REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL, ADMIRALTY & TAX DIVISION

MISC. CASE NO. 215 OF 2016

GOLDEN HOMES (MANAGEMENT) LIMITED.....APPLICANT

VERSUS

MOHAMMED FAKRUDDINN ABDULLAI.....1ST RESPONDENT

ALIBHAI HABIBA MOHAMED.....2ND RESPONDENT

GOLDEN HOMES LIMITED.....INTERESTED PARTY

RULING

1. The subject matter of this ruling is the preliminary objection dated 15th July 2016 and filed on the same date. The same is based on the grounds that pursuant to section 32 B (1), of the Arbitration Act No. 11 of 2009, the court lacks the jurisdiction to apportion and determine the costs of the arbitration.

2. The background facts of the matter are that, in 2013 a dispute arose between the Applicant and the Respondents, which was referred to arbitration and arbitrated before Ms. Sylvia Michelle Kithinji, as the sole Arbitrator. Subsequently the Arbitrator rendered the final award on 21st November 2014, in the following terms:

a) The Respondents to pay all service charge owed to the Claimant together with interest as at the date of this Award within thirty (30) days hereof;

b) The monies held in the Joint Account by Advocates of the Respondents and the Claimant to be transferred to the Claimant within seven (7) days from the date hereof;

c) The Claimant to hold both a directors and a shareholders/ lessees meeting within sixty (60) days hereof in accordance with the provisions of the Companies Act governing proceedings and meetings and record resolutions agreed by members with respect to provisions of service under the Lease particularly security and water; and

d) The Respondents to bear the costs of the proceedings

3. That pursuant to the above stated Award, which was adopted as a decree of the Honorable court on 15th May, 2015, vide High Court of Kenya, Commercial and Admiralty Division Misc. Cause No. 157 of 2015, on 27th April 2016, the Applicant and the Interested Party filed their party to party bill of costs dated 26th April 2016 for taxation by the Deputy Registrar. However, the Respondents raised the subject preliminary objection upon being served with the bill of costs.

4. The parties agreed to dispose of the preliminary objection by filing submissions. The Applicant argued that, the Honorable court has the jurisdiction to apportion and determine the costs of the arbitration in that; the arbitral award has already been adopted by the Honorable court rendering the Arbitrator *functus officio* in dealing with the matter anymore.

5. It was submitted that, when the chamber summons application, Misc. Cause No. 157 of 2015, was heard inter parties, though the law provides it be heard ex-parte, the Respondents did not raise any objection to the costs and interests of the arbitration proceedings being computed at the court rates, neither did they raise the issue of section 32 B (1) of the Arbitration Act, which they allege require the Arbitrator to apportion the costs. Therefore, the Respondents cannot allege that the court does not have Jurisdiction to assess the costs, whilst there is an order that the costs of the proceedings ought to be computed at the court rates.

6. That further, the arbitrator vide her email dated 1st August, 2016 was very clear that she was rendered *functus officio* once the matter was adopted by the court and she does not possess any power to alter the Award in any manner under section 34 of the Arbitration Act due to the lapse of time.

7. The Applicant argued that, the legal authorities raised and/or relied on by the Respondent on jurisdiction are misplaced and not applicable in the current case. The court was urged to disregard them. In the same vein, the authority of*; Kenfit Simited vs Consolata Father (2015) eKLR,* was said to be irrelevant and not applicable in this case, since the Arbitrator in that had stated clearly that;

"……the costs of this reference together with the arbitrator's costs to be paid by the respondent on the party to party basis or to be submitted for taxation if parties are unable to agree ……"

8. Therefore, the Arbitrator had reserved her rights under section 32 B (1) of the Arbitration Act, to apportion the costs and the Award therein had not been adopted by the court owing to the pending issue of costs. Yet in the case herein, the award has been adopted by the court and the costs computed at court rates. Therefore if the preliminary objection is upheld, then the Deputy Registrar and/ or the Taxing officer's decision will be set aside.

9. However the Respondent replied by submitting that, a preliminary objection is defined in the celebrated case of; *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Limited [1969] EA 696*, as a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. That the Court of Appeal in the case of; *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1* stated that:

"I *think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"*

10. The Respondent reiterated that the Arbitrator is the only person with exclusive jurisdiction to determine the quantum of costs and relied on the case of; *Kenfit Limited vs Consolata Fathers [2015] eKLR*, where the court stated inter alia that;

"We find merit in the reasoning by the learned judge. There can only be one award from a decision and determination of an arbitrator; this is not to say that the one award cannot be contained in two or more documents or made at different times. What we say is that the one award must be the final or composite award that determines all issues referred to the arbitrator for consideration. An award does not become final merely because the word "final" has been inserted as its heading; an award is final when all issues for consideration have been canvassed and a finding or determination made".

11. Finally, the Respondent cited the case of; *Transworld Safaris Limited –v- Eagle Aviation Limited & 3 Others [2012] eKLR***,** where the court held as follows:

"From the reading of this Section (which is now section 32B), it is clear that the Section has vested the arbitral tribunal with the exclusive jurisdiction to determine its costs and expenses. No other body is to make such a determination. Going into the exercise of ascertaining whether such costs were incurred in my view, would mean that the Taxing Officer would be acting beyond his jurisdiction. I believe that to avoid this scenario, the issue as to the Arbitration costs should have been included in the award, which the court would then enforce. To go into the rigors of making a determination as to the quantum of costs would mean that this

Court would be in essence interfering with the Arbitral Award, which was silent on the issue of the quantum of Arbitration Costs in the first place"

12. I have considered the Preliminary objection and the arguments for and in opposition thereto. The objection is based on the provisions of; Section 32 B (1), of the Arbitration Act No. 11 of 2009, which provides that;

"Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34 (5). (emphasis mine)

13. It therefore follows that the Arbitral tribunal generally has a wide discretion on assessing and determining the amount of costs to award in arbitration. This power is widely recognized in arbitration laws and rules (see; ICC Article 31(3) LCIA Article 28; TRIPPLE A–ICDR Article 31 UNCITRAL Rules Article 40). However, inevitably, the authority of the tribunal to award costs is always subject to the agreement of the parties at any time. (See*; Smith, "costs in International Commercial Arbitration," 56(4) Disp Resol J 30 (2001) 33).*

14. The courts would therefore be slow to disturb an arbitral tribunal decision on assessment and allocation of costs recoverable by a party. In the case of; *VV vs VW (2008) 2SL 929*, the Singapore High Court dismissed the Plaintiff's application to set aside an arbitral award on costs in an International Arbitration as it was for the view that, even though arbitrators should at least follow established legal principles when assessing costs payable by one party to another, Singapore legislation did not provide the court with authority to ensure that costs in arbitration had to adhere to any particular principle. Hence even an unreasonable costs award, could hardly be considered to be one which violated public policy and could not be set aside.

15. The provisions of Section 32 B (1), of the Arbitration Act No. 11 of 2009 requires that, the issue of costs be determined and apportioned by the arbitral tribunal in its award under this section or addition award under section 13 4(5). Therefore, while the losing party is expected to bear the costs of the other party, (see; AAA ICDR Article 31(d), LCIA Article 28(4), NAI Article 60, SIAC Rule 30(3) and UNCITRAL Rules Articles 38(e) and 40(2), there is generally no separate award relating to this matter and no taxation process. Instead, the tribunal assesses the legal costs incurred by the prevailing party and makes a provision for these costs in the final award. (Lew and Shore, "International Commercial Arbitration: Harmonising Cultural Differences", 54 Disp Resol J 33 (1999) 38.

16. I have read through the proceedings of the arbitral award herein rendered on 21st November 2014, and note that, under item number (5) which deals with who should bear the costs of proceedings, the Arbitrator had the following to say;

"the rule of the thumb is that 'costs follow event' which means that payment of costs is based on the outcome of the arbitration. While the Respondents had legitimate concerns against the claimant they failed to use the proper channels to try and redress the issues and resorted to breaching the Lease by failing to pay service charge which led to the institution of these arbitration proceedings. It therefore follows that the Respondents shall bear the costs of the arbitration".

17. The Arbitrator similarly states as follows in the final orders;

"In the light of the above, I hereby issue the final award in these proceedings as follows:

(4) The Respondent to bear the costs of the proceedings".

18. It is therefore clear that, the Arbitrator determined which party to pay the costs and stated clearly that it was payable by the Respondent. What is clear is that, the Arbitrator did not quantify the amount payable as costs. The question that arises is whether; the court should then step in and deal with the issue of quantum.

19. It is a fundamental feature of arbitration that as a chosen alternative to a national court, the decision of parties is for arbitrators to solve the dispute finally. The parties accept that, not only will arbitration be the form of dispute settlement, but also that they will accept and give effect to the arbitration award. Implied with the agreement to arbitrate, is the acceptance that the strict of the procedure and rights of appeal of the court, are excluded subject to very limited but essential protections. The decision of the Arbitrator is final and binding on the parties. This is both a contractual commitment of the parties and the effect of the applicable

law.

20. In that regard, the provisions of Part VI of the Arbitration Act, states that; the parties will only have recourse to the High court against arbitral awards, within the provisions of Section 35 and 37 of the Arbitration Act. Thus the court has no power to intervene in any matter outside these provisions. (See; *Anne Mumbi Hinga vs Victoria Njoki Gathara Nairobi Civil Appeal No. 8 of 2009*).

21. To revert back to the question of quantum, I find that, the court has no jurisdiction to descend into the arena of apportionment of costs, by virtue of the fact that the Arbitral tribunal has already determined who is liable to pay. Even then, the provisions of section 32 B(2) of the Arbitration Act No. 11 of 2009, states that;

"Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34 (5);

22. The Applicant argues that the subject arbitral award has been adopted as an order of the court and that the costs and interest of the arbitration proceedings computed at the court rates. Therefore the Arbitrator has become *functus officio*. With utmost due respect, I have considered the ruling delivered by the court on 15th May 2015, on the ex parte chamber summons application dated 30th March 2015 and filed in court of 1st April 2015. The Applicant was seeking that the Honourable court be pleased to adopt the Arbitral award herein as a decree of the court, and the costs of the application be provided for.

23. The court stated as follows in the ruling:-

"in my view, the application is merited, it has also complied with the provisions of the law. In the upshot, the application dated 30th March 2015 is allowed as prayed with costs in the cause."(emphasis mine)

23. I therefore find that, the Applicant in the first place did not pray that the court makes any order on the rates applicable to the costs and interest payable. Indeed, what the court said on costs and interest is as follows;

"the fact of this publication of the final award has been drawn to the attention of the Respondents herein, who has partly settled the awarded sum by paying part of the required charges owed to the Claimant, that is Kshs. 305,000 what is still outstanding and yet to be paid are interests and costs of the proceedings which are to be computed at court rates. The Applicant herein is desirous to enforce the said final award as a decree of this court, hence the present application."

24. As already stated, Section 32 B(1) of the Arbitration Act No. 11 of 2009, gives the tribunal the power to determine and assess costs. The tribunal had pronounced itself on the issue of costs and ordered that the Respondent bears the costs of the proceedings. There was no application before the court, to review and/or vary this order or set it aside. Therefore the court could not pronounce itself on this issue. Neither is there an indication that the parties entered into consent on the same.

25. Therefore, with due respect, the Applicant cannot argue that the Taxing officer has the jurisdiction to proceed and tax the bill of costs dated 26th April 2016 and filed on 27th April 2016, unless and only until the High court decision in *Golden Homes (Management) vs Mohammed Fakruddinn Abdullai, Alibhai Habiba Mohammed and Golden Homes Limited (2015) eKLR* where it was decided that costs and interests were to be computed at court rates with no objection from the Respondent is set aside, reviewed and/or varied by the High court on merit. This is because there was no prayer for the said orders and they could not be given.

26. In the same vein, the holding of the Arbitrator in the directions on 29th July 2016 that the parties were agreement that the assessment of costs be computed at court rates was not founded on any court order as courts do not grant orders that are not sought for. The only order the court could grant under the subject application at the risk of repeating myself, was for recognition of the arbitral award as a decree of the court.

27. Be that as it were, the provisions of Section 34 of the Arbitration Act, empowers a party to seek for correction of any computation, clerical and typo graphical and any other errors and to clarify and remove any ambiguity concerning specific point in the Arbitral award or additional award within thirty (30) days of receipt of the Arbitral award.

28. If the Claimant was not sure about the costs payable, they should have invoked this provisions of section 34 above and sought

for clarification and removal of any ambiguity on the same, within thirty (30) days of receipt of the order. The award herein was rendered on 31st November 2014, and the Claimant applied to have it adopted as an order of the court on 30th March 2015. This was a year after the award was rendered.

29. After it was adopted, Golden Homes Limited identified as an Interested party then wrote to the Arbitrator a letter dated 19th July 2016, seeking directions on assessment of costs. The Arbitrator gave directions and stated that she had become "functus officio" once the award was adopted by the court. F urther that the parties were in agreement that the costs be computed at court rates, and therefore the assessment of the costs should be determined by the court.

30. First and foremost, at the time directions were sought, the period within which any party would have invoked its rights under section 34 above had long passed. This clarification was being sought for almost two (2) years after the award was rendered. Secondly, the Arbitrator having found that she was "functus officio", she could not then make an order that the assessment of costs be made by the court. Thirdly, as already indicated herein, there was no agreement by the parties that costs be computed at court rates. Even if there was such an agreement, it cannot confer jurisdiction on the court to determine matters which have been expressly vested by the Arbitration Act in the jurisdiction of the Arbitral tribunal.

31. Based on the above findings, I hold that, the court has no jurisdiction to determine the issue of costs in that, the right of a party to have recourse to the High Court against an arbitral award is limited as per the provisions of Part VI of the Arbitration Act No. 4 1996. In that regard, I associate myself with the findings of the court in the cases of; *Transworld Safaris Limited –v- Eagle Aviation Limited & 3 Others [2012] eKLR*, and *Ann Mumbi Hinga vs Victoria Njoki Gathara Nairobi Civil Appeal No. 8 of 2009*, where the Court of Appeal held;

"Part VI of the arbitration Act has a heading under the title 'Recourse to High Court against Arbitral Awards' and the implication is that the High Court has no other power against an arbitral award outside the provisions of Section 35 and 37 of the Arbitration Act ……..the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act." (Emphasis supplied).

32. The upshot of all this is that, the preliminary objection is upheld with costs to the Respondent.

Dated, delivered and signed in an open court this 4th day of March 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Mbuthia for Mr. Mabiri for the Applicant and the Interested party

Mr. Shah for 1st and 2nd for Respondents

Dennis ……..Court Assistant.