REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CAUSE NO. E089 OF 2019

UNIVERSITY OF NAIROBI.....APPLICANT

VERSUS

SONGA OGODA & ASSOCIATES.....RESPONDENT

RULING

1. The proceedings before this Court are substantially for setting aside of an Arbitral award dated 24th November 2017 in arbitral proceedings between University of Nairobi (U.O.N or the Applicant) and Songa Ogoda Associates (Songa Ogoda or the Respondent).

2. The Application, which is anchored on the provisions of Section 35 of the Arbitration Act, has been met by a Preliminary Objection dated 24th April 2019 which raises two grounds:-

> 1. That the Honourable Court lacks jurisdiction to admit or hear the setting aside Application that is time-barred by Section 35(3) of the Arbitration Act.
>
> 2. That the Honourable Court lacks jurisdiction to order stay of adoption of a Final Arbitral Award issued on merits after *inter partes* Arbitration Proceedings as sought under Section 7 of the Arbitration Act, which section is limited to interim measures sought strictly before or during ongoing arbitration proceedings.

3. I start with the second ground. In the motion before Court, U.O.N had sought, as a first prayer, a stay order against the enforcement of the Arbitral Award pending the hearing and determination of the Motion. On the face of it, the entire Motion is said to be under Sections 7 and 35 of the Arbitration Act and Rule 7 of the Arbitration Rules, 1997. Section 35 of the Act are provisions on an application for setting aside of an arbitral award. While, Rule 7 is related to an application under Section 35.

4. Apparent therefore from the face of the Motion is that U.O.N attempts to find a basis for the application of stay in Section 7 of the Act which reads:-

> S. 7. "Interim measures by court
>
> (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
>
> (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

5. The point made by the Respondent is the Section 7 of the Act applies to interim measures before or during arbitration proceedings. That really is the position and this Court does not see any plausible answer that U.O.N can give to this argument.

6. That said, I think that the High Court has inherent power, where an application for stay and that for enforcement are both pending before it, to answer and determine a request that the application to set aside be heard first.

7. But as the outcome of the next Preliminary Objection will shortly reveal, the prayer for stay will be rendered otiose.

8. The objection is that the setting aside application is time-barred by Section 35 (3) of the Act. This reads:-

> "(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."

9. This Court readily agrees with counsel for the University that for the objection to proceed as a demurrer, the following factual basis set out in the affidavit of Prof. Stephen Kiama Gitahi sworn on behalf of U.O.N on 8th April 2017 must be accepted by the Respondent:-

> (8) THAT upon conclusion of the Arbitral Proceedings, the Arbitral Tribunal issued a letter dated 24th November 2017 notifying the parties that the Arbitral Award was ready for collection upon payment of the balance of the Tribunal's fees. The Tribunal further indicated that upon receipt of the request sum from either party, the Award would be delivered to that party. I produce a copy of a letter marked as "SK-2".
>
> (9) THAT the Respondent paid the Tribunal's fees *albeit* after the lapse of a considerable period of time. Upon payment of the fees, the Award was made available for collection from the Arbitral Tribunal.
>
> (10) THAT whereas the Respondent has not been disclosed when the Respondent collected the Award upon payment of the Tribunal's fees, the Applicant became aware of the Award on 22nd January 2019 when its erstwhile Advocates availed a copy of the application filed by the Respondent seeking enforcement of the Arbitral Award. I produce the first page of the application for enforcement of the Award which bears the stamp of the Applicant's erstwhile Advocates marked "SK-3".

10. In support of the objection, the Respondent argues that receipt of the award, for purposes of Section 35(3), was complete upon notification of the parties that the Arbitral Award was ready for collection upon payment of the Tribunal's fees and that time started running from 24th November 2017. The Respondent cited various decisions of the Court in support of the position and which include Mahican Investments Limited & 3 others -vs- Giovanni Gaida & 80 others [2005] eKLR and Mahinder Singh Channa v Nelson Muguk & Another [2007] eKLR.

