REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 32 OF 2016

IN THE MATER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD

BETWEEN

VICTORIA FURNITURES LIMITED.....APPLICANT

VERSUS

ZADOCK FURNITURE SYSTEMS LIMITED.....RESPONDENT

RULING

1. The ruling relates to a notice of motion application dated 14th December 2017 brought under the provisions of; Order 45 Rule (1) and Order 51 Rule (1) of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A, 63(e), 80, 99 and 100 of the Civil Procedure Act, Cap 21 Laws of Kenya; Articles 159(2)(d) and 165(2)(a) of the Constitution of Kenya and all other enabling provisions of the law.

2. The applicant is seeking for orders that; the Honourable court be pleased to review and set aside its ruling/order dated 18th October 2017 and thereupon re-consider and determine the Applicant's notice of motion application dated 10th February 2016 on its full merits. The costs of and relating to this application be provided for.

3. The application is based on the grounds on the face of it and an affidavit dated 14th December 2017, sworn by the applicant's director; Pankaj Shah. He deposed that, on 11th February 2016, the applicant filed an application dated 10th February 2016 (herein "the application"), seeking for orders inter alia, that the arbitral award of Mr. Stanley Kebathi (QS) dated 6th December 2015, (hereinafter called "the award") be set aside.

4. The application was contained in a single bound volume of papers (herein "the application bundle") comprising of:-

(i) A certificate of urgency dated 10th February 2016;

(ii) The Notice of motion dated 10th February 2016;

(iii) A supporting affidavit sworn by Mr. Pankaj Shah on 10th February 2016; and

(iv) Twelve (12) separate annexures to the supporting affidavit numbered "PS1 to PS12" consisting of a total of 1,258 pages.

5. Upon hearing the application, the Honourable court delivered a ruling on the 18th October 2017, dismissing the application for lack of merit, principally on the ground that the applicant had failed to place a copy of the award, before the court to enable the court make a determination of the merits of the applicant's main grounds for challenging the award.

6. The Applicant avers that, in fact a copy of the award was annexed to the supporting affidavit to the application and marked as "PS-11" at pages 1230 to 1255; of the application bundle. That due to patent, unintentional error and omission on the part of the court, the award was overlooked which led to the court to conclude that, the applicant had not satisfied both the legal and evidential burden of proof. As a result

there was miscarriage of justice and the Applicant is seriously aggrieved. Therefore in the given circumstances, there is good ground and sufficient cause to warrant the court review and set aside the ruling dated 18th October 2017.

7. That the Respondent will not suffer any prejudice since the copy of the award was and is contained in the bundle of documents served upon it. The application has been made without unreasonable delay and in good faith. Hence the plea that, the court considers the matter on merit and grant the orders sought in the interest of justice.

8. However, the Respondent filed a replying affidavit dated 26th February 2018, sworn by its director Victor Swanya Ogeto. He deposed that on the 18th October 2017, the application dated 10th February 2016 was dismissed by the court after hearing all parties and considering their written submissions. The Applicant thereafter applied for certified copies of proceedings, the ruling and filed a notice of appeal dated 30th October 2017, against the decision.

9. The application was termed as bad in law, irregular, vexatious, frivolous and an abuse of the court process for the reasons that; the Applicant is precluded from seeking review by dint of; Order 45 Rule 1(a) of the Civil Procedure Rules, on account of the Appeal. It was further argued that, no leave to appeal has been granted either this court or the Court of Appeal and in the absence thereof, the intended Appeal is fatal.

10. Finally, the Respondent argued that, the application is made after unreasonable delay contrary to the provisions of Order 45 Rule 1(b) of the Civil Procedure Rules and should be dismissed with costs to the Respondent, in the interest of justice and fairness.

11. The Respondent also filed grounds of opposition dated 19th January 2018 and argued that, the court lacks jurisdiction to entertain this application as it is in direct contravention of; section 32A of the Arbitration Act which provides that, the decision of the High court such as was reached by the Honourable court, is final and binding on the parties and that no recourse is available against the award otherwise than in the manner provided by the Arbitration Act, 1995.

12. Further, the entire application does not lie in law as the Arbitration Act and the Rules attendant thereto, are complete code of law which does not provide for or contemplate review proceedings. The suit was dismissed primarily on account of its breach of Section 36(3) of the Arbitration Act, and the breach is irredeemable by review of the orders of the court. That the Applicant is seeking for the court to sit on an Appeal of its own decision, in the guise of an application for review.

13. Subsequently, the application was disposed of through filing of submissions, wherein the Applicant invited the court to determine whether:-

a) The Honourable court has the jurisdiction to entertain the application;

b) The application lies, as the Arbitration Act and Rules do not provide for review proceedings;

c) The Applicant is precluded from making the application;

d) The Applicant has met the threshold to invoke the court's discretionary jurisdiction to review its orders; and

e) The application was made without unreasonable delay.

14. The applicant submitted that, both Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules give the Honourable Court the jurisdiction to review its own decision. That Jurisdiction is paramount in the lawful exercise of a court's functions. It dictates whether a further step can be made or not. Reference was made to the cases of; *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others (2012)* and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1* , where Justice Nyarangi (as he then was) held that;

> *"... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

15. The applicant further reiterated that, failure to take cognisance of the crucial annexure that was available to the court at the time of writing its ruling dated 18th October 2017, is a mistake and an error that is apparent on the face of the court record, hence an exception to the requirement that an Applicant must strictly prove the ground for review. Reference was made to the case of; *Kithoi versus Kioko [1982] KLR 177:* where it was held that:-

> *"The Civil Procedure Rules Order XLIV demands, inter alia, that an application for review must be based on the discovery of new and important evidence which was not within the Applicant's 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. The Applicant for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, failing which application will not be granted'"*

16. It was further submitted that, the Court has a wide jurisdiction and inherent powers to review a matter "for any other sufficient reason" and in the interest of justice, as held by the Court of Appeal in the cases of; *The Official Receiver And Liquidator Vs Freight Forwarders Kenya Limited (2001) eKLR and Equity Bank West Link MBO in Civil Application No. 78 of 2011.*

17. Finally, the Applicant submitted that, the application was brought before the court on the 14th December, 2017, after the ruling and orders were made on 18th October, 2017. There was no unreasonable delay.

18. The Respondents filed submissions dated 25th February 2018, and invited the court to determine whether:-

(a) *The court has jurisdiction to review the decision made on 18th October 2017;*

(b) *The review jurisdiction of this court has been properly invoked;*

(c) *The Applicant has established any legal grounds for review of this court's order of dismissal*

19. The Respondents reiterated that, the decision impugned was made under Section 35 of the Arbitration Act, which is self-contained deplete with its own procedures and restricts the intervention of any court in arbitral matters, as provided for under section 10 of the Act. Reference was made to the case of; *Anne Mumbi Hinga vs Victoria Njoki (2009) eKLR*, where the court held that; "there is no right of any court to intervene in an arbitral process or in an award except in the situations specifically set out in the Arbitration Act or previously agreed in advance by the parties. Similarly there is no right of appeal to the High court or court of appeal against an award except in circumstances set out in Section 39 in the Arbitration Act."

20. Further reference was made to the case of; *Nyutu Agrovet Limited vs Airtel Networks Limited (2015) eKLR* where the Court held that; "Section 10 and 35 of the Arbitration Act must be interpreted within the context of finality as internationally recognized in arbitral proceedings conducted under the UNICITRAL model.

21. However, the Respondent submitted on a "without prejudice basis" that the certified copy of the arbitral award was certainly within the Applicant's knowledge and could have been produced despite the Court having accorded the Applicant ample knowledge to produce the same. It was reiterated that, once the Applicant filed an Appeal against the decision sought to be reviewed, it lost the right to review, as held in the cases of; *Dishon Mareko Ngine and 4 Others vs Faustion Njeru Njoka & Another [2014]eKLR*, and *Haithar Haji Abdi & Another vs Southdowns Developers Limited (2017) eKLR*.

22. It was further submitted that, an order for review is a discretional one, as was held in the cases of; *National Bank of Kenya Ltd vs Ndungu Njau (CA) No. 211 of 1996 UR and Pancras T Swiy vs Kenya Breweries Ltd (2015) EKLR* both cited with approval of this court in the case of; *Martha Wambui vs Irene Wanjiru Mwangi & Another (2015) eKLR*.

23. Finally, the Respondent submitted that the only way the Applicant can properly challenge the ruling of the court dated 18th October 2017, on the grounds advanced herein would be by way of an Appeal to the Court of Appeal, but unfortunately an appeal does not lie from a decision of the High Court made under Section 35 of the Arbitration Act. However, no Appeal lies by virtue of the provisions of the Arbitration Act as articulated by the Court of Appeal in the cases of; *Nyutu Agrovet Limited vs Airtel Networks Limited (2015) eKLR* and *Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR.*

24. The Applicant filed further submissions in response to the Respondent's submissions and argued that, the replying affidavit filed herein, is incompetent and must be struck out on the ground that; the Respondent had informed the court on 22nd January that it would not be filing a replying affidavit but will rely on the grounds of opposition only. After the Applicant filed their submissions, the Respondent filed the replying affidavit through the back door, and as an afterthought without the leave of the court, which is tantamount to adducing fresh evidence after the case had been closed and during the making of submissions.

25. The Applicant reiterated that the court has inherent powers to review or even recall its previous orders *suo motu* after hearing the arguments from all the concerned parties. Reliance was placed on the case of; *Republic vs James Kiarie Mutungei (2017) Eklr.* It was argued that where a mistake has been committed which is remediable the same should be corrected under the inherent power of the court as held in the case of; *Republic v National Transport Services Authority Ex-Parte Extra Solutions Ltd (2017) eKLR.*

26. That, even though the Arbitration Act together with the Rules therein is self-contained, the provisions of the Civil Procedure Rules are expressly admitted where there is no such provision ousting the inherent jurisdiction of the High Court to review its own decision with respect to decisions made on applications brought under Section 35 of the Arbitration or any other sections of the Arbitration Act.

27. Further section 1(2) of the Civil Procedure Act states that, the Act applies to proceedings in the High Court and that, the application herein seeking to set aside an award is definitely a proceeding in the High court and in addition the High Court has power derived directly under Article 165(3)(a)of the Constitution to hear virtually any claim arising under the law.

28. Similarly Section 80 of the Civil Procedure Act, confers upon the court unfettered power to consider an application for review in the circumstances specified and to make such order as it thinks fit as held in the case of; *Sardar Mohamed v Charan Singh Nand Singh & Another (1959) EA 793.*

29. The Applicant further submitted that, the filing of Appeals in the Court of Appeal is provided for under Rule 82(1) of the Court of Appeal Rules 2010. An Appeal is properly lodged upon the filing of the Memorandum of appeal, record of appeal, payment of the prescribed fees and the deposit of security for costs, if required. The mere filing of a notice of appeal cannot therefore amount to preferring an appeal, as held in the case of; *Githere vs Kimungu [1976-1985] EA 101.*

30. The arguments by the Respondent that, the notice of appeal is a bar to the filing of the application for review is wrongly informed, as it is based on the provisions of; Order 42 Rule 6(4) of the Civil Procedure Rules, 2010 that provides for the "deeming of lodging of an appeal" in the following terms;

"… for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court a notice of appeal has been given."

31. The case of; *Yani Haryanto vs ED & F Man (Sugar) Ltd Civil Appeal No. 122 of 1992 (UR)*, was cited where it was held that a notice of appeal is only a formal notification of intention to appeal and it cannot be said that an appeal has been preferred at that stage to preclude aggrieved party from filing an application for review. Further reference was made to the case of; *Anders Bruel T/A Queencross Aviation v Kenya Civil Aviation Authority & Another [2013] eKLR.*

32. Finally the Applicant submitted that the Respondent's submissions are contradictory in that it cannot argue that the filing of the notice of appeal by the Applicant is fatal to the review application, and at the same time also argue that no appeal lies to the Court of Appeal against the ruling of 18th October 2017, which effectively amounts to approbation and reprobate on which is not permissible.

33. At the conclusion of the arguments by the parties, I have considered the application, the arguments advanced and submissions by the respective parties and I find the issues that have crystalized for determination are whether:-

(i) The replying affidavit filed by the Respondent is properly on record; and/or was filed without the leave of court and should be expunged there from;

(ii) The court has jurisdiction to hear and determine this application;

(iii) The court should grant the orders sought; and

(iv) Who should bear the costs?

34. On the first issue, I have perused the court record, and I note that, on 22nd January 2018, learned counsel Mr. Lubullelah, for the Respondent informed the court that, the Respondent had filed grounds of opposition to the application. The court then gave the parties directions on the filing of their submissions with leave to the Applicant to file and serve further Affidavit, if need arose. The matter was stood over to 5th March 2018, to confirm compliance and/or for further orders.

35. The court record of that date indicates that, the Respondent's learned counsel requested for leave to file a replying affidavit and the learned counsel Mr. Xavier requested for time to reply thereto. The court granted both parties time for the same and set the matter for highlighting of submissions. It is therefore not correct to argue that, the replying affidavit was filed without the leave of the court. Even if that was the case, the Applicant did not raise the issue upon being served with the impugned affidavit and/or before the highlighting of the submissions by the parties. The Applicant cannot therefore raise the issue in the submissions. I therefore find and hold that the replying affidavit is properly on record.

36. I shall now move to the issue of jurisdiction. It is indeed trite law as held by the Court of Appeal in the case of; *Owners of the Motor Vessel "Lillian S" (supra),* that jurisdiction is everything. Similarly the Supreme Court in the case of; *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others (2012)* held that;

"(68) A court's (or tribunal's) jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. …..without jurisdiction, the court (and tribunals) cannot entertain any proceedings"

37. The Supreme court has also held in; *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*, that:-

"Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

38. I have considered the arguments by the parties as summarized herein on the issue of jurisdiction and I find that, the provisions of; Section 10 of the Arbitration Act, clearly provides that; "no court shall intervene in matters governed by the Arbitration Ac except as provided in the Act" (herein "the Act"). However, section 35(1) of the Act, deals with setting aside of an arbitral award and allows intervention of the court. The sub-section (1) thereof states 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)."

39. It is therefore clear from these provisions that, the High court has power to hear and determine an application seeking to set aside an arbitral award on the grounds provided for under sub section 35 (2) of the Act. However, the argument advanced by the Respondent is that, the section 35 does not provide for "review" of a decision made after hearing and determining an application under section 35 of the Act. It is argued that once a decision is made on such an application, the court is functus officio.

40. The question that arises is whether, the decision rendered on 18th October 2017, on the notice of motion application dated 10th February 2016, renders this court functus officio and/or whether it was on the merit thereof and final and therefore, it is not subject to "review" but only subject of appeal. If it is subject to review; whether this court has jurisdiction to hear the "review" application. To answer this question, one has to have regard to the order made by the court in the subject ruling.

41. At paragraph 61 and 62 of the said ruling, the court stated as follows;

> *"(61) Regrettably, the court has to arrive at a decision that the Applicant has not proved its case on merit as required under the law. As already stated, the allegation and/or averments made by the Applicant against the Respondent and/or the Arbitrator have not been proved. It is therefore not possible for this court to evaluate the factual matters before it on merit. The Applicant bore the burden of proof.*
>
> *(62) The upshot of all this is that, the notice of motion application dated 10th February 2016 is hereby dismissed for lack of merit and costs to the Respondent."*

42. It suffices to note that, the reason why the court arrived at the decision that the Applicant had not discharged the onus of proof was that, the Applicant had not provided the court with a copy of the arbitral award. This is evident from the findings o at paragraph 59 of the ruling, where the court observed that, the failure to provide the original and/or copy of the arbitral award resulted in a failure by the Applicant to sufficiently discharge its burden of proof and as this went to the substance of the application, it was impossible for the court to evaluate the factual matter before it on merit.

43. It also suffices to note that the Respondent submitted at paragraph 24 of its submission that, "the court did not delve into the details of the contents of the (purported) arbitral award and neither did it make any findings of the act based on the contents thereof". If indeed, the reason why the court did not consider the matter on merit was because of lack of the arbitral award, then the matter was not dismissed upon evaluation totally on evidence availed,.

44. It is also not in dispute though that, indeed the copy of the award had been provided for in the Applicant bundle of documents, at pages 1230 to 1255, as confirmed by the court. The question that arises is whether; the matter the court should disregard it the document that has now been brought ot its attention and if so whether, disregard thereof will serve the interest of justice. The other question is whether; the Applicant should suffer for inadvertent mistake and/error on the part of the court, and the final question is; what prejudice the Respondent will suffer if the application for review is allowed.

45. As indicated at paragraph 59 of the impugned ruling and observed herein, the Respondent urged the court to strike out the Application seeking to set aside the award on the basis that, the application was incompetent and bad in law due to failure to provide a copy of the award. This is clearly captured under paragraph 49 of the ruling as follows:-

> *"The Respondent has submitted that this application is incompetent and bad in law on the ground that it is in breach of Section 36(3) of the Act. The (sic) said provisions are mandatory and require that a person relying on the Arbitral award of an Arbitration agreement should annex and/or provide original or certified copies thereof, which the Applicant herein has not complied with. The court was invited to strike out the application".*

46. From these submissions by the Respondent, it is clear that they did not find the application competent enough to be determined on merit and invited the court to strike it out. Had the Court agreed with the Respondent it would have struck it out. Similarly had the court taken note of the copy of the award on record it would have dismissed the Respondents submissions. Even if the application was struck out the Applicant would still file another competent application and the end result would be the same.

47. However, as can be seen from paragraph 59 of the impugned ruling, the Applicant did not address themselves to the concerns raised by the Respondent in relation to the failure to provide copy of the award. It is clear as observed by the court that, the issue of non-compliance of the provisions of section 36 of the Act, was brought to the knowledge of the Applicant as deposed at paragraph 2 the replying affidavit. The Applicant did not respond to the same. The Respondent then filed their submissions and at paragraph 1(c) thereof, it observed the same and the Applicant did not respond to the same, despite filing reply submissions to the Respondent's. It is against this background that the court found that, the Applicant has squandered an opportunity to avail critical evidence. As already stated, the court was of the opinion that there was no copy of the Arbitral award.

48. The questions however remains as to whether, the failure to take cognizance of the award amounts to an error on the face of the record and whether the court has power and/or jurisdiction or inherent power to review the impugned decision on the ground of the error, even in the light of the Applicant notice of appeal?

49. The provisions of; Section 80 of the Civil Procedure Act, grants the court unfettered discretion and/or power of review an order it has made and provides as follows:-

> *"Any person considering 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."*

50. In the same vein, Order 45, rule 1 of the Civil Procedure Rules 2010, states that:-

> *(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 t 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.

51. The Respondent argued that, the Applicant has not complied with the above provisions in that it has not provided evidence to show that there is an error apparent on the face of the record and/or the evidence they intend to introduce that was not within their knowledge and neither is there sufficient reason for review of the impugned decision.

52. From the application, it is quite clear that, the Applicants are relying on the ground of an error apparent on the face of the record. In my considered opinion, even if the failure to take cognizance of the award, is not a mistake or an error on the face of the record, it falls under the ground of "any other sufficient reason" as held in the case of; *The official Receiver and Liquidators vs Freight Forwarders Kenya Limited (2001) eKLR*. I am therefore satisfied that the application falls under the provisions of section 80 of the civil Procedure At and Order 45(1) of the civil Procedure Rules, 2010 *(See also Benjoh Amalgamated Limited vs Kenya Commercial Bank Limited, (2014) eKLR).*

53. The Respondent further argued that, the provisions of Arbitration Act and the Rules do not provide for review proceeding, however I agree with the Applicant's submissions that the same provisions do not exclude the power of the Court to review a decision under Order 45 rules the Civil Procedure Rules. In the same vein section 1(2), of the Civil Procedure Act, states that: "this Act applies to proceedings in the High Court and, subject to the Magistrate's Courts Act to proceedings in subordinate courts" I therefore find that the court has the power under the constitutional provisions of Article 165, the statutory provisions of the Civil Procedure Act and Rules and its inherent power to entertain the application herein.

54. It was further argued by the Respondent that, the Court cannot entertain an application for review when there is a notice of appeal. The Applicant argued to the contrary. I have considered the arguments and the authorities cited and I find the question to determine, is whether the notice of appeal, per se constitutes an appeal. I hold that the filing of the notice of appeal and request for typed proceeding per se does not constitute the filing of an appeal. The provisions of; Rule 82 of the Court of Appeal Rules, clearly detail out the documents to be filed to institute a valid appeal. That is not the case herein.

55. Based on the reasons stated herein, I find that the Applicant has made out a case for review and I allow the Application in terms of (2) of the application as prayed. That leads to the second limb to evaluation of the Application dated 19th February 2016, on merit.

56. It suffices to note that, the court had indeed identified the issues for determination, at paragraph 25 of the impugned ruling and even determined some of them. In that case the court shall adopt those issues and the findings thereon and only deal with the issues left pending.

57. The first issue raised was in relation to non compliance with the provisions of; Rule 7 of the Arbitration Rules. The issue was dealt with conclusively at paragraphs 26 to 30 of the ruling. The next issue was in relation to the alleged breach of section 36 of the Arbitration Act. The issue was dealt with at paragraphs 31 to 32 of the ruling. The third issue was in relation to the grounds relied on in support of the application. The issue was addressed at length from paragraphs 35 to 45 of the ruling, but not fully dealt with and therefore I shall deal with it herein.

58. The other issues not fully dealt with are in relation to; the setting aside the award on the grounds inter alia; public policy, bias and/or partiality. The applicant in a nutshell argues that the Arbitrator dealt with matters outside the scope of reference. That the parties having entered into compromise agreements and settled all claims, there was no dispute to refer to arbitration in the first instance.

59. However the history of the matter reveals that the Respondent declared a dispute and appointed an Arbitrator, whereupon the Applicant filed an Originating Summons vide High Court case number 445 of 2010, seeking to set aside the appointment. The Respondent then filed an application for the appointment of an Arbitrator and the Arbitrator herein was appointed. Subsequently, the Respondent filed a claim for inter alia Kshs. 206,135,283.31 and the Applicant filed a counter claim for a sum of Kshs. 230,337,399.62.

60. From the content of award, the Respondent challenged the jurisdiction of the Arbitrator on three grounds: there was no dispute, conflict on the part of the tribunal and the claim was time barred. The Claimant also challenged the counter claim on the grounds that, it offended the provisions of; section 22 of the Arbitration act and was statute barred. After considering the arguments of the parties and dismissed both challenges paving way for the hearing of the dispute as filed.

61. I have considered the decision of the Arbitrator on these issues raised and I find that it benefitted both parties, including the Applicant. Secondly it is ironical that the Applicant/Claimant challenged the jurisdiction of the Arbitrator, when it had filed a counter claim for determination, and alleged the Claimant's claim was time barred and yet it had filed its own.

62. In my opinion the parties subjected themselves to the jurisdiction of the Arbitral Tribunal by the mere act of filing their respective claims which were heard and determined. Even then, after the decision of the Arbitrator the parties proceeded with the proceeding basically endorsing that there was a valid dispute for determination.

63. The provisions of Section 17(6)and (7) of the Arbitration Act states that; "where the arbitral tribunal rules as a preliminary question that

it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter. The decision of the High Court shall be final and shall not be subject to appeal" Therefore the Applicant cannot be raising the issue of Arbitrators lack of jurisdiction at this stage and neither can it be a ground for setting aside the award.

64. The next issue raised is an issue of bias by the Arbitrator. The issue was also dealt with by the Arbitrator who found that the details of the alleged conflict of interest was not provided and dismissed it. The provisions of section 13 (3) and (4) states that:-

> "*(3)An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties.*
>
> *(4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.*

65. The Applicant did not utilize these provisions. Hence the Respondent submissions that the Applicant waved its rights under section 5 of the Act are well founded. Even then the bias alleged can only be deduced from the record as the court does not the benefit of the demeanor of the parties. But the record of proceeding of the arbitration proceedings was not availed.

66. However the main ground relied on is the fact that the Arbitrator relied on the compromised agreements and the decisions of the court, thus considering matters outside the scope of the dispute. I have considered the decision of the Arbitrator and I find that indeed at page 17 thereof, he states that he is in agreement with the findings of the two High Court judges who found that the Respondent had performed its contractual obligations and that the Applicant did not Appeal against those decisions. However I note that the Arbitrator arrived and/or made reference to these decisions after analyzing the performance of the contract by the parties and in particular the Respondent, as indicated at pages 10 to 17 of his decision.

67. The Arbitrator also considered the arguments by the Applicant as to whether the Respondent performed the contract or not, evaluated the reasons advanced, and ruled that, there was no evidence to prove the allegations that the Claimants did not have financial ability to perform the contract.

68. The other issues considered by the Arbitrator were inter alia whether the contract between the parties was a supply contract or a sub-let. The Arbitrator found that it was a sub-contract to supply and install. The Arbitrator also considered the Counter-claim by the Respondent and dismissed it in totality, on the grounds that when the parties were making a joint claim, the Applicant/Respondent did not indicate that the Claimant owed it any money, and similarly, having found that the Claimant/Respondent performed the contract, there was no breach to entitle the Applicant/Respondent to any payment. It is on the basis of this finding that the Applicant argues that the Arbitrator took into account irrelevant matters that influenced his decision. However the Respondent argues that both parties relied on un-led evidence on the joint claim.

69. In my considered opinion the evidence on the joint claim was not irrelevant to the subject matter before the Arbitrator. The parties had engaged into negotiations and the court had pronounced itself on the issues. Even then, the Applicant does not dispute that the parties executed the joint claim voluntarily. The claim was prepared by Mr. Were who played a key role in the distribution of the sums between the parties as indicated therein. He signed the joint claim and there is no evidence that the same is void and/or voidable, for whatever purpose.

70. The Arbitrator indicated that the guiding factor in determining the amount payable was founded on the joint claim. I am inclined to concur with the findings of the Arbitrator to the effect that the parties had voluntarily agreed on the sums of money due to them. The Applicants had agreed to this joint claim to be lodged against its client. It is then dishonest and untenable to expect the Arbitrator to shut its eyes on the same. I find no merit on the argument that the Arbitrator considered irrelevant matter.

71. The other ground advanced was that the award is against public policy. This court addressed the same in the subject rulings at paragraphs 46 and 47. I have considered the arguments advanced by the Applicant as indicated at page 31 of that ruling, and I find that the Applicant avers inter alia that, to allow the award to stand, will unjustly enrich the Respondent, discourage the compromise and settlement of disputes, violate his constitutional rights to fair administrative and judicial action, discourage investors and amount to gross miscarriage of justice.

72. In my considered opinion these are very general allegations. The relationship between the parties is based on the contract they executed on 4th July, 2006. It is not denied that the Applicant contracted the Respondent to carry out the works stated in the contract. It cannot therefore be said that the Respondent was not entitled to any payment and an award in its fair is unjustified.

73. I however note that, the substantial amount awarded to the Respondent is the interest on delayed payments, from October 2006 to November 2015, a period of 9 years and 2 months; amounting to Kshs. 64,638,337.12. In arriving at that figure, the Arbitrator states as follows;-

> "*My calculations are from first principals and I have allowed simple interest at the rate of 25%, the rate agreed by both parties in their joint claim. The Arbitration Rules Clause 18 (1) allows me to award simple interest at a rate and period that I may decide to be appropriate."*

74. However, the Arbitrator does not explain the basis or what informed the period of October 2006 to November 2015, he took into account. It suffices to note that, from the particulars of the Claimant's Claim, interest is claimed on delayed payments "until the date of filing of the Claim, being 21st October, 2013", but the Arbitrator awards it up to November 2015. In that regard, the interest awarded for the period of 21st October 2013 to November 2015 is unsupported, untenable and improper and should be deducted from the amount awarded.

75. The upshot of this is that, the application to set aside the Award is dismissed save for the period of the interest payable which the parties should calculate and agree on the same and if there is no agreement, either party is at liberty to move the court accordingly.

76. Those then are the Orders of the Court.

Dated, signed and delivered in an open court on this 4th day of November 2019 at Nairobi

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr. Xavier for the Applicant

Mr. Omolo for the Respondent

Dennis ----------Court Assistant