REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELENOUS SUIT NO. 232 OF 2014

CONSOLIDATED WITH MISC NO. 105 OF 2014

JOSEPH NJOGU NJUGUNA…….....APPLICANT

- VERSUS -

KEVIN LEWIS SAFARI…....…….RESPONDENT

RULING

1. The application before the court was brought pursuant to the provisions of Section 35 (2) (iii) of the Arbitration Act. It is an application which seeks the setting aside of the Arbitral Award dated 21st January 2014.
2. The following are the grounds upon which the application is based;

> *"a) The Applicant was not given proper notice of the arbitral proceedings and was unable to present his case as his then advocates, Messrs Kang'ahi & Associates Advocates failed to attend at the hearing of the arbitration.*
>
> *b) The Arbitral Award was made without giving the Applicant the opportunity to present his case.*
>
> *c) The essence of an arbitration is to allow both parties a fair chance to present their case, and this was not done in the case herein.*
>
> *d) The Applicant was therefore condemned unheard in contravention of the rules of natural justice.*
>
> *e) That it is in the interest of justice that the orders sought should be granted".*

3. It was applicant's case that he was not given a fair chance to present his case. As a result, the hearing of the case before the Arbitrator did proceed in the absence of the applicant.

4. The advocates for the applicant also failed to attend the proceedings.

5. Apart from failing to attend the proceedings before the Arbitrator, the applicant's advocates are

said to have failed to file the applicant's Defence.

6. The applicant pointed out that the failure, by his advocates, to file a Defence, did persist even after the said advocates had been granted a generous extension of time.

7. Having been absent at the hearing, the applicant feels that if the resultant award was not set aside, so that he could thereafter be afforded an opportunity to put forward his Defence, he would suffer injustice, irreparable loss and damage.

8. When canvassing the application, Mr. Mungai, the learned advocate for the applicant pointed out that his client was condemned un-heard.

9. I understood the applicant to be saying that if he had been heard, he would have put forward a formidable defence.

10. The said defence included the fact that whilst there was an agreement between the Applicant and the Respondent, the goods which the Respondent was selling did not belong to the Respondent. Apparently, the goods belonged to a limited liability company. In the result, the Applicant believes that there was a failure of consideration, on the part of the Respondent.

11. Secondly, the Applicant said that payment was made to the Respondent, to the tune of Kshs. 10,990, 000/-, which was more than the agreed purchase price, which was Kshs. 10,940,000/-.

12. The payment was not made by the Applicant, but by a company named **GOLD PACK INVESTMENTS.**

13. In answer to the application, the Respondent's advocate, Mr. Muchoki emphasized that the application did not fall within the ambit of Section 35 of the Arbitration Act.

14. Secondly, the Respondent submitted that the Application was filed too late, as it was not made within the time-span spelt out by Section 34 of the Arbitration Act.

15. As far as the Respondent was concerned, the lethargy shown by the Applicant disentitled him from the court's discretion.

16. In respect to the cheques which were used to pay the Respondent, it was pointed out that the Applicant was a Director of the company which made the payments. Furthermore, the person who gave the cheques to the Respondent was the applicant.

17. In any event, the Applicant was said to have failed to tell this court his reasons for failing to pursue the Arbitration process. If the mistake was made by the advocate for the Applicant, the Respondent reasoned that that mistake should not be visited upon him.

18. Finally, because of the very limited role of courts in cases which had gone through arbitration, the Respondent urged this court not to look at the draft Defence. If the court were to look at the draft Defence, that would be tantamount to re-opening the case, submitted the Respondent.

19. In Reply to the submissions of the Respondent, the Applicant suggested that the Respondent had sought to use the Arbitration process to enforce an illegality.

20. In effect, the Applicant delved further into the merits of his draft Defence. However, the Applicant did not address the concerns raised by the Respondent, who had submitted that the defence ought not to be looked at all.

21. In determining this application, I must start from the issue of jurisdiction. Section 35 (2) (a) and (b) of the Arbitration Act specifically tells the High Court about the instances in which it can

set aside arbitral awards. That section stipulates that;

"An arbitral award may be set aside by the High court only if –

a. *The party making the application furnishes proof –*

   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 an 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 failing 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 the agreement was in conflict with a provision of the 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; or*
   ii. *The award is in conflict with the public policy of Kenya".*

22. The applicant herein has expressly stated that his application was based on Section 35 (2) (iii) of the Arbitration Act. In effect, his assertion was that he was not given a proper notice of the arbitral proceedings, thus rendering him unable to present his case before the arbitral tribunal.

23. To my mind, the Applicant's submissions which touch on the perceived strength of his Defence, are not relevant to the Application. I so find because there is no provision in Section 35 (2) which stipulates that if a person can show that he has a good defence to the matter which had been determined by an arbitrator, he should be given an opportunity to present his said Defence either before the High Court or at a new arbitral process.

24. Indeed, the High Court is precluded from assessing the strength or otherwise of a Defence which was not made available to the arbitral tribunal. I say that the High Court is so precluded because Section 35 (2) says that the High Court may set aside an arbitral award *"only if"*, the applicant brings an application which fits in with one or more of the specified circumstances.

25. None of the specified circumstances suggests that when the person can demonstrate that he had a good defence, he may persuade the court to set aside the arbitral award.

26. I believe that when a party has a good defence, he ought to make it available before the arbitral tribunal.

27. If the party did not get a proper notice of either the appointment of the arbitrator or of the arbitral proceedings, he would be unable to put forward his defence.

28. In those circumstances, it is not the strength of the defence which would persuade the court to set aside the award. The court would set aside the award because of the lack of proper notice.

29. It therefore follows that when a party had been given proper notice of the appointment of the arbitrator and also of the arbitral proceedings, he cannot thereafter persuade the High Court to set aside the award, even if he had a formidable defence.

30. In this case, the Applicant expressly conceded that his lawyers were well aware of the arbitral proceedings.

31. He also admitted that the said lawyers were given a generous extension of time to file a Defence. However, no defence was actually filed.

32. Notwithstanding the failure by the applicant to file a defence, the arbitrators did not treat that as an admission of liability. In other words, the arbitrator still insisted on having evidence led, so as to prove the case of the Respondent herein.

33. On the basis of the Applicant's own concessions, he was definitely well aware of the arbitral proceedings. I say so, not because the applicant was personally served, but because his lawyers were duly served.

34. The Applicant's lawyers had implied authority to accept service of the Notices on his behalf.

35. The lawyers also had implied authority to file a defence, as well as to prosecute it before the arbitral tribunal.

36. Therefore, I find and hold that the service of the Notices upon the advocates who were on record for the Applicant was proper.

37. The Applicant had every opportunity to not only file his defence but to also canvass it before the arbitrator. There was no hurdle which was placed in the Applicant's path by either the arbitrator or by the Respondent.

38. If his lawyer failed him, the Applicant cannot blame that failure on either the Respondent or on the arbitrator. And if the arbitrator and the Respondent cannot be blamed for the failure of the Applicant's lawyers, it would be unreasonable to use such a failure as a basis for setting aside award.

39. I note that the Applicant has not, in any event, offered any explanation to the court concerning the steps he took to safeguard his legal rights when the matter was before the arbitrator. It is not good enough for a party to simply say that because he had instructed a lawyer, he expected the lawyer to file pleadings and also to thereafter prosecute his case.

40. I am in agreement with the following sentiments of Kimaru J. in **SAVINGS & LOANS LIMITED VS SUSAN WANJIRU MURITU, MILIMANI HCCC No. 397 of 2003;**

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to the litigant and not the advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case".

41. In this case, if the Applicant had been diligent, he would have become aware of his advocate's failure to file a defence. He would thereafter have taken steps to remedy the situation timeously, especially considering that the Applicant has conceded that the arbitrator did give to his lawyers, a generous extension of time.

42. I have also given due consideration to the award. I noted that the arbitrator addressed each

and the every point which the Applicant now says, would constitute a good defence.

43. As alluded to earlier, it is not the role of the court to evaluate the correctness or otherwise of the arbitrator's determination. In so saying, I am not suggesting that the determination or any part thereof was wrong. I am only saying that the jurisdiction of the High Court is limited by statute, when it is called upon to set aside an arbitral award. The limited jurisdiction does not enable or empower the court to consider the correctness or otherwise of an award, as a basis upon which an award would either be set aside or be recognized by the court.

44. It is sufficient that the arbitrator gave due consideration to the issues and thereafter determined the issues.

45. The only point upon which the Applicant sought the setting aside of the award, was not proved. Accordingly, there is no merit in the application.

46. It is therefore dismissed, with costs to the Respondent.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **2nd day** of **June 2015**.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Macharia for Mungai for the Applicant

Muchoki for the Respondent

Collins Odhiambo – Court clerk.