



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 513 OF 2013
IN THE MATTER OF THE ARBITRATION ACT, 1995
&
IN THE MATTER OF AN ARBITRATION
BETWEEN
KENYA PORTS AUTHORITY..... APPLICANT
AND
BASELINE ARCHITECTS.....1ST RESPONDENT
TAMCON ASSOCIATES.....2ND RESPONDENT
FERRADON ASSOCIATES.....3RD RESPONDENT
COSTWISE ASSOCIATES.....4TH RESPONDENT

RULING

1. The Applicant herein filed the Originating Summons dated **5th December 2013** on **6th December 2013** seeking to set aside the arbitrator's ruling of **16th July 2013** on jurisdiction.
2. In response, the Respondents filed the Notice of Preliminary Objection dated **16th January 2014** on even date with a view of arguing the following preliminary point:
 1. ***The application is time barred by the express provisions of Section 17 (6) of the Arbitration Act, 1995 having regard to the Arbitral Tribunal's decision on jurisdiction which was rendered on or about 12th March, 2013.***
 3. The parties filed written submissions with regard to the Preliminary Objection, which submissions were highlighted before me on **5th March 2014**. Mr.Kiche holding brief for Mr. Ohaga appeared for the Respondents while Mr. Munyalo appeared for the Applicant.
 4. Counsel for the Respondents relied on the Respondents' submissions filed on **28th January 2014**.

- It was his submission that the Applicant's Originating summons was premised on **section 17 (6)** of the **Arbitration Act**. He went ahead to submit that the said application was time barred subject to the aforesaid section and for that reason it was to be dismissed.
5. In opposition to the Preliminary Objection, Mr. Munyalo submitted that the Preliminary Objection was directed to prayer 1 of their Originating Summons. It was his submission that even if prayer 1 was time barred, which the Applicant denied, it would not affect prayer 2 for review.
 6. He further submitted that section 17 (6) was premised on the understanding that the application should have been made within 30 days. However, Counsel was of the view that the said rule could not apply to the applicant's case as the application before the arbitrator was not brought under the said section. He submitted that the section only applied if they came to the High court then and not before the arbitrator.
 7. It was further Counsel's submission that after the arbitrator gave his award they came across the Court of appeal ruling in **Davies & Another vs. Ministry (1973) E.A 463** which declared **clause A.7** of the **4th schedule** of the **Architects and Quantity Surveyors Act** null and void. According to Counsel the arbitrator had found jurisdiction based on clause A.7 which Counsel now submitted had been declared a nullity by the court of appeal case. Counsel informed the Court that when the Applicant went back to the arbitrator for a "re-consideration" based on the **Davies case (supra)**, the arbitrator declined stating that he had no jurisdiction to reconsider his award. This is when the Applicant decided to move to the High Court for a review of the said award and consequently the review of the ruling delivered on **16th July 2013**.
 8. It is submitted by Counsel for the Applicant that when they came to the High Court, they did so within 30 days as per Section 17 (6) of the Arbitration Act and the Applicant was therefore within time. He further submitted that the issue of jurisdiction had never been addressed and that the Applicant was never given a chance under section 13 of the Arbitration Act to select an arbitrator.
 9. In reply, Counsel for the Respondents submitted that the case of **Davies & Another vs. Ministry (supra)** which was determined even before the Arbitration Act, 1995 was promulgated did not hold any water in the new constitutional dispensation which also allows for arbitration. He further submitted that the arbitrator was competently appointed and that the submission by counsel for the Applicant that they were not given a chance to appoint an arbitrator was not correct. On that note, Counsel pointed out that, in any case the Applicant did not come to court to challenge the appointment of the arbitrator.

ANALYSIS

10. I have considered the pleadings herein, the submissions by counsel and the authorities cited. I take the following view of the matter. The celebrated decision in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited**, still remains good law insofar as matters can be raised before Court by way of Preliminary Objection.
11. The Respondents have raised one main point of law that the application as filed by the Applicant is time barred with regard to **section 17 (6)** of the **Arbitration Act**. The aforesaid section states thus:-

“(6) 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.”
12. The above section in my view is straight forward. The party aggrieved by the ruling of the arbitral tribunal on the issue of jurisdiction has the option to apply to the High Court to determine the matter within 30 days of receiving the notice of the Ruling.
13. In the Originating Summons, the Applicant is seeking for prayers that this Honourable Court be pleased to set aside the Arbitral Tribunal's ruling on jurisdiction dated **13th November 2013** as well as the one dated **12th March 2013** and delivered on **16th July 2013**.
14. As I view it, the Applicant did not at the first instance raise an issue with the ruling delivered on **16th July 2013** by the arbitral tribunal. However, after the Applicant came across the authority of

- Davies & Another vs. Ministry (1973) E.A 463** as mentioned above, they went back to the arbitral tribunal for a reconsideration of the issue of jurisdiction as Counsel puts it. According to the Applicant this was a new matter that was not known to the parties at the time the tribunal rendered its ruling on **16th July 2013**. The same is not disputed.
15. The Arbitral tribunal, vide its ruling dated **13th November 2013** held that it had no jurisdiction to review its earlier ruling delivered on **16th July 2013** hence the current Application by the Applicant. Therefore the question is, did the Applicant file the current application within 30 days as envisaged in **section 17 (6)** of the **Arbitration Act**? The answer is in the affirmative. The application herein was filed on **6th December 2013**, which is sixteen (16) working days after the ruling of **13th November 2013** was delivered.
 16. In my view, Prayer No. 1 in the Application filed by the Applicant is a direct result of the ruling dated **13th November 2013**. In that case, it cannot be said that the time limit of thirty (30) days in **section 17 (6)** of the Arbitration Act started running from **16th July 2013**. To construe it as such will amount to repressing the Applicant's right to approach this Court. I will add that, as much as the latter ruling of **13th November 2013** ruled that it did not have jurisdiction to review its earlier decision, it cannot be overlooked that the substantive issue the Applicant was seeking therein was still that of jurisdiction.
 17. In any case, the section in question is not couched in mandatory terms. Further, there is no provision in the said Act that the aggrieved party is barred from making the relevant application to the High Court once the said thirty days have lapsed. It is also worthy to note that this Court is enjoined to do substantial justice to the parties under **section 3A** of the **Civil Procedure Act**.
 18. In the upshot, the Notice of Preliminary Objection dated **16th January 2014** is dismissed with costs to the Applicant.

DATED, READ AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Tebino holding brief for Munyalo for Applicants

Kiche for Respondents

Teresia – Court Clerk