



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, J.J.A)

CIVIL APPLICATION NO. 262 OF 2018

BETWEEN

KENYATTA INTERNATIONAL CONVENTION CENTRE.....APPLICANT

AND

GREENSTAR SYSTEMS LIMITED.....RESPONDENT

(An application for leave to appeal from the Ruling and Order of the

High Court of Kenya at Nairobi (Olga Sewe, J) dated 19th January, 2018

in

Misc. Civil Appl. No. 278 of 2017

RULING OF THE COURT

In its application dated 10th September, 2018, **Kenyatta International Convention Centre (the applicant)**, more popularly known as 'KICC' seeks the following order:

"2. THAT Leave to Appeal be granted with respect to the Ruling and Order issued by the High Court (Justice Olga Sewe) on 19/01/2018 in Milimani Commercial Court Miscellaneous Civil Application No. 278 of 2017."

The factual matrix is fairly straight forward and undisputed:

On 14th October, 2015, the applicant and **Greenstar Systems Limited (the respondent)** signed an agreement for refurbishment and customization of six floors of the KICC Tower Block Offices in readiness for the World Trade Organization Conference that was scheduled to be held in Nairobi, Kenya later that year. The amount payable upon completion of the works was **Kshs.76,320,500** and it is common ground that the works were fully completed to the satisfaction of the applicant who took them over on 12th December, 2015. The applicant had by then only paid Ksh.10 million for the works and the respondent was complaining, to no avail, about the delay in payment of the balance which had escalated to more than Ksh.84 million by the time the amended claim was filed on 1st September, 2016.

As the agreement between them contained an arbitration clause providing for resolution of disputes arising out of or in connection with the agreement or its interpretation, the respondent invoked the clause and submitted the matter to a single arbitrator (**Mr. Geoffrey Imende**), who heard both parties and issued his Award on 17th March, 2017. The arbitrator found that the applicant, without any complicity by the respondent, had contravened the provisions of the **Public Procurement and Disposal Act, 2005** which rendered the tender won by the respondent illegal. Nevertheless, in line with several authorities on the doctrines of 'unjust enrichment and restitution', the arbitrator proceeded to issue the following award in favour of the respondent:-

[a] The Respondent shall pay to the Claimant the sum of Kshs. 47,419,029.86, such payment to be made within 21 days of the date on which this Award is taken up by either party. Interest (simple interest) will accrue thereon at the rate of 14.5% per annum from 31st August 2016 to 17 March 2017. Thereafter interest (simple interest) at the rate of 14.5% per annum will accrue effective from 21 days after the Award is taken up by either party if payment is not made within the said period until payment in full.

[b] Each party shall bear their own costs of this Reference.

[c] The balance of the costs of the Arbitral Tribunal is assessed at Kshs.1,098,200/= which is to be shared equally between the parties. Payment of these costs shall be made in full by the parties before the Award is collected, failing which it is to be paid in full by either party before the Award is collected. In the event that one party has paid the full cost of the Arbitral or any part thereof that is more than half of the costs of the Arbitral Tribunal, the other party shall reimburse the amount that that party should have paid with interest thereon at the rate of 14.5% per annum from the date of payment by the party that paid the costs of the Arbitral Tribunal until the date of such reimbursement in full.

The applicant's counterclaim for refund of Ksh.10 million paid for the works was also rejected.

If the applicant wanted to challenge that decision in the High Court, which is permissible under **section 35** of the Arbitration Act, it had to do so within 90 days. But it did not. Instead, it filed a motion before the High Court seeking to set aside the award on 23rd June, 2017. In turn, the respondent filed an application of its own on 14th July, 2017 under **sections 36 and 37 (2)** of the **Arbitration Act** for enforcement of the Arbitral Award as a Decree of the Court.

Upon hearing both applications, and considering several authorities, the High Court (**Olga Sewe, J.**) held, firstly, that the application was filed out of time and there was no provision for extension of time in Arbitration matters. She reasoned thus:-

"[20] There is no dispute that the Final Award of Mr. Geoffrey Imende, Arbitrator, was published on 17 March 2017. Accordingly, granted the strictures of Section 35(3) of the Arbitration Act, the Applicant only had up to 17 June 2017 to challenge the Award under Section 35, for Section 35(3) of the Arbitration Act provides that:

"An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award."

[21] Thus, although Counsel for the Respondent suggested that the Court ought to have been moved for extension of time, there is no such jurisdiction, granted that the Arbitration Act does not seem to envisage such a situation. In the case of Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR, the Court of Appeal expressed itself thus in connection with such applications that are not expressly provided for in the Arbitration Act, and which purport to rely on the Civil Procedure Act and the Rules thereunder:

"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 judgment/decreed arising from the award. In this regard we note that because of the number of the 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/decreed where 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 motu because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1."

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[23] Thus, there being no provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35(3) of the Act is imperative, and comports well with the principle of finality in arbitration. Indeed in the Anne Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, that 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. And, it is now well settled that the time of delivery and receipt of Award is equivalent to the date of notice by the Arbitrator.

.....

[24] Thus, the date of delivery and receipt of the Award in this instance was the 17 March 2017. In the premises, I would agree with Mr. Mbobu that the First Application herein is incompetent, for having been filed outside the 90 day period provided for in Section 35 (3) of the Arbitration Act.".... Accordingly there is good cause for holding that the First Application is incompetent and therefore ought to be struck out."

Despite that finding, Sewe, J. proceeded to examine the merits of the application and found that the arbitrator did not, as contended by the

applicant, deal with a dispute that was not contemplated by or falling within the terms of reference; that he did not grant a relief that was not envisaged by the Agreement or one that was not specifically pleaded before him; and that the award was not in conflict with public policy of Kenya. The application was dismissed while the application by the respondent was granted and a decree of the court was issued for **KShs.59,929,710/62**. That was on **19th January, 2018**.

Once again, the applicant was at liberty to appeal on a point of law to the Court of Appeal under **section 39 (3)** of the Arbitration Act, but did not. The sub-section provides:

(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2) -

(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal, the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)."

Section 10 referred to therein prohibits court intervention in matters governed by the Arbitration Act, while **section 35** generally covers applications for setting aside arbitral awards in the High Court. Under **section 39 (4)** such an appeal must accord with the time limits set by the Court of Appeal Rules, 2010; in this case **rule 82**, which provides that an appeal shall be instituted within sixty days of the date when the notice of appeal was lodged.

A notice of appeal was indeed lodged within time on 30th January, 2018. But no appeal was filed by 31st March, 2018 when it was due. Instead, the applicant appears to have made unsuccessful applications for stay of execution in the High Court on 23rd February, 2018, and another one before this Court on 12th July, 2018. The respondent then applied for a garnishee order to be served on the applicant's bankers for recovery of the decretal amount. The applicant reacted by filing an application on 8th August, 2018 seeking a stay or setting aside of the execution proceedings through a declaration that it was a Government parastatal against whom execution was prohibited under **section 24 (1)** of the **Government Proceedings Act**.

After hearing the parties, the High Court (**Maureen Odero, J.**) rejected the application for the reason that the applicant was not a government department or state corporation as defined in **sections 2** of the **State Corporations Act**; and that it was a body corporate established under **section 40** of the **Tourism Act, 2011**, with perpetual succession, capable of suing and being sued in its corporate name. **Section 21 (4)** of the **Government Proceedings Act** which makes reference to 'the Government', 'any Government department' or 'any officer of the Government' was therefore inapplicable. The court further held that the functions of the applicant 'cannot strictly be said to be of public importance or as being closely related to Government functions. Similarly the applicant does not derive its funding exclusively from the Government'. The application was dismissed on **18th October, 2018**.

Undeterred, the applicant proceeded to this Court and filed a motion on 3rd July, 2018 seeking leave under **Rule 4** of the Court's rules to file an appeal out of time against the ruling of Sewe, J. made seven months earlier. It told the single Judge of this Court (**Nambuye, JA**) that it intended to raise a point of law of public importance as to whether it is proper for it, as a public agency, to spend a colossal amount of money in fulfillment of its obligation under an illegal contract. The applicant reported that it had sought and obtained a legal opinion from the office of the Attorney General who opined that the sums awarded to the respondent were not due and payable by the applicant. As for the reasons for failure to apply within time, the applicant blamed its erstwhile advocates for inaction.

In response to that application, the respondent raised a preliminary objection on jurisdiction contending that there was no automatic right of appeal in view of **section 39 (3)** of the Arbitration Act. A right would only arise where the parties, in their agreement made provision for it; or secondly, with the leave of the High Court after refusal to set aside the award; or thirdly, upon leave being sought and granted by the Court of Appeal. None of those events had occurred and therefore, the application for extension of time was misguided. The case of **Nyutu Agrovet vs Airtel Networks Limited [2015] eKLR** which was applied in **Micro-House Technologies Limited vs**

Co-operative College of Kenya [2017] eKLR for the principle of law that a 'Court of law can only intervene in an arbitral matter where the parties have either entrenched the right for the Court's intervention in the arbitral clause, or alternatively, where the leave to exercise such an appellate right has been granted either by the High Court or this Court itself' was relied on.

Nambuye, JA agreed with the respondent and downed her tools after striking out the motion for incompetence. That was on **10th August, 2018**.

Still undeterred by the string of failures, the applicant has now returned to the full court with the motion before us. It becomes apparent at once that the application comes nine months after the ruling of the High Court. That significant delay thus becomes a threshold issue, considering the provisions relied on by the applicant to urge the application. The main provision relied on is **section 39 (3)** of the **Arbitration Act** which is reproduced above. **Rule 39 (b)** of the Court's rules is also invoked and it provides as follows:-

"39. Application for leave to appeal in civil matters In civil matters -

(a)

(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal." [Emphasis added].

So that, on the face of the application, there was no compliance with **section 39 (4)** of the Arbitration Act which requires the filing of an appeal within sixty days of the date of lodging the notice of appeal; and there was no compliance with **rule 39 (b)** of the Court's rules which requires an application for leave to be made within 14 days of the decision desired to be appealed. What did the parties make of that threshold issue? None of them filed any written submissions. Learned counsel for the applicant **Ms. Jane Nyandwa Okoth**, instructed by M/s J. O. Juma & Company Advocates, made very brief oral submissions contending that although the right of appeal was restricted as exemplified by the five-bench decision of this Court in the **Nyutu Agrovet case (supra)**, there was a crucial issue of public importance which this Court must grapple with; that is to say, whether the respondent should benefit from a contract which the arbitrator declared illegal. The applicant itself in the affidavit supporting the motion emphasizes the same issue and gives the history of the matter since Sewe, J.'s ruling. The applicant also talks about a stay of execution and furnishing of security, without making any prayer for such orders and, therefore, we shall ignore that part of the affidavit.

On the other hand, learned counsel for the respondent, **Ms. Kithae**, instructed by M/s Kyalo and Associates, similarly made brief oral submissions contending that the applicant had no right of appeal in a matter that arose from a decision of the High Court under **section 35** of the Arbitration Act. Counsel relied on the finality principle set out in the **Nyutu Agrovet case**, and urged us to reject the motion. She further referred us to the affidavit in reply which dwells on submissions of law rather than facts, and asserts, *inter alia*, that the applicant was guilty of non-disclosure of the fact that there was no agreement for a right of appeal in the arbitration clause; that there was no point of law of general public importance outside the provisions of **section 35** the determination of which will affect the rights of the parties; that the application flies against public policy behind the Arbitration Act which limits court intervention; that the discretion of the High Court was exercised judiciously; that all the applications made by the applicant were dismissed on merit; that the opinion of the Attorney General was not binding on the Court; and that there was unreasonable delay in filing the motion.

Several other authorities were relied on by the respondent, including **Nova Chemicals Ltd vs Alcon International Ltd, H. C. Misc. Application No. 1124 of 2002**, for the proposition that the right of appeal is either conferred by statute or by leave and not by implication; **Prof. Lawrence Gumbo & Another vs Hon. Mwai Kibaki & Others H. C. Misc. Application No. 1025 of 2004**, for emphasis on the finality principle, thus: "*Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally*"; and **Irungu Kihuni vs Wambugu Gakunga & Another [1986] eKLR** to the same effect.

We have considered the application which really calls for the exercise of our discretion. See **Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR** and **Machira t/a Machira & Company Advocates vs Mwangi & Anor. [2002] 2 KLR 391**.

The only issue, therefore, is whether the applicant has laid a proper basis for the judicious exercise of such discretion.

Conceptually, Arbitration now has a pride of place in **Article 159 (2) (c)** of the supreme law of the land as an alternative dispute resolution mechanism. The overarching principles of party autonomy and decisional finality loom large. Both parties herein indeed acknowledge those principles. They acknowledge the strong sentiments expressed by this Court in the **Nyutu Agrovet case (supra)** which in five different Rulings, a five-judge bench unmistakably spoke the same language. Sample this:

Per Karanja, JA:

"It is important therefore to ensure that our arbitration law, which as it stands now, meets the specific needs of international commercial arbitration, remains undiluted and true to the international standards espoused by the UNCITRAL model which we have adopted. One important feature of arbitration which is internationally accepted and which is meant to make arbitration more attractive as opposed to litigation is the concept of finality."

Per Mwera, JA:

"But in the same case, (Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR) the Court's decision of 10th November, 2006 was unanimous that when parties choose to resolve their disputes under the Act, by way of arbitral proceedings, the courts take a back seat. That the arbitral proceedings bestow the finality on disputes whereby a severe limitation is imposed on access to the courts, thereby as a matter of public policy, litigation is brought to an end."

Per Musinga, JA:

"No court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act. The principle of finality of arbitral awards as enshrined in the UNCITRAL Model law that has been adopted by many nations must be respected. The parties herein had agreed that the Arbitrator's decision shall be final and binding upon each of them. Since they did not agree that any appeal would lie, the appeal by the appellant is an unjustifiable attempt to wriggle out of an agreement freely entered into and must be rejected."

Per M'Inoti, JA

"Clearly, then, if it were the intention of the Act that the courts should intervene in arbitrations without let or hindrance, profound provisions such as sections 10 and 32A, or the limits inbuilt in sections 35 and 39 would be utterly unnecessary. It is equally self-evident to me that arbitration would serve no useful purpose as an alternative to judicial proceedings, expressly recognized by the Constitution, if the courts were allowed to intervene willy-nilly in arbitrations."

We are aware that the above decision was appealed and, for some time now, a decision is being awaited from the Supreme Court. In the

absence of any decision to the contrary, however, this Court's decision remains good law.

There was no agreement by the parties on the right of appeal in this matter. **Section 39 (3) (a)** of the Arbitration Act is therefore not applicable. Nevertheless, **section 39 (3) (b)** of the Act and **Rule 39 (b)** of the Court's rules give an aggrieved party a small, but well ring-fenced, window for access to this Court. Before consideration may be made under **section 39 (3) (b)** as to whether 'a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties', the party applying must surmount the first ring-fence of timeliness under the two provisions. And that is the achilles heel in this application.

The applicant did not seek leave of the court within 14 days as required under **Rule 39 (b)**. It brought this application after nine months when the appeal ought to have been filed by March 2018. The applicant blames its advocates for inaction, but, as correctly held by Sewe, J. above, in line with previous decisions of this Court, there is no provision in the Arbitration Act for extension of time, and there are no rules of procedure that can override an Act of Parliament. On that threshold issue, therefore, this application is a non starter and it is our finding that there is no proper basis laid for the judicious exercise of our discretion in the matter.

Even if we were to consider whether there was a point of law of general importance as required under **section 39 (3) (b)** (*supra*), we are not persuaded that the mere fact that the applicant was paying a huge amount of money would avail it. If the contract between the parties had prevailed as the basis of the claim, the applicant may well have paid even more money. The ogre put forth by the applicant is that the contract was declared illegal, but the creator of that ogre was the applicant itself! The finding was made by the arbitrator, and is not challenged, that it was the applicant, not the respondent, who did not fully comply with the law on procurement. But the applicant was happy to set up its own malfeasance as a defence to the respondent's claim and a basis for its counterclaim. The arbitrator examined at length the consequence of such conduct and considered numerous authorities before coming to the conclusion that the parties ought to be put back to the position they were in before the contract was signed. That way, unjust enrichment of the applicant was avoided and restitution was conferred on the blameless respondent. In our view, the arbitrator was entitled to make the decision he did. However, this aspect of the application is not the *ratio decidendi*.

In the result, the application fails, and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR