



REPUBLIC OF KENYA



KENYA LAW
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**Krishnamurthy v Nairobi West Hospital (Cause E573 of 2021)
[2023] KEELRC 1908 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1908 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E573 OF 2021**

JK GAKERI, J

JULY 27, 2023

BETWEEN

NARAYANAN KRISHNAMURTHY CLAIMANT

AND

THE NAIROBI WEST HOSPITAL RESPONDENT

RULING

1. In response to the claimant's chamber summons dated February 8, 2023, the respondent filed a notice of motion dated March 15, 2023 under certificate of urgency seeking orders that;
 1. Spent.
 2. Spent.
 3. This honourable court be pleased to set aside in toto the final arbitral award published by the sole arbitrator, Dr Wilfred A. Mutubwa on December 15, 2022.
 4. The court be pleased to issue any consequential order that it deems necessary to serve the cause of justice.
 5. The costs of this application be borne by the claimant/respondent.
2. The notice of motion is based on the grounds set out on its face and supported by the affidavit of Mary Ng'ang'a.
3. The respondent/applicant catalogues 15 reasons as to why the arbitral award published on December 15, 2022 should be set aside.



4. The first five (5) reasons are based on the argument that the arbitral award is contrary to public policy. Another three (3) urge that the arbitral tribunal acted outside its mandate.
5. The rest address issues of failure to take into account the fact that the claimant refused to collect his dues, irregularities, inconsistencies and irreconcilable findings by the arbitral tribunal, determination on the basis of matters not pleaded, bias and partiality, failing to consider the reason behind the redundancy and considering a payment voucher adduced by the claimant/respondent as part of his salary among others.
6. Finally, the applicant urges that the award will occasion great miscarriage of justice to the applicant if enforced.
7. In response to the notice of motion, the claimant filed a notice of preliminary objection dated March 28, 2023 on the same day on the ground that an application to set aside an arbitral award may be made within 3 months and the applicant herein made the application after expiry of the three-month period stipulated by the statute.
8. The claimant urges that the application by the respondent is incompetent, bad in law and ought to be dismissed with costs for being statute barred and the court had no jurisdiction to hear and determine the application.

Claimant's Submissions

9. Counsel for the claimant submitted that the court had no jurisdiction to enlarge time in arbitral proceedings as the application was filed after the 90 days period after the award was published.
10. That the applicant's reliance of systems failure was to no avail as the application was filed the last minute and was served on the morning of May 31, 2023.
11. Counsel urged that order 50 of the *Civil Procedure Rules*, 2010 was not available to the court.
12. Counsel urged the court to strike out the notice of motion with costs.
13. Counsel relied on the provisions of section 36(3) of the *Arbitration Act* to urge that the instant notice of motion by the respondent/applicant was statute barred.
14. The decision in *University of Nairobi v Multiscope Consultancy Engineers Ltd* (2020) eKLR was also relied upon to buttress the submission.
15. Regarding receipt of the arbitral award by parties to arbitral proceedings, counsel urged that the arbitral tribunal notified the parties that the arbitral award would be published on December 15, 2022 and was published but the notice of motion was filed on March 17, 2022 and was thus filed late and no leave to enlarge time was sought.
16. Finally, counsel relied on the sentiments of the Court of Appeal in *Anne Mumbi Hinga v Victorial Njoki Gathara* (2009) eKLR on the import of the 3 months period in section 35 of the *Arbitration Act*.
17. Counsel urged the court to find the notice of motion was filed out of time and dismiss it and uphold the preliminary objection.

Respondent's Submissions

18. Counsel for the respondent/applicant submitted that the notice of motion was filed on March 15, 2023 and served.



19. Counsel cited the sentiments of the courts in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (1969) EA 696, *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* (2014) eKLR and *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 others* (2015) eKLR on the definition of a preliminary objection and urge that dispute should not be summarily resolved.
20. Counsel admitted that the claimant’s notice of preliminary objection was ground on the jurisdiction of the court to hear and determine the notice of motion dated March 15, 2023 which counsel urged that it was filed within the 3 months period and the respondent received the award on December 19, 2023.
21. Counsel urged that the instant preliminary objection was a derogation from the principle enunciated in the *Mukisa case*.
22. Counsel submitted that they filed the notice on March 15, 2023 but the registry stated that it had issues with filing and in any case the arbitral award was received on December 19, 2023.
23. Counsel urged the court to dismiss the preliminary objection.

Determination

24. The issues for determination are;
 - i. Whether the instant preliminary objection is competent.
 - ii. Whether the notice of motion dated March 15, 2023 was filed out of time and concomitantly whether the court has jurisdiction to hear and determine the same.
25. As to the competency or otherwise of the claimant’s notice of preliminary objection dated March 28, 2023, the homeport are the often cited sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (Supra).
26. According to Law JA;

“ . . . A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration . . . ”
27. Sir Charles Newbold P. stated;

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . . ”
28. The Court of Appeal expressed similar sentiments in *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (2018) eKLR cited by counsel for the respondent.



29. The gravamen of the claimant’s objection is that the respondent’s notice of motion dated March 15, 2023 was filed out of the duration prescribed by section 35(3) of the *Arbitration Act*, 1995 which provides as follows;
- “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.”
30. It requires no belabouring that the issue of limitation of time within which an act ought to be done implicates the jurisdiction of the court to hear and determine matters arising there from as is the case here and as aptly captured by Nyarangi JA in *Owners of Motor vessel “Lilian S” v Caltex Oil (Kenya Limited)* 1989 KLR 1, jurisdiction is everything.
31. In determining this issue, the court is guided by the sentiments of the Court of Appeal in *Anne Mumbi Hinga v Victoria Njoki Gathara* (supra) where after itemising the grounds on which a party may apply for the setting aside of an arbitral award under section 35 of the *Arbitration Act*, the court stated;
- “It is clear, in the light of the above provision, that a party cannot ground an application to set aside an award outside section 35 of the Act . . .
- 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 last date for the challenge was February 15, 2008. All application filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction . . .”
32. In light of the foregoing, the court is satisfied that the notice of preliminary objection dated March 28, 2023 meets the threshold of a preliminary objection.
33. As to whether the respondent’s notice of motion dated March 15, 2023 is statute barred, parties have adopted contrasting positions. While the claimant’s counsel submitted that it was filed out of time, the respondent’s counsel submitted that it was filed within the three months period and thus within time.
34. The respondent’s counsel also submitted that even if the application was filed after March 15, 2023, it was filed within time since the respondent received the arbitral award on December 19, 2023 and referred the court to the top page of the arbitral award for the date.
35. The copy on record has no date as to when it was received.
36. A forwarding email or letter would have effortlessly established the fact of receipt beyond peradventure, but none was availed.
37. Court records reveal that the notice of motion was filed on March 17, 2023 at 10.37 am but received by the registry on March 21, 2023 when it was placed before the court and directions were issued.
38. This is consistent with the claimant’s counsel submission that the notice of motion was uploaded on the e-filing platform on March 17, 2023 and fully paid for on March 21, 2023, when it was deemed to be properly filed.
39. Puzzlingly, counsel’s submission that the notice of motion was filed on March 15, 2023 but the registry had challenges was not attested to by the supporting affidavit or any evidence from the registry. An email or letter to the registry on the urgency with which the notice of motion had to be on record would



have vividly demonstrated the submission which in this instance is not supported by any scintilla of evidence.

40. Equally, the respondent counsel's argument that the respondent received the arbitral award on December 19, 2022 cannot avail the respondent as the notice of motion was effectively filed on March 21, 2023 when the filing fee was fully paid.
41. Although section 35(3) of the *Arbitration Act* has no express provision on enlargement of time to file the application to set aside, the provision uses the phrase "may not" as opposed to "shall not", the respondent made no application for enlargement of time, an application the court would have entertained and rendered a ruling.
42. Relatedly, there is judicial authority to the effect that actual receipt of the arbitral award or its dispatch to the parties is not a requirement of the provisions of section 36(3) of the *Arbitration Act*, 1995.
43. In *University of Nairobi v Multiscope Consultancy Engineers Ltd* (supra), the court stated as follows;

"I would like to think that in the context of Section 32(5), delivery of award means the "giving or yielding possession or control" of a signed copy of the award to each party. It means releasing to or making available for collection the signed copy of the award to the parties. A plain reading of provisions does not require the arbitral tribunal to send or dispatch the signed copy of the award to the parties. . . . Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties."
44. In the instant case, it is common ground that the arbitral tribunal notified the parties that the award would be published on December 15, 2022 and was published in the presence of the parties and parties are in agreement as to the date of publication.
45. For the above-stated reasons and guided by the Court of Appeal decision *Anne Mumbi Hinga v Victoria Njoki Gathara* (supra), it is the finding of the court that the notice of motion by the respondent dated March 15, 2023 was filed out of time and the court lacks jurisdiction to hear and determine the notice of motion and it is accordingly dismissed.
46. Parties shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

