

CIVIL CASE NO. 550 OF 2006

MERCANTILE LIFE AND GENERAL ASSURANCE COMPANY LIMITED & ANOTHER V DILIP M. SHAH 7 3 OTHERS [2020] eKLR

Date of delivery of the Ruling: 15th January 2021

SUMMARY OF FACTS

This case commenced as a result of a default in payments by the Defendants to the Plaintiffs. The matter was eventually referred to arbitration and the court appointed Mr Collins Namachanja as the sole arbitrator who subsequently heard the dispute and published an Award.

The 2nd Plaintiff then filed a Chamber Summons Application under Sections 36 and 37 of the Arbitration Act, 1995 seeking to adopt the Award whereas the 4th Defendant filed a Notice of Motion Application under Section 35 of the Act seeking to set aside the Award. The 2nd Plaintiff also filed a Preliminary Objection to the 4th Defendant's Application on the ground that the Notice of Motion Application was filed out of time.

ISSUES

1. Whether the 4th Defendant's Application seeking to set aside the Award was filed out of time and if so, what are the consequences?
2. Whether the Award ought to be enforced as a decree of the Court?

ANALYSIS/DETERMINATION

Whether the 4th Defendant's Application seeking to set aside the Award was filed out of time and if so, what are the consequences?

The Judge was of the view that consistent with the object of the Act, the only logical interpretation of Section 35(3) of the Act is that an Application to set aside an Award must be made within 3 months from the date the Award is received and in the present case, the date of receipt was the date which the parties were notified of the Award.

Given that the 4th Defendant's Notice of Motion Application was filed more than 6 months after publication of the Award, the Application was struck out for being filed outside the 3 months prescribed.

Whether the Award ought to be enforced as a decree of the Court

The 4th Defendant opposed the Plaintiff's Application seeking to enforce the Award as a decree of the court on the ground that the Award was against public policy pursuant to Section 37(1)(b) of the Arbitration Act, 1995 as the Arbitral Tribunal entertained a claim that was statute barred under the Limitations of Actions Act (Chapter 22 of the Laws of Kenya).

The Judge however, was of the view that the Arbitrator already framed the issue of limitation for trial and determination. Therefore, he held that there was nothing to show that the Award was against public policy.

RULING/HOLDING

Given that the 2nd Plaintiff's Preliminary Objection was upheld, the 4th Defendant's Application was struck out for being filed out of time. On the other hand, the Judge held that the Plaintiffs met the pre-conditions for the enforcement of the Award. Thus, the Plaintiffs' Application seeking to enforce the Award as a decree of the court was allowed accordingly.

RATIONALE

The Judge aligned himself to the decision in *University of Nairobi v Multiscope Consultancy Engineers Limited* in that, once the arbitrator has signed off the Award and notified the parties that it is ready for collection upon payment of fees and expenses, the act of delivery is within the power and control of the parties and that the object of the entire Act would be undermined if a contrary meaning was given to Section 35(5) of the Act.

Furthermore, the Judge was of the school of thought that the act of delivery is simply making the signed copy of the Award available for collection to the parties. He was of the view that Section 32B of the Act did not require the Arbitral Tribunal to send a signed copy of the Award to the parties hence the purpose of Section 35(3) of the Act.

Regarding the second issue, the Judge was of the strict view that while public policy is a broad, infinite and malleable concept, it is important to first consider the principle that parties who enter into an arbitration agreement expect a level of finality.

CASE RELEVANCE

1. Section 35(3) of the Act provides that an Application for setting aside an arbitral award may NOT be made after 3 months have elapsed from the date on which the party making that Application had received the award.
2. Under Section 17(5) of the Act, the Arbitral Tribunal may rule on a plea on jurisdiction either as a preliminary question or in an arbitral award on merits.
3. When parties agree to have an arbitrator determine a dispute within the arbitration clause, they must take the consequences that the decision may be for or against one of the parties and that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the Award.
4. The court when called upon to decline enforcement of an arbitral award under Section 37 of the Act does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish.

**MERCANTILE LIFE AND GENERAL ASSURANCE COMPANY LIMITED &
ANOTHER V DILIP M. SHAH 7 3 OTHERS [2020] eKLR**

- 1st Plaintiff : Mercantile Life and General Assurance Company Limited
- 2nd Plaintiff: Mohammad Hassim Pondar (Suing on behalf of The International Air Transport –IATA)
- 1st Defendant: Dilip M. Shah
- 2nd Defendant: Panakaj Meghji Shah
- 3rd Defendant: Kamal M. Shah
- 4th Defendant: Five Continents Travel Ltd.
- Date of delivery of the Ruling: 15th January 2021
- Court: Commercial and Tax Division of the High Court of Kenya

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