REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL 8 OF 2009

ANNE MUMBI HINGA.....APPELLANT

AND

VICTORIA NJOKI GATHARA.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi, Milimani Commercial Courts

(Kimaru, J) dated 24th September, 2008

in

Miscellaneous Appl. No. 617 of 2000)

****

JUDGMENT OF THE COURT

This is an appeal against the ruling of the superior court (Kimaru, J) delivered on 24th September, 2008 in Milimani Commercial Court Miscellaneous Application No. 617 of 2000.

By an agreement in writing dated 14th January, 1998, the respondent as vendor agreed to sell to the appellant the suit property for a consideration of Kshs.1,500,000/= . On execution of the agreement, it was acknowledged by the parties that the appellant had already paid the respondent the sum of Kshs.230,000/= and that the balance of Kshs.1,270,000/= was to be paid within 60 days of the execution of the sale agreement. Soon after the execution of the agreement a disagreement arose between the appellant and the respondent regarding the manner of payment of the balance of the purchase price and because the sale agreement had an arbitration clause the two parties invoked it and as a result, the Chairman of the Law Society appointed a sole arbitrator, Mr. Wanjama, who is an advocate. The parties to the appeal together with their respective counsel thereafter appeared before the said arbitrator and after hearing the parties, the arbitrator made and published his award on 19th October, 1999 after giving notice to the parties and their respective advocates. The appellant had before the publication of the award failed to attend scheduled mentions before the arbitrator despite being

served with mention notices and when the award was read the appellant claims not to have received a notice. The award was read in the presence of the respondent's advocate but in the absence of the appellant and her advocate. The arbitrator found in favour of the respondent and ruled that the respondent had fully complied with the terms of the sale agreement and was therefore entitled to specific performance of the agreement and that it was the appellant who was in breach of the sale agreement.

After the reading of the award the arbitrator forwarded copies of the award to the advocates for the parties and also served the appellant with the notice of filing of the award in court.

The above notwithstanding, it is significant to point out that the heart of the appeal is that the appellant (the respondent in the superior court) contends that he was not notified of the date of the reading of the arbitration award and further contends that even her own advocate was not notified of the making of the award. She further claims that after the making of the award, neither her advocate nor herself were availed of a copy of the award by post or otherwise.

Following the publication of the award the respondent moved the court pursuant to ***Section 36 of the Arbitration Act 1995*** to have leave to enforce the award as a decree of the Court and the appropriate leave was granted by the Court on 17th January, 2002.

At this stage, for reasons which will become apparent shortly, we consider it important to reproduce in full the relief and the grounds set out in the application dated 25th April, 2008.

"***1. THAT this Honourable Court be pleased to certify this application urgent and the application be heard exparte at the first instance.***

2. THAT there be stay of execution of the decree/order of the court issued on the 17th January, 2002 together with all other consequential orders pending the hearing and determination of this application.

3. THAT the Honourable Court be pleased to set aside the decree/order of this court issued on the 17th January, 2002.

4. THAT the Honourable Court be pleased to declare/order that the arbitral award read in the Respondent's absence on the 19th October, 1999 has never been served upon the Respondent by the arbitrator in the manner required at all.

5. THAT the Honourable Court be pleased to order the arbitrator to serve the arbitral award upon the Respondent as required by law or as the court will direct.

6. THAT the Honourable Court be pleased to restrain the claimant/Applicant from entering into, being on, working or cultivating on, charging, selling, disposing of, developing or in any other manner dealing with land parcel L. R. No. 18084, either by herself or through her agents and or servants or howsoever pending the hearing and determination of this suit.

7. THAT the costs of this application be provided for.

THIS APPLICATION IS MADE ON THE FOLLOWING GROUNDS:-

(a) THAT the Respondent was not served with the claimant's application dated 29/9/2001 which gave rise to the order of 17/1/2002.

(b) THAT the arbitrator has never served the Respondent with the arbitral award in the manner prescribed by the Arbitration Act 1995 or at all.

(c) THAT the Respondent was therefore not given proper notice of the arbitral proceedings or was otherwise unable to present her case in that:-

(i) She had no notice of the reading of the award.

(ii) She had no notice of the filing of the award in court.

(iii) She had no notice of whether her advocates namely Mr Mutinda had any notice of further proceedings after the (sic) hearing of the arbitration.

(iv) She had no notice of proceeding further to filing of the arbitral award in court until May 2007, when she was served with an application dated 24th February, 2007.

(d) THAT the Respondent could have reacted, and will react, to the arbitral award when served and applied/apply to set aside the award on the following grounds:-

(i) The arbitral award dealt 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 in that:-

(1) The arbitral award deals with an agreement of sale purportedly dated 14th January, 1999 when there was no such agreement (sic) referred to the arbitration.

(2) The arbitrator's decision that the Respondent had been paid the entire consideration by the time he heard the dispute when she has not been paid to date.

(e) THAT the said arbitral award needed or needs interpretation on various specific points:-

(i) What the dispute before the arbitrator was.

(ii) The reasons for the decision

(iii) Where the arbitration was held.

(iv) When the award would be deemed to have been received.

(v) The arbitrator's reasons for his conclusions:-

(1) At page 2:-

"***(b) The applicant did pay the balance of the purchase price in the sum of Kshs.1,270,000.00 to M/s Salim Dhanji & Company some time before 26th November, 1998. The exact date remains unknown as neither party adduced evidence in this regard."***

(2) At page 5:-

"***In any event even if I were to accept that this sum was part of the purchase price, I find that it was paid by the applicant to their common Advocates on an unknown date but certainly before the Respondent completed her part of the Agreement."***

(1) When Mr Regeru did not testify to prove when or if the money was paid at all.

(2) When, as it has now turned out, the claimant has been keeping the consideration

with the National Housing Corporation and not with Salim Dhanji & Company Advocates and needs a court order to deposit the said sum in court.

(3) At page 5:-

"***The onus was clearly on the Respondent to prove that the payments were not paid on time. As she did not do so, I find on a balance of probabilities that the Applicant had duly complied with the terms of the Agreement For Sale dated 14th January, 1999 while the Respondent did not."***

The claimant was the plaintiff who sought to prove that she had paid all the money to the Respondent on time. How could the onus shift to the Respondent to prove that no money was paid on time?

(f) THAT the claimant is holding in her hands both the consideration and a purported transfer of the property.

(g) THAT the arbitral award was prematurely and secretly filed in court.

(h) THAT the arbitral award did not resolve the dispute as it did not determine the issue of the purchase price, when it ought to have been paid and how it should be paid.

(i) THAT the claimant fraudulently concealed that she had paid the consideration to the Respondent when she had not and now seeks an order of the court to withdraw the money from her account and deposit in court.

(j) THAT this is a sensitive land matter and it is only just and reasonable that the orders sought be granted.

(k) THAT the Deed Plan that the claimant used in the case has been cancelled by the Commissioner of Lands.

<u>THIS APPLICATION</u> is supported by the annexed affidavit of ANNE MUMBI HINGA and such submission as may be offered by the Respondent's Advocate at the hearing hereof."

By a ruling dated 24th September, 2008 the superior court (Kimaru, J) dismissed the application and found as a matter of fact that both the notice of the making of the award and the application to enforce the award were duly served as required.

Aggrieved by the said ruling the appellant lodged an appeal to the Court on 16th January, 2009 citing the following grounds:

"***1. THAT the Learned Judge erred in law and in fact in concluding that the appellant was notified of the date of the reading of the arbitral award when there was no evidence in the documents filed by the arbitrator that neither the appellant nor her purported advocate was notified of the said date.***

2. THAT the Learned Judge erred in law and in fact in concluding that the appellant appointed a Mr Ouna to act for her during the arbitral proceedings in place of Mr Mutinda when Mr Ouna clearly indicated that he did not have instructions from the appellant.

3. THAT the Learned Judge erred in law and in fact that the appellant notified the arbitrator of her decision to change advocates when there was no evidence whatsoever of any communication from the appellant to the arbitrator of any change of advocates.

4. THAT the Learned Judge erred in law and in fact in his conclusion that the new advocate did not appear before the arbitrator on the date fixed for making of the award, when the date the purported new advocate was required to appear before the arbitrator was merely for mention and not for the reading of the award.

5. THAT the Learned Judge erred in law and in fact in concluding that he had perused an affidavit of service filed in court which indicated that the appellant was notified of the date of making the award when there was no such affidavit filed in court by the arbitrator.

6. THAT the Learned Judge erred in law and in fact when he concluded and stated that there was sufficient evidence that after the making of the said award, a copy of the award was availed by post to the Applicant by the arbitrator when the arbitrator did not at any one occasion communicate to either the appellant or her purported advocate by post.

7. THAT the Learned Judge erred in law and in fact by deciding the matter on presumptions which were or could be rebutted.

8. THAT the Learned Judge erred in law and in fact in his conclusion that by merely participating in the arbitral proceedings the appellant would be presumed to know when all the steps pursuant to the hearings were taken even when she was not served with any notice of the taking of the said steps.

9. THAT the Learned Judge erred in law and in fact when he laid undue emphasis on the period that has passed since the award was made and accused the appellant of larches but failed to appreciate that the appellant became aware of the result of the arbitral proceedings only in 2007 when she was served with an application to deposit the consideration in court and when the Respondent had proceeded exparte all through since the year 2000.

10. THAT the Learned Judge erred in law and in fact when he failed to appreciate the role of the arbitrator and confused the said role with that of the Respondent's advocate.

11. THAT the Learned Judge erred in law and in fact in that, having decided that the appellant had appointed a Mr Ouna to act for her in place of Mr Mutinda, he nevertheless failed to appreciate the legal position that it is the Mr Ouna who should henceforth have been served with the application to make the award a judgment of the court and other service and not purported service upon the appellant personally.

12. THAT the Learned Judge erred in law and in fact when he did not read or appreciate submissions filed by the appellant but read only those of the Respondent."

The appeal came up for hearing before us on 12th October, 2009. The appellant was represented by Mr. L. M. Nyang'au and the respondent was represented by Mr. Fred Ngatia as the leading counsel assisted by Mr. M. N. Kariga.

It is clear to us that although the appellant has cited numerous grounds in support of the appeal there are only four principal points for determination namely:

1. Whether a notice of the publication or the making of the award had been served and the effect of failure to serve

2. Whether the award was served

3. Whether the application to enforce the award was served

4. Whether there was a right of recourse to the superior court or this Court.

The appellant's affidavit in support of the application was sworn on 25th April. 2008. It avers that the appellant was not aware of the case until May 2007 when the respondent served her with an application to have the balance of the purchase price held in the Housing Finance Company of Kenya Ltd deposited in court for the appellant to collect. The appellant depones that she was never served with any court documents relating to the matter contrary to the assertions of various process servers. She further stated that in the arbitral proceedings she was represented by Mr. Mutinda advocate and that after the arbitral proceedings were concluded and an award published she had instructed Mr. Mutinda to appeal against the award in the event that the award was against her. On this point she has averred that due to threats to her life and her family she had relocated from Kenya to Uganda for several years and only came back to Kenya in the year 2007, and further that she had not instructed Ouna & Company Advocates to act for her in the matter.

In his submissions Mr. Nyang'au the learned counsel for the appellant repeated the claims made by the appellant in the affidavit in support and disputed that there was personal service as required by ***Rule 5*** of the Arbitration Rules 1997 and ***Order 3 rules 6*** and ***7*** of the Civil Procedure Rules. He urged the court to allow the application so that her client can consider the options she has under Sections 34, 35 and 37 of the Arbitration Act.

On his part Mr. Ngatia the lead counsel for the respondent contended that service of the three sets of documents was duly effected and that any interference with the award or decree after nine years since publication of the award would cause havoc to the principle of finality of awards and their effectiveness in Kenya.

We have re-evaluated the evidence adduced in the superior court on the issue of service and it is clear to us that on 15th September, 1999 Messrs Ouna & Company who were then acting for the appellant informed the respondent's advocates M/s Kibatia & Company Advocates that they had been instructed to act for the appellant and had also requested for the appellants file from Mr. Mutinda the advocate previously acting.

By a letter dated 20th September, 1999, Ouna & Company were informed by the respondents advocates that the arbitral proceedings had been finalized and that what the parties were waiting for was the publication of the award which was conditioned on the payment of the arbitration fees in the sum of Kshs.100,000/= with each party being required to deposit Kshs.50,000/= at the point of collecting the award. The respondent's advocates also informed Ouna & Company that the respondent had paid his part of the arbitrator's fees and that the matter would be mentioned on 28th September, 1999 for further directions.

On 22nd September, 1999 Ouna & Company Advocates acknowledged receipt of the letter of 20th September, 1999. By a letter dated 28th September, 1999 the arbitrator informed the parties' advocates that the matter would be mentioned on 29th September, 1999 at 3.30 pm. Upon failure by Ouna & Company Advocates to attend, a further mention was fixed for 6th October, 1999 at 3.30 pm. Following the two notices the arbitrator read his award on 19th October, 1999 and by a letter dated 15th November, 1999 the arbitrator sent copies of the award to the advocates for both parties with a copy to the appellant. The appellant in the affidavit in support of the application admits that she did receive the letter of 15th November, 1999 from the arbitrator and further admits in the same affidavit that a copy of the award was also sent to her in September 2000 by the respondent's advocates.

As regards the service of the application dated 26th September, 2001 to enforce the award the appellants confirmed service vide her affidavit filed in court on 17th October 2009. The affidavit shows that although the appellant and her advocate failed to attend mentions prior to the

reading of the award they were duly served with the mention notices by the arbitrator. For the above reason we are satisfied that service of the necessary documents was effected on the appellant and her advocates and service on the appellant or her advocate was sufficient under section 32 of the Arbitration Act. Under the section the duty of the arbitrator is to deliver the award and he did so. Surely if the award had not been served on the appellant on what basis did she instruct Mr Mutinda her then advocate to appeal against the award as she admits in her affidavit? We hold that on the basis of the 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 arise 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. We therefore think that nothing turns on the issue of service but we shall revert to this later in this judgment.

Regarding the competence of the application before the superior court the application was grounded on:

- Order 1XB Rule F
- Order XXXIX Rule 1, 2, 2A & 3
- Order XLV Rule 15 of the Civil Procedure Act
- Section 3A and 63 (e) of the Civil Procedure Act
- Section 35 (1) (iii) & (iv) & (4) of the Arbitration Act
- Section 37 (1) (iii) & (iv) of the Arbitration Act
- Rules 4 (2), 5, 7, and 11 of the Arbitration Rules 1997.

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. ***Section 35*** of the Arbitration Act 1995 states:

"***35 (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).***

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

(a) the party making the application furnishes proof-

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

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

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

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

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

(b) the High Court finds that-

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

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

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 36 from the date on which that request had been disposed of by the arbitral award.

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

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 judgment or decree.

Section 36 on recognition and enforcement of an award provides:

"***36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.***

(2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish-

(a) the duly authenticated original arbitral award or duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language."

Similarly, grounds for refusal of recognition or enforcement which by and large are almost similar to those for setting aside an award are contained in ***Section 37*** of the Arbitration Act which stipulates:

"***37. (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-***

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that-

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

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

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

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(b) if the High Court finds that –

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

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

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 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".***

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. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the 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 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. 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 as so eloquently put in the case of ***Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1.***

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 courts 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 delivery of the award. The last date for the challenge was 15th February, 2008. All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction. Arising from the above findings concerning the competency of the application the next logical question to address is whether this appeal is properly before us.

In our view no appeal lies to this Court in the circumstance of this case. ***Section 39*** of the Arbitration Act dealing with appeals in arbitral matters states:

"***39. Where in the case of a domestic arbitration, the parties have agreed that –***

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award;

such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court may, as appropriate -

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2) –

(a) if the parties have so agreed that an appeal shall lie; and

(b) the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal grants special leave to appeal; and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned."

It is clear from the above provisions, that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to ***Section 39 (2)*** of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) with leave of the High Court or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent.

It is clear to us 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.

As stated elsewhere 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.

Again the appeal to this Court is incompetent because it does not comply with the requirements set out in ***Section 39 (1) and (3)*** of the Arbitration Act.

We therefore reiterate that there is no right for any court to intervene in the 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 broad principles of 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 courts 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 member of the public on whose behalf the State's powers are exercised – see the case of ***Deutscche Schachtbau vs Shell International Petroleum & Company Ltd (1990) 1AC 295, Court of Appeal***. There is nothing whatsoever indicating that the award before us, 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 finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled 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 the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation.

To illustrate the point we will cite two United States cases. The first one is the Supreme Court's decision in ***Hall Street Associates, L. L. C., Petitioner vs Mattel, Inc 552 U. S. – (2008)***. In this case the Court struck down an arbitration agreement that allowed the courts to overturn an arbitration award that contained legal errors or factual findings that were not supported by "*substantial evidence"*. The Court recognized that where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the Federal Arbitration Act ("FAA") 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 the Court said, "**opens the door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process".** The court viewed that as unacceptable outcome especially in light of what it saw as clear language in the text of the "FAA" restricting judicial review to the grounds specifically listed in the statute. The court held that 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."***

The lesson of ***Hall Street*** is that 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 in the case before us 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. This is illegal and unacceptable. The fact that the court entertained this interference is what has necessitated our indepth review of what we consider to be the correct approach when future courts are faced with similar applications or challenges.

The second illustration of what a final award means including the limited judicial intervention is provided by the U. S. case of ***Eastern Seaboard Concrete Construction Co., Inc., et al vs Gray Construction Inc., et al., District of Maine – Civ. No. 08-37-P-S*** where the First Circuit Court of Appeals refused to intervene with a second award issued by an arbitrator to clarify the initial award. The non intervention was grounded on the policy of finality. In this case the court placed great emphasis on the limited scope of judicial review of an arbitral award and *inter alia* held that courts "deferential review of arbitration awards" extended to the arbitrators reasoning for revisiting and clarifying his award. If an arbitrator says that he or she intended make a particular finding or ruling but inadvertently left it out and stated it incorrectly the courts respect for arbitration, precludes judicial second – guessing of the arbitrator."

In our 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. As we have stated above 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 interlocutory applications which has in turn resulted in considerable delay should have been treated as a jurisdictional issue under the Act and dealt with straightaway. On our part we recognize 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, we have no hesitation in striking out this appeal and also hereby set aside the superior court ruling and in substitution strike out the application dated 25th April, 2008 with costs to the respondent both here and below. It is so ordered.

Dated and delivered at Nairobi this 13th day of November, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR