REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

MISC CAUSE NUMBER 59 OF 2017

MARECO LIMITED..CLAIMANT

VERSUS

MELLECH ENGINEERING & CONSTRUCTION LIMITED....RESPONDENT

RULING

BACKGROUND OF THE CASE

The Claimant and Respondent in **Clause 23 & 24** of the contract agreement agreed to resolve any dispute controversy, claim, arising from the **Contract/Agreement** between the parties by 1st mediation within **21 days** and failure to which the matter would be resolved by arbitration.

Both parties participated in arbitration proceedings that culminated with the **Final Award** of 11th November 2016.

The Claimant filed **Chamber Summons** on **6th June 2017** and sought recognition and enforcement of the **Final Award** because despite demand for settlement of the award; the Respondent refused, neglected and /or otherwise failed to pay the sums or any part thereof.

Upon service, the Respondent's advocates on record by application filed on 22nd June 2018 sought to cease acting for the Respondent.

The Court ordered direct service to the Respondent. Upon service, instead of Replying to the instant application, by an Application dated **26th July 2016**, the Respondent/ Applicant moved the court through a Notice of motion under a Certificate of Urgency for the orders that the time be enlarged for the Applicant to file a motion to set aside the arbitral award dated 11th November 2016.

On 29th January 2019, parties through Counsel agreed to proceed by relying on written submissions filed.

RESPONDENT/APPLICANT'S CASE

The application was supported by the Affidavit of **Gerald Reuben Wamalwa**, a director of the Respondent Applicant. He states that, he received the formal arbitral award on 8th June 2018 and it is on the same day, that he noted that the arbitral award had been served to his previous Counsel, **Onyango Ndolo & Co. Advocates**. He alleged that he noted that the said arbitral award was not served on him by his advocates on record then who were served on the 19th of April. The breakdown of communication was the cause of inordinate delay to file application to set aside the arbitral award of 11th November 2017. However, Counsel did not bring this to his attention. Consequently, this miscommunication led to the delay in filing the application to set aside the arbitral award.

The application is based on the grounds that;

a) The arbitral award delved into issues not falling within the scope of arbitration;

b) The award contains decisions on matters beyond the scope of arbitration.

The Respondent/Applicant further filed Respondent's Submissions in Support of the Notice of Motion Application - 20th July 2018, dated 24th September 2018. In their submissions the Respondent/Applicant relied on **Order 50 rule 6 of the Civil Procedure Rules 2010** which grants Courts power to enlarge time as justice may require, where limited time has been fixed for doing any act or taking any proceedings under the Civil Procedure Rules, by summary notice or by order of the Court.

Order 50 rule 6 CPR 2010 provides;

"***Power to enlarge time***

> ***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***
>
> ***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."***

CLAIMANT'S CASE

The Claimant responded to the Respondent's Application by a Replying Affidavit dated 2nd August 2018 and filed on 22nd August 2018 with skeletal submissions. The Claimant submitted that the Court lacked jurisdiction to hear the matter under **Section 10 of Arbitration Act** that confers Court jurisdiction only in stipulated instances in the Act. Secondly, the application was brought more than 3 months after the Applicant had received the arbitral award as stipulated under **Section 35 (3) of the Arbitration Act**. They also deponed that on 17th July 2018, the Court directed that the Respondent/Applicant responds to the Application for Enforcement of the arbitral award filed by the Claimant on 6th June 2017 2016 within 7 days but they instead filed the instant application seeking to enlarge time for setting aside the Final Award.

In the Claimant's affidavit in Reply to Respondent's application; the Claimant raised the issue of the Final Award as follows;

The parties were to share Arbitrator's Fees and each party was to deposit **Ksh 100,000/-** with the sole Arbitrator. On 20th September 2016, the sole Arbitrator, **Mr. James Ochieng Oduol**, informed parties the Final Award was ready for collection. The Respondent failed to deposit part of the fees; the Applicant paid all fees and the arbitral award was released on 11th November 2016.

On 13th February 2017, The Claimant's advocates wrote to Respondent's Advocate on settling the **Final Award** as per annexed copy of letter marked **AOM-8.**

The Respondent insisted to be issued with the Final Award as per letter

Marked **AOM-9.**

On 15th February 2017, The Applicant's Advocates caused Final Award to be filed in Court vide forwarding letter marked **AOM-10**

On 12th May 2017, the Claimant's wrote further demand to the Respondent. In the demand letter, the Claimant's advocates enclosed copy of Final Award as per copy of letter marked **AOM-11**.

The Respondent did not respond; the Claimant filed Amended Party and Party Bill of Costs, when it came up for hearing, the Respondents had new advocates on record and same was adjourned.

On 31st August 2017, the Arbitrator delivered Ruling and **Ksh1,080,328/-** as costs for the arbitral reference.

On 28th May 2018 when the Claimant's application came up for hearing the Respondent's advocates sought to file application to cease acting.

On 22nd June 2018, the application to cease acting was filed heard and determined.

On 17th July 2018 when the application for enforcement of award came up there were new advocates on record, the Court directed the Respondent to file reply to the application within 7 days instead the instant application for enlargement of time was filed.

The Claimant further filed Submissions in Opposition to the Respondent's Notice of Motion dated 2nd August 2018 and filed on 22nd August 2018 and relied on the case of ***Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR*** where it was held;

> ***"Besides, the issue of jurisdiction as explained above, Section 35 of the Arbitration Act bars any challenge even for valid reason after 3 months from the date of delivery of the award. The last date of challenge was 15th February 2008.All the applications filed in the Superior Court were incompetently brought before the Superior Court and the Court lacked jurisdiction. Arising from the above findings concerning competency of the application, the next logical question to address is whether the appeal is properly before us…."***

They also relied on ***Nairobi Flying Services v Kenya Airport Authorities [2016] eKLR*** which struck out an application for the extension of time to set aside an arbitral award on the grounds that the court had no jurisdiction. The Claimant further relied on the Court of Appeal's decision in ***Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR*** which emphasized on party autonomy and finality of arbitral

awards.

DETERMINATION

The issue to be determined by this Court is:-

1. Whether the court has jurisdiction to enlarge the time for setting aside an arbitral award.

Section 10 of Arbitration Act 1995 sets out the Courts jurisdiction where parties are bound by Arbitration Clause as follows;

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

Section 35 (1) of the Arbitration Act sets out that recourse to the High Court against an arbitral award may only be made by an application for setting aside under subsection (2) and (3).

Section 35 (2) sets outs the circumstances under which the High Court can set aside an arbitral award as:-

> ***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***
>
> ***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;***
>
> ***ii) the award is in conflict with the public policy of Kenya.***

Section 35 (3) further states that:

> ***"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."***

As was held in ***Kenyatta International Convention Centre (Kicc) v Greenstar Systems Limited [2018] eKLR*** where the Court relied on the Court Appeal case of ***Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR*** supra, which held that **Section 35 of the Arbitration Act** bars any challenge even for a valid reason after 3 months from the date of delivery of the award.

In light of the above sections, the High Court indeed has jurisdiction to set aside an arbitral award but is limited by **Section 35(2) and (3)** of the Arbitration Act**.** However, **section 35 (3)** does not envisage a situation where the court could be moved for extension of time past the 3 months.

In the case of ***Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR***, the Court of Appeal expressed itself in connection with such applications that are not expressly provided for in the Arbitration Act, and which purport to rely on the Civil Procedure Act and the Rules thereunder:

> ***"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 which states: "Except as provided in this Act no court shall intervene in matters governed by this 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. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules hook line 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."***

The Applicant relied on **Order 50 rule 6 CPR 2010** that grants Courts power to enlarge time. In the instant case the Court's jurisdiction is ousted because these are not Court proceedings but Arbitration proceedings, where parties voluntarily choose to resolve disputes by arbitration. When parties expressly exclude Court intervention in their Arbitration Agreement; the Court will only intervene by virtue of **Section 10 & 35 of Arbitration Act 1995** in only specific instances/areas as are spelt out in the Act. Extension/Enlargement of time is not one of the stipulated instances.

Even if the Court were to have jurisdiction to enlarge time; from the facts placed before the Court of chronology of events culminating to the instant application; the Respondent voluntarily accepted and participated in arbitration proceedings; the Respondent was aware and was served with the final settlement through his advocates on record then; otherwise the said Advocate would have controverted this fact by filing an affidavit to the effect of their inadvertence. Finally, the Claimant served the Respondent on 12th May 2017, still, the statutory 3 months elapsed without an application to set aside being filed.

In the case of ***Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR*** it was held;

> ***"Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as lam not ready to pronounce that the Arbitration Act is a complete Code excluding any other law applicable in civil like litigation, I do not see where the Civil Procedure Act applies in this matter.***
>
> ***Rule 11 of the Arbitration Rules states; so far as appropriate the Civil Procedure Rules shall apply to all proceedings under these Rules.***
>
> ***The Subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules.-not the Act. In any event a rule cannot override a substantive Section of the Act- Section10 [Arbitration Act]''***

DISPOSITION

After taking into consideration the submissions by Claimant and Respondent/Applicant; I find no legal basis to allow/uphold the application filed on 26th July 2016 as this Court lacks jurisdiction under the Arbitration Act 1995 to enlarge time to file application to set aside Arbitral Award. Conversely, **Order 50 Rule 6 CPR2010** is not available to the Court to enlarge time in Arbitration proceedings where Court's jurisdiction is in only specific instances/areas as prescribed by Section **10 & 35 of Arbitration Act**. Therefore;

1. **The Court lacks jurisdiction to enlarge time for the application to set aside the arbitral award;**

2. **The Respondent's application for setting aside the arbitral award was time barred as provided by Section 35 (3) of the Act;**

3. **The application of 26th July 2018 for enlargement of time is struck out with costs to Claimant;**

4. **The application of 6th June 2017 for enforcement of Final Award of 11th November 2016 to proceed for hearing and determination a date to be obtained by parties in the Registry.**

DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS ON 11TH MARCH 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR KARANJA FOR CLAIMANT

MR OWALLA FOR RESPONDENT/APPLICANT

COURT ASISSTANT: JASMINE