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Kenya Branch

CASE LAW SUMMARY

CIVIL SUIT NO. 47 OF 2008
P.N. MASHRU LIMITED VS TOTAL KENYA LIMITED [2013] eKLR

Date of delivery of the Ruling: 29th January 2013

SUMMARY OF FACTS

The parties herein had entered into a Transportation Agreement. A dispute subsequently arose between the parties with respect to how much money was payable to the Respondent for services rendered under the said Agreement which dispute was referred to arbitration pursuant to the provisions of the said Agreement. Mr Collins Namachanja was appointed by the Chairman of the Chartered Institute of Arbitrators to resolve the dispute. The Arbitrator subsequently heard the matter and published the Award in favour of the Plaintiff/Respondent.

The Defendant/Applicant then filed a Notice of Motion Application under Sections 3A and 80 of the Civil Procedure Act, Cap 21 and Section 35 of the Arbitration Act, 1995 seeking an order for review, variation and/or setting aside the arbitral award whereas the Plaintiff/Respondent filed a Chamber Summons Application seeking recognition and enforcement of the said arbitral award. The Applicant was aggrieved with the Award since in its view, the said Award touched on matters which arose prior to the said Agreement that gave rise to the arbitral proceedings.

In opposition to the Applicant's Application, the Respondent averred that: then said Application was incompetent since the court had no jurisdiction to review and/or vary the arbitral award within the provisions cited; that the Application was filed out of time limited under Section 35(3) of the Arbitration Act, 1995; and that the application offended clear and mandatory provisions of Rule 4(2) of the Arbitration Rules 1997.

ISSUES

Whether the Defendant's/Applicant's Application is incompetent by reason of citation of Sections 3A and 80 of the Civil Procedure Act?
Whether the Defendant's/Applicant's Application is incompetent for failing to comply with the provisions of Rule 4(2) of the Arbitration Rules, 1997?
Whether the Defendant's/Applicant's Application was filed within time?

ANALYSIS/DETERMINATION

Whether the Defendant's/Applicant's Application is incompetent by reason of citation of Sections 3A and 80 of the Civil Procedure Act?

The Judge agreed with the Plaintiff/Respondent that Sections 3A and 80 of the Civil Procedure Act are inapplicable.

However, since the Defendant/Applicant also cited Section 35 of the Arbitration Act under which there was no doubt that the Court had jurisdiction to set aside an arbitral award, the Judge held that there was no issue in respect of the citation of superfluous and irrelevant provisions.

Whether the Defendant's/Applicant's Application is incompetent for failing to comply with the provisions of Rule 4(2) of the Arbitration Rules, 1997?
Rule 4(2) of the Rules provides as follows:

"*All applications subsequent to filing an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.*"

The Judge held that taking into account the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010, the employment of the word "shall" in Rule 4(2) of the Rules is merely directory hence the Application could not be said to be incompetent on that score.

Whether the Defendant's/Applicant's Application was filed out of time?

The Application was filed out of the stipulated 3 months period prescribed by Section 35 of the Arbitration Act and since no explanation was proffered as to why the Application was not made earlier, the Judge held that the court lacked the jurisdiction to entertain the said Application and must therefore down the judicial tools in the matter pursuant to the decision in *The Owners of Moto Vessel "Lillian S" vs Caltex Oil Kenya (1989) KLR 1.*

RULING/HOLDING

Consequently, the Defendant's/Applicant's Application to set aside the Award was struck out. The Plaintiff's/Respondent's Application was allowed with the result that the Arbitrator's Award was ordered to be enforced. 3

RATIONALE

Regarding the second issue, the Judge was of the school of thought that "shall" may be construed to be merely directory rather than mandatory in that, the mere use of the word "shall" cannot oust the jurisdiction of the High Court because the word is not necessarily in mandatory terms. In respect of the third issue, the Judge adopted a strict interpretation of Section 35(3) of the Act. In striking out the Defendant's/Applicant's Application, the Judge stated as follows:-

"*It is therefore clear that an Application for setting aside an award ought to be made within 3 months from the date of receipt of the Award or within 3 months from the date on which the request for correction or interpretation of an Award was disposed of.*"

CASE RELEVANCE

The word "shall" in statute only signifies that the matter is '*prima facie*' mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.

Section 35(3) of the Act talks about "receipt" of the Award as opposed to "publication" of the Award. The two terms are not used interchangeably. When the step taken is not a mere publication but a notification to the parties that the Award is ready, the notice is sufficient delivery of the Award since any other interpretation would introduce unnecessary delays in the arbitral process and deny it the virtue of finality.

Whereas the provisions of Section 35(3) of the Act provides that an Application in respect of 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 arbitral award, thus giving a window for making an Application even after expiry of the said period, the decision whether or not to allow extension of time to make such an Application is an exercise of judicial discretion and like any other judicial discretion, must be exercised judicially and not capriciously.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 47 OF 2008

P N MASHRU LIMITED……..…...……..PLAINTIFF/RESPONDENT

VERSUS

TOTAL KENYA LIMITED……DEFENDANT/APPLICANT

RULING

This ruling is the subject of two applications. The first application is by the defendant dated 28th July 2012 seeking an order for review, variation and/or setting aside the arbitral award made on 17th June 2011 by **Collins Namachanja, Esq**. The other application is by the plaintiff dated 11th January 2012 by the plaintiff seeking recognition and enforcement of the said arbitral award, and security from the defendant for its performance.

In my view where there are two applications, one seeking to set aside an award and the other seeking enforcement of the same, the Court ought to deal with the application seeking the setting aside first since its determination may dictate whether or not there would be necessity to deal with the one seeking enforcement. If the Court were to commence with the hearing of the one seeking the enforcement of the award, the Court may find itself in an embarrassing situation of making two contradictory decisions. Accordingly, I propose to deal with the Defendant's Motion dated 28th July 2011 before venturing to consider the plaintiff's Chamber Summons dated 11th January 2012.

The application is expressed to be brought under sections 3A and 80 of the Civil Procedure Act, Cap 21, section 35 of the Arbitration Act No. 4 of 1995. It is based on the following grounds:

1. That the parties herein entered into a Transportation Agreement dated 1st February 2007 but which was to commence on 1st November 2006 for a period of 12 months. The said agreement was for the transportation and delivery of the Applicant's products by the respondent from its

principal depots or customer location to designated delivery points.

2. That subsequently, a dispute arose between the parties herein as to how much money was payable to the respondent for services rendered under the said Agreement given the losses sustained by the Applicant at the hands of the Respondent..

3. That the said dispute was referred to Arbitration pursuant to the provisions of the said Agreement following which, Mr. Collins Namachanja (herein referred to as "The Arbitrator") was appointed by the Chairman of the Chartered Institute of Arbitrators to resolve the present dispute.

4. The parties filed their pleadings and the matter was heard and submissions tendered by the respective parties accordingly. The culmination of the entire process was the making of the final Award, which the Arbitrator did on 17th June 2011.

5. That whereas the said award is final, the Applicant is aggrieved by the same as it touches on matters, which arose prior to and after the expiry of the said Agreement dated 1st February 2007 that provided for the Arbitration process.

6. That the Arbitration clause in the said Agreement and pursuant to which the dispute was referred to Arbitration is clear that only disputes, differences and/or questions arising from the Agreement can be referred to Arbitration.

7. That notwithstanding the foregoing, the Respondent in the claim lodged with the Arbitrator particularised claims arising from the year 2004 before the commencement of the said Agreement and after the expiry thereof, which obviously are outside the scope of Arbitration.

8. That whereas the Applicant objected to the admission of year 2004 claims into arbitration, the Arbitrator affirmed the said claims and made an Award, which included them.

9. That the Arbitrator having admittedly so considered the claims arising from the year 2004 found that the Applicant is liable to pay the respondent inter alia the exorbitant sum of Kshs. 7,514,370.17/=.

10. That in view of the foregoing, the Arbitrator with due respect acted ultra vires in considering the issues and disputes that had arisen prior to the coming into force of the Agreement and after the expiry thereof.

11. That in the circumstances, the arbitral award deals with dispute not contemplated by or not falling within the terms of the reference to arbitration and as such is ultravires.

12. That as such, the arbitral award contains decisions on matters, which were not and cannot be referred to arbitration and to that extent should be set aside.

13. That whereas the Applicant is fully committed to the arbitration process and the award emanating there from, the apparent irregularity in the award substantially prejudices the Applicant.

14. That notably, the Applicant was obligated to settle the said sum of Kshs. 7,514, 370.17/= within 21 days from date when the award was taken up by either party and as such unless this

Application is urgently heard and determined, the applicant stands to suffer immense prejudice not to mention that his Application stands to be rendered nugatory.

15. That the Respondent has since filed the award in court and the Applicant is apprehensive that the Respondent will take further steps towards enforcement.

16. That this application has been made without reasonable and/or undue delay.

17. That in the interest of justice, and to give effect to the intention of the parties in the Agreement dated 1st February 2007 that the award be set aside at least to the extent that the same covers extraneous matters.

The application is supported by an affidavit sworn by **Boniface Abala**, the applicant's legal manager on 28th July 2011. According to the deponent, the parties herein entered into a Transportation Agreement dated 1st February 2007 which was to commence on 1st November 2006 for a period of 12 months which Agreement was for a period of 12 months for transportation and delivery of the Applicant's products by the Respondent from its principal depots or customer location to designated delivery points. A dispute subsequently arose between the parties with respect to how much money was payable to the Respondent for services rendered under the said Agreement which dispute was referred to Arbitration pursuant to the provisions of the said Agreement and **Mr Collins Namachanja** (the Arbitrator) was appointed by the Chairman of the Chartered Institute of Arbitrators to resolve the said dispute. After hearing the parties the said Arbitrator made his award on 17th June 2011 which award the applicant is aggrieved with since in its view the said award touches on matters which arose prior to the said Agreement that gave rise to the Arbitral proceedings. According to the deponent, only disputes, differences or questions arising from the Agreement can be referred to Arbitration. In his view, it is the entire agreement between the parties and upon its execution, all previous agreements, contracts or understandings in relation to the subject matter thereof between the parties thereto, or their assignors, shall cease to be of any effect. Notwithstanding the foregoing, the respondent's claim included matters arising from the year 2004 prior to the commencement of the Agreement which matters in the deponent's view had been overtaken by events and are outside the scope of Arbitration as provided in the said Agreement. Despite the applicant's objection to the inclusion of the said claims the Arbitrator affirmed the said claims and found that the applicant is liable to pay the respondent inter alia a sum of Kshs 7,514,370.17 which sum is in the deponent's opinion exorbitant. According to the deponent, the Arbitrator acted ultra vires in considering the issues which arose prior to the Agreement. And hence the arbitral award dealt with disputes not contemplated by or not falling within the terms of the reference to arbitration and as such is irregular and ought to be set aside. Whereas the applicant is fully committed to the Arbitration process and invariably to the Award emanating therefrom, the apparent irregularity, in the deponent's view, substantially prejudices the applicant. According to him, it is in the interest of justice and in order to give effect to the intention of the parties as envisaged in the Agreement dated 1st February 2007 that the impugned Award be set aside at least to the extent that the same covers extraneous matters.

In opposition to the application, the respondent filed an affidavit sworn by **Dipesh Mashru**, its Director on 25th October 2011. According to him the applicant is incompetent since the court has no jurisdiction to review and/or vary the arbitral award within the provisions cited; that the application is filed out of time limited under section 35(3) of the Arbitration Act, 1995; and the application offends clear and mandatory provisions of Rule 4(2) of the Arbitration Rules, 1997. According to the instructions received from the respondent's advocates, the applicant's advocates collected the final arbitral award on 11th July 2011 while the respondent's advocates collected the same 12th July 2011 on which day the respondent's advocates requested the applicant's advocates to cause their clients to comply therewith.

From the supporting affidavit, it is deposed that the Defendant was fully aware of the terms of the final arbitral award. Therefore the Arbitrator having notified of the publication of the final award on 17th June 2011, this is the date that under the provisions of section 35(3) of the Arbitration Act, 1995 the Defendant is deemed to have received the arbitral award hence the application ought to have been filed at latest by 17th September 2011. Even if time was to be reckoned from 11th July 2011 when the award was received, the last date on which the application ought to have been filed would have been 11th October 2011 hence the application herein is hopelessly out of time, is incompetent and ought to be rejected. It is further deposed that the application is unmerited since there is no material placed on record to justify the grant of the orders sought. In the plaint herein, the respondent's claim was in respect of unpaid transportation charges for services rendered in respect of a contractual relationship that commenced in the year 2004. Faced with the suit, the applicant applied for stay of the proceedings and for an order of referral to arbitration on the ground that the matters in dispute in the suit were subject of arbitration clause in terms of the Agreement dated 1st February 2007. According to the deponent, the relevant arbitration clause in the Transport Agreement dated 1st February 2007 was to the effect that it was only to apply for the purposes of resolving through arbitration disputes arising "during the continuance" of the Agreement yet by the time this suit was filed in court, the Agreement had come to an end by effluxion of time. Despite that the Applicant's application was allowed by consent on 2nd December 2008 and the dispute referred to arbitration for resolution. Hence the appointment of the Arbitrator was done at the instance of the applicant. It is therefore the respondent's position that the applicant is a party who changes positions when circumstances and convenience suit it hence the application herein is a gross abuse of the court process and is against public policy as it does not respect a now well established legal concept of finality of arbitral awards as well as the desirable policy for expeditious disposal of commercial disputes. In any event, it is deposed, the applicant has not demonstrated in what manner the arbitral award dealt with a dispute that was not contemplated by or fell outside the terms of reference to arbitration and the applicant likewise failed to demonstrate which part of the arbitral award, if any, deals with any such dispute. It is further contended that in view of the state of the pleadings filed before the Arbitrator the issues framed by the parties for determination in the arbitration did not incorporate the question as to what period the respondent's claim related to which issue was raised by the applicant for the first time during the trial and at the submissions stage which issue was considered by the Arbitrator who found that what had been presented for arbitration was the Plaintiff/Respondent's claim as originally submitted to this court for resolution. Accordingly it is deposed that the applicant has not demonstrated in any way how the arbitral award can be termed as having dealt with an issue falling outside the terms of the reference to arbitration and is therefore unmerited

The parties relied on their written submissions in the prosecution of the application. In the applicant's view, under section 35(2)(a)(iv) of the Arbitration Act an arbitral award may be set aside by the High Court only if the party making the application furnishes proof that 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. Further section 37(1)(a)(iv) provides that the High Court may refuse to recognise or enforce an arbitral award on the said ground. Based on the evidence on record of the applicant's application, it is submitted that the arbitrator made his award based on matters that are not contemplated and not falling within the terms of the agreement dated 1st February 2007. In support of the application the applicant relies on **Pinnacle Projects Lts vs. Dickson Matu High Court Miscellaneous Application No. 742 of 2008** and **Express Kenya Ltd vs. Peter Titus Kanyago High Court Miscellaneous Application No. 963 of 2002**. Distinguishing this case from **Kihuni vs. Gakunga & Another [1986] KLR 572**, it is submitted that in this matter the Statement of Agreed Issues signed by both parties does not extend the arbitral proceedings to periods outside the scope of the agreement since issue no. 4 effectively deals with losses 'during the currency of the Transportation Agreement' which shows the parties' intention to be bound by the currency of the agreement. With respect to **Kenya Shell Ltd vs. Kobil Petroleum Ltd Nairobi Civil Appeal No. 57 of**

2006, it is submitted that the applicant has moved the court under section 35(2)(a)(iv) which deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration rather than section 35(2)(b)(ii) which deals with cases where the award is in conflict with public policy of Kenya. Similar arguments, it is submitted applies to **Christ for All Nations vs. Apollo Insurance Company Ltd HCCC No. 477 of 1999**. Whereas in **APA Insurance Ltd vs. Hon. Chris Okemo High Court Miscellaneous Application No. 241 of 2005** the court dismissed the application to set aside the award based on the ground that the applicant did not object to admissibility of 'without prejudice' correspondence, in the present case the applicant objected to the consideration of the extraneous matters. The cases of **Mahinder Singh Channa vs. Nelson Muguku & Another High Court Miscellaneous Application No. 108 of 2006** and **Deekay Contractors Ltd vs. Construction & Contracting Ltd High Court Miscellaneous Application No. 762 of 2003** are also distinguished on the grounds that in this case as opposed to the said case, the application was filed within 90 days of the publication of the arbitral award in compliance with section 35(3) of the Arbitration Act. It is therefore submitted on behalf of the applicant that section 35(2)(a)(iv) is clearly beyond peradventure that this court will intervene and rightly so when an arbitrator deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration as this would lead to grave injustice upon the aggrieved party and such is the case here hence the application ought to be allowed.

On the part of the respondent, it is submitted that in the entire Arbitration Act, there is no jurisdiction vested in the court to review or vary an arbitral award and therefore, to the extent that the application seeks to review or set aside the arbitral award the same is incompetent. In light of the provisions of section 10 of the Arbitration Act as read with section 32A of the same Act, the only recourse against an arbitral award is under section 35(1) thereof hence the provisions of the Civil Procedure Act more so sections 3A and 80 thereof cited by the applicant are inapplicable and hence the jurisdiction of the Court has not been properly invoked. It is further submitted that where an award has been filed under rule 4(2) of the Arbitration Rules, 1997 all subsequent applications are to be by chamber summons in the said cause. As the application herein is brought by way of Notice of Motion, the same, it is submitted, is incompetent. In the respondent's view, the primary ground upon which the applicant relies in his application is that the award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration. However, in the respondent's view, the defendant has failed to adduce any evidence, cogent or otherwise, to support this allegation which allegation can only be determined by reference to the actual terms and/or scope of the reference of the said arbitration a task which the applicant has failed to perform. In its plaint filed in this court on 26th January 2008, it is submitted that it was clearly made to the applicant that the respondent's claim related to the entire period of engagement and the defendant applied for the entire claim to be referred to arbitration for resolution. It is therefore the respondent's view that its claim was covered by clause 29 in the Transport Agreement between the parties dated 1st February 2007. By purporting now after the determination of the arbitral process that the said agreement did not cover the contractual period of 2004-1st February 2007,, the respondent contends that the applicant of for all intents and purposes approbating and reprobating positions on the said clause which conduct is against a clear policy of the law that parties to litigation should not be allowed to approbate and reprobate positions depending on circumstances obtaining at any given time. Based on the pleadings and material placed before the Arbitrator, it is submitted that there was never any doubt at all as what the issues in dispute submitted for arbitration were. Pursuant to the provisions of section 4(3)(c) of the Arbitration Act, it is submitted that by operation of law, a separate arbitration agreement arose for adjudication being the provision of transport services by the Plaintiff in favour of the Plaintiff since the year 2004 and hence those issues formed the scope of the arbitral proceedings and were rightly adjudicated upon. It is further submitted that since in the statement of claim the plaintiff made a claim for payment of unpaid invoices raised since 2004 which formed part of the issues for determination by the arbitral tribunal, it does not lie for the Defendant to seek to have the arbitral award set aside on the fact that the Plaintiff's claim included the period going back to the year 2004. In the

respondent's view, the plaintiff's claim for unpaid invoices raised since the year 2004 formed part of the dispute contemplated by or falling within the terms of reference to arbitration and was a matter within the scope of the reference to arbitration. Citing **Kihuni vs. Gakunga & Another** (supra) and **Rwama Farmers' Co-operative Society Limited vs. Thika Coffee Mills Limited [2012] eKLR**, it is submitted that the applicant cannot in law be permitted to challenge the respondent's claim for payment of the unpaid invoices raised since the year 2004 as being a dispute not contemplated by or falling within the terms of reference to arbitration when the same formed part of the issues drawn by its advocates for determination by the arbitral tribunal and which issue the Arbitrator extensively dealt with hence cannot be challenged as to do so would amount to challenging the merits of the award which is prohibited under section 32A of the Arbitration Act. With respect to the finality of the arbitral decisions, the respondent relies on **Kenya Shell Limited vs. Kobil Petroleum Limited** (supra) and **Christ for All Nations vs. Apollo Insurance Company Ltd HCCC No. 477 of 1999** (supra). In the respondent's view even if the arbitrator exceeded his jurisdiction and dealt with the matters that went beyond the scope of the reference to arbitration, the applicant is in law deemed to have waived its right to mount any challenge pursuant to sections 5 and 17(3) of the Arbitration Act by not raising the issue either in the pleadings or at the hearing and for this submission the respondent relies on **Transworld Safaris Limited vs. Eagle Aviation Limited & 3 Others High Court Miscellaneous Application No. 238 of 2003**.

I have considered the pleadings and the submissions made by the parties herein. It is important for the court to outline a brief history of this matter. The respondent in this matter instituted this suit on 26th February 2008. In the suit the respondent claimed a sum of Kshs 8,766,347.97 as at February 2008 based on a Transport Agreement entered into in 2004 between the parties herein. By a Notice of Motion dated 3rd March 2008, the applicant sought orders seeking inter alia that "this Honourable court be pleased to issue an order to refer the Plaintiff and the Defendant to arbitration" one of the grounds being that "the issues that arise in the Plaintiff's suit are the subject of an arbitration agreement dated 1st February 2007 and that the issues arising in the plaintiff's suit pertained to matters that arose during the subsistence of the Agreement aforesaid hence the agreement is operative and capable of being performed. On 2nd December 2008, the parties recorded a consent before **Waweru, J** whose effect was to stay proceedings in this suit and refer the parties to arbitration. The dispute was eventually referred to the Arbitrator herein for the purposes of resolution. The respondent then filed a statement of claim which was later amended in which he sought Kshs 6,855,347.97. There was a defence and counterclaim filed by the respondent and a reply to the defence and defence to the counterclaim filed by the respondent. Agreed issues were then drawn and approved by the parties some of which were whether or not the outstanding and unpaid charges due to the Claimant from the Respondent as at 6/2/2008 stood at Kshs 8,766,347.97 or Kshs 3,712,407.12; whether the Claimant is entitled to the reliefs sought in the statement of the Claimant and what, if at all, is the rate of interest applicable to the amount due to it from the Respondent; and whether the respondent is entitled to the reliefs sought in the counterclaim and what if at all, is the rate of interest applicable to the amount due to it from the claimant. The Arbitrator, after hearing the parties rendered his award dated 17th June 2011 in which he awarded the respondent Kshs 7,514,370.00 with interest at the rate of 12% per annum payable if the award was not paid within 21 days with costs assessed at Kshs 421,097.69 to also accrue interest if not paid within a similar period.

The first issue for determination is whether the application is incompetent by reason of citation of sections 3A and 80 of the Civil Procedure Rules. In **Kenya National Chamber of Commerce & Industry vs. Edon Consultants Civil Appeal No. 34 of 2001** the Court of Appeal held that where a dispute has been resolved by arbitration, it is perplexing for the Appellant's counsel to think that the setting aside of the arbitration award can be achieved under Orders 9A and 21 of the Civil Procedure Rules as the same can only be set aside under section 35 of the Arbitration Act.

Again in Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 of 2009 the same Court expressed itself as follows:

"Under section 35 of the Arbitration Act, the duty of the arbitrator is to deliver the award and he did so. If the award had not been served there was no basis for the appellant to instruct her then advocate to appeal against the award. As she admits in her affidavit, we hold that on the basis of documentary evidence adduced all the three documents were served. The reason for this is that the challenge on due process under the Act can only be raised before the making of the award. After the making of an award such as in this case the absence of notice cannot be a ground for challenge under the Act. 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. 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. Failing to serve any process after an award has been made, is not one of the grounds for setting aside an award or any subsequent judgement or decree. Similarly, the grounds for refusal of recognition or enforcement which by large are almost similar to those for setting aside an award are contained in section 37 of the Arbitration Act and again it is clear that none of the grounds set out in the application fall under the provisions of section 37 of the Arbitration Act. A careful look at all the provisions cited in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override section 10 of the Arbitration Act which provides that except as provided in this Act no court shall intervene in matters governed by this Act. In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act and this includes entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or the judgement/decree arising from the award. In this regard we note that because of the number of applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to the Court that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court, *suo moto*, because jurisdiction is everything…Had the superior court played a supportive role as contemplated in section 10 of the Arbitration Act and the other provisions in the Act which invite court's intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided…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 the delivery of the award. The last date for the challenge was 15th February, 2008 and all the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction… It is clear to the court that none of the grounds relied on by the appellant fall under section 35 or section 37 of the Arbitration Act. An award having been published nearly 10 years ago after several mention notices concerning the award were ignored by the appellant and her advocates, the filing of the application constituted an abuse of the court process. The superior court had no business entertaining the application giving rise to this

appeal as well and should have struck it out for lack of jurisdiction…We therefore reiterate that there is no right for any court to intervene in arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the Arbitration Act. We are concerned that contrary to the finality of arbitral awards as set out in the Arbitration Act the superior court all the same entertained incompetent applications which have in turn resulted in the 10 years delay in the enforcement of the award. One of the grounds relied on to invite the superior court's intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the State's powers are exercised…There is nothing whatsoever indicating that the award before the court fell under any of the above definitions of public policy, so as to warrant a challenge under the public policy exception…In the arbitration agreement there is an implied agreement between the parties to carry out the ultimate award. The concept of the finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modelled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of this Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation. Where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the policy of allowing flexibility to the parties, clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render the informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process which is an unacceptable process. The goal of flexibility must yield to a national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway…By entering into an arbitration agreement a party necessarily gives up most rights of appeal and challenge to the award in exchange for the virtue of finality of the award. From the above it is clear that from the case before the court the appellant has made nonsense of all the virtues of having gone to arbitration resulting in a delay of 10 years following resort to many interlocutory applications aimed at upsetting the finality of the award which is illegal and unacceptable. The fact that the court entertained this interference is what has necessitated the court's in-depth review of what the court considers to be the correct approach when future courts are faced with similar applications or challenges…In this case it is quite clear to us that it was wrong for the court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The court had no jurisdiction to do so in the first place under the clear provisions of the Act. Intervention by the filing of several applications which has in turn resulted inconsiderable delay should have been treated as a jurisdictional issue under the Act and dealt with straightaway. On the court's part, it recognises that the matters raised in the application before the superior court and this appeal are well outside the provisions of section 39 of the Arbitration Act and for this reason, the court has no hesitation in striking out this appeal and setting aside the superior court ruling and striking out the application with costs".

I therefore agree with the respondent that sections 3A and 80 of the Civil Procedure Act are

inapplicable. However, the applicant has also cited section 35 of the Arbitration Act under which there is no doubt that the Court has jurisdiction to set aside an arbitral award. Accordingly no issue turns upon the citing of superfluous and irrelevant provisions.

The next issue for determination is whether the application as filed is incompetent for failing to comply with the provisions of rule 4(2) of the Arbitration Rules, 1997. For avoidance of doubt the said rule provides:

All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.

Whereas the phrase employed in the said rule is “shall” it has been held that in certain circumstances that word may be construed to be merely directory. I would associate myself with the holding by the Court of Appeal of Uganda in **David Kayondo vs. The Co-Operative Bank (U) Ltd SCCA No. 10 of 91** to the effect that the mere use of the word “shall” cannot oust the jurisdiction of the High Court because the word is not necessarily mandatory. This position was also adopted by **Ringera, J** (as he then was) in **Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) HCCC No. 462 of 1997** where he held that the use of the word “shall” in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. Under what circumstances, then, do courts deem the word to be merely directory as opposed to mandatory" The East African Court of Appeal in **Brooke Bond Liebig (T) Ltd. vs. Mallya [1975] EA 266** held that Rules of procedure are designed to give effect to rights of the parties and once parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. The Court however added a rider that this does not mean that the rules of procedure should not be complied with - indeed they should be - but that non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no prejudice has been done to the parties. In my view, taking into account the provisions of Article 159(2)(d) of the Constitution I have no doubt in my mind that the employment of the word “shall” in rule 4(2) of the Arbitration Rules, 1997 is merely directory hence the application is not imcompetent on that score.

That leads me to issue whether the application was filed within time. Section 35(3) of the Arbitration Act 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.

It is therefore clear that an application for setting aside an award ought to be made within 3 months from the date of the receipt of the award or within 3 months from the date on which the request for correction or interpretation of an award was disposed of. The respondent contends that the advocates were notified by the Arbitrator that his final award was ready for collection vide a letter dated 17th June 2011 and that applicant’s advocates received the award on 11th July 2011 hence the application ought to have been made by latest 11th October 2011. This position according to the applicant is vindicated by annexture BA-1 to the supporting affidavit which shows that by 19th July 2011, the applicant was fully aware of the terms of the final award. The said annexture is a resolution of the company resolving *inter*

alia to apply for review, variation and/or setting aside of the award. That annexture while referring to the award made on 17th June 2011 does not expressly deal with the date when the applicant was notified that the award was ready. Section 35(3) aforesaid talks about "receipt' of the award as opposed to the publication of the award. Accordingly, I am not satisfied that the two terms can be used interchangeably. Where however, the step taken is not a mere publication but a notification to the parties that the award is ready, I would agree with the decision of **Nyamu, J** (as he then was) in **Transworld Safaris Ltd vs. Eagle Aviation Ltd** (supra) that a notice to the parties that an award is ready is sufficient delivery since any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality. The respondent has annexed a copy of the letter dated 17th July 2011 addressed to both advocates informing them that the award was ready for collection. Further to that there is a copy of a letter written by the respondent's advocates addressed to the applicant's advocates which on the face of it indicates that on 12th July 2011 the applicant's advocates were made aware of the existence of the final award. Under section 9 of the Arbitration Act, a communication effected by facsimile or electronic mail is deemed to have been received if it is transmitted to a facsimile number or electronic mailing address, as the case may be, specified by the addressee as his number or address for service and is deemed to have been received on the day on which it is so transmitted. The applicant has not disputed by way of any affidavit that this communication was received. Neither is there any submission on this grave matter. As was stated by **Warsame, J** (as he then was in **Mahinder Singh Channa vs. Nelson Muguk & Another Nairobi (Milimani) HCMA No. 108 of 2006:**

"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 or formula and non-compliance with the requirements of the Arbitration Act by a party clearly ousts the jurisdiction of the High Court. Time limit and the 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 of the date on which the party 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. 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…Publication is something which is complete when the arbitrator becomes *functus officio* but so far as the time for moving under the statute is concerned, it is the notice that matters. It is wholly untenable that the time would not begin to run for a wholly indefinite period if neither side takes 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 period has only just started to run and the fact that he could have had his award by walking round the corner at any moment from the date upon which he received notice of its availability cannot be held against him. Such a construction of the rule appears to be entirely unreasonable. It has never been applied and there is no reason to hold that it applies now…As the parties in this matter were aware that the award was published and this information was supplied to the applicant after it made an inquiry as to the effective date of publication of the award, the letter stating that the award had been issued cannot change the earlier factual and legal position. 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…In this case the award was delivered to the parties on 25th August and not 16th November, 2005. The award was ready in August, 2004 and it cannot be understood why it would remain on the shelves of the arbitrator for one year and 5 months when the parties made inquiry as early as August, 2004. The position of the applicants is not tenable and it is an attempt to salvage what was lost through their own negligence and/or laxity which negligence or laxity cannot be cured by the misplaced letter of the arbitrator dated 16th December, 2005…Therefore the applicant is out

of time in bringing the present application which is without doubt outside the 90 days or 3 months prescribed and/or allowed under section 35(3) of the Arbitration Act. As the application was filed contrary to the provisions of section 35(3) of the Arbitration Act, it is filed without leave and therefore the court has no jurisdiction to entertain the same."

Therefore taking into consideration the letter dated 17th June 2011, the facsimile dated 12th July 2011 as well as the averment on oath in paragraph 5 of the replying affidavit sworn by **Dipesh Mashru** on 25th October 2011 all of which remain uncontroverted as well as the applicant's resolution dated 19th July 2011, I agree with the position taken by the respondents that at the latest the application ought to have been made by 11th October 2011 hence the present application which was made on 18th October 2011 was out of time. Whereas the provisions of section 35(3) of the Arbitration Act provides that an application of this 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, thus giving a window for making an application even after the expiry of the said period, the decision whether or not to allow extension of time to make such an application, to my mind is an exercise of judicial discretion and like any other judicial discretion, must be exercised judicially and not capriciously. It must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects. What it means is that the court must show that it has teeth when faced with a deserving case to grant appropriate relief. However the court acts on reason and not on emotion. See **Rose Detho vs. Ratilal Automobiles & 6 Others Civil Application No. Nai. 304 of 2006.**

In the instant case no explanation has been proffered as to why the application was not made earlier. Where an application is made outside the time stipulated under the provisions of the Arbitration Act, I agree with **Warsame, J** in **Mahinder Singh Channa vs. Nelson Muguk & Another Nairobi**(supra) that the Court would have no jurisdiction to entertain the matter. Without jurisdiction **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1,** expressed himself as follows:

"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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

I must therefore down the judicial tools in this matter at this stage and find that the Notice of Motion dated 14th October 2011 is incompetent. Accordingly, the same is struck out with costs to the respondent.

Having so found, the only objection raised by the Defendant in the affidavit sworn by **Boniface Abala** on 19th December 2012 was the pendency of the application for setting aside. In fact in paragraph 7 thereof the deponent, correctly in my view, appreciated the fact that the application for adoption of the award is to follow as a matter of course if the application seeking to set aside is disallowed and will automatically be dispensed with.

In the result the plaintiff's application dated 11th January 2012 is allowed with the result that Arbitrator's award herein is ordered to be enforced. The Plaintiff will have the costs this application.

Dated at Nairobi this 29th day of January 2013

G.V. ODUNGA

JUDGE

In the presence of:

Mr Njoroge for the Plaintiff

Mrs Kariuki for the Defendant