REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO.E001 OF 2018

TALEWA ROAD CONTRACTORS LIMITED.....APPELLANT

VERSUS

KENYA NATIONAL HIGWAY AUTHORITY.....RESPONDENT

RULING

1. Before me are two applications one dated 7th June 2018 and another dated 12th June 2018. On 11th July 2018 I directed that both applications be heard together.

2. The application dated 7th June 2018 is brought pursuant to section 1A, 3, 3A, 63(e) and 79 of the Civil Procedure Act; order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions. It seeks the following:-

a) THAT the Appellant/Applicant be granted leave to file and serve its Memorandum of Appeal out of time.

b) THAT as a consequence of grant of Order (1) above, the memorandum of appeal dated 21st May 2018 and filed on 30th May 2018 be admitted out of time.

c) THAT this Honourable Court do issue such other directions and/or Orders as the Court may deem just and expedient to grant.

d) THAT the costs of this application be in the cause.

3. The application is based on grounds numbers (a) – (l) on the face of the application and is supported by undated affidavit of John Wainaina filed on 13th June and a Replying affidavit of John Wainaina sworn on 6th July 2018 filed on 9th July 2018 together with annextures thereto.

4. The said application is opposed. The Respondent filed a Replying affidavit by Nathaniel Munga sworn on 8th October 2018 together with annexture thereto.

5. The second Notice of Motion dated 12th June 2018 is brought pursuant to Article 159(2) (c) of the Constitution, Section 3A of Civil Procedure Act, Order 51(1) Civil Procedure Rules and section 10, 32A, 35 and 39 of the Arbitration Act, 1995 as amended and all enabling provisions of the law.

6. The application is based on grounds Nos. 1 to 6 on the face of the application. It is further supported by an affidavit of Nathaniel Munga sworn on 12th June 2018 and by Replying affidavit of Nathaniel Munga sworn on 8th October 2018.

7. The brief statement of facts in this matter are that the parties entered into a contract for periodic maintenance of Mombasa – Miritini (A-109) road after a tender process wherein the Appellant was the successful bidder. Upon execution of the contract the Appellant commenced works on the project, being road construction works, and it leased a yard which had site offices and stored all equipment. On 19th June 2013 the Respondent terminated the contract and the termination letter was delivered to the Appellant's yard while being accompanied by armed police officers. At the point of termination the Respondent confiscated the Appellant's equipment, vehicles and all that was within the Appellant's yard and its staff chased away that the equipment that were within he Appellant's yard were later vandalized and others stolen, while the Respondent had possession and all that was in the office and store within the yard destroyed, whereas the yard was also accruing rent due and payable to the Appellant's Landlord; that a consequence of the aforegoing the Appellant declared a dispute which was referred to arbitration and Eng. Paul T. Gichuhi was appointed by the chairman of the chartered institute of Arbitration as the sole Arbitrator. *(See appointment letter marked "**JW-1**").*

8. On 22nd June 2015 the parties appeared before the Arbitral Tribunal for first preliminary meeting and then the post site meeting where the parties amongst several issues agreed under No.13 that:-

> **"The claimant will supply case law before the Right of Appeal, in accordance with section 39, is granted by the Arbitral Tribunal."**

9. The dispute was heard before the Sole Arbitrator and the award published on 22nd Marc 2018. The Appellant being aggrieved by the said award lodged a Notice of Appeal on 18th April 2018 and also requested for typed proceedings. The Appellant/Applicant proceeded to file a memorandum of appeal on 30th May 2018 followed by the present application for extension of time whereas the Respondent on its part filed the present application seeking to strike out the appeal.

10. I have considered the pleadings, the counsel rival written submissions as well as oral submissions made before me, and having regard to the respective pleadings herein, the parties having not agreed on issues, the issues arising for consideration and determination can be summarized as follows:-

> **a) Whether the Respondent's Replying affidavit dated 8th October 2018 should be expunged from the record?**
>
> **b) Whether there is a valid arbitration agreement between the parties herein and by which a resulting arbitral award would be appealable?**
>
> **c) Whether the Honourable Court has jurisdiction under section 35(3) of the Arbitration Act to entertain an appeal and/or an application to enlarge time for lodging an appeal?**
>
> **d) Whether the Honourable Court has the requisite jurisdiction, pursuant to section 39 of the Arbitration Act, to take cognizance of, hear and determine the intended appeal which is premised on factual issues?**

A) Whether the Respondent's Replying affidavit dated 8th October 2018 should be expunged from the record?

11. It is contended by the Appellant/Applicant, that on 11th July 2018 that both sides were granted 14 days to file their responses. That the Respondent did not file the Replying affidavit within 14 days period given by court but filed its Replying affidavit on 9th October 2018. The Appellant/Applicant contends that the Replying affidavit was filed without court's leave and sought that it be struck out.

12. I note that the court had granted leave for filing response within a given time but the Respondent filed its Replying affidavit out of time and did not seek leave to have the same admitted out of time. The Respondent urges that having entered appearance, it had right to respond by way of filing a Replying affidavit. It urged court to allow the Replying affidavit on record for the sake of doing substantive justice in this matter.

13. In **Trust Bank Limited vs Amalo Company Limited [2002] eKLR** the Court of Appeal stated thus:-

> **"As we have endeavoured to explain in a certain amount of detail, this was a matter in which the learned Judge had before him the appellant's documents upon which his whole case was based, on the date he had set down the matter for hearing; save for the mere irregularity that the same had not been served on the respondent in time."**

The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by George, C.J (Tanzania) in the case of **Essanji and Another vs Solanki [1968] EA at page 224.**

> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right."**

14. In regard of this issue, I am guided by Article 159(2) (d) of the Constitution of Kenya 2010, which enjoins court to do justice without due regard to procedural technicalities. I am alive to the fact that the impugned Replying affidavit is already on record and duly served and raises relevant material facts which cannot be overlooked in determining this matter as by doing so, the court would fail in its mandatory duty of doing substantive justice to parties. I therefore find no basis for my proceeding to expunge the Respondent's Replying affidavit dated 8th October 2018. I do not agree by allowing the said affidavit on record any party seeking justice would be prejudiced in anyway as the court is required in determining matters to determine the same on merits. No party who has put on record any pleadings should be shut out on a technicality but courts must if possible endeavor to consider all evidence on record, hear all parties and determine the matter on merit. I decline to expunge the Replying affidavit and the same shall be considered in determining this matter.

B) Whether there is a valid arbitration agreement between the parties herein and by which a resulting arbitral award would be appealable?

15. In the contract entered into between the Appellant and the Respondent there existed an arbitration clause in the contract Agreement for the periodic maintenance of Mombasa-Miritini (A-109) Road. In provided thus:-

> **"Any dispute in respect of which:**

a) The decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

b) Amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

shall be finally settled by an arbitrator to be agreed upon between the parties or failing agreement to be nominated on application of either party by the appointee designated in the farm of Tender for the purpose and any such referee shall be deemed to be submission to arbitration within the meaning of the Arbitration Laws of the Republic of Kenya. The said arbitrator/shall have full power to open up, review and revise any decision, opinion, instruction, determination, certification or valuation of the Engineer related to the dispute…."

16. The form of arbitration agreement to be satisfied is set out under section 4 of the Arbitration Act which provides:-

"(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing."

The arbitration clause in the parties contract, quoted above satisfied the validity requirement of an arbitration agreement.

17. It is Appellant/Applicant contention that under prayer (b) of its application that:-

"THAT as a consequence of grant of Order (1) above, the memorandum of appeal dated 21st May 2018 and filed on 30th May 2018 be admitted out of time."

The above is the basis upon which the Appellant/Applicant preferred the intended appeal.

18. What is the legal position as regards the Appellant/Applicant purported *"reservation of Right of Appeal"* before the tribunal? **Section 4 of the Arbitration Act** requires the arbitration agreement to be in writing. The Appellant/Applicant in urging that the purported *"reservation of right of appeal"* and for it to be valid, it has demonstrated that the Respondent however took part in the same as it was a party to the agreement to reserve the right of appeal and did consent to the same or consented to any party asserting to act through it to enter into such purported *"agreement"* on its behalf. The Appellant/Applicant has not averred there was an agreement in writing duly signed by the parties. None has been produced duly executed by both parties or parties counsel by which a resulting arbitral award may be appealable.

19. Section 32 A of the Arbitrator Act dealing with the effect of an award provides:-

"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."

The arbitration clause in the Contract Agreement expressly provided that the determination of the Arbitrator shall be final reinforcing the provisions of the above-mentioned section. I find under **section 32A of the Arbitration Act** it is clear that anything except as otherwise agreed by the parties no recourse is available against the award otherwise than in the manner provided under the Arbitration Act.

20. In the case of **Kenyatta International Convention Centre vs Greenstar Systems Limited [2018] eKLR** it was held that such agreement to access appeal must be provided for in an arbitration clause contained in an agreement pursuant to which the arbitral process is anchored:

"As for the second threshold, it is not disputed that the respondent's objection is anchored on the provision of section 39 of the Act…

My construction of the above provision is that there are three ways in which a party can access the appellate jurisdiction of this court in a matter arising from an arbitral process. The first is 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 to the Court of Appeal exists. Secondly, through leave granted by the High Court under the same provision."

21. In view of the above I have found no agreement existed between the parties herein by which a resulting arbitral award arising from an arbitration process between the parties herein would be appealable.

C) Whether the Honourable Court has jurisdiction under section 35(3) of the Arbitration Act to entertain an appeal and/or an application to enlarge time for lodging an appeal?

22. The Appellant/Applicant in its application dated 7th June 2018 is seeking leave to file and serve its Memorandum of Appeal out of time and that the Memorandum of Appeal dated 21st May 2018 and filed on 30th May 2018 be admitted out of time. Underground (c) of the Appellant/Applicant it avers:-

"Whether the Honourable Court has jurisdiction under section 35(3) of the Arbitration Act to entertain an appeal and/or an application to enlarge time for lodging an appeal?

23. Section 35 (1) (2) (3) of the Arbitration Act provides:-

> **"(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).**
>
> **(2) An arbitral award may be set aside by the High Court only if—**
>
> **(a) The party making the application furnishes proof—**
>
> **(i) That a party to the arbitration agreement was under some incapacity; or**
>
> **(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**
>
> **(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
>
> **(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or**
>
> **(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or [Rev. 2017] Arbitration No. 4 of 1995 21**
>
> **(vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;**
>
> **(b) The High Court finds that—**
>
> **(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
>
> **(ii) The award is in conflict with the public policy of Kenya.**
>
> **(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."**

24. I have very carefully considered **section 35 of the Arbitration Act** which deals with application for setting aside an award and in which such an application should be made within 3 months from the date of receipt of the arbitral award as opposed to **section 39 of the Arbitration Act** dealing with appeal process and in which an appeal may be made within the timeline and in a manner presented by the Rules of Court applicable, as the case may be in the High Court or the Court of Appeal.

25. In the instant application, an application to file an appeal out of time should have been made within the prescribed period of 30 days. The Application has been filed after a period of about 73 days from 22nd March 2018; the appeal is intended to be against facts but not on points of law. The Applicant who has had the proceedings in good time did not file an application to set aside the award in time nor an appeal. The Appellant/Applicant has not demonstrated that the delay was caused by non-availability of the proceedings in time nor has it given reasonable grounds for the delay to justify leave to be granted as sought. He filed an appeal without leave and has not given a good reasonable for doing so.

26. The Appellant/Applicant, in its application has not specifically cited any provision under the Arbitration Act, under which its application for extension of time to file an appeal out of time can be entertained. I have gone through the Arbitration Act and I have been unable to find any specific provision for enlargement of time to file an appeal against an arbitral award. In the case of **Dinesh Construction Company (K) Limited vs Kenya Sugar Research Foundation [2018] eKLR** the High Court held that in the absence of any specific provision under Arbitration Act governing a procedure sought by a party the Court would lack jurisdiction to entertain such application:-

> **"Thus, there being no specific provision in the Arbitration Act for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either to grant stay of execution, or set aside the enforcement order of 11 July 2017, or to extend time for purposes of setting aside the Arbitral Award."**

27. Having considered the relevant provisions relied upon by the Applicant and upon thorough perusal of the Arbitration Act, I have found that there is no single provision under the relevant Act from which this court can claim to have jurisdiction to extend time as sought by Applicant/Appellant to be granted leave to file and serve Memorandum of Appeal out of time. The application is misconceived. Further to the above the Appellant/Applicant's application is purported to be supported by an affidavit of John Wainaina. The same is not dated. It is not clear when it was sworn for want of the swearing date. The same offends section 5 of the oaths and Statutory Declaration Act which provides:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

28. Section 5 of the Oaths and Statutory Declaration Act, is a mandatory provision which must be complied with. It is not a cosmetic requirement but it goes to the root of any matter before court. The Appellant/Applicant affidavit has not been dated and is incurably defective and the same is expunged from the record. The Appellant/Applicant application has no affidavit in support hence it is incompetent and cannot succeed.

D) Whether the Honourable Court has the requisite jurisdiction, pursuant to section 39 of the Arbitration Act, to take cognizance of, hear and determine the intended appeal which is premised on factual issues?

29. Arbitration is a free choice made by the parties in the contract Agreement and in a situation where parties agree on the finality of the arbitral award, hence the court's intervention cannot be invoked by any party to overturn the arbitral award through an appeal. The finality of an arbitral award is forfeited in no uncertain words by the provisions of section 10 of the Arbitration Act which provides:-

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

30. Section 10 of the Arbitration Act contemplates that this Honourable Court can only intervene in arbitration matters when permitted to do so under the Act. In the case of **Prof. Lawrence Gumbe & Another vs Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004** Nyamu, J held that such intervention by the Court can only be *"supportive and not obstructive or unsurpation-oriented."*

31. Section 32 A of the Arbitration Act emphasizes finality of arbitral award and only permits this Honourable Court to intervene against an arbitral award when "agreed by the parties":

"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."

32. Further under **section 39 of the Arbitration Act** the courts are only permitted to intervene against arbitral award through an appeal process where *"the parties have agreed"* to appeal and the appeal is restricted to determining *"any question of law arising in the course of arbitration or out of the award."*

33. In the Court of Appeal in the case of **Kenyatta International Convention Centre vs Greenstar Systems Limited:-**

"As already highlighted above, the Court in the Nyutu Agrovet case (supra) was categorical that this Court's right to intervene in matters arising from an arbitral process is limited to instances where the parties had either entranced an automatic right of appeal to this court in the arbitration clause."

(See also **Nyutu Agrovet vs Airtel Networks Limited [2015] eKLR and Micro-House Technologies Limited vs Co-operative College of Kenya [2017] eKLR).**

34. In the instant matter, I find that the Respondent has aptly demonstrated that there is no arbitration agreement where the parties had either entranced an automatic right of appeal to this court in the arbitration clause, thus rendering the arbitral award herein not subject to appeal before this court. In absence of such an agreement in the arbitral clause between the parties deprives this court jurisdiction to entertain any application seeking its appellate intervention against the aforesaid arbitral award herein as the Appellant/Applicant came out seeking for.

35. In the case of the **High Court in Tanzania in the case of DB Shapriya and Co. Ltd vs Bish International BV [2003] 2 EA 411** it was stated thus:-

"Except for ground (i) which imputes bias, all the remaining grounds are against the findings of the arbitrator on the questions of either fact or law. However erroneous these findings may be, they are not subject to court's intervention. These allegations would have been legitimately adjudicated on merit by this court if they involved errors of law apparently exhibited on the award. In the absence of this legal qualification the court declines to interfere with the arbitrator's findings which are the subject matter for grounds (ii) to (xxii) of the petition."

36. It is contended by the Respondent, that Appellant/Applicant application is purely based on Civil Procedure Act and Civil Procedure Rules which are inapplicable to the Applicant's present application. It is further contended that under the Arbitration Rules 1997, the Civil Procedure Rules cannot be applied as submitted by the Appellant/Applicant to impede finality of an arbitral award.

37. In the case of **Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR** it was held thus:-

"A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly 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…

The provision of the 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 the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the

Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court *suo motu* because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1."

38. I am thereof of the view that the Applicant's application and Intended Appeal is an abuse of court process.

39. I have perused the Appellant/Applicant's application and indeed it is premised on the provisions of Civil Procedure Act and Civil Procedure Rules only. In submissions the Appellant/Applicant submitted that Rule 11 of the Arbitration Rules provides for application of Civil Procedure Rules. I do not agree that was the intention of the parliament in drafting the Arbitration Act, as if that was so, it should have expressly stated so and such Rule cannot override the statute, thus the Arbitration Act. The provisions of the 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 the Civil Procedure Rules where appropriate. It is also clear that Civil Procedure Rules would not be regarded as appropriate if its effect would be to deny an award finality and expeditious enforcement, both of which are major objectives of arbitration. It follows that all provisions invoked except sections 35 and 37 of the Arbitration Act do not give jurisdiction to the superior court to intervene and any application filed in the superior court other than provided do not give the superior court jurisdiction. Without jurisdiction court should strike out such applications, for want of jurisdiction.

40. In view of the above, I find the Appellant/Applicant's application and the purported intended appeal to be tantamount to an abuse of the process of this Honourabe Court. What constitutes an abuse of court process was dealt with in the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** where it held as follows:-

"We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and Mr. Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process."

41. The upshot is that:-

a) The Appellant/Applicant application dated 7th June 2018 seeking leave to file and serve its Memorandum of Appeal out of time and admission of Memorandum of Appeal dated 21/5/2018 and filed on 30/5/2018 is without merit and is struck out and dismissed.

b) The Respondent's application dated 12th June 2018 seeking the Appellant/Applicant Appeal be struck out and dismissed be and is HEREBY allowed appeal filed is struck out and dismissed.

c) Costs of both applications are awarded to the Respondent.

Dated, signed and **delivered** at **Nairobi** this **14th** day of **February, 2019.**

……

J .A. MAKAU

JUDGE