11. The Response by U.O.N is that no copy of the Award was availed to either party on 24th November 2017. Relying on the definition of the word "publish" in Black's Law Dictionary 9th Ed. which means "to distribute copies of a work to the public", U.O.N argues that what happened on that date cannot be said to be a publication by any stretch of imagination.

12. The Court was urged that as the word "publish" is not defined in the Act, the Court should adopt the meaning given to the word in the Public Finance Management Act No. 18 of 2012, it being argued that it is in tandem with both the ordinary and contextual meaning of the same word. There, under Section 2 word "publish'' means:-

> "In relation to a document, includes—
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> (a) publishing the document in a newspaper, Government Gazette or other publication of general circulation in Kenya; or
>
> (b) publication of an abridged or summary versions of the documents without loosing the core content of the document; or
>
> (c) making the document available for reference at public libraries or offices of national government entities or in archives of those institutions; or
>
> (d) posting the document on the internet on a Government website; or
>
> (e) if the document relates only to a county government or any of its entities—
>
> (i) publishing the document in a newspaper or other publication of general circulation in the County;
>
> (ii) making the document available for reference at public libraries or offices of the county government or those entities; or
>
> (iii) posting the document on the Internet on a county government website;"

13. U.O.N further argued that to find that time starts to run from the date when parties are notified that the Arbitral Award is ready for collection has several legal impediments.

14. First, that notification and/or publication are alien concepts under the relevant Section 35 of the Act and that if the legislature intended that a "notification" beleaguered by substantial financial impediments was sufficient "receipt" and /or "delivery" of the award, nothing would have been easier than to expressly state so.

15. The Court is reminded that the Applicant could not obtain a copy of the Arbitral Award as "receipt" was conditional upon full payment of the Tribunal's fees which was substantial. The Court was asked to find that in consonance with the provisions of Article 27(1) of the Constitution, a party's financial disposition cannot be the basis for inequality before the law.

16. It was contended that to refuse the Applicant access to Court on the basis of delay in satisfying a financial impediment prior to receipt of the Award is a gross affront to its right to equal protection before the law, access to justice, and the non-derogable right for fair trial guaranteed in Articles 25(c), 48 and 50(1) of the Constitution.

17. U.O.N submits that, the Respondent fronts a narrow interpretation of the provisions which is inconsistent with Article 20 of the Constitution which mandates that; "Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right", and which enjoins this Court to adopt an interpretation of the Bill of Rights that most favours the enforcement of a right. Last, that as the Arbitration Act was enacted way before the new constitutional dispensation then it should be construed with the alterations, adaptions, qualifications and exceptions necessary to bring it into conformity with the current Constitution.

18. The arguments made for and against the Preliminary Objection herein regarding Section 35(3) of the Act were taken up, on all fours, in Nairobi High Court of Kenya at Nairobi Milimani Commercial & Tax Division Miscellaneous Cause No. E 083 of 2019 University of Nairobi –vs- Multiscope Consultancy Engineers Limited. Indeed because of the commonality of issues the two causes were heard together on the Preliminary Objections.

19. The Court gave its decision in E 083 of 2019 on 13th May 2020. The Ruling was this Court's answer to the meaning to be to assigned to word "received'' in Section 35(3) of the Act. It would not be good use of judicial time to rehash those findings because the two matters were argued together. And I do not mean to be discourteous to the parties here in asking them to read that decision, a copy of which is made available alongside this Ruling.

20. Regarding this matter, I hold that the date of the letter when the Tribunal notified the parties that the Arbitral Award was ready for collection upon payment of the balance of the Tribunal's fees is the date of receipt for purposes of reckoning time under Section 35(3) of the Act. It is common cause that the date is 24th November 2017 and the Motion for setting aside filed on 9th April 2019 would be hopeless outside the three months deadline.

21. The Preliminary Objection of 24th April 2019 that the application of 9th April 2019 is time-barred is hereby upheld. The said Motion is hereby struck out with costs.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Miss Nyaga for the Applicant.

Mr Ochieng for the Respondent.