IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, OKWENGU & MOHAMMED JJA

CIVIL APPEAL NO. 92 OF 2009

BETWEEN

KAMCONSULT LIMITED …….....……..……APPELLANT

VERSUS

TELCOM KENYA LIMITED……..……...1ST RESPONDENT

POSTAL CORPORATION OF KENYA…….…….....2ND RESPONDENT

(Being an appeal from the Orders of the High Court of Kenya at Nairobi of Hon. Mr. Justice A. G. Ringera dated 11th December 2001)

in

HCCC 262 OF 2001 (O.S)

****

KAMCONSULT LIMITED…….…….....……CLAIMANT

VERSUS

TELCOM KENYA LIMITED……..……....…….……1ST RESPONDENT

POSTAL CORPORATION OF KENYA…….……..…2ND RESPONDENT

CONSOLIDATED WITH

HCCC 267 OF 2001

POSTAL CORPORATION OF KENYA……APPLICANT

VERSUS

KAMCONSULT LIMITED…….……..…...……..…..…..……1ST RESPONDENT

TELCOM KENYA LIMITED……..…..……...…….……2ND RESPONDENT

JUDGMENT OF THE COURT

[1] This is an appeal against the ruling and order of the High Court (Ringera J) delivered on 11th December 2001 in which the High Court upheld a preliminary objection and dismissed a notice of motion dated 2nd December brought by Kamconsult Limited (*herein the 'appellant'*).

[2] The genesis of the appeal was an originating summons lodged in the High Court on 23rd February 2001 by Telkom Kenya Limited (*herein the 1st respondent*) under **Section 17 (6)** of the **Arbitration Act, 1995** and **Rule 3(1)** of the **Arbitration Rules, 1997**. In a nutshell the 1st respondent was seeking termination of the arbitration proceedings between itself and Postal Corporation of Kenya Limited (*the 2nd respondent herein*) on one side, and the appellant on the other. The main ground for seeking termination of the proceedings was lack of jurisdiction on the part of the arbitrator.

[3] The High Court (Ringera, J) in its decision rendered on 17th September 2001 held that the appellant's claim before the arbitrator was statute barred and for that reason the arbitrator lacked jurisdiction to hear the matter. The appellant was aggrieved by that decision, but being fully aware that **Section 17 (7)** of the **Arbitration Act** barred it from appealing against that decision, filed an application by way of a notice of motion seeking review of the decision, that is the decision rendered by the High Court on 17th September 2001. The notice of motion was dated 2nd October 2001 and was filed under **Orders XLIV Rule 1 & XXI Rule 22** of the former edition of the **Civil Procedure Rules** (*now repealed*); **Sections 3A, 63e & 80** of the **Civil Procedure Act;** and **Rule 11** of the **Arbitration Rules**. The respondents filed a notice of preliminary objection on the grounds that no appeal or review lay against the order or decision of the superior court arising out of proceedings pursuant to **Section 17 (6)** of the **Arbitration Act.**

[4] In its ruling delivered on 11th December, 2001 that is now subject of the present appeal, the High Court upheld the preliminary objection of the respondents and ruled that the right of review of orders made under **Section 17 (6)** of the **Arbitration Act** is neither expressly conferred by the Act nor is it to be implied. The appellant has filed a memorandum of appeal challenging this ruling on six grounds mainly contending that the learned Judge erred and misdirected himself in upholding the preliminary objection.

[5] During the hearing of the appeal, learned counsel Mr. Khalwale appeared for the appellant. In his submissions Mr. Khalwale cited **Abdi Rahman Shire Vs. Thabiti Finance Co. Ltd** ***Civil Appeal No. 76 of 2000***, where this Court having considered the ruling made by Ringera, J, on 17th September, 2001, in **Telkom Kenya Ltd & Another vs. Kamconsult Kenya Limited** ***HCCC No. 262 & 267 of 2001*** concluded that Ringera J was not right in holding that an acknowledgment of a debt under **Section 23 (3)** of the **Limitations of Actions Act** does not create a new or fresh cause of action but only extends the accrual of the right of action in respect of the cause from the original date to the date of acknowledgment. Counsel noted that this court in **Abdi Rahman Shire** (*supra*) made a finding that the learned Judge applied a wrong law. Counsel submitted that after that decision in **Abdi Rahman Shire** (*supra*) the appellants filed an application for review and the respondents filed a notice of preliminary objection that was upheld by the learned Judge, Counsel therefore argued that the decision of Ringera J of 17th September 2001 was wrong.

[6] Mr. Ouma, learned counsel appeared for the 1st respondent. He maintained that there was a deliberate attempt by the appellant to mislead this court as the memorandum of appeal had been crafted in such a way as to look as if the appeal is against the two rulings of Ringera J. That is the ruling of 17th September 2001 and that of 11th December, 2001. Counsel argued that the High Court only granted leave to the appellant to appeal against the ruling of 11th December 2001. Counsel pointed out that the respondent's reference was brought under **section 17** of the **Arbitration Act** and that under **section 17 (6)** a reference could be made to the High Court, and this was the jurisdiction that was invoked. Counsel argued that under **Section 17(7)** the decision of the High Court is final and not subject to appeal; that the appellant

did not make reference to **Abdi Rahman Shire** (*supra*) a case that was delivered after their motion was filed; that **Section 10** of the **Arbitration Act** specifically restricts the Courts' jurisdiction; and that though the appellant had relied on **Rule 11** of the **Arbitration Rules**, that rule did not confer any right.

[7] Mr. Mude, learned counsel appeared for the 2nd respondent and fully associated himself with submissions by the 1st respondent. Counsel added that the right of review is not conferred under the Arbitration Act; that Section 10 is what was applicable and that it restricted the court; that **Rule 11** of the **Arbitration Rules** only imports procedural provisions and not substantive rights; and that grounds 2, 4 & 5 raised in the memorandum of appeal and prayer 2 do not arise from the order subject of the appeal. In a short response, Mr. Khalwale argued that the decision of Ringera J was a miscarriage of justice and should not be allowed to remain in our books.

[8]. We have considered the record of appeal, the submissions by learned counsel, the authorities cited as well as the law. The only issue for determination in this appeal is whether the High Court is vested with the powers to review its decision and/or orders made pursuant to an application under **Section 17 (6)** of the **Arbitration Act.**

[9] **Section 17** of the **Arbitration Act** that is entitled "***Competence of arbitral tribunal to rule on its jurisdiction***" states as follows:

> ***"1 ……***
>
> ***2. ……***
>
> ***3. …….***
>
> ***4. ……..***
>
> ***5. …….***
>
> ***6. Where the Arbitral tribunal rules as a preliminary question that it has jurisdiction any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.***
>
> ***7. The decision of the High Court shall be final and shall not be subject to appeal.***
>
> ***8. ……..***

[10]. Thus **section 17 (1)** of the **Arbitration Act** gives the arbitral tribunal powers to rule on whether or not it is vested with jurisdiction to hear a matter before it, and where the tribunal rules that it has jurisdiction, such a decision is appealable to the High Court. However, **Section 17 (7)** of the **Arbitration Act** ousts the power of this court to sit on appeal against the decision of the High Court made pursuant to **Section 17 (6)** of the **Arbitration Act**.

[11]. In the appeal before us, the appellants questioned the decision of the High Court made pursuant to **Section 17 (6)** of the **Arbitration Act** upholding the objection that the arbitrator had no jurisdiction to hear the matter.

[12] At this juncture it is important to note that during the hearing of this appeal Mr. Khalwale learned counsel for the appellant did not address the pertinent issue of the power of the High Court to review its decision made pursuant to **Section 17 (6)** of the **Act**. Instead, learned counsel addressed us on the decision of the High Court wherein it was held that the arbitral tribunal did not have jurisdiction to hear the matter before it. Counsel cited the decision in **Abdi Rahman Shire** (*supra*), in support of his contention that the decision of Ringera J on the issue of jurisdiction was wrong. We have perused the **Abdi Rahman Shire** (*supra*) and do find that the submission by counsel that he filed the application for review after this decision is clearly false and misleading. This is because the decision in that case was

rendered on 8th March 2002 whereas the application for review was filed on 2nd October 2001.

[13] Further, we do concur with the counsel for the 1st respondent that the memorandum of appeal as filed by the appellants appear to be against the decision of Ringera J made on 17th September 2001 on the issue of the jurisdiction of the arbitral tribunal. We think that the appellant was trying to sneak in an appeal against the decision of Ringera J on lack of jurisdiction of the arbitral tribunal through the back door. As noted above pursuant to **Section 17 (7)** of the **Arbitration Act** the decision of the High Court is final and not subject to appeal. With respect to the learned counsel he did very little to help this court to determine the real issue before it and that is whether the High Court can review its decision made pursuant to **Section 17 (6)** of the **Arbitration Act**. This notwithstanding we proceed to address the issue before the court.

[14] In addition **Section 10** of the **Arbitration Act** provides that:-

> ***"Except as provided in this Act, no court shall intervene***
>
> ***in matters governed by this Act."***

On the other hand, **Rule 11** of the **Arbitration Rules** provides:-

> "***So far as is appropriate, the Civil Procedure Rules***
>
> ***shall apply to all proceedings under these Rules***."

[15] In the case of **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, this Court considered these provisions and rendered itself 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".***
>
> ***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."***

[16] In **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR,** Mwera JA had this to

say on the same issue:-

> ***"Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil-like litigation, I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:***
>
> ***"11. So far as is appropriate, the Civil Procedure***
>
> ***Rules shall apply to all proceedings under these Rules."***
>
> ***The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10."***

[17] As noted above the notice of motion seeking review of the ruling by the superior court was brought under **Orders XLIV Rule 1, XXI Rule 22** of the former edition of the **Civil Procedure Rules** *(now repealed*), as well as **Sections 3A, 63e, 80** of the **Civil Procedure Act** and **Rule 11** of the **Arbitration Rules**.

Under **Rule 11** of the **Arbitration Rules**, **Orders XLIV Rule 1, XXI Rule 22** of the former edition of the **Civil Procedure Rules** (*now repealed*) could be held to be applicable to the Arbitration Rules in so far as the same may be appropriate. However the Arbitration Act does not provide for review of High Court decisions made pursuant to **Section 17 (6)** of the **Act**, and therefore under **Section 10** of the **Act** the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases, a rule cannot override a substantive law. **Sections 3A, 63e** and **80** of the **Civil Procedure Act** are also not applicable pursuant to **Section 10** of the **Arbitration Act**.

[18] We take note of the fact that arbitration proceedings are intended to provide a faster and less technical process for resolution of disputes. Thus the omission to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation. No doubt the case of **Abdi Rahman Shire** (*supra*), which overturned the decision of Ringera J on interpretation of **Section 23 (3)** of the **Limitations of Actions Act** would have a bearing on the propriety of the orders made by Ringera J on 17th September 2001 on the jurisdiction of the arbitral tribunal. Nevertheless, this Court has no jurisdiction to entertain an appeal in that regard as this court only exercises jurisdiction conferred by statute. The parties having chosen to proceed by way of arbitration, the Arbitration Act and Rules bind them.

[19] The upshot of the above is that this appeal must fail. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 29th day of July, 2016

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR