REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 51 OF 2009

SAFARICOM LIMITED ……………………….....…………... PLAINTIFF

V E R S U S

OCEAN VIEW BEACH HOTEL LIMITED ……..….. 1ST DEFENDANT

SALIM SULTAN MOLOO …………………….…….2ND DEFENDANT

ALSAI (K) LIMITED ………………………………… 3RD DEFENDANT

RULING

1. **SAFARICOM LTD**, the Plaintiff sued the 1st Defendant **OCEAN VIEW BEACH HOTEL LIMITED;** that the 1st Defendant being the registered proprietor of property **L.R. No. 4709 Section 1 Mainland North**, situated in Mombasa (hereinafter referred to as '**the property'**); issued the Plaintiff with an illegal and invalid notice dated 13th February 2009 requiring the Plaintiff to vacate the property while the Plaintiff had a right to occupy the property by virtue of the agreement for the 1st Defendant to lease the property to the Plaintiff.

2. The Plaintiff sued the 2nd Defendant, **SALIM SULTAN MOLOO** and the 3rd Defendant, **ALSAI (K) LIMITED** alleging that they had a charge and a lease over the property during the subsistence of the agreement between Plaintiff and 1st Defendant, referred to above, and Plaintiff pleaded that the subsequent charge and lease did not entitle the Defendants to terminate the Plaintiff's tenancy.

3. As stated before the Plaintiff pleaded that by the agreement between it and 1st Defendant, the parties agreed the 1st Defendant would lease the property to Plaintiff. The Plaintiff set out the terms of that agreement in the Plaint as follows-

"6. It was an express term of the Agreement, inter alia, that-

i. **The 1st Defendant would grant the Plaintiff a Lease for an initial period of nine (9) years and eleven (11) months subject to renewal for a further two (2) consecutive terms of six (6) years each;**

ii. **Pending the completion, execution and registration of the Lease, the parties were to observe and comply with the provisions contained or implied in the Lease as if the same were incorporated in the agreement;**

iii. **The 1st Defendant would grant the Plaintiff possession of the suit property from the commencement date of the agreement and would further allow the Plaintiff and its authorized servants or agents, full and free access for twenty four (24) hours a day and three hundred and sixty five (365) days a year to and from the suit premises and the apparatus erected thereon;**

iv. **The 1st Defendant warranted that it had legal title to the suit premises and that it had obtained all the necessary consents of any mortgagee, chargee or any other third party necessary to allow it to enter into the agreement; and**

v. **The 1st Defendant would only terminate the agreement if there was substantial breach of the terms of the agreement by the Plaintiff after serving a notice and if the Plaintiff had not remedied the breach within twenty eight (28) days of such notice."**

4. Following that agreement Plaintiff pleaded that it took possession of the property and proceeded to construct, there upon a base transcaner station, telecommunications apparatus and a generator room. On the property there is also a beach hotel. Plaintiff pleaded that the 3rd Defendant had given it notice to vacate the property.

5. It is also pleaded by Plaintiff that the 1st Defendant had neglected or failed to execute the lease prepared by Plaintiff's Advocates.
6. The 1st Defendant in his defence while acknowledging the existence of the agreement to lease the property to the Plaintiff plead as follows-

- **In further answer to paragraph 6 of the Plaint the 1st Defendant states that the Plaintiff knew or ought to have known by exercise of due diligence that the suit property were encumbered by a Charge and Further Charge to the 2nd Defendant dated 1st November 2004 and 26th February 2005. The 1st Defendant adds that it was unable to obtain the prior written consent of the 2nd Defendant and that in the absence of such consent the Agreement to Lease is null and void.**

- **In answer to paragraph 8 of the Plaint, the 1st Defendant avers that by 27th June 2005 the suit premises were encumbered by a Charge and Further Charge in favour of the 2nd Defendant but that the Plaintiff forwarded the intended Lease to the 1st Defendant over 2 years after the Agreement to Lease was executed.**

- **Further to paragraph 8 above, the 1st Defendant states that by August, 2007 the 1st Defendant had already created a second Further Charge dated 27th January 2006 in favour of the 2nd Defendant.**

- **In answer to paragraph 9 of the Plaint, the 1st Defendant avers that the 2nd Defendant refused to grant his consent for the creation of the Lease and that the 1st Defendant could therefore not execute the Lease as that would constitute a fundamental breach of the terms of the Charge, Further Charge and second Further Charge.**

7. It is important to state that the agreement between Plaintiff and 1st Defendant had an Arbitration Clause.

8. The 1st Defendant on the above pleadings, amongst others, sought the suit be dismissed.

9. The 3rd Defendant in its defence pleaded that the property was not available for leasing to Plaintiff because the 3rd Defendant had been granted lease over the entire property which lease had been

registered. That because it was so registered, such registration constituted notice of its interest to the Plaintiff.

10. Plaintiff sought, by Chamber Summons dated 28th May 2009 temporary injunction, as per Section 7 of the Arbitration Act Cap 49, seeking to restrain the Defendants from removing the Plaintiff's tower antennae, dish antennae or any other apparatus belonging to Plaintiff at the property.

11. That application was heard and Ruling delivered by M. K. Koome, J (as she then was, now she is a Judge of the Court of Appeal) on 6th November 2009. By that Ruling the Learned Judge declined to grant the injunction orders.

12. The Plaintiff being aggrieved by that order appealed to the Court of Appeal. Three Court of Appeal Judges on hearing an application under Rule 5(2) (b) of the Court of Appeal Rules the Justices granted injunction pending the hearing and determination of the appeal as sought by the Plaintiff. Parties did not inform this Court what is the status of that appeal.

13. The matter was then heard by a single Arbitrator as per the Arbitration Clause, who made his award on 25th April 2013.

14. The Plaintiff has filed before this Court a Chamber Summons application dated 17th July 2013 seeking for this Court to adopt the Final Award delivered by the Arbitrator, David Mereka, on 25th April 2013, as the judgment of this Court. The Chamber Summons is brought under Section 36(1) of Cap 49 and Rules 6, 9 and 11 made there under. The application is based on the ground that the Defendants had not challenged or appealed against that Final Award and the Plaintiff needs to enforce the award hence its prayer for its adoption.

15. Parties proceeded to file their written submissions and on the date fixed by consent for those submissions to be highlighted, only the Advocate for the 2nd and 3rd Defendant attended and highlighted his submissions. In those submissions the 2nd and 3rd Defendants seek dismissal of the Chamber Summons dated 17th July 2013, for the adoption of the award.

16. The objection raised by the 2nd and 3rd Defendants to the adoption award can only be under Section 37 of Cap 49. This is because had the said Defendants wished to seek to set aside the award they ought to have moved this Court by application under Section 35 of Cap 49, and such application under Section 35 ought to have been within three months from the date the Plaintiff received the arbitral award. The arbitral award was made on 25th April 2013. The two stages available to a party wishing to move against an award were discussed in the case **SADRUDIN KURJI & ANOTHER –Vs- SHALIMAR LIMITED & 2 OTHERS [2008]eKLR** viz-

> **"The Arbitration Act, appears to us to envisage two stages when objection may be raised. The first stage is before the award is filed in Court, and the second, after it has been filed. The grounds upon which the applications may be made at the first stage are set out under Section 35 of the Act. The grounds for applications made at the second stage are set out under Section 37 of the Act. The Appellants complaint is not that they were not afforded a hearing during the first stage but during the second stage. Clearly, the failure to serve the Appellants with a notice of the application for enforcing the arbitral award as a judgment denied them a hearing and this offended the rules of natural justice.**
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> > **'If no application to set aside an arbitral award has been made in accordance with Section 35 of the Act, the party filing the award may apply ex parte by Summons for leave to enforce the award as a decree.'**
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> **The procedure as we understand it is that at the conclusion of arbitral proceedings, as those in issue before us, either party may file the arbitral award in Court, (rule 4(1)).**

Upon filing of the award by dint of the provisions of rule 5, the party filing is obliged to notify all parties of the filing. Thereafter any party aggrieved has a right to apply pursuant to Section 35 of the Act for an order setting aside the award for any one, some or all the reasons which are set out under that Section. A careful reading of the rules suggests that ex parte proceedings are eschewed. However if any party wishes to move the Court ex parte, then rule 6 comes into play. One must seek the leave of the Court to enforce any arbitral award. Such an application may only be made where no party has taken steps to move the Court under Section 35 to set aside the arbitral award."

17.The Court's intervention in arbitral process is limited as stated in Section 10 of Cap 49 as follows-

> **"Except as provided in this Act, no Court shall intervene in matters governed by this Act."**

Once an award is issued, as in this case, the Court is restricted to act as provided under Sections 35 and 37, as discussed above. However even under those Sections the Courts have, in discussing arbitral matters, stated that the guiding principle should always be the concept of finality of arbitral process. The Court of Appeal in the following decisions stated thus-

"ANN MUMBI HINGA –Vs- VICTORIA NJOKI GATHARA [2009]eKLR viz-

The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the Court's intervention or facilitation.

To illustrate the point we will cite two United States cases. The first one is the Supreme Court's decision in Hall Street Associates, L.L.C., Petitioner vs Mattel, Inc 552 U.S. – (2008). In this case the Court struck down an arbitration agreement that allowed the Courts to overturn an arbitration award that contained legal errors or factual findings that were not supported by "substantial evidence." The Court recognized that where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the Federal Arbitration Act ("FAA") policy of allowing flexibility to the parties clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced Court review of arbitration awards the Court said, "opens the door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." The Court viewed that as unacceptable outcome especially in light of what it saw as clear language in the text of the "FAA" restricting judicial review to the grounds specifically listed in the statute. The Court held that the goal of flexibility must yield to:-

> **"A national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway."**

This was also the finding in the case **NATIONAL CEREALS & PRODUCE BOARD v ERAD SUPPLIERS & GENERAL CONTRACTS LIMITED [2014]eKLR** viz-

"The Arbitration Act, Act No. 4 of 1995 is based on a Model Law on international commercial arbitration adopted in 1985 by the United Nations Commission on International Law (UNCITRAL). One of the principles underlying the Model Law and in turn the Arbitration Act is the severe restriction on the role of the Court in the arbitral process. That principle finds expression in Section 10 of the Act. Section 35 of the Arbitration Act is itself underpinned by that principle. Our Courts have, since the coming into force of that statute, observed and given effect to that principle. …. In Anne Mumbi

Hinga v Victoria Njoki Gathara [2009]eKLR for instance the Court stated-

> **'Again no intervention should have been tolerated firstly because of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards …."**

18. With that principle in mind I shall proceed to consider the objections raised by the 2nd and 3rd Defendants.

19. The said Defendants submitted that their interest in the property ranked in priority to the agreement between the Plaintiff and 1st Defendant. That the Arbitrator by his award took away their right which had crystallized to an interest in land protected by Article 40 of the Constitution.

20. I have looked at the provisions of Section 37 and I fail to see under which subsection thereof that submission falls under. A close look at that submission, in my view, shows that it amounts to nothing short of the Defendants seeking an appeal from the Arbitrators decision on whether the Defendants charge had priority over the Plaintiff's and 1st Defendant's agreement. The Arbitrator made a finding that the Defendants must have inspected the property, before granting 1st Defendant a loan, which was secured by a charge or entering into a lease agreement over the property. That if they did they found the Plaintiff in possession. The Arbitrator did make a comment that the Defendant who were alleging their charge instrument and the lease took priority failed to avail both documents to the Arbitrator. Further the Arbitrator made a finding that the Lease agreement between Plaintiff and 1st Defendant created a valid contract which at the conclusion of his award he recognized and gave it effect.

21. The above being the finding of the Arbitrator the Defendants cannot seek an appeal from this Court and thereby seek this Court to make a determination on an issue that was before the Arbitrator. That is not permitted under Cap 49. Cases in point are **NAIROBI MISC. APPLICATION NO. 297 OF 2008 KENYA OIL COMPANY LIMITED & ANOTHER –Vs- KENYA PIPELINE COMPANY LTD (2008)eKLR** as follows-

> **"Having considered the application and the rival submissions of the Advocates for the parties, I make a finding that this application is an attempt on the part of the applicants to seek this Court to substitute its discretion for the discretion already exercised by the learned Arbitrator who heard full arguments of the matter. In his wisdom and having considered the totality of the dispute before him, the learned Arbitrator decided on the form of security that should be furnished in this case. I do not think, it is within the powers of this Honourable Court to question the form and nature of security as ordered by the learned Arbitrator."**

Deekay Contractors Limited v Construction & Contracting Limited [2014]eKLR-

> **"The issue of issuance or otherwise of the Certificate under Clause 22 of the agreement is an issue of fact and as an Arbitrator is the master of facts, this Court cannot fault facts as had been captured by the Arbitrator. See the cases of KENYA OIL COMPANY LIMITED & ANOTHER v KENYA PIPELINE COMPANY [2014]eKLR, MORAN v LLOYDS (1983)2 ALL ER 200 and DB SHAPRIYA & CO. v BISHINT (2003)3 EA 404, where there is judicial consensus that-**
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> > **'All questions of fact are and always have been within the sole domain of the Arbitrator … the general rule deductible from these decisions is that the Court cannot interfere with the findings of facts by the Arbitrator."**

22. My discussion in response to the Defendant's submissions above apply to the Defendants' objection to the adoption of arbitral award on the ground the Plaintiff was time barred in referring

the dispute to the Arbitrator. The Counsel for the Defendant submitted that the fourteen (14)| days within which the Plaintiff should have referred the dispute to the Arbitrator was falling on 11th June 2009. That the referral was late by 350 days and therefore that the proceedings before the Arbitrator were time barred.

23. The Arbitrator made a finding that plea of time barred should have been raised as a Preliminary Objection and went further to find that the arbitral process was not time barred because the Court of Appeal in entertaining the application under Rule 5(2) (b) ordered the Plaintiff to initiate the arbitration within 28 days. That was the finding of the Arbitrator and the objection on that finding, in my view, not falling within the provisions of Section 37 of Cap 49 this Court cannot interfere with the same. This Court is not an Appellate Court to the Arbitrator.

24. Justice Koome by the Ruling on the injunction application stated that the 2nd and 3rd Defendants were not parties to the agreement where the Arbitration Clause was contained. The learned Judge proceeded to find that-

> **"there is no legal basis for issuing orders against them (2nd and 3rd Defendants)."**

The Defendant therefore submitted that the Arbitrator in finding otherwise was against the doctrine of *res judicata*.

25. It is correct to state that the 2nd and 3rd Defendants were not party to the Arbitration Clause. However the Court of Appeal in their Ruling as per R.S.C Omolo J.A stated thus-

> **"The 2nd and 3rd Respondents got entangled in the dispute between the Applicant and the first Respondent and the 2nd and 3rd Respondents must either wait for the dispute to be resolved or get involved in the resolution of the dispute."**

26. The 2nd and 3rd Defendants fully participated in the arbitration. They filed defence and submitted before the Arbitrator extensively. They did not object to their involvement in the arbitral process. It is therefore late in the day to raise that objection. That objection also has no basis in law. It is rejected.

27. There is no ground of objecting to the adoption of the arbitral award on the basis that it goes against public policy under Section 37. The Defendants are therefore precluded from raising that objection.

28. The Defendants raised an objection relating to the provisions under Section 36 that the Plaintiff had failed to file, the original or certified copy of the arbitral award and the original or certified copy of the arbitration agreement. That objection in my view is well taken. I have perused the Court file and I was unable to trace the original award or arbitration agreement. Both Section 36(3) of Cap 49 and Rule 4 of The Arbitration Rules require that the original or certified copies of the award and arbitration agreement be filed first before the application for adoption of the award is filed. The Plaintiff failed to so file. That in my view is a breach which cannot lead to the dismissal of the application. It is a failure that only attracts the striking of the Plaintiff's application. It is a procedural breach.

29. In the end therefore the orders of the Court are-

a. **The objections raised by the 2nd and 3rd Defendants seeking the Court to substitute its discretion to that of the Arbitrator are rejected and dismissed.**

b. **The Chamber Summons dated 17th July 2013 is hereby struck out with costs because the Plaintiff failed to supply the original or certified copies of the award and arbitral agreement.**

It is so ordered.

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE