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Kenya Branch

CASE LAW SUMMARY

HC.COMM. MISC/E197/2018
PESA PRINT LIMITED V ATTICON LIMITED & ANOTHER; SYMPHONY TECHNOLOGIES LTD & 2 OTHERS (INTERESTED PARTIES); BARONS ESTATES LIMITED (INTENDED RESPONDENT)

Ruling Date: 20th December 2019

SUMMARY OF FACTS

The case concerned a disagreement over a loan repayment by the applicant to the respondents. After the failure of the applicant to abide by the terms of the loan agreement, the respondents referred the case to arbitration. The arbitrator rendered an award in favor of the respondents and the applicant sought to have this award set aside in court. Their setting aside application was based on the grounds of fraud and violation of public policy under section 35 of the Arbitration Act. More specifically, the applicant claimed that the award violated public policy because it would lead to the unjust enrichment of the respondent. On the other hand, the fraud was as a result of the alleged failure of the arbitrator to confirm the exact payments that the applicant had paid to the respondent. The applicant also accused the arbitrator of failing to enjoin parties who had a stake in the result of the award.

Conversely, the respondents asserted that the applicant had not proven how the grounds of setting aside the award were demonstrated in the arbitral proceedings. They also urged the court to decline the applicant's bid to enjoin new interest parties that were not part of the arbitral proceedings. According to them, the setting aside application was a disguised appeal by the applicant, and thus further evidence or additional parties could not be presented before the court at that stage. While they acknowledged that the court could admit additional evidence in cases of fraud, the respondents maintained that the court did not have the power to enjoin new parties. The additional parties before the court also opposed their own enjoinder as they clarified that they did not amount to interested parties within the meaning of the term under the Constitution of Kenya (protection of the Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013. In response, the applicant asserted that the court exercised original jurisdiction over the setting aside application. This signified that the court had the power to admit new evidence and additional parties to the hearing, especially because the case concerned allegations of fraud.

ISSUES

1. Whether the court exercised original or appellate jurisdiction over the setting aside application filed by the applicant.
2. Whether the court had the power to enjoin new parties in the case in light of the allegations of fraud made by the applicant.
3. Whether the award rendered by the tribunal was infected by instances of fraud, bribery, undue influence, or corruption under Section 35(2)(a)(vi) of Arbitration Act.
4. Whether the award violated public policy under section 35 (2)(b)(ii)
5. Whether Atticon Limited was properly before the arbitral tribunal and whether such tribunal was properly constituted, and if not, whether this rendered the award void ab initio.
6. Whether a stay of execution on the award should be granted.

ANALYSIS AND DETERMINATION

On the first issue, the court begun by determining whether there were allegations of fraud, bribery, undue influence, or corruption in order to determine the type of jurisdiction it exercised in the matter. The court relied upon the Black Laws Dictionary to define these terms, and as per the facts, the court held that the applicant had failed to show how the arbitral proceedings were tainted with fraud, bribery, undue influence, or corruption. Therefore, the court had no original jurisdiction over the matter. What was evident was the lack of a conclusive decision on the facts leading up to the loan repayment by the applicant. The court noted that the applicant had an earlier opportunity to introduce the interested parties in the arbitration proceedings in order to clarify these matters before the arbitral tribunal. However, the applicant expressed their wish to canvass the hearings by way of written pleadings, and at no point did they raise an objection as to the non-inclusion of the interested parties. Under section 5, a party is deemed to have waived their right to object where they choose to continue with the proceedings and they fail to raise a matter on non-compliance within the prescribed time limit, or if there is no time limit, they raise the issue after an unreasonable delay. Since the applicant had not enjoined the parties during the arbitration proceedings, the court held that it was too late for them to enlist them in the current proceedings.

Additionally, the court found that it did not have appellate jurisdiction over the matter. The issues raised by the applicant went to the merits of the case which were already canvassed by the arbitral tribunal. The court held that it could not re-examine these matters as it would amount to using the court to appeal where parties were unsatisfied with the outcome of the arbitral proceedings. Owing to the finality of arbitral awards, the court could no longer entertain the merits of the case as the applicant wished. However, the court invited the applicant to file separate suits to claim what was due to them after the recognition and enforcement of the award. This was because there was a probability of unjust enrichment of other parties at the expense of the applicant.

HOLDING

The court held that it neither exercised appellate or original jurisdiction over the application. The former type of jurisdiction was absent as the court was not entitled to re-examine matters already addressed by the arbitral tribunal. The latter type of jurisdiction was also absent because the applicant had failed to prove how the arbitral proceedings were tainted with fraud, bribery, undue influence, or corruption. As to the enjoinder of the parties, the court found that the applicant could not enjoin these new parties because they had failed to do so during the arbitral proceedings. Failure to raise these objections without undue delay amounted to a waiver of the right to object under section 5 of the Arbitration Act. Finally, the court dismissed the application to set aside the award and it made directions as to the recognition and enforcement of the arbitral award upon production of the original or certified copy of the Final Award and Arbitration Agreement.

RATIONALE

The reasoning of the court was founded on the principle of non-interference with arbitration matters as stipulated under section 10 of the Act. It refrained from re-examining the matters already canvassed by the arbitral tribunal in order to reinforce the finality of arbitral awards. Moreover, it was apparent that the jurisdiction of the court in this matter was confined to the grounds stipulated under section 35 and 37. Failure to prove these grounds would restrict the court from asserting its authority over the arbitral matter. The court was also keen on the swift nature of arbitration. This

was because it refused the enjoinder of new parties with unnecessary delay especially after the applicant had the opportunity to enjoin them during the arbitral proceedings.

RELEVANCE

Section 5 of the Act provides that if a party fails to raise an objection on non-compliance within the requisite time frame, such a party will be held to have waived their right to object. Where no timelines are prescribed by the parties, the party has the responsibility to raise the objection without undue delay. Waiver of the right to object will prevent a party from raising an objection in any further proceedings, including proceedings before a court of law.

Section 35(2)(a)(vi) of the act provides that an award may be set aside on grounds of fraud, bribery, undue influence, or corruption. Jurisprudence from the Court of Appeal provides that a court may exercise original jurisdiction in investigating an arbitral matter that manifests either of the aforementioned grounds. Such original jurisdiction allows the court to admit new evidence. However, if a party does not prove how the arbitral proceedings were tainted with either fraud, bribery, undue influence, or corruption, the court will cease to exercise original jurisdiction and decline to admit new evidence presented by the parties.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL APPL. NO. E 197 OF 2018

PESA PRINT LIMITED...APPLICANT

-VERSUS-

ATTICON LIMITED..1ST RESPONDENT

USHINDI CREDIT LIMITED..2ND RESPONDENT

AND

SYMPHONY TECHNOLOGIES LTD.......................1ST INTERESTED PARTY

FAMILY BANK LTD..2ND INTERESTED PARTY

DR. EKURU AUKOT T/A EA CONSULTING..........................3RD INT. PARTY

BARONS ESTATES LIMITED.........................INTENDED 2ND RESPONDENT

RULING

INTRODUCTION

By an application dated 11th December 2018, pursuant to **Section 35 of the Arbitration Act, 1995 Rule 7 of the Arbitration Rules (1997) Section 3A of the Civil procedure Act, Order 51 of the Civil Procedure Rules, 2010** and all other enabling provisions of the law, the Applicant herein (**Pesa Point limited**) sought orders;

a) That there be a stay of execution of the arbitral award dated 24th August 2018 and published by the Sole Arbitrator, Mr. John M. Ohaga on 13th September 2018 pending the hearing and determination of this application;

b) That this Honourable Court be pleased to set aside the Arbitral Award herein dated 24th August 2018 and published by the Sole Arbitrator, Mr. John M. Ohaga on 13th September 2018.

The Application was based on grounds that;

1. The dispute between the Applicant and the 1st Respondent concerned a **LOAN AGREEMENT** dated 9TH June 2016 signed between the Applicant and the 1st Respondent. The object of the said Loan Agreement was that the 1st Respondent agreed to lend to the Applicant a sum of Ksh 50,000,000 for purposes of paying off a claim or guaranteeing the payment of the same to the Applicant to settle a consent order in ***NAIROBI HIGH COURT MISC. APPLICATION NUMBER 507 OF 2015*.**

2. The salient feature of the said loan agreement was that in the event the 1st Respondent's guarantee to the 1st Interested Party is utilized to meet the Applicant's obligations under the said loan/guarantee agreement, then the Applicant shall repay the entire principal of the loan outstanding to the lender.

3. It was also a term of the agreement that in the event the 1st Respondent's guarantee to the 1st Interested party is utilized to meet the Applicant's obligations under the said guarantee agreement, then the Applicant shall repay the entire principal of the loan outstanding to the 1st Respondent in line with this clause:

a) The borrower (Applicant) shall provide, simultaneously with the signing of this agreement, an irrevocable bank instructions or payment note, to remit the above loan together with any additional compensation and/or charges (if any) to the account of:

Account Name : Atticon Limited

Account Number: [xxxx]

Bank: Family Bank Limited

Branch: Kilimani Branch

Branch Code: 046

Within 48 hours from the receipt of their initial deposit or mobilization fees in respect of tender number NTSA/ICB-014/2014-2015.

4. The 1st Respondent did not pay off the claim but rather guaranteed the payment of the same in form of Bank Guarantee taken by the 2nd Interested Party with the 1st interested Party. The effective date of the guarantee was 30th June 2016 and expired after 3 months on 30th September 2016.

5. The 1st Respondent contended that the guarantee was called on by the 1St interested Party. This was because, there was no evidence that the Applicant made good its financial obligations with the 1st Interested Party in terms of the Agreement dated 10th June 2016. The Applicant denied the same and maintained that the guarantee was not called on since it made good its obligations with the 1st interested Party.

6. Notably, neither the 1st Interested Party nor the 2nd Interested Party were parties to the Arbitration process to verify the truthfulness or otherwise of the respective positions taken by the Applicant and the 1st Respondent, neither did the Arbitrator call upon the 1st and the 2nd interested parties to clarify on the true position.

7. Consequently, the Arbitrator reached the conclusion that the Applicant was in breach of its obligations under the Loan Agreement. This was due to failure to demonstrate that it complied with **Clause 2 of the Loan Agreement;** by issuing irrevocable bank instructions for the remittance of the loan to the 1st Respondent within forty eight (48) hours from the receipt of the initial deposit or mobilization fees in respect of the tender.

8. This presupposes that the guarantee was taken up by the 1st Interested Party, and therefore the Applicant was obligated to indemnify the 1st Respondent. This finding was factually incorrect, legally unsound, fraudulent and goes against public policy for reason that:

a) The Sole Arbitrator shifted the burden of proof from the 1st Respondent to the Applicant by stating that the Applicant should have

presented evidence to show it made its financial obligations to the 1st interested party;

b) The 1st Interested Party has unequivocally confirmed that it did not call on the guarantee that was issued in its favour through a letter dated 7th December 2018 to the 2nd Interested Party when it came to its attention that there were allegations that the guarantee had been called on by it;

c) The 1st Respondent was aware that the guarantee had not been called on by the 1st Interested Party, and it could easily confirm the same from the 2nd Interested Party which was its bank, but chose to misrepresent facts to the Arbitrator with the intention to defraud the Applicant. nothing could have been easier than for the 1st Respondent to get a confirmation from the 2nd Interested Party since a bank is obligated to give the financial information of its clients/customers;

d) The Arbitrator's failure to ask for a confirmation from the 2nd Interested Party or the 1st Interested Party as to whether the guarantee was called on in a contested issue, or order the jointer of both, but instead resort to assumptions was manifestly illegal and/or a demonstration of connivance with the 1st Respondent to defraud the Applicant;

e) The award of Ksh 50,000,000 to the 1st Applicant, whereas the guarantee in favour of the 1st Interested Party was not called on **amounts to unjust enrichment of the 1st Respondent and/or fraud, hence against public policy.**

9. The Sole Arbitrator ignored the fact that the entire contractual sum of Ksh 30,000,000 had been remitted by the Applicant towards the fulfilment of its contractual obligations to the 2nd Respondent. The Sole Arbitrator ordered that since the said sum had not been paid in terms of the contractual terms spelt out in the Further Agreement, the Applicant to again pay Ksh 30,000,000 to the 2nd Respondent. this finding and eventual award was factually incorrect, legally unsound, fraudulent and goes against public policy for reason that:

a) It amounts to unjust enrichment of the 2nd Respondent and hence against public policy since the entire contractual sum had been remitted by the Applicant towards the settlement;

b) **The 1st Interested Party which was a party to the tripartite further agreement dated 25th July 2016 which was the subject of the Arbitration was deliberately not enjoined in the proceedings to expose the 2nd Respondent, hence breach of procedure and thus illegality.** The 1st Interested Party should have been a mandatory party to the arbitral proceedings;

c) The Arbitrator's failure to ask for a confirmation from the 1st Interested party and the 3rd Interested Party as to whether the 3rd Interested received Ksh 20,000,000 on behalf of the 2nd Respondent and whether the 1st Interested Party had received the initial Ksh 10,000,000 for onward payment to the 2nd Respondent in a contested issue, but instead resorted to assumptions which was manifestly illegal and/or a demonstration of connivance with the 2nd Respondent to defraud the Applicant;

d) The 2nd Respondent was aware that it had instructed the 3rd Interested Party to receive money on its behalf, and it could easily confirm the same from the 3rd Interested Party, **but chose to misrepresent facts to the Arbitrator with the intention to defraud the Applicant.**

1st & 2nd RESPONDENTS' REPLYING AFFIDAVIT

The Respondents' opposed the Application vide a Replying affidavit dated 26th February 2019 sworn by Emily Nkirote Bantai the Operations Manager of the 1st and 2nd Respondents (the Respondents).

She gave a summary of the Respondents' response to the Application as follows;

a) The Application merely alleges, but does not disclose any or any *bona fide* grounds of challenge to the award;

b) The Application is an appeal disguised as an application to set aside the award;

c) The Applicant has improperly purported to introduce new evidence in the Application, which evidence was not placed before the Arbitral Tribunal;

d) The Application does not set out any or any reasonable basis for **the highly injurious allegations of conspiracy and fraud made against the Arbitral Tribunal and the 1st and 2nd Respondents;**

e) The Application is contrary to the prevailing public policy which demands finality of arbitration awards; and

f) The Application has been orchestrated by the Applicant to vex, embarrass and unduly prejudice the Respondents and the Honourable Arbitral Tribunal.

Background to the Dispute Between the Applicant and the Respondents

She stated that the genesis of the current dispute can be traced back to the National Transport and Safety Authority's advertisement, and subsequent award, of **Tender No. NTSA/ICB-014/2014-2015** for the supply, delivery, installation and maintenance of 2nd generation smart-card based driving licenses ("the Tender).

Subsequently, that the Applicant, as a representative of the Consortium, executed a Consent Agreement with the 1st Interested Party. A salient term of the consent Agreement was that the Applicant would pay the 1st Interested Party **Ksh 104,500,000.00**(Kenya shillings One Hundred and Four Million and five hundred thousand)(herein after **"the settlement sum")** in return for the 1st Interested party's withdrawal of the Judicial Review Application.

That despite receipt of the payment alluded to in paragraph 16 of this Replying Affidavit, the Applicant neglected, refused and/or otherwise failed to repay the loans due to the 1st and 2nd Respondents under the Loan Agreement and the further Agreement (collectively "the Agreements").

That the Applicant had purported to introduce new parties in the application, being the 1st 2nd and 3rd interested parties, which parties did not participate in the Arbitral proceedings.

The Applicant's failure to repay loans due to the Respondents constrained the Respondents to refer the dispute to Arbitration pursuant to the Arbitration clauses in the Agreements.

GROUNDS OF OPPOSITION BY 2ND INTERESTED PARTY

The 2nd Interested Party opposed the Application by filing Grounds of Opposition on 19th February 2019 on grounds that;

a) The Applicant had not met the conditions or grounds for setting aside the Arbitration Award as contained in **section 35 of the Arbitration Act, 1995;**

b) The 2nd Interested party is not a necessary party to these proceedings as it was not a party to the Arbitration proceedings.

c) The Application is an abuse of the Court process and incurably defective and cannot lie.

GROUNDS OF OPPOSITION BY 1st INTERESTED PARTY

The 1st Interested party opposed the application by filing Grounds of Opposition on 26th February 2019 on grounds;

a) That the 1st Interested Party is not a necessary party to these proceedings as it was not a Party to the Arbitration proceedings.

2nd INTERESTED PARTY'S NOTICE OF MOTION

The 2nd Interested Party through its advocates filed a Notice of Motion application dated 7th March 2019 and sought to be struck out from the proceedings herein for being an unnecessary party. Their application was based on grounds that the 2nd Interested Party is not a necessary party to these proceedings as it was not a party, witness or participant to the Arbitration proceedings whose Award the Applicant seeks to set aside. As such, the 2nd Interested Party cannot assist this Honourable court in any way in determining whether or not to set aside the Arbitration Award on the grounds as provided by **Section 35 of the Arbitration Act 1995.**

APPLICANT'S SUPPLEMENTARY AFFIDAVIT

The Applicant filed a Supplementary affidavit dated 15th March 2019, sworn by David Njane the Managing Director of the Applicant. He asserts that the Ksh 10,000,000 transferred to the 1st Interested Party on 19th May 2017 by the Applicant was for partial settlement of the financial obligation it had with the 1st Interested Party. This clarification was made vide a letter dated 3rd December 2018 from the Applicant to the 1st Interested party when it was first discovered that the Applicant's advocates had made a factual error in its statement to the 3rd Interested Party.

That however, the Applicant made the initial payment of Ksh 7,000,000 to the 2nd Respondent on 4th May 2017 to its account **number [xxxx]**held at Family Bank Limited, Kilimani Branch.

That the Applicant made a further payment of Ksh 5,225,000/- to the 1st Respondent under the instruction of the 2nd Respondent on 19th May 2017 to its account **number [xxxx]** held at Family Bank Limited, Kilimani Branch. The 1st and the 2nd Respondents are related companies, and they have a common management.

That the Applicant thus even overpaid its loan under the further agreement dated 25th July 2016 entered into between itself, the 1st Interested Party and the 2nd Respondent by Ksh 2,225,000.

The Applicant challenges the Arbitral award for 2 reasons being that the making of the award was induced or affected by fraud, bribery, undue influence or corruption under **Section 35(2) (a) (vi) of Arbitration Act** and **that the award is in conflict with public policy of Kenya under Section 35 (2) (b) (ii) of the Arbitration Act**.

NOTICE OF MOTION DATED 18TH MARCH 2019

The 1st interested Party filed the application seeking to be struck out from proceedings as it is unnecessary party.

The 1st interested party was not a party in the Arbitral award that the Application dated 11th December 2018 seeks to set aside. The interested Party therefore cannot assist the Court in determining whether the Arbitral award ought to be set aside. The Arbitral award did not issue any orders or confer any liability upon the 1st interested party.

NOTICE OF MOTION DATED 20th MARCH 2019- INTENDED 2ND RESPONDENT

The intended 2nd Respondent through its Counsel filed a Notice of Motion application dated 20th May 2019 and sought orders;

a) That the court be pleased to **add Barons Estates Limited as a Respondent in these proceedings before the court;**

b) That the court does **order a stay of its proceedings in this matter pending the hearing and determination of this application;**

c) That leave of this court be granted to the **intended 2nd Respondent to appeal and or apply as herein done to vacate, set aside quash, and or otherwise nullify the proceedings culminating in and/or the award of the Arbitral Award dated 24th August 2018 including the legality of the instruments used to convene and or constitute the Tribunal;**

d) That a finding and/or declaration do issue that the 1st Claimant herein to wit **Atticon Limited was not a party and/or properly before the Arbitral Tribunal that generated the award; if any presented before this court in the instant matter.**

e) That a finding and/or declaration be made and issue that the Arbitral Tribunal that made and/or generated **the Arbitral Award in the instant case dated 24th August 2018 was not properly and/or lawfully convened and/or constituted and the ensuing proceedings and or award were so vitiated as to be a nullity *ab initio*;**

f) That leave so granted in prayer 4 operate as a **stay of execution of the said Arbitral Award dated 24th August 2018;**

g) That costs of this application be provided for

h) Any other order and further relief that this Honourable court may deem fit and just to grant in the circumstances;

3RD INTERESTED PARTY'S NOTICE OF MOTION of 28th MARCH 2019

The 3rd interested Party filed Notice of Motion that it should be expunged from the record and removed from proceedings as it is not a party to the dispute or alleged relationship between the Applicants and Respondents herein. The 3rd interested Party is a professional person an Advocate of the High Court of Kenya and the award makes no reference to him or confer any rights or obligations to him.

1st & 2nd RESPONDENTS GROUNDS OF OPPOSITION

The 1st and 2nd Respondents opposed the application dated 20th May 2019 by intended 2nd Respondent BARON ESTATES was opposed by on the following grounds;

a) That the Honourable court lacks the jurisdiction to entertain the application and the underlying proceedings in view of:-

b) The provisions of (inter alia) **Sections 10, 35 and 37 of the Arbitration Act (Act No. 4 of 1995).**

c) The Court of Appeal decision of **Nyutu Agrovet Limited vs Airtel Networks Limited [2015] eKLR Civil Appeal No 61 of 2012**

1ST INTERESTED PARTY 'S GROUNDS OF OPPOSITION

The 1st interested party opposed the Notice of Motion application dated 20th May 2019 by filing Grounds of Opposition of 12th June 2019. The Grounds are;

a) This Court lacks jurisdiction to hear and determine the application as the three (3) months time limit provided for under **Section 35 of the Arbitration Act 1995** for a party to file an Application to set aside an Arbitration Award expired on 13th December 2018 and there is no provision of law allowing for extension of such time.

2nd INTERESTED PARTY'S GROUNDS OF OPPOSITION

The 2nd interested party opposed the Notice of Motion dated 20th May 2019 by filing grounds of opposition on 4th June 2019 that;

a) This e court lacks jurisdiction to hear and determine the application as;

b) the three months' time limit provided by **Section 35 of the Arbitration Act 1995** for a party to file an application to set aside an arbitration award expired on 13th December 2018 and there is no provisions of law allowing for extension of such time;

c) By virtue of **Section 10 of the Arbitration Act 1995**, the Civil Procedure Act and Companies Act cannot apply to circumvent the express provisions of **Section 35 of the Arbitration Act 1995.**

APPLICANT'S REPLYING AFFIDAVIT FILED ON 21st MAY 2019

The Applicant, Pesa Print Limited filed Replying Affidavit to 1st, 2nd and 3rd Interested Parties' Notice of Motion Applications dated 18th March 2019, 7th March 2019 and 28th March 2019 respectively

On 16th May 2019 David Njane the Managing Director of the Applicant herein, **deponed that an application for setting aside an arbitral Award under Section 35 of the Arbitration Act is not an appeal from the arbitral Award, and therefore the parties in the arbitral proceedings must not necessarily be the same in the application for setting aside, especially if the ground for setting aside the said arbitral Award is that the making of the Award was induced or affected by fraud, bribery, undue influence or corruption under Section 35 (2)(a)(vi) of the Arbitration Act**.

He further stated that the Court of Appeal succinctly addressed itself on the nature of the court process for setting aside an arbitral Award in ***National Cereals & Produce Board –vs- Erad Suppliers & General Contracts Limited [2014]eKLR*** as hereunder;

"31. ***In the year 2009, under Act 11 of that year, the grounds for applying to set aside an arbitral award were expanded to include circumstances where the making of the arbitral award was induced or affected by fraud, bribery, undue influence or corruption. That amendment was done for a good reason: to enhance the credibility of the arbitration process. In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction. That view of the matter accords with the definition of the phrase 'original jurisdiction' in Black's Law Dictionary 4th Ed. Rev. 61971 where it is defined thus: "jurisdiction in the first instance; jurisdiction to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts."***

32. ***Section 35 as amended by Act 11 of 2009 clearly provides for the setting aside of an arbitral award on grounds of fraud, bribery, undue influence or corruption. As we have said whether an award is tainted by any of those vices is a matter of fact, on which the High Court must be satisfied before passing 'judgment'. For that purpose the High Court exercises original jurisdiction. In the same vein, it is also open for this court, where a decision of the High Court emanating from such challenge is appealed; to take or order the taking of additional evidence should circumstances permit."***

APPLICANT'S SUBMISSIONS

THE LAW

The Applicant submits that an Application for setting aside an arbitral award under **Section 35 of the Arbitration Act** is not an appeal from the arbitral award, and therefore the parties in the arbitral proceedings must not necessarily be the same in the application for setting aside, especially if the ground for setting aside the said arbitral award is that the making of the award was induced or affected by fraud, bribery, undue influence or corruption under **Section 35 (2)(a)(vi) of the Arbitration Act.**

The court while considering an application for setting aside an arbitral award exercises original jurisdiction as opposed to appellate jurisdiction, therefore the Applicant in the application for setting aside is not bound to maintain the same parties, especially if the inclusion of the new parties can help the court to determine whether there was fraud, bribery, undue influence or corruption.

The Court of Appeal succinctly addressed itself on the nature of the court process for setting aside an arbitral Award in ***National Cereals & Produce Board –vs- Erad Suppliers & General Contracts Limited [2014]eKLR*** *supra*

It further submitted that if a party adduces extra/additional evidence to prove that the arbitral award was induced or affected by fraud, bribery, undue influence or corruption, it is likely that parties who may not have been parties to the arbitral proceedings and who may have adversely been mentioned be enjoined to shade more light on the impugned transactions so that they are not condemned unheard.

THE LAW ON JOINDER OF AN INTERESTED PARTY

The court in ***Republic –vs- Attorney General; Law society of Kenya (Interested party); ex-parte: Francis Andrew Moriasi [2019]eKLR*** succinctly defined who an interested party is. The Court stated;

"19. ***Rule 2 of the Constitution of Kenya (protection of the Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013 define an interested party as:***

***"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation." Likewise, the Supreme Court in Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others [2014]eKLR defined an interested party as follows*;**

"consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

20. A person is thus legally interested in the proceedings if they lead to a result that will affect him by either establishing or curtailing his or her legal rights. From the above provisions and definitions, it is evident that the Law Society of Kenya has a stake in the impugned provisions of the Circular, to the extent that the said guidelines may affect the practice of law by members of the legal profession, and the proper administration of justice. It is therefore properly joined in these proceedings as an interested party."

2ND INTERESTED PARTY'S WRITTEN SUBMISSIONS IN RESPECT OF NOTICE OF MOTION DATED 7TH MARCH 2019

The 2nd Interested party submitted as follows;

That the parties in the Arbitration proceedings had every opportunity in the course of those proceedings to enjoin the 2nd Interested Party as a Party or as a Witness but chose not to. They cannot purport to enjoin the 2nd Interested Party after the Arbitration Proceedings have been determined. **A perusal of the Arbitration proceedings (page 98, paragraph 27) clearly demonstrates that during the Pre Trial directions before the Arbitrator, the parties indicated to the Arbitrator that they would be relying on the pleadings as filed and the witness statements as filed without calling oral evidence. The parties chose to proceed by way of written submissions.** At that point in time, the parties ought to have indicated that they wanted the 2nd Interested Party to tender evidence during the proceedings. They chose not to do so and it is now late in the day to purport to enjoin the 2nd Interested Party to the Application seeking to set aside the Award.

That the Arbitration Act 1995 is a strict code that applies exclusively in the conduct of Arbitration Proceedings and in proceedings challenging an Arbitration Award in the High Court. The Arbitration Act and Rules do not have provisions for a Party to be enjoined in an application to set aside an Award when such a Party was not a party or participant in the Arbitration proceedings sought to be impugned. The Court of Appeal in ***Ann Mumbi –vs- Victoria Njoki Gathara[2009]eKLR,*** expressed itself on exclusivity of the Arbitration Act as follows;

"A careful look at all the provisions cited in the heading 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 states: "Except as provided in this Act no court shall intervene in matters governed by this Act.

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 hook line and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. If 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 motu because jurisdiction is everything as sp eloquently put in the case of Owners of the Motor Vessel "Lilian S" –vs- Caltex Oil (Kenya) Ltd 1989 KLR 1."

That the Court of Appeal decision in ***Civil Appeal No. 9 of 2012 National Cereals and Produce Board –vs- Suppliers & General Contractors Limited [2014] eKLR,*** which the Respondent/Applicant relies on is distinguishable and cannot aid the Respondent/Applicant's cause.

The Application before the Court of Appeal was specifically brought **under Rules 29(1)(b)(2) of the Court of Appeal Rules** seeking to adduce further evidence in support of the Appeal by the filing and service of a Supplementary record of Appeal to include a special report of the Public Investments Committee adopted by the National Assembly on 12th November 2013. The decision involved the circumstance under which the Court of Appeal can admit new evidence in an Appeal. It does not involve the powers of the High Court to enjoin parties in an application to set aside an Arbitration Award. Indeed, the Court of Appeal held as follows with regard to its powers to receive new evidence under **Rule 29** of its Rules:-

"This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filing in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

DETERMINATION

The Court found it necessary to outline the chronology of applications filed based on several legal issues raised and supported by contested parties and adduced facts and more importantly the preliminary issue with regard to the Court's jurisdiction.

The Court has outlined at best the summary reflecting myriad of applications by various parties on the dispute whether or not the Court should set aside the Final Award by Sole Arbitrator Mr. John M.Ohaga of 13th September 2018 on the basis of fraud, bribery corruption and unjust enrichment.

After consideration of the pleadings and submissions by Counsel for parties or parties themselves; the issues that emerge for determination are as follows;

1. What jurisdiction should the Court invoke in determination of whether to set aside or not the instant Final Award"

2. Whether in determining the issue of fraud, bribery corruption or unjust enrichment, Symphony Technologies Limited 1st interested Party; Family Bank Limited 2nd Interested Party, Dr Ekuru Aukot T/A EA Law Consulting, 3rd Interested Party and Baron Estates Limited intended 2nd Respondent should be joined as parties to these proceedings"

3. Whether the making of the award was induced or affected by **fraud, bribery, undue influence or corruption under Section 35(2) (a) (vi) of Arbitration Act** and

4. Whether the award was/is in conflict with public policy of Kenya under **Section 35 (2) (b) (ii) of the Arbitration Act**.

5. Whether **Atticon Limited was /not a party and was/not properly before the Arbitral Tribunal that generated the award and the Arbitral Tribunal in the instant case dated 24th August 2018 was not properly and/or lawfully convened and/or constituted and the ensuing proceedings and/ or award were so vitiated as to be a nullity *ab initio*;**

6. Whether Stay of execution of the said Arbitral Award dated 24th August 2018 should be granted.

ANALYSIS

1. What jurisdiction should the Court invoke in determination of whether to set aside or not the instant Final Award"

Any issues arising from the Final Award or Arbitration Proceedings, this Court shall only determine in terms of **Section 10 of Arbitration Act that provides;**

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

The parties contended that this Court in hearing and determination of allegations of **fraud, bribery, undue influence or corruption under Section 35(2) (a) (vi) of Arbitration Act** that tainted the Arbitral award and which is in conflict with public policy of Kenya under **Section 35 (2) (b) (ii) of the Arbitration Act**; the High Court is bound by Court of Appeal decision that the court is endowed with original jurisdiction as elucidated in the case of ***National Cereals & Produce Board –vs- Erad Suppliers & General Contracts Limited [2014]eKLR*** *supra*. Specifically at paragraphs 31 & 32 of the Ruling of the Court of Appeal in the abovecited case; the High Court is bound by the legal position. In determination of whether the Arbitral award is vitiated by either **fraud, bribery, undue influence or corruption it is a matter of fact and the Court shall take evidence to prove such irregularities thereby invoking its original jurisdiction. Is this principle applicable to the instant case for this Court to invoke original jurisdiction to hear and determine the matter"**

Section 3 of the Arbitration Act provides;

“party” ***means a party to an arbitration agreement and includes a person claiming through or under a party.***

This Court has not been provided with the Original /certified copy of Final Award and Arbitration Agreement to determine who were/are parties to the Arbitration proceedings that culminated to the impugned final award that is alleged to be vitiated by fraud, bribery, undue influence or corruption. The annexed copy of Final Award marked **DN2** to the Applicant’s application is a faint copy, not legible and is neither the Original or certified copy as required by **Section 36 (3) Arbitration Act.**

Secondly, if the Final award is tainted by allegations of fraud, bribery, undue influence or corruption and the High Court exercises original jurisdiction, then the pleadings ought to contain particulars of fraud, bribery, undue influence or corruption. The Court and parties are bound by pleadings and hearing of evidence of facts to establish the claims are /ought to be based on the pleadings filed. The standard of proof required is beyond balance of probabilities in civil proceedings and almost beyond reasonable doubt as in criminal cases. The particulars of alleged misconduct would entail the following elements;

Undue Influence is described in Black’s Law Dictionary;

“persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts instead subject to the will or purposes of the dominating party.

Unjust enrichment is when a person unfairly gets a benefit by chance, mistake or another’s misfortune for which the enriched has not paid for or worked for the benefit and morally and ethically should not keep the benefit.

Fraud is defined in Oxford Dictionary as wrongful or criminal deception intended to result in financial or personal gain.

Bribery is defined as giving or receiving an unearned reward to influence someone’s behaviour for example a kickback- an unearned reward following favourable treatment.

Corruption is defined as any unlawful or improper behaviour that seeks to gain an advantage through illegal means.

A person who has been unjustly enriched at the expense of another must legally return the unfairly kept monies or benefits.”

The dispute before the Arbitral Tribunal is with regard to the Loan Agreement of 9th June 2016 between the Applicant Pesa Print

Limited and Atticon Limited 1st Claimant. Atticon Limited agreed to lend the Borrower Pesa Print Ksh 50,000,000/- in form of Bank Guarantee to Symphony Technologies Limited 1st interested Party pursuant to Consent in ***Miscellaneous Application 507 of 2015***.

The Applicant stated that it made good payments as agreed with Claimant in various processes. Yet in the 1st Claimant's Statement of Claim it deponed that the Applicant failed to honour its payment obligations to Symphony Technologies Limited 1st interested Party as per the Consent Agreement hence the 1st Claimant's irrevocable guarantee was utilized and the 2nd Claimant's claim from the Applicant under Further Agreement of 25th July 2016.

On 15th May 2017, 2nd Claimant made a formal demand to the Respondent for **Ksh 30,000,000**/= and on 30th May 2019 both Claimants advocates sought payment of total **Ksh 80,000,000/-** which was the subject of Arbitration proceedings that culminated to the Final Award.

The Applicant contends that the claim by 1st Claimant was settled and therefore there was no need to call up the irrevocable guarantee to pay Symphony Technologies 1st interested Party. The Guarantee would not have been called up as it expired and there was no extension granted. Despite seeking clarification and confirmation from the 2nd Interested Party, Family Bank Limited on the payment of bank guarantee to 1st interested party, the Bank declined to divulge any information. The Applicant contends that either the Respondents intent to enforce the Arbitral award would amount to fraud as no bank guarantee was utilized to pay the 1st interested party. Secondly, if the 1st interested party Symphony Technologies were paid through the Bank guarantee and from the Applicant directly, it would amount to unjust enrichment being paid twice for the same claim.

The Applicant confirmed payment of **Ksh 10,000,000/=** to 1st interested party Symphony Technologies Limited on 19th May 2017 for onward transmission to 2nd Respondent Ushindi Credit Limited. A further **Ksh 20,000,000/-** was paid to the 2nd Respondent Ushindi Credit Limited vide E A Law Consulting (Dr Ekuru Aukot) (3rd Interested Party) Law Firm's Client Account. The Claim by the 2nd Claimant is settled and the Applicant contends it is not liable to comply with the Arbitral award.

The Applicant takes issue with the Arbitral Award on the basis that it was a culmination of proceedings that left out crucial and relevant parties; the 1st Interested Party Symphony Technologies Limited to confirm benefit /payment from Bank Guarantee, the 2nd Interested Party Family Bank Limited to confirm if and when the irrevocable bank guarantee was settled in favour of the 1st interested party and if and when the 1st Claimant deposited funds to facilitate the guarantee.

There was/is also Dr Ekuru Aukot T/A EA LAW Consulting to confirm receipt of Ksh 20,000,000/- on behalf of 2nd Respondent Ushindi Credit Limited.

From the circumstances outlined above and the Arbitral Award Proceedings record and award, this Court finds no tangible or cogent details of any suggestion of bribery and/or corruption by any party before and/or during the Arbitral proceedings. What seems to be emerging from the Applicant's claims is that certain legal questions/issues have not been conclusively confirmed in terms of compliance of the 2 Loan Agreements the one of **9th June 2016 and 25th 2016 and the irrevocable bank guarantee effected by the 2nd Interested Party in favour of 1st Interested Party that is/are challenged.**

The Arbitration proceedings were by the Claimants and Respondent/Applicant by virtue of the Arbitration Agreement/Clause in the agreements.

