



RIN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 291 OF 2012

BETWEEN

BROADWAY TRUST LTD.....APPELLANT

AND

CHINA YOUNG TAI ENGINEERING CO. LTD.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya (Havelock, J.) dated 26th January 2012

in

HCMC No. 846 of 2010

JUDGMENT OF THE COURT

In this appeal, *the appellant, Broadway Trust Limited*, is aggrieved by the ruling and order of the High Court (*Havelock, J.*) dated 26th January 2012 in which the learned judge held that proceedings taken out by *the respondent, China Young Tai Engineering Co. Ltd.* to enforce an arbitral award were regular and within the *Arbitration Rules, 1997*. It contends that the respondent irregularly extracted the decree without reference to it, adopted a wrong and *ex parte* procedure, and violated the rules of natural justice by denying it the opportunity to be heard before the arbitral award was made a decree of the court.

The respondent resists the appeal by contesting the jurisdiction of this Court to entertain it, the competence of the appeal and as regards the merits of the appeal, by contending that the arbitral award was properly and regularly made a decree of the High Court.

The background to the appeal is fairly straightforward. By a written contract dated 31st May 2008, the appellant engaged the respondent to construct commercial premises on its property known as *LR No. 209/3841/1 (Arcadia Place), Hurlingham, Nairobi* on the terms and conditions set out therein. Before completion of the development, however, a dispute arose between the parties, which in terms of the contract, was referred to a single arbitrator, *Samson G. Obae, (QS)*.

After hearing the dispute, the arbitrator made two awards, on 7th May 2010 and 29th June 2010. The first award was worded as follows:

“Formwork was properly paid for as work done in the contract. I therefore rule that the

respondent (the appellant in this appeal) has a right for (sic) the use of the formwork on site to cast the slab where it is laid because this has already been paid for. Further, the respondent should use the formwork within a reasonable period of sixty (60) days from the date of ruling, i.e. 7th May 2010. This allows the respondent twenty one (21) days to prepare and cast of the concrete (sic), twenty eight (28) days for the setting of the concrete and eleven (11) days to remove the formwork and clear the site. However, if the respondent is not able to cast the slab within Sixty (60) days, they should pay the Claimant Kshs. 4,075,000.00 within thirty (30) days after expiry of the sixty (60) days when the formwork is in use as compensation and thereafter the formwork will become the property of the respondent.”

As regards the second award, the arbitrator ordered the appellant to pay the respondent a total of **Kshs 8, 127, 252.99** made up of interest on delayed payment, nett amount on retention, and interest on retention.

It would appear that for one reason or another the appellant did not settle the sums awarded to the respondent under the two awards and on 18th August 2010 the respondent filed the award in the High Court. On or about 26th August 2010, the respondent applied to the High Court for the arbitral awards to be enforced as a decree of the court, which order was granted on 26th November 2010. Thereafter the respondent obtained and served upon the appellant a notice to show cause why execution should not issue for a sum of **Kshs 13,052,316.00**, which was scheduled for hearing on 8th December 2011.

That notice to show cause spurred the appellant to take out, on 7th December 2011, the motion on notice which gave rise to this appeal in which it prayed, in the main, for stay of execution of the decree, the setting aside of the decree, and leave to liquidate whatever amounts the court found to be due to the respondent, by monthly instalments of Kshs 300,000/-. The application was supported by an affidavit sworn by the appellant's Chairman/director, **Ndung'u Gathenji**, in which he deposed that the appellant had requested the respondent to remove the formwork from its site but it declined to do so in order to receive from the appellant the payment under the first award. He further deposed that the respondent had not served upon the appellant a copy of the decree for approval, that the amount in the decree was far too excessive and at variance with the award, and that the proceedings to make the arbitral award a decree of the court were conducted *ex parte* without any notice to the appellant, which was irregular and in violation of the rules of natural justice.

The respondent opposed the appeal vide a replying affidavit sworn by its managing director, **Qian Guo Jun**, on 9th December 2011. It contended that the sums awarded by the arbitrator were due and payable by the appellant; that the appellant had not challenged the arbitral award within the stipulated time or at all; that it had duly served the appellant with the application for enforcement of the arbitral award as a decree of the court but the appellant failed to attend court; and that there was no basis for allowing the appellant to liquidate the decree in instalments as prayed.

As we adverted earlier, Havelock, J. found no merit in the appellant's application and dismissed the same, thus provoking this appeal in which the appellant impugns the ruling on five grounds, contending that the learned judge erred by finding that the respondent had properly obtained the decree; by failing to hold that the respondent could neither extract the decree without first seeking the appellant's approval nor proceed *ex parte* in the enforcement of the arbitral award; by holding that the appellant had not filed a supplementary affidavit whilst the same was on record and thereby ignoring material evidence; by taking into account irrelevant matters whilst ignoring relevant matters; and by reaching his decision against the weight of evidence.

On the first ground of appeal the appellant, represented by **Mrs. Mwangangi**, learned counsel, submitted that its fundamental right to be heard was violated when the respondent proceeded with the application for enforcement of the arbitral award without notifying or serving it as required by rule 4 of the Arbitration Rules or at all. It also contended that it was irregular for the respondent to extract the decree without first sending to it a copy for approval. Pressing the issue further, the appellant urged that the amount of Kshs 13,052,316 in the notice to show cause was way above the Kshs 8,127,252.99 in the arbitral award. Relying on ***John Kamunya & Another v. John Nginyi Muchiri & Others [2015] eKLR***, it urged us to find that the notice to show cause was null and void and ought to have been set aside *ex*

debito justitiae.

Turning to the second ground, the appellant submitted that it was entitled, under rule 4 of the Arbitration Rules, to be served with an application to make the arbitral award a decree of the court, and that it was not enough to serve upon it only the notice of filing of the award. In support of that proposition it relied on **Sadrudin Kurji & Another v Shalimar Ltd & Others, [2008] eKLR** and submitted that the learned judge erred in holding otherwise. Regarding the respondent's failure to serve on it a draft copy of the decree for approval before the same was extracted, the appellant relied on **Andrew Karani Ileri & Another v. NIC Bank Ltd [2017] eKLR** and submitted that the requirement for such approval under the Civil Procedure Rules is mandatory.

On the third ground of appeal, the appellant contended that the learned judge misdirected himself when he held that it had failed to file a supplementary affidavit as directed by the court, yet the same had already been filed and was on record. In the appellant's view, the failure of the learned judge to consider the depositions in that affidavit was prejudicial to it because the matter was determined without due consideration of all its evidence.

In the penultimate ground of appeal it was the appellant's contention that the learned judge erred by failing to take into account relevant matters, to wit, its supplementary affidavit, and by taking into account irrelevant matters such as the misrepresentation that it was served with the application to make the arbitral award a decree of the court. On the basis of the decision of this Court in **African Airlines International Ltd v. Eastern & Southern Trade & Development Bank [2003] EA 140**, and of its predecessor in **Mbogo & Another v. Shah [1968] EA 93**, we were urged to interfere with the exercise of discretion by the learned judge on account of his consideration of irrelevant matters and failure to consider relevant matters.

Lastly the appellant submitted that on the whole the learned judge erred by failing to apply his mind to the issues and the evidence before him and came to a wrong conclusion, leading to a miscarriage of justice.

The respondent through, its learned counsel, **Mr. Lubullelah**, opposed the appeal by attacking its competence as well as its merit. It was submitted first that there was no notice of appeal on record and if there was, the same was not duly lodged and endorsed by the Registrar of the High Court as required by the rules of this Court. Secondly the respondent argued that there was no certified copy of the order appealed from in the record of appeal as required by **rule 87(1) (h)** of the Rules of this Court and that the appellant had failed to resort to rule 88 of the Court of Appeal Rules which provides for filing of a supplementary record of appeal. On the authority of the ruling in **Salama Beach Hotel Ltd & 4 Others v. Kenyariri & Associates & 4 Others [2016] eKLR**, we were urged to find the appeal incompetent and strike it out. Although the respondent had not moved the court to strike out the record of appeal as required by rule 84 of the Court of Appeal Rules, it nevertheless urged us to invoke the courts inherent jurisdiction and strike out the appeal.

Next the respondent contended that this Court has no jurisdiction to hear and determine the appellant's appeal because the same does not fall within section 39 of the Arbitration Act, which contemplates a decision by the High Court on an application for setting aside an arbitral award, and as regards appeals therefrom to this Court, a prior agreement between the parties recognising the right to appeal or grant of leave by this Court to appeal on the basis that a point of law of general importance is involved. It was the respondent's view that none of these preconditions are in existence to enable the appellant appeal to this Court. Relying on the decisions of this Court in

Anne Mumbi Hinga v. Victoria Njoki Gathara [2009] eKLR and **Nyutu Agrovet Ltd v. Airtel Networks Ltd [2015] eKLR**, the respondents submitted that the Arbitration Act is a complete and self-contained code and that there was no right of appeal to this Court outside the provisions of the Act.

Turning to the merits of the appeal, the respondent submitted that that under rule 6 of the Arbitration Rules, it was entitled to proceed *ex parte* in the application to make the arbitral award a decree of the court because the appellant had not applied to set aside the arbitral award under section 35 of the

Arbitration Act. It also urged that the appellant had not satisfied the requirements of section 37 of the Arbitration Act regarding the grounds for refusal to recognise or enforce an arbitral award and therefore there was no basis for interfering with the ruling of the learned judge. The respondent emphasized that the appellant, having failed to challenge the arbitral award in the manner provided by the Arbitration Act, had no basis for objecting to the enforcement of the award.

Lastly, although maintaining that the Civil Procedure Act and the rules made thereunder were not applicable to this appeal, the respondent nevertheless urged that even if they were, Order 21 rule 8(2) regarding approval of a copy of the decree by the opposite party before extraction was optional rather than mandatory and that Order 21 rule 8(7) gave the court unfettered power to approve a draft decree. It relied in support of that submission on the decision of the High Court in **Lochab Transporters Ltd v. Fanuel Kambona Mutesa [2017] e KLR.**

We have carefully considered the record of appeal, the ruling by the learned judge, the submission by learned counsel, the authorities they cited and the law. As the respondent has raised issues touching on the jurisdiction of this Court as well as competence of the appeal, it behoves us to determine those issues first and deal with the merits of the appeal only once we are satisfied there is jurisdiction and that the appeal before us is competent. As this Court stated in **Owners and Masters of The Motor Vessel “Joey” v. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367,** the question of jurisdiction is a threshold issue which must be determined immediately and at the earliest stage.

In **Nyutu Agrovet Ltd v. Airtel Networks Ltd (supra),** the issue was whether an appeal lies to this Court under section 35 of the Arbitration Act. A sole arbitrator had made an award in favour of the appellant. The respondent applied successfully under section 35 to set aside the award. The appellant then filed an appeal and the issue before this Court was whether the appellant had a right of appeal. A bench of five judges of this Court held that there was no right of appeal under section 35 of the Arbitration Act and that was deliberate, given the clear policy and intent of the Act to limit intervention by courts in arbitral awards. However the Court reiterated that appeals to this Court from arbitral awards lie under section 39 which provides as follows:

“39 Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall—

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(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).

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.”

In this appeal, the appellant did not challenge the arbitral award before the High Court within 90 days of receipt of the award as required by section 35 (3) of the Act. By dint of section 32A, the arbitral award became final and binding on all the parties and could not be interfered with except as provided in

the Act. As we understand it, the appellant did not seek, both before the High Court and in this Court, to interfere with or vary the arbitration award in any manner. Its contention is that the process adopted by the respondent to make the arbitral award a decree of the court was irregular and flawed. We understand the appellant to contend that once the High Court had made the arbitral award its own decree, the appellant was entitled to ask the court, in its capacity as the executing court, to determine whether the arbitral award had been properly made a decree of the court. That, in our view, does not entail interference with the arbitral award and is an issue determined by the High Court pursuant to its powers under the Civil Procedure Code and the rules made thereunder, which also forms the basis of the appeal to this Court, once any of the parties is aggrieved by determination of the High Court. Accordingly, to the extent that the appellant does not challenge the validity of the arbitral award, we find that the decisions in Anne Mumbi Hinga v Victoria Njoki Gathara (supra) and Nyutu Agrovot Ltd v Airtel Networks Ltd (supra) are distinguishable.

It is apt also to point out that after dismissal of its application, on 2nd February 2012 the appellant applied to the High Court under **section 75** of the Civil Procedure Act and **Order 43** of the Civil Procedure Rules for leave to appeal to this Court. In opposing the appeal, the respondent took the view that no leave was necessary because the appellant had an automatic right of appeal, a position that was sustained by the High Court (*Mutava, J.*) in a ruling dated 21st June 2012, where he stated:

“With regard to the application for leave to file appeal, the respondent agreed that the applicant had a right of appeal under Order 43 of the Civil Procedure Rules and did not require leave of the court to file an appeal. I do concur and hold that there is no necessity for leave to file an appeal in the present matter. The applicant can file the appeal as a matter of right.”

Accordingly we do not find any merit in the respondent’s contention as regards jurisdiction.

Turning to the question of competence of the appeal, there is no substance in the contention that there is no notice of appeal on record because it is clearly contained on page 85 of the court record. As regards the order appealed from, the respondents’ contention is equally baseless because a certified copy of that order is contained in the supplementary record of appeal filed on 20th February 2013. But even if the situation were as the respondent claims, we would not have entertained these objections because the appellant had a clear remedy under rule 84 of the Court of Appeal Rules, which it failed to utilise. That rule provides thus:

“84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

In addition, **rule 104(b)** of the Rules of this Court prohibits a respondent from raising, without leave of the court, any objection to the competence of the appeal, which could have been raised by an application

under rule 84. The respondent in this appeal did not apply to strike out the appeal under rule 84 nor sought leave under rule 104. It is in that context that the ruling in ***Salama Beach Hotel Ltd & 4 Others v. Kenyariri & Associates & 4 Others (supra)***, should be understood because an application to strike out the record of appeal under rule 84 was before the court, though filed out of time.

Turning to the merits of the appeal, there are, in our view, only two issues for determination, namely; whether the respondent was obliged to serve upon the appellant a copy of the decree for approval before it was extracted, and whether the appellant was denied an opportunity to be heard by virtue of the proceedings to make the arbitral award a decree of the court having been *ex parte*.

Section 36 of the Act provides for recognition and enforcement of arbitral awards and what the party seeking recognition and enforcement of the award has to furnish the court. Section 37 sets out the grounds upon which the court may refuse to recognise or enforce the arbitral award, none of which apply in the present case. Rules 5 and 6 of the Arbitration Rules are very relevant to this dispute and provide thus:

“5. The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.

6. If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.”

The affidavit of service on record shows that on 26th August 2010, a court process server by the name ***Joel Munyao Kisilu*** served the appellant’s advocates with a notice of filing of an arbitral award, which was dated 9th August 2010. That service was in compliance with rule 5. It is common ground that the appellant did not file any application to set aside the arbitral award in accordance with section 35 of the Act. In that eventuality, rule 6 entitled the respondent, as the party who had filed the award, to apply *ex parte* to enforce the award as a decree of the court.

The effect of rule 6 is that the respondent was entitled to proceed as it did and that the High Court did not err in dismissing the appellant’s application to set aside the decree. This appeal is accordingly lacking in merit and is accordingly dismissed in its entirety with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 19th day of January, 2018

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR