



IN THE COURT OF APPEAL

AT NAIROBI

(CORMA: VISRAM, KARANJA & MWILU, JJ.A)

CIVIL APPEAL NO. 135 OF 2011

BETWEEN

**MAE PROPERTIES LIMITED.....APPELLANT**

AND

**SUBASH CHANDER KOHLI.....1<sup>ST</sup> RESPONDENT**

**FEDERAL DISTRIBUTION LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Muga Apondi, J) dated 29<sup>th</sup> October 2010*

*in*

*HCCC No. 309 of 2004)*

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**JUDGMENT OF THE COURT**

1. This is an appeal by **Mae Properties Limited** (the appellant), against the decision of Muga Apondi J., dismissing the appellant's application dated 29<sup>th</sup> January 2010, and allowing the preliminary objection dated 24<sup>th</sup> February 2010 filed by **Subash Chander Kohli** and **Federal Distribution Limited** (the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively).

The Appellant seeks that this Court:-

***“a) Allows the appeal.***

***b. The Preliminary Objection dated 24<sup>th</sup> February 2010 be overruled.***

***c. The Appellant's application dated 29<sup>th</sup> January 2010 be heard on its merits by the Superior Court.***

***d. The Appellant be awarded costs of this appeal.”***

2. A brief background to this appeal is that the appellant filed suit in **Civil Case No. 309 of 2004** at the High Court in Nairobi, seeking a declaration that the respondents were trustees for the appellant in respect of eight properties, and an order for the transfer of the said properties back to the appellant. The appellant also sought a true and full account of all the monies received by the respondents; an account of profits made from the sale of the properties; and an order for payment of all sums received. It further sought special damages of Kshs. 25,457,972.58 being the difference between the sale price and the alleged market price of the said properties, plus damages for the lost use of money, general damages and punitive/aggravated damages.

3. Pursuant to an order of the High Court made on 4<sup>th</sup> September 2008, following consent of the parties, the suit was referred to arbitration for hearing and determination under the then **Order XLV** of the **Civil Procedure Rules**

**(presently Order 46).**

The parties filed the necessary documents and directions were taken. Subsequently, parties gave evidence before the arbitrator on 12<sup>th</sup> June, 2009 and 23<sup>rd</sup> July 2009. Upon hearing the parties, the arbitrator, by the award dated 1<sup>st</sup> December 2009, made several findings *inter alia* that the respondents should have disclosed interest in the properties; that the claim was barred by time limitation; and that the suit should be dismissed. He went further to state that if his determination on time limitation were reversed then the appellant was entitled to Kshs. 8,000,000.00 as general damages for the loss which it had suffered.

4. Dissatisfied with the award, the appellant filed a Notice of Motion application dated 29<sup>th</sup> January, 2010 under **Order XLV rule 15 (1)(a)** seeking to set aside a portion of the arbitrator's award dated 1<sup>st</sup> December, 2009 on the arbitrator's finding on the limitation period. The appellant also prayed that judgment be entered for it against the respondents in the sum of Kshs. 8,000,000.00 plus costs.

The application was premised on misconduct by the arbitrator who was said to have taken into consideration affidavits that had been expunged from the agreed bundle of documents by his order for directions issued on 14<sup>th</sup> May 2009, during the arbitration. In addition, submitted the applicant, the respondents had abandoned their objection on the limitation issue, and the arbitrator ought not to have made a determination on it. The jurisdiction of the arbitrator to determine the issue of limitation period was also challenged. The application was supported by the affidavit of Emma Wachira, the Company Secretary of the appellant, sworn on 28<sup>th</sup> January, 2010.

5. The respondents filed a preliminary objection dated 23<sup>rd</sup> February, 2010 contesting the jurisdiction of the High Court to set aside only part of an arbitrator's award under **Order XLV rule 15 (1) (a)**. It also disputed the High Court's jurisdiction to enter judgment for an applicant consequent upon the setting aside of an award.

The preliminary objection was heard by Apondi J., who in a Ruling rendered on 29<sup>th</sup>, October 2010, upheld the same. The learned Judge found that the application by the appellant was incompetent on the grounds that the High Court lacked jurisdiction to set aside part of an award and to enter judgment for an applicant consequent to setting aside the award.

6. That is the Ruling that gave rise to this appeal in which the appellant vide the Memorandum of Appeal dated 28<sup>th</sup> June, 2011 proffered 7 grounds of appeal, which raise issues, *inter alia*, to the effect that the preliminary objection ought not to have been allowed as it had not raised a pure point of law; the court could not determine the jurisdiction of the arbitrator in a preliminary objection; the court could not determine whether a partial award could be set aside in a preliminary objection; and ultimately, that the preliminary objection failed to meet the threshold set by law, and that the learned Judge erred in failing to appreciate the provisions of the law with regard to setting aside of awards. The appellant's prayer is that the appeal be allowed with the result that the preliminary objection in question be overruled, and the appellant's application dated 29<sup>th</sup> January, 2010 be remitted back to the High Court for hearing on merit.

Parties filed written submissions as directed by this Court on 10<sup>th</sup> June 2015, and appeared before us for highlighting of the said submissions.

7. Learned counsel Mr. P.M Gachuhi and B. Ngeno, appeared for the appellant, while Mr Andrew Wandabwa appeared for the respondent. For the appellant, it was urged that the preliminary objection failed to meet the threshold of a preliminary objection as set out in the *locus classicus* case of **Mukhisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 (Mukhisa Biscuit case)**. Learned counsel submitted that the preliminary objection raised matters of law and fact rather than pure points of law as required. Counsel urged that there were facts in dispute before the High Court as could be deciphered from the replying affidavit filed by the respondent. The application did not therefore, in his view, meet the 2<sup>nd</sup> limb of the Mukhisa Biscuit case, to the effect that the facts should be deemed to be admitted. He further contended that **Order XLV rule 15** of the **Civil Procedure Rules (repealed)** invoked the court's discretion and therefore, a preliminary objection could not be used to determine a matter which called for the exercise of the Court's discretion.

The other issue raised was on the severability of an award. Could the court set aside part of the award, and confirm the other part under **Order XLV rule 15** of the **retired Civil Procedure Rules**? Learned Counsel for the appellant submitted that it could be done. He referred to his list of authorities to buttress his position.

He contended that it is possible to sever the issue of limitation from the award and pointed out that the arbitrator had admitted that the award was severable. He submitted that the issue of limitation was arguable and that the learned Judge misdirected himself on the same when he decided to deal with it summarily by way of preliminary objection. He explained that where the Court finds breach of fiduciary duty then the issue of limitation of time does not arise. In support of this proposal, counsel called in aid the case of **Stephens & 6 Others vs Stephens and Another [1987] KLR 34**, where in a matter based on a claim for land held in trust under the law of succession Act, where the issue of limitation was raised, the Court held that no plea of limitation is available to a fiduciary in possession of trust property who abuses such trust and converts such property to his own benefit. Learned counsel urged, therefore, that the claim herein was based on fiduciary relationship between the parties, and the issue of limitation could not be used to defeat it.

He further contended that the appellant was shut out before being heard and thus denied justice. He therefore urged the Court to allow this appeal, set aside that order, and send the application back to the High Court for hearing on merit.

8. On his part, Mr. Wandabwa, learned counsel for the respondents, opposed the appeal. He submitted that the **Order XLV** of the **Civil Procedure Rules (repealed)** does not allow the Court to sever part of an award and adopt another. He contended that the provisions of **Order XLV rule 15** only allow for the Court to either set aside and rehear the suit or dismiss the application.

He contended that the preliminary objection was within the threshold of the Mukhisa Biscuits case (supra), and that the learned Judge had not considered any facts. The affidavit raised no factual issues at all which the Court was invited to consider in dealing with those preliminary issues, he said. He argued that from the beginning, jurisdiction and limitation period were an issue for consideration. These were issues that were on the agreed list of issues for determination. He contended that the arbitrator had said he would not consider the application for striking out but would deal with the substantive issue, and that the defence of the respondents raised the issue of jurisdiction and limitation period, which was also one of the agreed issues for determination. He contended that, had the arbitrator failed to consider these issues, especially on limitation, the respondent would have challenged his decision. He distinguished the authorities relied on by the appellant, saying that they were based on awards made under the Arbitration Act and not under **Order XLV of the Civil Procedure Rules (repealed)**.

His strong submission, which he urged this Court to adopt, was that under **Order XLV of the Civil Procedure Rules**, the only option available to the Court is to either confirm the whole award, or set it aside. The doctrine of severability, according to learned counsel, is alien under the said provisions of the

law. He urged us to dismiss the appeal with costs.

9. We have carefully considered these able submissions by counsel, the record of appeal, the grounds in support of the appeal, and the law and the legal authorities referred to. The appeal principally revolves around the issue as to whether the preliminary objection met the threshold as set out in the **Mukhisa Biscuits case** (supra). More specifically, whether the two points raised in the preliminary objection are pure points of law or they needed to be proved by way of adduction of evidence. These two issues were related. The first was whether an award made pursuant to **Order XLV rule 15 (1) (a) (repealed)** is severable; and whether the Court had jurisdiction to enter judgment for an applicant, consequent upon the setting aside of an award, partially or otherwise.

We need to point out from the outset, that although the issue of limitation was canvassed extensively before the High Court and this Court, the learned Judge did not, and could not make a determination on it within the preliminary objection. All the learned Judge was supposed to determine was whether the issues raised in the preliminary objection were valid and within the ambit of the Mukhisa biscuit case. We cannot therefore make any determination on it. Nor can the learned Judge be faulted for not considering the same before allowing the preliminary objection.

10. Looking at the two points on which the preliminary objection was predicated, we have no doubt whatsoever that they raised a pure point of law, which was whether the award was severable under **Order XLV rule 15**, and secondly whether after setting aside the award under that rule, the Court could proceed to enter judgment on the remaining part of the award. In our view, no facts or other evidence was required to be presented to the Court for consideration to enable it determine those issues.

In this case we agree with learned counsel for the respondent, that an award issued following proceedings conducted under the Civil Procedure Act is different from an award governed by the Arbitration Act. Under the Arbitration Act, an award can be severed in certain circumstances, and part of it be remitted back to the arbitrator for reconsideration. It is not however necessary for us to get into those details for purposes of this ruling.

On the other hand, under the repealed **Order XLV**, currently **Order 46 of the Civil Procedure Rules**, there is no provision for severing an award. The court can only either adopt the award or set the entire award aside. Upon setting aside such an award, the court can only, subject to the agreement of the parties remit the matter to another arbitrator, or proceed to hear the matter in Court. It cannot enter judgment automatically upon setting aside of the award.

11. From the foregoing, it is evident that, in our view, the learned Judge was right in his finding that the preliminary objection raised pure points of law, and it therefore met the threshold of preliminary objections as set out in the **Mukhisa Biscuits case**. The preliminary objection was therefore properly taken. The two points touched on the jurisdiction of the Court, which we emphasise is a point of law. Having upheld the preliminary objection, the Court was bereft of jurisdiction to consider and determine any other issues raised in the matter.

As held by this Court in the celebrated case of **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited [1989] KLR 1**

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

Having downed its tools, the court could not therefore delve into issues of limitation of time, or any other. We are satisfied that the learned Judge did not misdirect himself on this matter, and his decision was fully anchored on the law. In conclusion therefore, we find this appeal lacking merit and dismiss it with costs to the respondents.

*Dated and delivered at Nairobi this 1<sup>st</sup> day of July, 2016.*

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**