ciarb
Kenya Branch

CASE LAW SUMMARY

HCCOMMMISC/108/2006
MAHINDER SINGH CHANNA V NELSON MUGUK AND ANOTHER

Ruling Date: 14th May 2007

SUMMARY OF FACTS

In this case, the applicant and respondent had their dispute resolved through arbitration. However, the applicant was aggrieved by the award and sought to set it aside. This was on grounds of the arbitrator considering matters that were beyond their scope of reference when making the award. More specifically, he claimed that the arbitrator had apportioned liability between the insured and the insurer, yet this was not covered by the arbitration agreement. On the other hand, the respondent claimed that the application to set aside was filed out of time. The court therefore had no jurisdiction to entertain it.

ISSUES

Whether the court had the jurisdiction to entertain the setting aside application in light of the timelines under the Arbitration Act.

ANALYSIS AND DETERMINATION

The court held that it did not have the jurisdiction to entertain the application. This was because the applicant had filed it out of the 90-day window provided for under section 35 (3) of the Act. As per the facts, the court found that the applicant had written a letter to the arbitrator seeking clarification on the date of publication of the award. The arbitrator stated that the date of the publication of the award had fell on the 25th of August 2004. Nonetheless, in a subsequent letter, the arbitrator also stated that the award had been issued to the parties on the 16th of September 2005. This was also the date of actual delivery of the award to the parties. Following this letter, the application to set aside the award was filed on the 14th of February 2006.

As per the court's determination, the date of delivery of the award was the same as the date of the publication of the award. Different authorities were cited by the court to demonstrate that the delivery of the award was independent of actual receipt of the award and its contents by the parties. Thus, the time for setting aside the award begun running from the time the arbitrator had published the award. In light of this finding, the applicant was time barred from filling a setting aside application because the application was filed outside the 90-day period which ended on the 25th of November, 2004.

HOLDING

The court found that it had no jurisdiction to entertain the award because it was filed outside of the 90-day period allowed under section 35 (3) of the Act.

RATIONALE

The reasoning behind the court's ruling was the principle of finality of arbitral awards. The court asserted that it would defeat the purpose of arbitration if the time of delivery of the award was determinant upon the actions of the parties. Instead, the award became final once the arbitrator published it. Even if the parties had not appraised themselves on the contents of these awards, the time for setting aside the award begun running from the time the arbitrator published the award and notified the parties of the same.

CASE RELEVANCE

Section 35 (3) provides that an application to set aside an award may not be brought 90 days after the date on which the party making the application had received the award. The date of receipt is not determined by actual delivery of the award to the party. Instead, it refers to the date of publication of the award and a notification to the parties of the same by the arbitrator. Thus, if a party fails to file a setting aside application within 90 days after being notified on the publication of the award, the application will be time barred.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 108 of 2006

MAHINDER SINGH CHANNA ……..……..APPLICANT

VERSUS

NELSON MUGUK ……..1ST RESPONDENT

KENYA ORIENT INSURANCE CO. LTD…….2ND RESPONDENT

RULING

The application for my decision is the Chamber Summons dated 14th February, 2006 seeking that the arbitral award by Mr. Faruq Khan Esq., sitting as a single arbitrator dated 25th August, 2004 and delivered on 16th November, 2005 be set aside. The second prayer is that the Honourable court be pleased to give directions and guidance on subsequent proceedings with HCCC No.259/99 as consolidated with HCCC No.964/98.

The complaints of the applicants against the arbitral award is that the arbitrator acted without jurisdiction by dealing in a matter which was not in dispute therefore he went against the provisions of section 35(2) when he dealt with a matter that was not before him. In essence the arbitrator dealt with a matter which was not meant for his determination.

Mr. Otieno – Omuga learned counsel for the applicant submitted that the issue of apportioning liability between the respondents was not among the issues placed for his determination. The pleading before him was not asking for him to apportion liability between an insured and insurer.

Mr. Otieno-Omuga further submitted that the principle ground for seeking the setting aside of the arbitral award is that the arbitrator took into consideration matters that was not placed before him for determination. He was supposed to exercise his powers within the boundaries of the law and within the set down rules. According to **Mr. Otieno-Omuga** Advocate the arbitrator took into consideration matters that were not placed before him for determination. The confines are the law and within the set down rules. And in by contravening the law the arbitrator committed a misconduct within the meaning of Order 45 Rule 15 of the Civil Procedure Rules. In short the arbitrator was not called upon to apportion liability between an insurer and insured.

The application was opposed by the respondent first on jurisdictional question, which is whether the applicants' application dated 14th February, 2006 was filed within time. The time allowed after the

award is within 3 months after the date of the publication of the award. **Mr. Kyalo** Advocate submitted that as far back as 6th September, 2004 the applicant was aware that there would be a problem or issue on the date of publication of the award.

Now it is essential for me to deal with the jurisdictional issue before I address the other pertinent issues raised by the applicant. Jurisdiction is the power that gives the court the authority to determine the issues in dispute. The court has to ensure that it is clothed with jurisdiction before it embarks on a void determination. A court without jurisdictional powers has no authority and/or mandate to determine the matter in controversy. It is jurisdiction that gives the court, the duty, powers, authority and/or mandate to address its mind to the matters for determination. If a court has no jurisdiction, it has no powers to determine the issues meant for determination. In essence if the statute ousts the jurisdiction of the court in particular way due to the absence of an act or due to an omission of one party, then the court has to down its tools immediately.

Section 35(3) states;

"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 conditions for setting aside an arbitral award is well enumerated in Section 35(3) and Section 34(1) (2) (5) of the Arbitration Act No.4 of 1995. According to Section 34, a party may make a request to the arbitrator within 30 days after the receipt of the arbitral award if he considers the arbitral tribunal to attend to any correction, errors, clerical or typographical or to make correction or to give an interpretation of any issue. A party may also under Section 34(4) request the arbitral tribunal to make an additional arbitral award as to the claims presented in the arbitral proceedings but which were omitted from the arbitral award. Upon consideration the arbitral tribunal is empowered to make the additional arbitral award within 60 days after the receipt of the request. Nevertheless the tribunal has powers to extend the time limited for making a correction or giving an interpretation or the time for making an additional arbitral award under sub section (2) or (5).

The question in this matter is when was the arbitral award made or received by the parties. Section 32(5) states that;

"After the arbitral award is made a signed copy shall be delivered to each party".

According to the applicant the award was issued to the parties on 16th November, 2005 and therefore that is the letter delivered the award to all the parties. **Mr. Otieno-Omuga** Advocate submitted that time started running from 16th November, 2005 when the award was delivered to all the parties. The applicant then moved to the High Court on 14th February, 2006 which is within the 90 days time allowed under Section 35 of the Arbitration Act.

The answer for the 1st respondent is that as far back as on 6th September, 2004 the applicant was aware that there could be a problem and/or an issue on the date of publication of the award. In a letter dated 8th September, 2004 the arbitrator says that the date of the publication of the award is 25th August, 2004. According to **Mr. Kyalo** Advocate if indeed the award was published on 25th August, 2004 then the last day for bringing a challenge would fall around 25th November, 2004.

Mr. Kyalo Advocate submitted that the arbitrator being an engineer was at liberty to engage in

correspondences to clarify issues to the parties but what he says in the letter dated 16th December, 2005 cannot change the facts. The fact remains that the arbitral award was published on 25th August, 2004. He seems not to be aware that after reading of the award he becomes *functus* officio, save for correction, which should be made within 30 days.

It is my position that a party to an arbitral proceedings cannot be allowed to derogate from the requirements under the arbitration Act. When a party submits his cause of action to an arbitrator then if he wishes to challenge the decision or the award, he must approach the High Court using the correct gate and formula. In my view non compliance with the requirement of the arbitration Act by a party clearly ousts the jurisdiction of the High Court. Time limit and period for seeking the intervention of the High Court is prescribed under Section 35(3) and the period is limited to 90 days after the lapse from the date on which the party had received the arbitral award. If the aggrieved party does not file the application or proceedings before the High court within the appropriate 90 days, the court has no opportunity or jurisdiction to determine the dispute. It is my view that a party who fails to file his application within the 90 days and when no leave is sought and obtained, then he shall be deemed to have waived the right to object.

The arbitrator by a letter dated 20th August, 2004 informed the parties that he was in the process of putting the final touches on the award. And he also warned the parties to make payments for his fees so that the award can be available to them. Lastly in that letter he informed the parties that the award would be ready any time from 1st September, 2004.

The applicant in a letter dated 6th September, 2004 to the arbitrator stated;

"Kindly let us know the effective date of publication of the award to enable us to advise our client accordingly".

That letter made reference to the earlier letter dated 20th August, 2004 and it was written on behalf of the present applicant by **M/S Otieno – Omuga & Ouma** Advocates. And in reply to that letter the arbitrator wrote a letter dated 8th September, 2004 addressed to all the 3 parties to the arbitral proceedings. It is essential to reproduce the said letter;

"Further to my letter to the parties dated 20th August, 2004, I am in receipt of the first Respondent's letter dated 6th September, 2004 wherein they have sought the date of publication of my award in respect of the above dispute.

For the information of the parties, my award was published on 25th August, 2004 and now awaits collection from my offices by any of the parties on payment by banker's cheque of my final payment all as advised in my letter to the parties dated 20th April, 2004.

The parties are advised accordingly".

The applicant relies on the subsequent letter by the arbitrator which stated that the award had been issued to the parties on 16th November, 2005.

The letter dated 8th September, 2004 talks about the publication of the award, which was done on 25th August, 2004. The said publication was subject collection of the award by the parties upon payment of the requisite fees, while the letter dated 16th December, 2005 talks of the issuance of the award to the parties.

In **Bulk Transport Corporation vs Sissy Steamship co. ltd Lloyd's Law Report (1979) Vol. 2 page 289** it was held;

"Publication was something which was complete when the arbitrator became fuctus officio but so far as the time for moving under the statute was concerned, it was notice that mattered. He does not say in that passage so far that notice necessarily means notice of actual contents. The alternative which seems to me to wholly untenable is that time would not begin to run for a wholly indefinite period if neither side took up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the six weeks period has only just started to run and the fact that I could have had this award by walking round the corner at any moment from the date upon which I received notice of its availability cannot be held against me. Such a construction of the rule appears to me entirely unreasonable. It has never been applied and I see no reason to hold and I decline to hold, that it applies now".

The parties in this matter were aware that the award was published on 25th August, 2004 and this information was supplied to the applicant after it made an inquiry as to the effective date of publication of the award. I do not think the letter dated 16th December, 2005 stating that the award had been issued on 16th November, 2005 can change the earlier factual and legal position.

I therefore hold that the award subject of this contest was delivered, published and/or issued to the parties on 25th August, 2004. The parties were informed that the award was ready for collection through the letter dated 8th September, 2004, which was necessitated by an inquiry made by the applicant. As far back as in the year 2004 September, the parties were aware that the award had been published and was ready for collection.

I am in total agreement with **Nyamu J** in **HCCC 238/2003 Transworld Safaris Ltd vs Eagle Aviation Ltd & 3 others** when he held;

"Any other interpretation or holding would result in dilatory tactics that would defeat the arbitral process denying it of the virtues associated with it such as speed and cost effectiveness"

It is my position that the award was delivered to the parties on 25th August, 2004 and not 16th November, 2005. The award was ready in August, 2004 and I do not understand why it would remain in the shelves of the arbitrator for one year and 5 months, when the parties made inquiry as early as in August, 2004. I do not think the position of the applicant is tenable and I think it is an attempt to salvage what lost through their own negligence and/or laxity. That negligence or laxity cannot be cured by the misplaced letter of the arbitrator dated 16th December, 2005.

I therefore hold that the applicant is out of time in bringing the present application. This application is without doubt outside the 90 days or 3 months prescribed and/or allowed under section 35(3) of the Arbitration Act. The letter dated 8th September, 2004 shows that the award was published on 25th August, 2004 with no room for confusion, uncertainty and doubt.

In the premises the application was filed contrary to the provisions of Section 35(3) of the Arbitration Act. It is filed without leave and therefore this court has no jurisdiction to entertain the same. **It is dismissed with costs to the 1st respondent.**

Dated and delivered at Nairobi this 14th day of May, 2007.

M. A. WARSAME

JUDGE