IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GITHINJI, VISRAM & KOOME, JJ.A)

CIVIL APPEAL NO. 33 OF 2005

BETWEEN

CAROL CONSTRUCTION ENGINEERS LTD …….…..…… APPELLANT

AND

KENYA AGRICULTURAL RESEARCH INSTITUTE ……. RESPONDENT

(An appeal from the Ruling and Decree of the High Court of

Kenya at Nakuru (Kimaru, J) dated 30th November, 2004

in

H. C. Misc. Appl. No. 99 of 2004)

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JUDGMENT OF THE COURT

Briefly, the facts leading to this appeal are that sometime in 1999 Kenya Agricultural Research Institute, "KARI" contracted the appellant Carol Construction Co. Ltd to rehabilitate its water supply system. The appellant commenced the work in June 1999. About October 2000, the respondent terminated the contract, which termination was disputed by the appellant. The terms of the contract between the parties required that any dispute between the parties be referred to Arbitration. On request by the parties, the Chartered Institute of Arbitrators, vide a letter dated 1st August, 2001, appointed LEE G. MUTHOGA SC, as the sole arbitrator in the dispute.

The arbitrator having heard the evidence and submissions of both parties entered a Final Award dated 30th September, 2003 which was delivered on 12th January, 2004. The arbitrator found that the appellant was liable to pay the respondent the sum of Kshs.6,290,288.75. The appellant applied for corrections, clarifications and interpretation of the Final Award which was objected to by the respondent. Consequently, the arbitrator made a Revised Final Draft which found the respondent liable to pay the appellant a sum of Kshs.3,075,340.55. The respondent then made an application to the High Court seeking orders that the Revised Final Arbitral Award be set aside. The ruling of the learned Judge in granting the prayers, in part, stated that:

"The Revised Final award was therefore published against the law. The said Revised

Final award dated the 20th [sic] of February, 2004 is consequently set aside. The Final Award dated 20th of September, 2003 and published on the 12th of January, 2004 is the proper award that reflected the decision of the arbitrator. I declare the Final Award to be the legitimate award of the Arbitrator."

It is worth noting that another application was made to the High Court by the appellant after the Court declared the Final award the legitimate award. The appellant sought orders to set aside the Final award made by the arbitrator, and in the alternative the award be referred back to the sole arbitrator for re-consideration. Both prayers were denied on the grounds of *res judicata*. This ruling was made on 1st July, 2005. The Judge further reiterated that the Final Award by the sole arbitrator be adopted as the judgment of the court.

Aggrieved by the foregoing the appellant, Carol Construction Co. Ltd, seeks the following orders in the appeal:

"1. That the ruling of the Honourable Judge be set aside.

2. That the Final Revised Award be reinstated as the lawful decision of the sole Arbitrator.

3. That, in the alternative, the matter be sent back to the sole Arbitrator for consideration or re-hearing.

4. Any other or further orders consequential upon the above."

The above prayers are premised on the following seven (7) grounds of appeal:

"1. That the trial Judge erred in law holding that the respondents application dated 16th June, 2004 was filed within time.

2. That the learned trial Judge misdirected himself in law and fact in reinstating an Arbitrator's Final Award dated 30th September, 2003 which the Arbitrator had admitted contained errors and omissions.

3. That the trial Judge erred in defining the powers of an Arbitrator and ignoring section 19 of the Arbitration Rules.

4. ***That the learned Judge erred in finding that the Revised Final Award was in conflict with the Public Policy of Kenya.***

5. That the learned trial Judge erred by deciding the application on sentiments rather than evidence on record.

6. That the learned Judge erred in not remitting the Revised Final Award back to the arbitrator having note that the Arbitrator has himself noted error in the Final Award itself.

7. That the learned trial Judge erred in holding that the arbitrator sat on appeal over his own decision by revising the Final Award."

After carefully analyzing facts, issues as well as the grounds of appeal laid down by the appellant and guided by the principle that this Court shall only look into issue of law, we will start by examining whether the respondent's application dated 16th June, 2004 was filed within time.

The above ground is premised on ***section 35 (3)*** of the Arbitration Act which states 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."***

The appellant submits that the application was incompetent because it was filed in court outside the three months period allowed by law. This issue was a point of determination at the High Court where the Judge in finding that the application was filed within time recounted that the Final Award was published on 12th January, 2004. The appellant aggrieved by the said Final Award applied for its revision through a letter dated 23rd January, 2004. Despite the respondent's objection to the revision through a letter dated 13th February, 2004 the arbitrator went ahead and considered the application for revision and gave a ruling on the Revised Final Award on 20th February, 2004.

The court held that:

> ***"While it is true that the applicant ought to have filed his application by 12th of April, 2004 three months after the Final Award was made, the matters were complicated by the arbitrator, accepting the request by the respondent to revise the Final Award. By publishing the Revised Final Award, the Arbitrator in effect sat on the Appeal against his own decision."***

We are inclined to agree with the ruling of the High Court in dismissing this ground of appeal and holding that the application was filed within three (3) months required by law. The critical aspect in determining this issue is the date from which the three (3) months started running. On the face of it, and as observed by the trial Judge, it should have been from the date the final award was published. However the preceding circumstances which in fact made the arbitrator agree to revise the award resulting in the Revised Final Award, clearly indicates that the arbitrator in effect sat on his own appeal and therefore the three months started running from 28th March, 2004 when the arbitrator wrote to the respondent declining to make corrections of the Revised Final Award in accordance with ***section 34 (1) (a)*** of the Arbitration Act.

The other question this Court needs to determine is whether the revision made by the arbitrator fundamentally overhauled the award and thus failed to comply with ***section 34 (1)*** of the Arbitration Act which provides that:

> ***"34 (1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties***
>
> a. ***a party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature:…"***

The revision made by the Arbitrator completely transformed the finding in favour of the respondent in the Final award of Kshs.6,290,288.75 to a finding for the appellant in sum of Kshs.3,075,340.55 in the Revised Final Award. The court should ask itself whether the corrections effected by the arbitrator fit into the definition or description of "computation errors, any clerical or typographical errors" as provided by the Act. We do not think so. We say this because by the mere fact that the "correction of error" totally overhauled the award thus "raising eyebrows" as described by the High Court casts doubt as to what margin of error changes the whole award in huge figures as to rule in favour of the appellant what was initially in favour of the respondent.

Further, a critical examination of the letter dated 13th February, 2004 by the respondent objecting to the corrections shows that it felt any corrections would amount to an appeal against the arbitral award. This clearly indicates that there was no consensus by the parties on the issue of corrections. Furthermore, corrections anticipated by ***section 34 (1) (a)*** was in itself a contention between the parties. And this was

left to the sole discretion of the arbitrator to determine which issue fell into the description of ***section 34 (1) (a)***.

This is evident in the Arbitrator's letter dated 20th February, 2004, where he notes that since there is no consent by the parties with regard to the corrections, he can only respond to issues falling under ***section 34 (1) (a)*** which relates to "computation errors, any clerical or typographical errors or any other errors of similar nature." In the same letter the arbitrator went ahead to determine which grounds fall under ***section 34 (1) (a)*** and those he considered did not fall under ***section 34 (1) (a)***.

The arbitrator simply ignored the objections of the respondent and went ahead to make the revisions. He did not hear the parties on these major revisions he made, contrary to the principles of natural justice. He erred in doing so.

We agree with the learned Judge's observation that once an Arbitrator publishes a final award, he becomes *functus officio* subject to only making corrections as provided by ***section 34 (1) (a)*** of the Arbitration Act. The court said:

> ***"clerical mistakes was defined as being a slip of the pen or something of that kind or an error arising from an accidental slip or omission i.e. something wrongly put in or left out by accident."***

Finally, this Court ought to establish whether the High Court misdirected itself in reinstating the Arbitrator's Final Award dated 30th September, 2003 which the Arbitrator had claimed contained errors and omissions. The question is whether the trial Judge had powers to set aside the Revised Final Award and reinstate the original award.

Section 10 of the Arbitration Act states:

> ***"Except as provided in this Act, no court shall intervene in matters governed by this Act."***

The spirit of the above clause acknowledges that Arbitration being a form of Alternative Dispute Resolution (ADR) is a technique for the resolution of disputes outside the courts, by parties who voluntarily choose that method of dispute resolution. The gist of the section therefore, is to give confidence to arbitral tribunals to deal with matters in an expeditious manner. However, as noted from the opening statement of the clause, there is an exception to the rule where it states that *"Except as provided in this Act…"*.

This leads us to ***section 35*** of the Arbitration Act which states:

> ***"(1) 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) …".***

Subsection (2) goes ahead to give the conditions under which the High Court may set aside the Arbitral Award. In view of the above provision, the appellant contends that the High Court only has powers to set aside an Arbitral Award and not to declare an award legitimate or otherwise.

It is clear from the foregoing provisions of section 35 of the Arbitration Act, that the High Court only has jurisdiction to set aside the award in relation to an arbitral award under the said section. The High Court in setting aside the Revised Final Award dated 20th February, 2004 declared that the Final Award delivered on 12th January, 2004 was the legitimate award of the arbitrator. We are of the considered view that learned Judge by use of the phrase "***I declare the Final Award to be the legitimate award of the arbitrator, did not in essence grant any substantive relief***". Those words were used following the setting aside of the Revised Final Award. The substantive relief given was the setting aside of the Revised Final Award. The legal consequence of setting aside the Revised Final Award was to restore the Final Award.

Thus, the phrase used by the learned Judge merely clarified the legal status of the Final Award and the legal consequences of his order setting aside the Revised Final Award. Thus the phrase had no legal effect and did not alter the legal status of the Final Award and the appeal against the use of the phrase is incompetent.

Consequently, this Court upholds the ruling of the High Court to the extent it set aside the Revised Final Award. We hold that in publishing the Revised Final Award, the Arbitrator acted *ultra vires* his powers by fundamentally transforming the award contrary to ***section 34 (1) (a)*** of the Arbitration Act. In view of our finding, that (declaration) had no effect and did not alter the legal status of the Final Award following the setting aside of the Revised Final Award. We dismiss the appeal in its entirety with costs to the respondent.

Dated and delivered at Nakuru this 20th day of March, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR