REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CAUSE NO. E 083 OF 2019

UNIVERSITY OF NAIROBI.....APPLICANT

VERSUS

MULTISCOPE CONSULTANCY ENGINEERS LIMITED..... DEFENDANT

RULING

1. A debate about the meaning to be assigned to the word "received" in Section 35(3) of the Arbitration Act (**the Act)** is here with us again.

2. University of Nairobi (**U.O.N or the Applicant**) and Multiscope Consultancy Engineers **(Multiscope or the Respondent)** are entangled in a dispute regarding professional fees claimed by Multiscope for consultancy working in the construction of University of Nairobi Towers. The dispute culminated into arbitration under an Arbitral Tribunal consisting of Q.S Harun Nyakundi, Gitonga Murugara Advocate and Arch Stanley Kebathi.

3. These proceedings, commenced primarily under the provisions of Section 35 of the Act, are brought by U.O.N to set aside the Award dated 24th November 2017 by the Arbitral Tribunal.

4. The Application immediately faced a challenge by way of a Preliminary Objection on the premise that the application dated 3rd April 2019 is filed out of time in contravention of Section 35(3) of The Arbitration. Section 35 reads:-

"(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).

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(3) 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.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Multiscope argues that the Arbitral Tribunal published the award on 24th November 2017 when it notified the Applicant of the publication of the Award. Counsel Morara asserts that the 3 months period referred to in Section 35(3) began to run from the date the award was published by the Tribunal. In this regard the Court was asked to follow a long string of decisions by our Courts that the award is deemed as delivered to parties when parties are notified that the award is ready for collection. The Court was referred to, among others, the decisions in **Mahinder Singh Channa –vs- Nelson Muguka & Another [2007] eKLR, Kenyatta International Convention Centre (KICC) -vs- Greenstar Systems Limited [2018] eKLR.**

5. Mr. Ngatia responded to the objection by, first, giving a sequence of the events regarding the award. That the award is dated 24th November 2017 is not in contention. By a letter of the same date the Arbitral Tribunal notified counsel for the parties of the publication of the final award in which it informed them that upon receipt of the its fees from either party it would deliver the award to the paying party.

6. That the Respondent paid fees after the lapse of a considerable period of time and upon payment of the fees, the award was available for collection from the Arbitral Tribunal. In the affidavit sworn by Prof. Stephen Kiama Gitahi in support of the application he depones that university became aware of the award on 12th March 2019 when its erstwhile advocates availed a copy of the award to it. That the said advocates informed them that they had collected the said award on 5th March 2019.

7. It was argued by counsel that a party must have contents of the award to be able to challenge it and that Section 35 of the Act is predicated on the award been with the party. Counsel argued that the effective date for computation of time for purposes of Section 35(3) of the Act was when the award was actually "delivered" and "received" by the Applicant.

8. As a build up to that argument the Applicant made reference to Section 32(5) of the Act. Section 32 is on the form and contents of an Arbitral Award and Subsection 5 cited by the Applicant reads:-

“Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.”

It was then argued that by dint of the powers granted to an arbitral tribunal by Section 32(B) (3), the tribunal may withhold the delivery of the award to the Applicant on account of non-payment of fees.

9. The Applicant contends that it would be legal nonsense to hold that the award was delivered when in fact it was withheld. Further that it was legally nonsensical to say that notification of the award is equivalent to delivery, urging that the concept of notification is alien to the provisions of section 35 of the Act.

10. The Applicant beseeches the Court to adopt the holding in **Dewdrop Enterprises Ltd. v Harree Construction Ltd [2009] eKLR** which was to the effect that the statutory period commences only after a copy of the arbitral award has been availed to the relevant party.

11. The Applicant argues that decisions further afield are in consonance with its proposition. That, for instance, in **Union of India vs Tecco Trichy Engineers** the Supreme Court of India, considering similar provisions to our Section 35(3) held that for the delivery of an arbitral award to be effective it has to be received by the party. This decision was followed by the same Court in its later decision of **State of Maharashtra & Others –vs- M/s Ark Builders Pvt Ltd.**

12. Also cited by the Applicant is a New York Court decision in the **Matter of Lowe (Erie Insurance Co.)** The substance of the decision is that for purposes of a similar 90 days statutory limitation, the operative measuring date is the date in which the decision was received by the Petitioner or his agent. In other words, that delivery of the award must be construed as the date on which the award was received.

13. Turning to a different shade of argument but which supplements its position, the University contends that to uphold the objection would be a gross affront to its right of equal protection of the law, access to justice and the non-derogable right to fair trial guaranteed in Articles 25(c), 27(1), 48 of 50(1) of The Constitution. That it took the Respondent one year and two months to make full payment of the Tribunal fees and expenses demonstrates the financial impediment presented by the condition. That bearing in mind that it took the University to obtain a copy of the award barely a month after the Respondent, it would be an abridgment of the cited constitution rights if the Applicant was to be refused access to Court and Justice.

14. I now turn to consider the arguments but first I need to observe that the objection taken up is a preliminary objection and must proceed on the assumption that all facts pleaded by the University are uncontested (**See Mukisa Biscuits Manufacturing Co. Ltd vs. West End. Distributors Ltd [1968] EA 697**.). The decisive facts which must be assumed as correct are that the Arbitral Tribunal issued a letter dated 24th November 2017 notifying the parties that the Award was ready for collection upon payment of the balance of the Tribunal fees, the Advocates for the University collected the award on 5th March 2019 and that the University thereafter became aware of the award on 12th March 2019.

15. At first blush it may appear as though the mainstream interpretation of Section 35(3) given by our Courts is at odds with the position taken by other common law jurisdictions in the decisions cited by the University. Our mainstream view being that a notice to the parties that an award is ready for collection is both sufficient delivery and receipt of the award to the parties. The foreign decisions holding that for delivery of an award to be effective then it has to be received by the party. As this decision attempts to demonstrate that apparent divergence does not in fact exist.

16. To discern the true meaning of Section 35(3), a short journey begins from Section 32(5) of The Act. Section 32, as stated earlier, is on the forms and contents of an arbitral award. Subsection 5 reads:-

“Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.”

17. Section 32 (B) (3) permits an arbitral tribunal to withhold the delivery of an award to the parties until full payment of the fees and expenses is received by it. Assuming that the arbitral tribunal has no reason to withhold the delivery of an award, what is the exact obligation imposed on the tribunal by Section 32(5)" Put differently, what does delivery mean on the context of Section 32(5)"

18. So as to put this in good perspective, it seems to this Court that the duty of an arbitral tribunal differs from that of a Judge

delivering a Judgment or Ruling. Order 21 Rule 8(1) of the Civil Procedure Rules provides that a decree shall bear the date of the day on which the judgment was delivered. In that context delivery of a judgment or ruling is to the official statement of a formal decision or judgment of the court.

19. Contrasted, Section 32(5) of the Act talks about the signed copy of the arbitral award being delivered to each party. The University referred this Court to the definition of delivery in Black's Law Dictionary "Ninth Edition" which means:-

"1. The formal act of transferring something, such as a deed, the giving or yielding possession or control of something to another. 2. The thing so transferred or conveyed."

20. I would like to think that in the context of Section 32(5), delivery of the 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.

21. It is against this understanding of the law that the provisions of Section 35(3) should be interrogated. For good measure I, again, set out those provisions:-

"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."

22. It seems to this Court that whether or not the party making an application under Section 35 is deemed to have received the arbitral award depends on how the arbitral tribunal delivers the signed copy of the award. In the case decision of **Union of India** (*Supra*), the award was physically delivered to the office of the General Manager, Southern Railway on 12.3.2001 but the Chief Engineer of the Corporation received it on 19.3.2001. Since the Court took the view that only delivery to the Chief Engineer was effective then it held that actual receipt by him of a copy of the award was the starting pointing for purpose of calculating the time to challenge the award in Court.

23. In the **Matter of Lowe** (*supra*) statute there required the Arbitrator to deliver a copy of the award to each party "in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested". The Court held that in the circumstances of the case delivery had to be construed as the date on which the award was received.

24. This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a 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.

25. Should it be any different because the arbitral tribunal has withheld the delivery of the award because of none payment of fees and expenses (Section 32B (3)" Counsel Ngatia argues that it would be a legal absurdity to deem that the award has been delivered when in fact it has been withheld. With respect I am unable to agree. Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.

26. The rationale for taking this stance has been explained on several occasions and I am content to cite just one such occasion. In **Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others [2005] eKLR**, Ransley J was happy to identify with Nyamu J,

"The question arises as to the meaning of "had received" the arbitral award.

This question was raised before Mr. Justice Nyamu in the case of *Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003* where he held that in order to comply with Sec 35(3) the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection.

In its normal meaning "receipt" means the actual obtaining of the arbitral award.

In his ruling Nyamu, J has this to say about "receipt": at page 27 B

"Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

27. And although not raised by the parties, I have had to ponder why limitation of time is imposed on a setting aside application and not that for recognition or enforcement (Section 37 of The Act). And it is instructive that the UNCITRAL Model Law on International Commercial Arbitration from which our statute heavily borrows is similar in this respect. It has to come down to, again, the finality and expeditious principles of Arbitration. Arbitration is a binding dispute resolution mechanism contracted by parties. It is expected that parties will accept the answer an arbitral tribunal gives to a dispute they place before it. If, however, any party is aggrieved then it should raise its grievance at once so that it is addressed in speedy fashion that it is not inimical to expeditious disposal of the dispute. For that reason, setting aside motions are time bound. On the other hand, enforcement is open ended (save perhaps for the law of limitation on execution) so as to give parties an opportunity to abide by the outcome without the need for coercion that may follow enforcement or recognition.

28. Having said all these, there could be occasion when delay in collection of award is beyond the blame or control of parties. Let me give a surreal example. The present Covid 19 epidemic is a stark reminder that we can all be faced with situations that that are beyond normal contemplation. The arbitral tribunal today notifies the parties that the award is ready for collection. A few hours later, a complete lockdown of 120 days is ordered by the Government due to the Covid 19 epidemic. Neither the arbitral tribunal nor the parties can access a signed copy of the award either physically or online. Surely in such exceptional circumstances, there is justification to deem the time as running from earliest date the parties have access to the signed copy of the award.

29. This leads me to an issue raised by the Applicant. That it was late in collecting the award because it had difficulties raising its share of the tribunal fees and expenses. It then makes the submission that financial disposition should not be allowed to lead to inequality before the law. This in my view can hardly be a reason for putting off the effective day to a later date. It may perhaps be a premise upon which a request for expansion of time can be made. That is, for an application for time to be expanded. Whether or not the University will be able to persuade the court that this amounts to an extraordinary circumstance that merits an exceptional extension of time is, of course, a different matter. The Court makes this observation well aware that there is a school of thought, with large numbers, that because of the absence of specific provisions for expansion of time under Section 35(3), then the timelines set are cast in stone and can never be expanded. For those skeptical about the Court's power to expand time, even in exceptional circumstances, the decision of the Hong Kong Court of first instance in **Sun Tian Gang –vs- Hong Kong & China Gas (Jilin) Limited[2016] 5 HKLD 221** cited to Court by Counsel Ngatia is a worthy read. But as this debate is beyond the scope of the controversy placed before me, i say no more.

30. For now, I uphold that preliminary objection and do hereby strike out the Notice of Motion dated 3rd April 2019 filed by University of Nairobi.

Dated, Signed and Delivered in Court at Eldoret this 13th Day of May 2020

F. TUIYOTT

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 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nyaga(miss) holding brief for Ngatia for the Applicant.

No appearance for the Respondent.