REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 264 OF 2017

MASON SERVICES LIMITED..PLAINTIFF

VERSUS

SAFARICOM LIMITED...DEFENDANT

RULING

1. Under challenge in these proceedings is the enforcement of a final Award of Mwaniki Gachoka published on 27th July 2018. Safaricom Limited (Safaricom) have in a Chamber Summons dated 20th November 2018 sought the setting aside of part of the said award which awarded Mason Services Limited (Mason) damages of Kshs.13,620,427.39 together with interest and costs. The Application is substantially anchored on the provisions of Section 35 of Arbitration Act.

2. By an agreement dated 1st December 2014 Safaricom and Manson entered into a contract for provision of cleaning and landscaping services by Mason. Clause 18 of the agreement had an Arbitral Agreement as follows:

> 18.2. Arbitration.
>
> 18.2.1 If the dispute has not been settled pursuant to the amicable settlement process within thirty (30) days or such longer period as may be agreed upon between the parties from when the amicable settlement process was instituted, any party may elect to commence arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either party, by the Chairman for the long time being of the Kenya Branch of the Chartered Institute of Arbitration of the United Kingdom.
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> 18.2.2 Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.
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> 18.2.3 To the extent permissible by law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.
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> 18.2.4 Pending final settlement of determination of a dispute, the parties shall continue to perform their subsisting obligations hereunder.
>
> 18.2.5 Nothing in this Agreement shall prevent or delay a party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.

3. A dispute arose between the parties and it was referred to Arbitration of a Tribunal constituted of a single Arbitrator, Mr. Mwaniki Gachoka. Vide a letter of 3rd October 2018, the parties were invited to collect the award on 4th October 2018. Both parties collected the Award on the said date.

4. Safaricom is aggrieved by that part of the decision in which Mason was awarded a sum of Kshs.13,620,427.39 as compensation in lieu of reasonable notice. In the grounds in support of the summons now before Court, Safaricom contends that the Arbitrator made the award without making a finding that Safaricom had breached the terms of the Agreement. The Courts attention is drawn to paragraph 72 of the final Award. Safaricom argues that the Arbitrator found that the Agreement did not lay down any sanction for unreasonable notices or compensation or pay for notice where either parties gave unreasonably short notices.

5. Safaricom further contends that on making the Award, the Arbitrator ignored the provisions of Section 29(5) of the Arbitration Act which required him to determine the dispute according to the terms of the contract. The Arbitrator is also assailed for relying on a decision that was neither submitted by parties nor were the parties invited to submit on. The Arbitrator is also faulted for disregarding what Safaricom sees as binding Court of Appeal decisions in Provincial Insurance Company of Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa [1995 – 1998] 2 EA 289 and Dharamshi vs. Karsan [1974] EA 41 Safaricom argues that such disregard is against public policy.

6. Lastly, Safaricom criticize the Award as being based on amounts contained in a bid submitted by Mason in response to a request for proposal which is distinct and separate from the Arbitration Agreement. The Arbitrator in thus charged for dealing with a dispute not contemplated by or not falling within the terms of reference to Arbitration or that it contained decisions on matters beyond the scope of the reference to Arbitration.

7. Mason responds to the Application by a preliminary objection and a replying affidavit of Stephen Njoroge sworn on 14th December 2018. In the preliminary objection, Mason argues that the application before court is statute barred by dint of Section 35(3) of the Arbitration Act.

8. On the merit of the application, Mason takes the view that the Arbitrators award is correct as he had found that Safaricom acted in an arbitrary manner in extending performance of the contracts and failing to give reasonable notice during the extension of the contracts. Further that it was within the Arbitrator's discretion to make reference to the law and decisions of the High Court and any other superior courts in order to arrive at a just and fair award without necessarily calling the parties to comment on them. In addition, Mason credits itself for relying on relevant English decisions, local authorities and works of eminent authors to counter the Applicant's defence that damages are not available for breach of contract.

9. I have considered the arguments made for and against the application. I have also read the authorities referred to me. I begin by determining the preliminary objection in respect to whether the application is time barred.

10. The entire Section 35 of the Act reads:-

> 35. Application for setting aside arbitral award
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> (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).
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> (2) An arbitral award may be set aside by the High Court only if—
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> (a) the party making the application furnishes proof—
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> (i) that a party to the arbitration agreement was under some incapacity; or
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> (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
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> (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
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> (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
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> (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
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> (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
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> (b) the High Court finds that—
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> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
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> (ii) the award is in conflict with the public policy of Kenya.
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> (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.
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> (4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the

grounds for setting aside the arbitral award.

11. Mason refers the Court to the letter of the Arbitrator of 17th July 2018 in which he advises the parties that the Award was ready for collection on 27th July 2018 at 2.30pm. He also advises that fees should be settled before the collection of the Award. To the mind of Mason, 27th July 2018 is the date on which the parties must be taken to have received the Arbitral Award and so the last day for bringing of an application for setting aside would be on or about 26th October 2018.

12. It would seem that none of the parties collected the award on 27th July 2018 and the reason was not explained to Court. Anyhow, on 3rd October 2018, the Arbitrator writes to Counsel for the parties again advising them that the award would be ready for collection on 4th October 2018 at 10.00am. In this letter, he confirms that both sides had settled his fees of Kshs.1,029,200.00. In that letter he also acknowledges receipt of cheque No. 429,600.00 from the Claimant.

13. For Safaricom, it was argued that the time started to run on 4th October 2018 and so the Application filed on 20th November 2018 was well within the three (3) months provided in Section 35(3) of the Act.

14. The battle lines are drawn around the construction of the provisions of Section 35(3) as to when it is construed that the party applying has received the Award. Yet this is an issue that is old hut.

15. In Transworld Safaris Limited –vs- Eagle Aviation Limited & 3 others [2018] eKLR High Court Miscellaneous Application No. 238 of 2003 (unreported) Nyamu J (*as he then was*) held that a notice to parties that an Award was ready was sufficient delivery of the award. Put differently, parties will be taken to have received the award once they receive notice of the date when the award is ready for collection. The rationale for this holding was explained by the Judge as follows:-

> "Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration Act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

16. This position has been followed in several decisions. See for example Mahinder Singh Channa v Nelson Muguk & another [2007] eKLR and P. N Mashru Limited –vs- Total Kenya Limited [2013] **eKLR.**

17. In the matter before this Court the Arbitrator first told the parties that the Award was ready for collection on 27th July 2018. As stated earlier, no explanation was proffered by the parties as to why the parties never collected the award on the due date.

18. An attempt by Counsel for Safaricom to introduce evidence of when payment of the Arbitration fees was made objected to by Counsel for Mason. The Court upheld that objection because the attempt came very late in the day when Mason was responding to the Application at the hearing. If Safaricom thought that anything would turn on that evidence then it should have in good time, sought to file a further affidavit introducing the evidence in good time. The preliminary objection was filed on 15th January 2019 and the hearing was six months later on 16th July 2019. It would be prejudicial to Mason for Safaricom to introduce this evidence at this very late stage of the proceedings.

19. Back to the Rule, I would think that an exemption to the rule is where the applying party demonstrates that the other party has frustrated the collection of the award and that the delay in collection of the award can be placed solely at the feet of the respondent. Only then can the date of actual collection of the award be construed to be the date of receipt of the award.

20. Given that Safaricom has not demonstrated that Mason was responsible for non-collection of the Award on 27th July 2018, that date has to be taken to be the date Safaricom received the Award. As the application was filed a date after the deadline of 26th October 2017 then the application of 20th November 2018 is time barred and that would be the end of the road in this matter.

21. However I shall consider the merit of the application in the event I have misconstrued the law on the timelines.

22. The challenge to the Award is taken up on three broad grounds. First that the Award was a determination of matters beyond the scope of the Arbitration Agreement. Related to this, and this is the second issue is that the Award, dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration and contained decisions beyond the scope of the reference to Arbitration.

23. A third issue is that the Award of general damages of Kshs.13,620,427.39 was made in disregard to binding precedent of the Court of Appeal and therefore against public policy.

Beyond scope of the Arbitration Agreement

24. It has to be understood that all the complaints made by Safaricom revolve around the award of general damages. The Arbitral Agreement is in Clause 18.2 of the agreement which I again reproduce:-

> 18.2. Arbitration.
>
> 18.2.1 If the dispute has not been settled pursuant to the amicable settlement process within thirty (30) days or such longer period as may be agreed upon between the parties from when the amicable settlement process was instituted, any party may elect to commence arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or

in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either party, by the Chairman for the long time being of the Kenya Branch of the Chartered Institute of Arbitration of the United Kingdom.

18.2.2 Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.

18.2.3 To the extent permissible by law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.

18.2.4 Pending final settlement of determination of a dispute, the parties shall continue to perform their subsisting obligations hereunder.

