REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 43 OF 2017

SUMMIT COVE LINES CO. LIMITED.....PLAINTIFF

VERSUS

UAP INSURANCE COMPANY LTD.....DEFENDANT

R U L I N G

This Ruling is in respect of two Applications.

1. The first relates to a chamber summons application dated 29th January, 2019 where the Applicant is seeking for orders as here below reproduced;

> **(a) That the Arbitral award made on 14th August, 2018 by Mr Mulwa Nduya be recognized as binding, be adopted and enforced as an order of this court.**
>
> **(b) That the Applicant be granted leave to enforce the Arbitral Award dated 14th August, 2018 as the decree of this court.**
>
> **(c) That costs of this application be provided for**
>
> **(d) That the said Respondent be ordered to pay all costs and expenses incidental to the enforcement and execution of the decree aforesaid.**

2. The application is premised on the grounds on the face of it and an affidavit dated 29th January 2019, sworn by **Joseph Kirema** the, Managing Director for the Claimant (herein "the Applicant) where he deposes;

> **(a) that both parties appeared before the single Arbitrator and he made his award on the 14th August 2018 in which he directed the Defendant/Respondent to pay the plaintiff/Applicant Ksh 11,650,000/=**
>
> **(b) Subsequently, he awarded was duly served as required by law and there has not been any application by the Defendant/Respondent under section 35 of the Arbitration Act or otherwise in challenge of the award made by the Arbitrator.**

3. The Defendant/Applicant in reply to the applicant dated 29th January 2019 filed a replying affidavit sworn on the 25th February, 2019 by Joseph Mwai its senior legal counsel where he deposes that;

> **(a) That the Arbitrator made his award on the 14th August, 2018 but failed to disclose it till the 18th October 2018**
>
> **(b) That upon reviewing the award he noted that the Arbitrator had made a fundamental error by finding there was no dispute between the parties as the accident occurred on the 20th April,2011.**
>
> **(c) That the Defendant avers that it instructed its previous advocate to file and application to set-aside the award immediately. Unfortunately, the advocate refused to take instructions and notified the Defendant in December.**
>
> **(d) That it was difficult to instruct an advocate in December and more difficult since the Defendant's previous advocate failed to provide the Respondent with the Arbitral proceedings. It is advocate on record for the Defendant that requested for the proceedings and it yet to be furnished with all the documents by the Arbitrator**

(e) that the Defendant avers that the Plaintiff's application is premature since the time for filing an application to set aside has not lapsed. That the three months commencing on the 18th October, 2018 is exclusive of the period between 21st December and 13th January both days inclusive under the Civil Procedure Rules which are applicable to these arbitration proceedings.

(f) that the defendant avers that under section 37 (1) of the Arbitration Act this court has power to decline to recognize and enforce the award if it is contrary to public policy and shall cause grave miscarriage of justice.

4. The second application is the Defendant/Respondent application dated 4th February 2019 by which he Defendant prays for the following orders;

(a) The honorable court be pleased to set aside the arbitral award dated 14th August 2018 for being inconsistent with public policy.

(b) That costs of the application be provided for

5. The application is premised on the grounds on the face of it and an affidavit dated 4th February 2019, sworn by Joseph Mwai, the senior Legal Officer of the defendant (herein "the Applicant). He deposed that;

(a) The Respondent took out and insurance policy with the Applicant to cover a forklift registration number KAY 521 against accidental damage and on the 20th April, 2011 the Respondent notified the Applicant of an alleged accident that had caused damage to the forklift. Upon carrying out investigating, the Applicant concluded that there was no accidental damage to the forklift and repudiated the insurance contract.

(b) The dispute was referred to arbitration and the hearing took place on the 19th January 2018 and 19th March 2018. On the 18th October 2018 delivered his arbitral award dated 6th August 2018 in which he made contradictory findings and held that there was no despite between the parties, that the accident involving the insured forklift occurred on the 20th April 2011 and that all witnesses confirmed that the accident happened on the aforementioned ate.

(c) That the applicant averred that the question of whether the accident occurred was an issue in controversy and the same goes to the root of the award and by ignoring the input of the Applicant's witnesses, the resultant award failed to adjudicate on the real dispute between the parties

(d) The Applicant avers that failure by the arbitrator to adjudicate on the real dispute before him amounts to misconduct of his part and a ground to set aside the arbitral award.

(e) The applicant avers that the law entitles them to file an application within three months of the notifications they were notified on the 18th October 2018 and as such the time to file an application to set aside an award shall lapse on the 11th February 2019. However, for purposes of computing time, the period between 21st December, 2018 shall be omitted from the computation period.

6. The Defendant/Applicant, in support of the Chamber Summons dated 4th February, 2019 submitted in reliance to Order 50 Rule 6 of the Civil Procedure Rules 2010 which grants courts power to enlarge time as justice my 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."

7. In response to the Defendant/Applicant's application, the Plaintiff/Respondent via a replying affidavit sworn on the 8th February 2019 by Mr Joseph Kirema avers that;

(a) The Defendant's application is time barred since the same has been filed after expiry of three months from the date of service of the final award by the Arbitrator which is in contravention of section 35 of the Arbitration Act.

(b) The Plaintiff also avers that the Arbitrator's award does not offend public policy and the Defendant/Applicant has not stated that public policy has been offended by the Arbitrator's award.

(c) The Plaintiff further avers that time started running immediately after publication of the award and at no time did it stop running as alleged by the Defendant/Applicant and in any case the law of stoppage of time is provided for under order 50 of the civil

procedure rules and the same is not applicable in arbitral proceedings since the Arbitration Act has the Arbitration Rules 1997.

(d) the Plaintiff then avers that the Defendant/Applicant is out to frustrate and delay the Plaintiff form enjoying the fruits of its given award.

8. The hearing direction of the applications were given on 6th February 2018 and each party agreed to file written submissions on 26.3.2019 each party, having filed written submission opted to highlight on the same orally

ANALYSIS AND DETERMINATION.

9. I have considered the applications before me, the grounds of opposition and the affidavits filed in support in either I have also considered the submission by both parties, the case law cited and the relevant law.

10. The applications for the enforcement of the Arbitral award and setting aside for the award dated 14th August, 2018 are related and can be determined together.

11. I could not help but notice that the Plaintiff, in its replying affidavit sworn on the 8th February 2019 at paragraph 3 has raised the issue of being time bared. I am of the view that the issue of limitation of time is a preliminary issue which ought to be determined before this court embarks on the merits of each party's case. This is because, if the Defendant's application is indeed time barred, then this court will automatically lack jurisdiction to entertain the defendant's application.

13. Whether the court has jurisdiction to entertain an application for setting aside an Arbitral Award after the expiry of three months. There is no disputation that the final award of Mr Mulwa Nduya, Arbitrator, was dated and published on 14th August 2018 whereby it was then served upon the parties on the 18th October 2018. Accordingly, granted are the strictures of section 35 (3) of the Arbitration Act where the applicant only had up to 17th January, 2019 to challenge the award under section 35 of the Arbitration Act.

14. 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".

15. 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).

16. Section 35 (2) sets out 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

17. Section 35 (3) further states that;

"An application for setting aside the arbitral award may not be made after 3 months have elapsed form the date on which the party making that application hadreceived 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".

18. The Defendant's application is dated 4th February and filed on the 5th February 2019 which is exactly 18 days after the lapse of 3 months.

In the case of **Kenyatta International Conventional Center KICC –vrs- Green-star systems limited (2018) e KLR Olga Sewe which relying on the Court of Appeal decision in ANNE MUMBI HINGA VRS VICTORIA NJOKI GATHARA (2009)** stated as follows;

> **" …Thus, there being no provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the time line set out in Section 35(3) of the Act is imperative and comports well with the principle of finality in Arbitration. Indeed in the Anne Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, 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."**

19. The Applicant relied on Order 50 Rule 6 CPR 2010 that grants courts power to enlarge time.

20. In the case of **ANNE MUMBI HINGA VRS VICTORIA NJOKI GATHARA** (supra), the court of appeal stated;

> **" 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 At 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"… Besides the issue of jurisdiction as explained above, 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…."**

21. Also in the case of **Nyutu Agrovet Limited -vrs -Airtel Networks Limited (2015) e KLR** 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 I am not ready to pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil like litigation, I don't 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- section 10 (Arbitration Act)"**

22.Similarly, I am persuaded with the reasoning in the case of **Mareco Limited vrs Mellech Engineering & Construction Limited (2019) e KLR** where Muigai J held a follows;

> " 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 and 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".

DISPOSITION.

23. Accordingly, it is my considered finding that the failure by the Defendant /Applicant to comply Section 35(3) of the Arbitration Act is fatal to the Chamber Summons dated 4th February 2019. It is further evident from the Hinga case (Supra) that this court has no jurisdiction to entertain an application under Section 35 (3) of the Arbitration Act even for a valid reason after expiry of 3 months from the date of delivery of the award.

24. Therefore the application dated 4th February, 2019 be and is hereby dismissed with costs to the plaintiff.

25. The second issue for determination before this court is whether the application has made out a case for recognition and adoption of the final arbitral award as a court judgment?

26. The Arbitration Act confers the High Court with power to recognize and enforce domestic arbitral award a binding upon application by parties for such orders under the provisions of section 36 of the Arbitration Act, which provides;

> (1) domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37
>
> (2)…
>
> (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish
>
> (a) the original arbitral award or a dully certified copy of it; and
>
> (b) the original arbitration agreement or a duly certified copy of it.

27. Section 37 of the Arbitration Act on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against which it is involved. The said section 37 (1) (a) and (b) provides;

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

(i) a party to the arbitration agreement was under some in capacity; 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, under the law of the state where the arbitral award was made;

(iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties ,was not in accordance with the law of the state where the arbitration took place; or

(vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or

(vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;

(b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

29. In the case of vrs **Tanzania National Roads Agency Kudan Sigh construction Limited Misc. Civil application No.171 of 2012** the court held interalia that:

"recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the Arbitration Act. The conditions set under section 37 of the Act have not been met to warrant this court not to recognize enforce the award."

30. The finality of a decision from an Arbitral Tribunal was discussed in this case of **GATHARA ANN MUMBI HINGA VRS VICTORIA NJOKI**

"We therefore reiterate that there is no right for any court to intervene in the arbitral process, or in the award except in the situations specifically set out in the Arbitration Act or a previously agreed in advance by theparties and simultaneously there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the Arbitration Act."

31. Also, the court of Appeal in the case of **NYUTU AGROVET LTD VRS AIRTEL NETWORKS LTD (2015) eKLR;**

"My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them form the courts for determination by a body put forth themselves, and adding to all that as in this case, that the arbitrators award shall be final, it can be taken that as long as the given award subsists it is theirs. But on the event it is set aside as was the case here, that decision of the High Court final remains their own, none of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration."

32. I have perused the court record and have found that the Plaintiff/Applicant has partly complied with condition asset out in section 36 of the Arbitration Act and has furnished the court with the original final award dated 14th August, 2018 and but in the supporting affidavit the original arbitration agreement or a duly certified copy of it as not be furnished by the Plaintiff/Applicant.

33. In the case of **David Chabeda & another vrs Francis Ingasi (2007)** eKLR the court rendered itself that failure to comply with the mandatory provisions of section 36(3) of the Act, renders the application for recognition of an arbitral award in -curable defective. The same holding was upheld I the case **National Oil Corporation of Kenya Ltd vrs Prisco Petroleum Network Ltd (2014) eKLR.**

34. In the case of **Structural Construction Company Limited vrs International Islamic Relief Organization High Court Nairobi, Miscellaneous case No. 596 of 2005** it was held that a copy of the arbitration agreement annexed to the Applicant's supporting affidavit is acceptable for purpose of enforcement of the award.

35. The bottom line in my considered opinion is that the original or a copy of the original arbitration agreement must be filed first before the award can be recognized as a judgment of the court.

36. I confirm that a copy of the arbitration agreement is filed in the Plaintiff's list of document but the same was never annexed to itssupporting affidavit sworn on the 29th January 2019 and neither was it referred to or relied on. In the supporting affidavit, the plaintiff only avers that both parties agreed that the dispute be referred to arbitration this is contrary to the provision of section 36 (3).

That being the position in this matter, it follows that the Plaintiff's application dated 29th January, 2019 is incompetent. I proceed to dismiss it with no orders a to costs

Orders accordingly.

Ruling dated signed and delivered at Mombasa this 7th day of May 2019.

LADY JUSTICE D. O. CHEPKWONY