REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 914 of 2011

KENYA AIRPORTS AUTHORITY …….....……. PLAINTIFF

Versus

NAIROBI FLYING SERVICES LIMITED …….....…….. DEFENDANT

R U L I N G

1. The Plaintiff filed an ex parte Originating Summons herein under Certificate of Urgency on 29 June 2012. On that day my learned brother Musinga J. certified the same as urgent and had the file placed before me for determination of the Application. The Plaintiff duly served the Application upon the Defendant who responded by filing a Notice of Appointment as well as a Notice of Preliminary Objection on the 2 July 2012. The Defendant maintained in its Preliminary Objection that the Plaintiff\'s Application offends the provisions of **section 35 (3)** of the Arbitration Act. The Defendant put forward the view point that this court lacks jurisdiction to extend time as regards the three month period prescribed under **section 35** of the Arbitration Act, for challenging the Arbitral Award. The Defendant pointed out that the three month period had long lapsed. It also detailed that the Application has been brought under wrong and inapplicable provisions of law, is not known to the law and is consequently defective. Further, the Defendant maintained that the Application is an abuse of the court process.

2. When counsel for both parties appeared before me on 4 July 2012, Mr. Ibrahim for the Plaintiff indicated that he was ready to proceed with the Application and would like both the Application and the Preliminary Objection heard together. Mr. Kaluma for the Defendant did not agree with that approach and after a short argument I directed that the Preliminary Objection should be heard first, before me, on 6 July 2012. Thus, it was on that date that Mr. Kaluma submitting first, detailed that the nature of the Defendant\'s objection was that the court does not have jurisdiction to entertain the Application for an order for the extension of time to challenge the *Interim Award (No. 2)* of the Arbitrator R. O. Kwach, retired Judge of Appeal, dated 8 September 2011. Counsel noted that the period for setting aside and challenging an award under **section 35 (3)** of the Arbitration Act, is limited to 3 months. There is no provision under that Act for extension of time. Counsel further submitted that **section 10** of the Act made it quite clear that no court should intervene in matters governed by the Act. He noted that the Plaintiff\'s Application had been brought under other statutes and he maintained that those did not apply to matters of arbitration and cannot be invoked in cases where extension of time is being sought. He observed that the Plaintiff\'s application had been brought under **Order 37 Rule 6** of the *Civil Procedure Code* as well as **section 27** of the *Limitation of Actions Act*. He emphasised that those provisions do not apply and cannot

be relied upon by the court for jurisdiction to extend time to upset an Award. He submitted that the application was not only misconceived but an abuse of this court\'s process.

3. Mr. Kaluma went on to state that he had filed a List of Authorities but particularly wanted to draw this court\'s attention to the case of **Anne Mumbi Hinga v Victoria Njoki Gathara** being *Civil Appeal No. 8 of 2009* (2009)eKLR. He stated that the Appellant in that case had maintained that she had not been notified of the Award until more than three months after it had been delivered. Mr. Kaluma referred me to page 13 of the authority and submitted that what the Court of Appeal had confirmed in those circumstances, are relevant to this matter. This court has no jurisdiction to handle the application and should strike it out. The other authorities in Mr. Kaluma's List only support the position as detailed in the **Hinga** case. I was referred to the judgement of the Ransley J. in **Mahican Investments Ltd and 3 others v Gaida & 73 others & Caluwa Ltd** (2005)eKLR at page 8. Counsel contended that the Application should be struck out so that the Arbitration process can be continued.

4. In his turn, counsel for the Plaintiff stated that the Preliminary Objection is opposed. He immediately conceded that whatever Mr. Kaluma had said in relation to the Arbitration Act was correct. However, the Application had not been brought under the provisions of that Act. The arbitration Award which the plaintiff was seeking to challenge was made under the provisions of **section 33 (1)** of the *Kenya Airports Authority Act* and not under the provisions of the *Arbitration Act*. All the objections raised by counsel for the Defendant are objections in relation to the Arbitration Act. In counsel\'s opinion that Act does not apply to an arbitration under the Airports Authority Act. The submission is supported by the decision in **Giant Holdings Ltd. v Kenya Airports Authority** being *HCCC No. 694 of 2003* as per Ojwang J at page 84. That position was also confirmed in the case of the **World Duty Free Company Ltd v Kenya Airports Authority & 2 others**, *HCCC No. 684 of 2006* as per Nambuye J. at page 35. Counsel maintained that an arbitration under the *Kenya Airports Authority Act* was a special and independent procedure. He maintained that even if the *Arbitration Act* was to apply, the *Arbitration Rules 1997* **rule 11** provided that the *Civil Procedure Rules* apply to the Rules under the Arbitration Act inasmuch as they are appropriate. Counsel for the Plaintiff agreed that the Arbitration Act has no provision for extension of time, that is under the Limitation of Actions Act under which the Plaintiff had rightly brought its Application. Counsel wrapped up his submissions by stating that the Preliminary Objection has no validity – it would only have been so if the Arbitration Act had been applicable to the arbitration.

5. In reply counsel for the Defendant submitted that **section 33 (1)** of the Kenya Airports Authority Act only dealt with two issues. The first is that disputes should be handled through arbitration by the appointment of an arbitrator by the Chief Justice. It does not provide for the substantive law under the arbitral process. Counsel submitted that once the arbitrator is appointed, the arbitral process will come under the provisions of the Arbitration Act. He pointed out that the procedure had been agreed between the parties and that the arbitral process had proceeded under the provisions of the Arbitration Act – this is a matter of fact and not submission. He went on to say that as regards the **Rule 11** of the Arbitration Rules, he would once again refer the court to the **Hinga** authority, detailing that the Rule cannot supersede **section 10** of the *Arbitration Act*, in any event.

