REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 295 OF 2008

IN THE MATTER OF: THE ARBITRAITON ACT, 1995

AND

IN THE MATTER OF: ARBITRAITON

BETWEEN

MOHAWK LIMITED …… CLAIMANT

AND

LEO INVESTMENT LIMITED …….. 1ST RESPONDENT

R. S. GILL T/A/ GILL CONSULT …… 2ND RESPONDENT

R U L I N G

1. The Plaintiff/Applicant filed a Chamber Summons dated 24th May 2013 brought under the provisions of **section 37** of the *Arbitration Act* and **Rule 9** of the *Arbitration Rules, 1997*, seeking the leave of this Court to have the arbitration award made by Hon. Rtd. Justice E. Torgbor on 11th August 2011 entered, filed and adopted by this Court. The second prayer sought was that this Court be pleased to enter Judgement for the Plaintiff in terms of the said award. The grounds in support of the application noted that that by consent of the parties the proceedings herein were stayed (pending arbitration) 11th June 2008. As a result of the arbitration, the Plaintiff was given a final award in its favour. After the delivery of the award, the Defendants/Respondents filed an application under section 35 of the Arbitration Act seeking to set-aside the award on the grounds of misconduct but had failed to take any steps to prosecute the said application for a period in excess of 18 months. It was noted that the contract signed between the parties hereto have expressly recognised the fact that the decision and award by the arbitrator was to be final and binding on both parties.
2. The Plaintiff's Application was supported by the Affidavit of its advocate on record one **Philip Kisaka Sikolia** sworn on 24th May 2013. The deponent noted that the consent order recorded by the parties in Court on the 11th June 2008 and after they had failed to agree upon an arbitrator, Justice (Rtd.) Edward Torgbor had been duly appointed by the chairman of the Architectural Association of Kenya as the sole arbitrator. The arbitration was eventually concluded and an Award made by the arbitrator on 11th August 2011. The deponent noted the application by the Defendants/Respondenta had been filed only a week before the expiry of the statutory 60 day

period in which the Defendants as Respondents had to file their application to set aside. He noted that the said application had not been served upon the arbitrator as required. In the deponent's view the Defendants/Respondents' application was scandalous, frivolous and/or vexatious being based on unsubstantiated allegations.

3. The Defendants and Respondents filed a Notice of Preliminary Objection on 10th of July 2013 detailing that the Application of the Plaintiff/Applicant was incompetent and a nullity as it could not apply for Judgement while there was pending before Court an application for setting aside the Arbitral award. Further, the Application in the view of the Defendant/Respondent was *res judicata* in view of the Ruling of **Mutava J.** delivered on 12th October 2012 that stopped the Plaintiffs/Applicants' from responding to the Defendant/Respondent's application through a contra application. Both parties filed written submissions in relation to the Preliminary Objection as directed by Court.
4. The Defendants/Respondents outlined their objection to the Plaintiff/Applicant's application for judgement on the two grounds as indicated above. As regards the position whereby the Plaintiff/Applicant could not apply for judgement from an arbitral award while the application for setting aside that award was still pending before court, the Defendants/Respondents pointed to the provisions of **section 35 (1)** of the *Arbitration Act* detailing that:

> **"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)."**

The Defendant/Respondent also pointed to the provisions of **Order 46 rule 16** of the *Civil Procedure Rules, 2010*. It quoted **Rule 16 (3)** as follows:

> **"Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit."**

The Defendants/Respondents submitted that the specific wording of the provisions as above presupposed that an application for setting aside an arbitral award has to be heard before judgement can be given in accordance with the award and, in the event that an award is set aside, it shall be superseded. They noted that the Award had been delivered on the 11th August 2011 and the Application to set aside was dated 4th October 2011. They detailed that the said application still remains pending before the court as it had not been fully determined. The Defendants/Respondents gave no excuse as to why an application filed on 4th October 2011 had not come to hearing before court to date. However, they maintained that in light of **Order 46 Rule 18** of the *Civil Procedure Rules, 2010,* judgement could only be entered in accordance with the arbitral award in three scenarios namely:

a. were no application to set aside the award has been filed
b. where such an application was filed and has subsequently been heard and determined and no other application has been made within the time allowed or
c. when such an application has been heard and refused.

5. As regards the *res judicata* point, the Defendant/Respondent referred to **section 7** of the *Civil Procedure Act*. They noted that an application had been made by the Plaintiff/Applicant dated 24th May 2012 (not 2013 as detailed in the Defendants/Respondents' submissions) in which it had sought to reply to the Defendants/Respondents' application to set aside the arbitral award, through a contra application. **Mutava J.** had delivered a Ruling on 11th October 2012 in which he had stated at paragraph 10 thereof:

> **"my perusal of the application of 17th May 2012 whilst cushioned in terms seeking to strike out the application to set aside is itself misplaced as a party cannot respond to an application through a contra application".**

It was the Defendants/Respondents' submission following upon the said Ruling as above, that the Plaintiff/Applicant cannot seek to respond to such an application by way of the similar Notice of

6. The Plaintiff/Applicant's submissions put forward the much quoted viewpoint that a Preliminary Objection should consist of a point of law which has been pleaded, or which by clear implication, arises out of the pleadings and which, if argued as a preliminary point, may dispose of the suit. The Plaintiff/Applicant detailed that such a Preliminary Objection was premised on the fact that all the facts as stated by the other party are not contested but rather that the application is fatally defective for not complying with the law. It pointed to the holding in the case of **Anthony Kegode & Anor. v Four Ninety Investment Ltd & 3 Ors (2006) eKLR** as well as that in **Nelion Soap Industries Ltd v Diamond Trust Bank Kenya Ltd (2004) eKLR**. The Plaintiff/Applicant then went on to point out the provisions of **section 37** of the *Arbitration Act* more particularly sub paragraph **(2)** which reads:

> **"If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi) , the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."**

The Plaintiff/Applicant reasoned that this Court where finding the existence of an application to set aside the award, could not dispose of an application for enforcement. It could only be a reason to adjourn the making of an enforcement order. It emphasised that the Defendants/Respondents had filed their application to set aside the Award on 6th October 2011, and had taken no steps to prosecute the same, resisting all attempts by the Plaintiff/Applicant to have the same determined or dismissed. This had been prejudicial to the Plaintiff/Applicant in that the Arbitration proceedings having been concluded over two years ago (from the delivery of the award), it had still not been able to realise the fruits thereof. Lastly on this point, the Plaintiff/Applicant noted that the Defendants/Respondents had put forward the argument that under **Order 46 Rule 16**, an application for setting aside the award was a bar to enforcement or recognition of the same. The Plaintiff/Applicant submitted that **Order 46** was only applicable where arbitration was subject to an Order of Court.

7. As regards the submissions of the Defendants/Respondents that the Plaintiff/Applicant's application was *res judicata,* the Ruling of **Mutava J.** was in respect of an application by the Plaintiff/Applicant seeking to dismiss the Defendant's application to set aside the award for want of prosecution. Not wishing to delve into the merits of the said Ruling, the Plaintiff/Applicant submitted that the present application, as well as the grounds upon which it is founded, had never been issues determined previously by any court. Further, it did not consider that the application before this Court could be said to be a contra application in response to the Defendants/Respondents' application to set aside. Finally, the Plaintiff/Applicant agreed that a Preliminary Objection should consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which, if argued as a preliminary point, may dispose of the suit. It maintained that what the Defendants/Respondents were seeking to achieve by raising what it termed "this misconceived preliminary objection" was to deny the Court an opportunity to consider all the facts of the case and render justice.
8. The heading to **Order 46** quite clearly reads:

> **"Arbitration under Order of a Court".**

However the body of the Order deals with matters raised before the Court in enforcement proceedings or setting aside awards. I do not consider that the Order relates only to arbitrations which have been instituted by Order of Court. In any event, by an Order made on the 15th January 2009 by **Khaminwa J.** the Court directed the Chairman or the Vice-Chairman of the Architectural Association of Kenya to appoint an arbitrator. It seems to me that the arbitration before Justice (Rtd.) Edward Torgbor was, in fact, ordered by Court and consequently **Order 46** necessarily applies. I find against the Plaintiff/Applicant on this point. Similarly, I have perused the provisions of **Order 46 Rule 18** of the *Civil Procedure Rules, 2010*. I believe that the strict interpretation of that Rule clearly indicates that

the Court shall, on request by any party, enter judgement according to the award except where an application **under rules 13, 14 or 16** has been heard and determined. (Emphasis mine). **Rule 16** under that Order clearly provides the power for the Court for setting aside an award on the grounds detailed therein. As a consequence, I find myself in agreement with the Defendants/Respondents that their application dated 4th October 2011 needs to be heard first before this Court can hear and determine the current Application before it.

9. As regards the *res judicata* point raised by the Defendants/ Respondents, it is correct that the Application determined by the Ruling of **Mutava J.** dated 11th October 2012, was before Court seeking to strike out and dismiss the Defendants/Respondents' application to set aside the award dated 4th October 2011. As I understand the matter considered by the Judge, it was whether a Notice of Motion application could be brought seeking to strike out a Chamber Summons application. The Judge seemed to have narrowed down the issue as to whether a Chamber Summons application can be termed as a pleading. As a consequence, the Judge found that the Chamber Summons application of the Defendants/Respondents dated 4th October 2011 was not and did not fall in the definition of "pleading". As such he consequently allowed the Defendants/ Respondents' Preliminary Objection that the application sought to be struck out, was not a pleading capable of being struck out. On the second point of the Preliminary Objection raised by the Defendants/Respondents under **Rule 7** of the *Arbitration Rules*, the Judge ruled that in seeking to strike out the application to set aside the award, the application of the Plaintiff/Applicant dated 17th May 2012 was misplaced, as he was of the view that a party cannot respond to an application through a contra application. I have no doubt that having been rebuffed by **Judge Mutava** as above, the Plaintiff /Applicant now seeks to try his luck before this Court in what amounts to a rephrased Application. In my view, the two Applications being different in content and in terms of the Orders sought, I do not consider the current Application before Court to be *res judicata* and I concur with the Plaintiff/Applicant's viewpoint in this regard.
10. However, as I have found that **Order 46 Rule 18** leaves no doubt that the Defendant/Respondent's Application to set aside the award should be heard and determined first prior to the Plaintiff/Applicant's Application dated 24th May 2013, I suspend the hearing of the same. Either one party or the other or both may now take a date for the hearing of the Defendants/Respondents' Application dated 4th October 2011 at the Registry on a priority basis. In view of my suspending the Plaintiff/Applicant's said Application, I make no order as to costs as regards this Ruling.

DATED and delivered at Nairobi this 9th day of October, 2013.

J. B. HAVELOCK

JUDGE