18.2.5 Nothing in this Agreement shall prevent or delay a party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.

25. The provisions of that clause and indeed the entire agreement do not prescribe the nature of remedy that an Arbitrator is limited to making an award in the event of a dispute. This Court takes it that the Arbitration Agreement contemplated that the Arbitrator would be free to grant a remedy which he/she thought was deserved and just depending on the nature and circumstances of the dispute before him. In that event, by making the award he did, the Arbitrator here cannot be held to have gone beyond the scope of the Arbitration Agreement because the Agreement was not prescriptive of the remedies available.

Was the issue of general damages before the Arbitrator?

26. This Court has looked at the Statement of Claim dated 29th September 2017 which constitutes the pleading by Mason. Mason prays for the following:-

a) Kshs.144,750,082.56.00

b) An order directing the Respondent to pay instalments equivalent to Six (6) months of Arbitration proceedings and/or until termination of Arbitration.

c) General and aggravated damages.

d) Costs.

e) Interest on (a), (c) and (d) above.

(My emphasis)

27. Whether or not to award general and aggravated damages in the event of liability was an issue squarely before the Arbitrator. It is also clear, not just from the Award itself (paragraph65-68) but also the application before me that Safaricom itself made arguments that such damages were not awarded for a breach of contract claim.

28. This Court has no doubt that whether or not Mason deserved general and/or aggravated damages for breach of contract was a live issue in dispute before the Tribunal right from the outset when the claim was filed.

Award against public policy?

29. As I turn to consider whether or not the award was against public policy, I have to consider one other complaint taken up by Safaricom. It is argued that by relying on decisions not referred to by the parties and which they were not invited to comment, the Arbitrator breached the rules of a fair hearing.

30. It is conceded that in making an award of general damages, the Arbitrator relied on the decision in Arch Katerega & Anor -vs- Uganda Posts Ltd[2012] UG COMMC 70 and Ramesh Manek –vs- Kenya Posts and Telecommunication Nairobi HCC No. 862 of 1993 both of which had not been referred to him. However, this Court is not aware of any law that restricts a Court or Arbitral Tribunal from deciding a matter on the basis of persuasive decisions which have not been put before it by the parties. As long as the authorities upon which the Tribunal bases its decision are relevant to the issues properly identified to be for determination, then the Tribunal should not be hamstrung to only making reference to cases or material (not evidence) cited to it by parties, some of which may well be irrelevant or misleading.

31. That said it is good practice for the Court or Arbitral Tribunal to invite parties to comment on an authority which the Tribunal feels is decisive in determining an aspect of the dispute and which was not referred to by the parties. Yet, just because the Arbitrator does not do that, by itself, cannot be a basis for finding that he/she has abridged the parties right to fair hearing.

32. In the matter before this Court the issue of whether or not general and/or aggravated damages was central to the determination of the matter and the parties submitted on the matter. In the end the Arbitrator was entitled to rely on authorities cited to him and any other authorities, though not brought to his attention by parties, but were helpful in resolving the issue.

33. Is finding that general damages are awarded for breach of contract against public policy? I say very little on this. The general proposition, and this is really a general proposition, in that general damages are not awarded for breach of contract. Yet it would seem that the Court of Appeal has not completely shut out the possibility that damages are awardable where the respondent is shown to be oppressive, highhandedness, outrageous and insolent see the following passage in the decision of Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR.

> "On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the Nigerian case of Marine Management Association & Another vs National Maritime Authority (2012) 18 NWLR 504.
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> The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa (supra), andJoseph Ungadi Kodera vs Ebby Kangisha Kavai, KSM C. A. No. 239 of 1997 (ur).
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> The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above. In this case the mere fact that the appellant wrote several letters to the respondent without remedial measure being undertaken immediately cannot amount to oppressiveness, insolent or vindictive behaviour. The correspondence was responded to explaining what was being undertaken. The fact that the respondent took no corrective action only making incessant promises that the issue was under investigations is not of itself evidence of high handedness, outrageous, or insolent conduct. Further there was no agreement at the time as to the real cause of power outages. There was a blame game between them which went on for a long time. In those circumstances we do not see how the respondent can be accused of being oppressive, high handed, outrageous, insolent or even vindicative".

34. Whether or not there was a basis for the Arbitrator to make an award for general damages for breach of contract and the quantum reached is a matter that goes to the merit of the decision. A matter beyond the scope of a Section 35 application.

35. Ultimately the Chamber Summons of 20th November 2018 is without merit and is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 11th Day of December 2019

F. TUIYOTT

JUDGE

PRESENT;

Muthee for Litchie for the Applicant

No appearance for Respondent

Court Assistant: Nixon