6. I am very much aware that the **Hinga** authority is a judgement of the Court of Appeal which is binding upon me. First of all, the judgement in referring to Part VI of the Arbitration Act found that under the title heading of ***"Recourse to the High Court against Arbitral Awards"***, the implication was that the High Court has no other power as against an arbitral award outside the provisions of **sections 35** and **37** of the Arbitration Act. The Application here is not brought under the provisions of the Arbitration Act. According to the heading of the ex-parte Originating Summons the same and is brought under **Order 37 Rule 6** of the *Civil Procedure Rules*, as well under **section 27** of the *Limitation of Actions Act*. At page 13 of the **Hinga** case, the Court stated:

"**A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the Superior Court clearly shows that, all the provisions including the Civil Procedure Act and Rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: *"except as provided in this Act no court shall intervene in matters***

governed by this Act". **In the light of the above, the Superior Court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgement/decree arising from the award. In this regard we note that because of the number of applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where the Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the Superior Court to intervene and all the applications filed against the award in the Superior Court should have been struck out by the court *suo moto* because jurisdiction is everything as so eloquently put in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (1989) KLR 1.*"**

In my view, what the Court of Appeal was saying as quoted above, was that no matter how you disguise an application, no matter what heading you put to it, if it involves arbitration proceedings then only the provisions of the *Arbitration Act* can apply thereto.

7. In the same authority, the Court of Appeal also considered the position as regards a challenge to an award under the provisions of **Section 35** of the *Arbitration Act*. It had this to say at page 14:

"**besides the issue of jurisdiction as explained above, Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award.**"

The Defendant also referred me to the case of **Mahican Investments Ltd & 3 Others v Gaida & 79 Others (2005) eKLR**. In that case, **Ransley J** found that:

"**A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.**"

Finally, the Defendant laid before court the Court of Appeal decision in **Joseph W. Karanja & Anor. v Geoffrey N. Kuira (2006) eKLR**. This authority dealt with matters of arbitration procedure which I could not see was relevant to this particular Application.

8. In turn, the Plaintiff put before court two authorities both Rulings of High Court Judges. The first (in time) was that of **Ojwang J** in **Giant Holdings Ltd v Kenya Airports Authority** *HCCC 694 of 2003*(unreported). The learned Judge considered in that matter the question of jurisdiction of the Superior Court. He noted that **section 33 (1)** of the *Kenya Airports Authority Act* (Cap. 395) states:

"In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and where any person suffers damage no action or suit shall lie that he shall be entitled to such compensation therefor as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice."

The learned Judge asked himself the question as to whether this was an independent procedure of conflict resolution or was it subject to the provisions of the *Arbitration Act, 1995*. It is to be noted that no authority was put before the learned Judge in support of either proposition. However the Judge went on to say:

"the position in my considered opinion is that s.33(1) of the Kenya Airports Authority Act provides *an independent, special procedure of dispute resolution by arbitration*. It cannot be subject to the provisions of the Arbitration Act, as no canon of statutory interpretation will support the proposition made by counsel for the plaintiff. Whereas the Arbitration Act is certainly a basis for consensual arrangements between the parties, and also does provide for the role of the Court at the very beginning, s.33 of the Kenya Airports Authority Act is more mandatory in its statement of the first forum of dispute resolution; that forum is the arbitrator, and not the court."

It is to be noted that Ojwang's Ruling was delivered on the 3rd day of June, 2005.

9. The second authority laid before court by the Plaintiff was that of **World Duty Free Company Ltd T/A Kenya Duty Free Complex v Kenya Airports Authority & 2 Others**\' *HCCC 684 of 2006*as per **Nambuye J**. That Ruling was delivered on 11 May 2007. At page 35 of her Judgement, the learned Judge had this to say:

"Issue was raised about non-compliance with the provisions of the Kenya Arbitration Act No. 4 of 1995. In response to this, this Court fully agrees with the reasoning of J. B. Ojwang J. in Giant Holdings Ltd versus KAA Nairobi HCCC 694 of 2003 at page 84 of the ruling, that the procedure provided for under Section 33 (1) is a special and independent procedure and it has no linkage to the procedure under Act No. 4 of 1995. This is so because section 33 (1) of the Act does not provide that link. This court however cannot go into enquiries as to what rules the arbitrator appointed under that Section is to apply as that will be mere conjecture as it was not one of the issues raised."

Regretfully, I do not find myself in agreement with my two learned colleagues. In any event, this is somewhat non-consequential as I am bound by the **Hinga** authority of the Court of Appeal which was delivered after the two Rulings in this Court, on the 13th day of November, 2009.

10. The up-shot of the above is that I uphold the Defendant\'s Preliminary Objection. I take cognizance of the provisions of section 2 of the Arbitration Act which reads as follows:

"Except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration."

I adopt the last paragraph of the Court of Appeal\'s finding in the Hinga case when it stated:

"In our case it is quite clear to us that it was wrong for the court to have entertained a challenge to arbitral award – reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. As we have stated above the court has no jurisdiction to do so in the first place under the clear provisions of the Act. Intervention by the filing of several interlocutory applications is which has in turn resulted in considerable delay should have been treated as a jurisdictional issue under the Act and dealt with straightaway."

Accordingly, I strike out the Plaintiff\'s ex parte Originating Summons dated 29 June 2012 with costs to the Defendant. I direct that the arbitration proceedings pending before Kwach JA (retired) should continue and be determined with utmost alacrity.

DATED and DELIVERED at NAIROBI this 11th day of July, 2012.

J. B. HAVELOCK
JUDGE