings is Kshs 1,760,807.88/- the impugned ruling not to disturb the Arbitrator's Award compelling the Applicant to pay the respondent a colossal sum of kshs 12 million remains bare and untenable both in law and in fact and must therefore be reviewed. For this argument, counsel cited the decision in ***Muyodi v Industrial and Commercial Development Corporation & Another*** [2006] IEA 243 wherein the Court of Appeal described what constitutes an error apparent on the face of the record.

13. It was submitted that compelling the applicant to pay Kshs 12 million instead of the undisputed contractual debt of kshs 1,760,807.88 cannot be just. Counsel further submitted that the applicant is ready to pay the respondent a total sum of Kshs 5 million in settlement of the dispute which amount can be paid by way of instalments in view of the Covid -19 Pandemic which has adverse effects of the applicant's business.

14. Counsel argued that because the arbitrator was not properly appointed, the applicant has demonstrated sufficient case to allow this court to lift the lid on the award and do substantive justice to both parties by substituting the award of Kshs 12 million with a justiciable contractual compensation payment of upto Kshs 5 million. For this argument counsel cited the decision in ***Parliamentary Service Commission V Martin Nyaga Wambora & Others*** [2018] eKLR wherein it was held that the court's jurisdiction in a review application is ostensibly to correct its ruling with a review to doing justice to the parties.

Respondent's submissions

15. The respondent submitted that this court is *functus officio* and lacks the jurisdiction to hear this application. For this argument, counsel referred to the landmark cases of ***Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** [1989] KLR and ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*** [2012] e KLR wherein it was held that a court cannot arrogate to itself jurisdiction exceeding that which it conferred upon it by law.

16. It was submitted that Section 35 of the Arbitration Act (hereinafter **"the Act**") does not provide for **"review"** of a decision made after hearing and determining an application under the said section. Counsel maintained that the instant application contravenes the provisions of Section 32A of the Act which stipulates that the decision of the High Court is final and binding on the parties and that no recourse is available against the award otherwise than in the manner provided for under the Act.

17. Counsel submitted that in so far as the instant application seeks for stay of execution, the application is *res judicata* following the impugned ruling of 23rd April 2020 wherein the prayer for stay of execution was dismissed. It was further submitted that even assuming that the court could still consider the application for stay of execution, the applicant has not met the prerequisite elements that would entitle it to the court's exercise of its discretion to grant a stay. Counsel argued that no sufficient grounds have been established to warrant the stay orders as envisaged under Order 42 Rule 6(1) of the Civil Procedure Rules (CPR). It was also submitted that the instant application does not meet the threshold set for the granting of the discretionary orders of review.

18. On the prayer that the parties herein be ordered to undergo fresh arbitration or in the alternative, that the respondent be compelled to accept Kshs 5 million as the full and final decretal sum, counsel submitted that the prayer was based on inadmissible documents made on a "**without prejudice**" basis in an attempt to settle the matter out of the court.

Analysis and determination

19. I have considered the application dated 20th May 2020, the respondent's response and the parties' rival submissions together with the authorities that they cited. It is worthy to point out that the impugned ruling whose review the applicant seeks was delivered on 23rd April

2020 and not 17th April 2020 as has been stated in the application. The main issues for determination are as follows: -

> ***a) Whether review of this court's ruling, rejecting the applicant's application for the setting aside of the Arbitral Award under Section 35 of the Arbitration Act, is available option for the applicant herein.***
>
> ***b) Whether this court should allow/admit letters written on a "without prejudice" basis.***
>
> ***c) Whether this court can allow the payment of the decretal sum by way of instalments.***

Review

20. The respondent argued that the review sought has no legal basis as Section 35(1) of the Act which deals with the setting aside of an arbitral award at Sub-Section (1) thereof provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under Sub Section (2) and (3).

21. According to the respondent, Section 35 of the Act does not provide for "**review"** of a decision made after hearing and determining an application under Section 35 of the Act.

22. On its part, the applicant invoked the provisions of Article 159 of the Constitution, Section 80 of the Civil Procedure Act and Order 45 of the CPR to buttress the argument that this court has unlimited inherent jurisdiction to grant orders of the review in the interest of justice.

23. From the outset, it worthy to point out that arbitration, as an alternative dispute resolution mechanism is a unique procedure in which parties to an agreement, as was the position in the instant case, voluntarily choose to subject any dispute arising from their agreement to arbitration instead of litigating before the ordinary courts. Needless to say, arbitration as a dispute resolution mechanism is governed by its own rules under the Act. This position was aptly captured by Mwongo J. in ***Gooodison Sixty-One School Limited v Symbion Kenya Limited*** [2017] eKLR as follows:

> ***"……the primeval and enduring fundamental principles of arbitration, accepted and practiced worldwide over numerous centuries, hold that non mandatory arbitration is, firstly, an inherently complete mechanism of dispute resolution alternative to the state court litigation system; therefore, secondly, that intervention by courts in the arbitral process is extremely limited except where parties agree or the law so stipulates; thirdly, that its essence involves party autonomy, namely, that parties in appropriate cases can choose or ask someone to choose an independent third person or persons to arbitrate or adjudicate over their dispute using a process they mutually agree to; fourthly, that the parties agree that the decision of the third person(s) is binding on them; and finally, that the arbitrator is not bound by complex court litigation procedures and processes or the strict laws of evidence. [Emphasis added]***

24. The contextual framework of arbitration in Kenya was stated by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **Civil Appeal (Nairobi) No 57 of 2006** where the court said:

> ***"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No. 4 1995 (the Act) would apply and the courts take a back seat."***

25. In the present case, as I have already stated in this ruling, the arbitration process was wholly consensual from its inception as it emanated from an arbitration clause contained in the agreement by the parties. This signifies that the clear intention of the parties was to resolve their dispute through arbitration, in which case, the matter is governed by the **Arbitration Act that** provides for both the substantive and procedural law for the arbitration

26. Section 32A of the Arbitration Act stipulates as follows:

> ***"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."***

27. Section 10 of the same Act stipulates that: -

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

28. My understanding of the above provisions is that the intention of the lawmakers was not to involve the court in consensual arbitrations except only under the limited circumstances prescribed in the Act or the Rules made under the Act. Furthermore, as can be seen from the wording of section 32A of the Act, the intention was to make the arbitration award final and binding on the parties, unless the parties agree otherwise. From the above foregoing, the logical conclusion one can make is that in majority of the limited occasions where the court is entitled, under the Act, to intervene in arbitration when an application is made to court and to make a decision in respect of such application, the court's decision is generally stated as final and not subject to appeal as can be discerned from the wordings of **sections 12(8), 14(6), 15(3), 16A (3), 17(7)** and **section 32B (6)**.

29. When considering the import of section 10 of the Act in ***Anne Mumbi Hinga v Victoria Njoki Gathara*** **[2009] eKLR** the court held that:

"A careful look at all the provisions 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"

30. In ***Kamconsult Ltd v Telkom Kenya Ltd & Another*** [2016] eKLR, **the court** concluded that:

"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"

31. In the said ***Kamconsult Ltd*** case (supra) the Court further stated at paragraph 18 that the Arbitration Act does not provide for review of High Court decisions on questions of jurisdiction made pursuant to **section 17(6)** and added that:

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

32. Going by the dictum in the above cited cases and provisions together with the essence and principles of arbitration, I am not persuaded that this court's impugned decision can be reviewed, as suggested by the applicant herein. The applicant invoked the inherent jurisdiction expressed under the provisions of **Article 159** of the **Constitution, sections 3A, 63(e) and 80 of the Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** as applicable in this case in order for justice to prevail.

33. The question which then arises is whether, assuming that this court is wrong in its finding that it does not have the mandate to make an order for review of its impugned decision, the applicant has made out a case for the granting of orders of review.

34. **Order 45, Rule 1(b) CPR** is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

"(1). Any person considering himself aggrieved-

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

(b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

35. The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

"Any person who considers himself aggrieved-

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

(b) by a decree or order from which no appeal is allowed by this Act.

may apply for a 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.

36. **Section 63 (e) of the CPA on the other hand stipulates as follows:**

"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient."

37. Under **Section 80** and **63 (e)** of the **Civil Procedure Act**, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In ***National Bank of Kenya v Ndungu Njau*** *Civil Appeal No. 2111 of 1996*, the Court of Appeal held that;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect expansion of the law"

38. In the ***National Bank*** **case (supra),** the court made the following statement which I find to be applicable in this case:

"In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal and not for review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it"

39. In ***Shah v Dharamshi*** **[1981] KLR** the court held that:

"For an application for review to succeed the evidence must not only be new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence"

40. **Order 45** of the **CPR** is very explicit that a court can only review its orders if the following grounds exist: -

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

41. The pertinent issue for determination herein, therefore, is whether the Appellant has established any of the above grounds to warrant an order of review. In ***Muyodi v Industrial and Commercial Development Corporation & Another*** **[2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

42. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in ***Pancras T. Swai v Kenya Breweries Limited*** **[2014] eKLR** held that:

"In ***Francis Origo & another v. Jacob Kumali Mungala*** *(C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated: -*

"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

We think Bennett J was correct in ***Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557*** *when he held that:*

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

43. I have carefully considered the reasons advanced by the Applicant in seeking review of the impugned ruling. The reasons can be summarized as follows: -

> ***a. Failure to consider and determine whether or not the arbitration proceedings were carried out regularly and by a competent arbitrator in view of the fact that the purported arbitrator was not appointed pursuant to the express terms of the arbitration clause as negotiated between the parties.***
>
> ***b. Failure to consider and determine whether or not an application for enforcement of an arbitral award can regularly proceed for hearing and determination when there is another application pending before the same court for the setting aside of the same arbitral award.***
>
> ***c. Inadvertently finding that the applicant did not tender evidence to contradict the process server's testimony.***
>
> ***d. Inadvertently failing to consider the justice of the matter by allowing an unlawful award.***
>
> ***e. Inadvertently failing to realize that the effect of the ruling of 17th April 2020 is to validate an illegal process and assist the applicant/respondent on its attempt at unjust self-enrichment at the expense of the respondent/applicant.***
>
> ***f. Inadvertently failing to determine whether or not an applicant seeking to enforce an arbitral award has a duty to inform the court of the existence of an application to set aside the same award and the effect such failure to disclose the existence of the said application may have on the consequent orders made by the court.***
>
> ***g. Inadvertently failing to consider the fact that the net effect of the ruling of 17th April 2020 is that an arbitral award arising out of an arbitration proceedings carried out contrary to Section 35(v) is not enforceable on the sole basis that the respondent did not participate in the impugned arbitral proceedings.***

44. I note that in the application dated 1st August 2018 wherein the applicant sought to set aside the award the main reason advanced was that the award was made in blatant disregard and/or contravention of public policy in Kenya. The applicant maintained that it was not given notice of appointment of the Arbitrator or the Arbitral proceedings. According to the applicant, it did not participate in the Arbitral proceedings and was thus condemned unheard. This court did not find the said ground to be plausible for reasons that were extensively discussed in the said ruling.

45. I have considered the reasons set out in respect to the instant application for review and those in the earlier application to set aside the award and I find that the grounds advanced in this application are matters which ideally ought to have been raised in the application to set aside the award if not on an appeal. I find that the said grounds relate to issues that were canvassed or ought to have been canvassed at the hearing of the application to set aside the award and do not meet the threshold set for review under **Order 45 Rule 1** of the **CPR**.

46. The applicant also claimed that the award was unlawful as it exceeded the contractual sum in dispute. It must however be noted that the when parties agree to have an arbitrator determine a dispute within the arbitration clause, they must take the consequences that the decisions may be for or against one of the parties and that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. The court, under **section 35** of the ***Act***, does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish. In this regard, I find useful guidance in ***Mahan Limited v Villa Care ML*** HC Misc. Civil App. No. 216 of 2018 [2019] eKLR wherein it was held:

> ***"It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them. It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act."***

47. It is therefore my considered view that the Applicant has not satisfied the requirements for grant of the orders of review.

Letters on "Without Prejudice"

48. The applicant also sought the alternative prayer for the court's intervention and order the Respondent to accept a payment of Kshs 5 million in full and final settlement of the dispute herein and allow the applicant to settle the same on equal monthly instalments of Kshs. 300,000/-. For this argument the applicant attached copies of letters exchanged between the parties during negotiations that were geared towards the settlement of the dispute before it was referred to arbitration. On its part, the respondent argued that the said letters are inadmissible having been written on a without prejudice basis.

49. **Halsbury's Laws of England Vol 17** paragraph 213 states that: -

> ***"the contents of a communication made "without prejudice" are admissible when there has been a <u>binding agreement</u>*** *(emphasis court)* ***between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible…"***

50. In ***Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd [***1986] eKLR: -

> ***"… if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of that "without prejudice" letter"***.

51. In the present case, a perusal of the applicant's annexures marked **"TO-01"** shows that even though the respondent had through a letter dated 25th June 2019 indicated that it would be willing to accept settlement at Kshs. 5 million, the said proposal was not accepted by the applicant. In a letter dated 18th May 2020, the respondent's counsel addressed the applicant's counsel as follows regarding their refusal to respond to the offer:

> ***"It is unfortunate that your client chose not to respond to our client's proposal to settle the entire suit at Kshs. 5,000,000.00 which silence impliedly meant our offer was turned down when it subsisted before the ruling was read. It is rather inimical and nifty that despite ignoring our proposed amount, you equally ignored our letter dated 14th September, 2019 despite numerous indications that you will respond to it."***

52. From the contents of the above correspondence between the parties herein, it is evident that even though the parties herein initially engaged in correspondence, on a without prejudice basis, in an effort to settle the dispute out of court, the said negotiations were not successful thus leading to the reference of the dispute to arbitration. In the circumstances of this case, one can say that the negotiations were overtaken by events following reference of the dispute to arbitration.

53. Guided by the decision in the ***Lochab Transport Ltd.*** case (supra) I find that since the offer made by the respondent on "without prejudice" was not accepted by the applicant and a contract concluded, no evidence can be adduced of the terms of the "without prejudice" letters. My further finding is that this court cannot, in the present circumstances, substitute the award made by the arbitrator with its own award or compel the respondent to accept the proposed figure of kshs 5 million as settlement.

54. I hasten to add that the decision on whether or not to agree on payment by installments or a different amount other than the amount awarded by the arbitrator is a matter that only the parties can agree upon as this court does not have the mandate to compel a party to accept a different outcome from that which was made in the arbitral proceedings.

55. In a nutshell, I am not persuaded to disturb this court's ruling of 23rd April 2020 and accordingly, I find and hold that, on its merits, the review would have been unsuccessful.

Disposition

56. The upshot of my determination herein is that on the question whether a review of the impugned ruling lies, I find and hold that there is no provision for review of the said ruling under section 35 of the Arbitration Act.

57. Further, even had review been an available option, and having analyzed the impugned ruling, I do find on the merits of the application that the review is unsuccessful. By extension, the alternative prayer for the court's intervention is also unsuccessful.

58. For all the foregoing reasons, the application is dismissed with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 9th day of July 2020 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Otwal for respondent

Mr. Ochieng for Agwara for applicant.

Court Assistant: Sylvia