On 23rd April 2018, neither party sought to join the interested parties during arbitration proceedings. Instead, when Parties and Counsel appeared before the Sole Arbitrator, they agreed that they did not wish to make any oral arguments and award should be based only on the pleadings, witness statements, documents produced in support of each parties' case and the respective written arguments. At this juncture the Applicant and/or Counsel should have raised the issue of joining the interested parties to verify the receipt of payments by the Applicant in satisfaction of its obligations under the agreement and hence non requirement to call up the bank guarantee. Therefore, it is too late to seek to enjoin interested parties and intended 2Nd Respondent to join these proceedings if the Applicant waived its right by virtue of **Section 5 of Arbitration Act Section 5 of the Arbitration Act provides ;**

" *Waiver of right to object*

***A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object*.”**

The Court has found that its jurisdiction is limited as follows;

a) Although the timeline for filing application to set aside the Arbitral award is 3 months from the date of receipt of the Final Award from the Sole Arbitrator, the Applicant received the Final Award on 13th September 2018 and filed the application on 13th December 2018 well within the statutory timeline.

Section 35(3) of the Arbitration Act which provides that;

“***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***.”

b) The issues raised in the Applicant’s application were canvassed during the Arbitral Proceedings and hence the Court lacks jurisdiction to raise hear and determine them again as it would amount to sitting on appeal on the same matter. The Applicant’s claim of unjust enrichment by 1st interested Party Symphony Technologies Limited may be pursued as a separate suit by the Applicant as it is a secondary commercial matter regarding enforcement of the Arbitral Final Award if and when the Final Award is recognized and enforced.

Anne Mumbi Hinga vs Victoria Njoki Gathara [2009]eKLR, where the court stated that,

“***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*.”**

c) The Plaintiff’s claim against the 1st & 2nd Respondents to claim payment as awarded in the Final Award if and when it is recognised and enforced can be lodged as a separate suit to avoid payment of the same amount twice if already paid. In the separate suit all relevant parties may be joined to those proceedings.

d) The bank guarantee is a payment generally issued by the issuing bank on behalf of the Applicant/Client securing payment to a 3rd Party; the beneficiary for the case that the client fails to fulfil a contractual commitment. In this case, the Applicant may sue the 2nd interested Party Family Bank Limited for settling the guarantee without authorization if contracted for and/or settlement of the guarantee after it expired. The Guarantee is a separate contract from the Loan Agreement and parties privy to it may sue.

Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016]eKLR where the court held that;

“The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.”

In the case of ***Rashid Moledina & Co (Mombasa) Limited & Others vs Hoima Ginners Limited (1967) E.A. 645,*** it was held that,

“courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute”.

Kenya Shell Ltd vs Kobil Petroleum Ltd[2006] eKLR where the Court of Appeal expressed the views of Ringera J in the case of ***Christ for All Nations vs Apollo Insurance Co. Ltd (2002) EA 366*** where the court held that;

"*although public policy is a most broad concept incapable of precise definition…. An award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:*

a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or

b) inimical to the national interest of Kenya or

***c) contrary to justice and morality*.”**

Continental Homes Ltd vs Suncoast Investments Ltd [2018]eKLR where the court held that;

***“In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator*.”**

In the case of ***Glencore Grain Ltd versus TSS Grain Millers Ltd. [2002] 1 KLR 606*,** the learned Judge at page 77 held that;

“A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive”.

From the above excerpts, it emerges that the parties the Applicant and Respondents chose their forum and process of dispute resolution as outlined in the Arbitration Clause/Agreement housed in the 2 Loan Agreements. They attended and participated in Arbitration proceedings. They did not raise any issue of joinder of parties to arbitration proceedings. The same cannot successfully be raised at this stage. This Court’s mandate is limited to application of **Sections 35 36 and/or 37 Arbitration Act.** The original jurisdiction to hear and determine allegations of fraud, bribery and/or corruption is not invoked as the pleadings do not/did not disclose reasonable basis/grounds for such an inquiry. No evidence of fraud bribery and/or corruption was pleaded against the Arbitrator, the Respondents and/or Counsel to parties to the Arbitration Proceedings to warrant such an enquiry by this Court. What is disclosed is possibility of unjust enrichment by the 1st interested party by virtue of the called up irrevocable bank guarantee proceeds and payments made by the Applicant. To that end, the Applicant can /may lodge civil proceedings for redress against the Respondents for double payments if at all. There will be no prejudice to any party. The Bank Guarantee is a separate contract and independent of the Loan Agreements subject matter of arbitral proceedings and again any aggrieved party privy to the said bank guarantee may pursue redress in separate civil proceedings.

DISPOSITION

1. The application of the Applicant to set aside the Arbitral award on the basis of the same being contrary to public policy and/or vitiated by bribery, corruption, fraud and/or unjust enrichment is dismissed with Costs.

2. The Application to join the interested parties and Intended 2nd Respondent to these proceedings is also denied & dismissed with costs. The appropriate process ought to have been raising the issue of joinder during arbitral proceedings. They waived their right under Section 5 of Arbitration Act.

3. In this case, there are no proceedings for this Court to hear and determine the issue of fraud, bribery corruption and unjust enrichment as the pleadings do not disclose the particulars of the same for the Court to invoke original jurisdiction.

4. This Court lacks appellate jurisdiction to rehear matters raised during arbitral proceedings save to ensure the Proceedings culminating to and the Final Arbitral Award are in compliance with the Arbitration Act.

5. The Final Award by the sole Arbitrator of 13th August 2018 shall be recognized and enforced subject to compliance with section 36 (3) Arbitration Act 1995; on production and service of original or certified copy of the Final Award and Arbitration Agreement.

DELIVERED SIGNED & DATED IN OPEN COURT ON 20TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR MAKOKHA FOR THE APPLICANT

MUNA H/B WERE FOR 2ND INTERESTED PARTY

ODHIAMBO H/B KARANJA FOR 1ST AND 2ND RESPONDENTS

MS JASMINE – COURT ASSISTANT

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