REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 102 OF 2014

TUMAINI TRANSPORT SERVICES LTD……PLAINTIFF

VERSUS

TATA CHEMICALS MAGADI LIMITED .....DEFENDANT

R U L I N G

Outline of facts and introduction

1. On 26/8/2016 by an application by Notice of Motion dated the same day and expressed to be premised on the provision of sections 35, 36(i) and 39 of the Arbitration Act and Section 1A, 1B 3 & 3A of the Civil Procedure Act was filed and sought orders that:-

(i) THAT the Arbitral Award dated 22nd February 2016 byCollins Namachanja be recognized as binding.

(ii) THAT the Arbitral Award dated 22nd February 2016 by Collins Namachanja be varied.

(iii) THAT the Arbitral Award dated 22nd February 2016 by Collins Namachanja for nominal damages be substituted with an award for substantial damages and the Honourable Court be pleased to reassess the damages.

(iv) THAT the costs of this application be provided for.

2. That application on its face, is grounded on the facts that the arbitrator did not properly address his mind to the principles in the assessment of damages and the law applicable in award of nominal damages by taking into account irrelevant factors and has in effect aggrieved the applicant. In the affidavit in support of the application, the deponent, one Bernard Ngandi Mwilu avers that although the award was ready on the 22nd May 2016 he was unable to collect the same till 27/5/2017 due to financial constraints. Upon reading the award he was dissatisfied and obtained an advised from the Counsel on record to the effect that the well settled principles of assessment of damages was never observed by the arbitrator as it never met the purpose of award of damages which is to restore the victim of breach, as far as possible, to the position one would have been without the breach of contract. The correspondence with the arbitrator and the award itself were then exhibited to support the application.

3. The application was opposed by the Respondent by a Replying affidavit of one DOMINIC MWASHIGADI sworn on the 13.10.2016.

The affidavit asserts the finality of the arbitral awards and the principal of party autonomy and that section 10 of the Arbitration Act restricts the circumstances under which a court of law would interfere with an arbitral award. Additional grounds were advanced that the application is incompetent for lack of an agreement to bring the matter within the preview of section 39 of the Act and that the application was inordinately late and filed outside the timelines set by section 3a (4) Arbitration Act and Order 46 Rule 17 Civil Procedure Act. On those grounds the Respondent prayed that the application be dismissed from lacking on merits.

4. Both parties agreed to canvass the application by written submissions pursuant to which agreement the Applicant filed on 17/01.2017 submissions dated 16/01/2017. While the Respondent did file submissions on the 23/2/2017. The parties then attended court on the 8/3/2017 when Mr. Mutembei Advocate appeared for the Applicant while Ms Mutende appeared for the Respondent.

Submissions by the parties

5. The hallmark of the Applicant's submissions are that section 39 of the Arbitrated Act empowers the court to entertain the application where there is an agreement to that effect by the parties and in circumstances that the parties would have contemplated the dispute to arise in the cause of arbitration. To the applicant it was contended that in the circumstances of this case the parties could not have contemplated that in the course of arbitration the arbitrator would make a mistake by only awarding nominal damages even after finding the respondent to have been at default.

6. For such reasons the Applicant took the position that the circumstances of the case presented facts not previously covered by controlling precedents and raise unique and substantial issues of law from which the court ought to rise to the occasion and deliver itself, the strictures of section 39 of the Arbitration withstanding. The decision by ***Majanja J in Harrison Kinyayoi vs Attorney General and Others***, Nairobi Petition No. 74 of 2013 was cited for the proposition that a substantial issue of law may be presented by factors that have never been covered by leading precedents or an important question concerning the scope and meaning of decisions of the higher courts or the application thereof on the well settled principles of law to such facts but that the mere existence of a complex or unique question is not by itself a substantial question.

7. The Applicant added a submissions that over and above the provisions of section 39 of the Act, there was unlimited jurisdiction vested in the court under Articles 165, 159 and 48 of the constitution and that statutory provisions which seek to limit the jurisdiction of the court must be interpreted narrowly and strictly so as to further access to justice. For that proposition, the decision in ***Republic vs Public Procurement Administrative Review Board & Another exparte Selex Sistemi Integri Limited [2008] eKLR*** was cited. To the applicant, to construe section 39 of the Act in a manner that restricts the right of the Applicant to urge this dispute would be to derogate from his right to access justice and therefore a violation of Article 48 of the Constitution.

8. Having challenged the alleged uncalled for strictures of section 39 of the Act, the applicant then ventured into the jurisdiction of an appellate court to interfere with an award of damages by the trial court or tribunal. The well-known decisions in this area were then cited to court and they include; Nigerian court of Appeal decision in ***Dumez (Nig) vs Ogboli [1972] 3 S C*** cited with approval in ***Kaluruak Gitau & Another vs Nancy Anne Wathithi Gitau [2016] eKL***, Kivati vs Coastal Bottlers also cited in ***Kahuruka Gitau (supra) and Ken Odondi & two others vs John Okoth Obura [2013] eKLR*** all for the proposition that an appellate court should be slow to interfere and will only interfere with an award of damages being in the nature of discretionary jurisdiction, where the trial court acted on wrong principles, or that it awarded so excessive or so little damages that no reasonable court would or that it took into account irrelevant facts that led it to arrive at a wholly wrong decision.

9. The next line of submissions by the Applicant was then premised on when a court would award nominal damages and it is contended that the same is not synonymous with small or misery damages but are only available where there is established infraction of a right but which infraction entitle the victim to no real damages. A raft of decisions were then cited for the proposition that where breach of contract and

loss are proved then the court ought to award damages as would naturally flow from the breach or those that which must have been in the contemplation of the parties at that time they made the agreement. Leading on this point is the decision in provincial insurance company of ***East Africa Ltd vs Mordecai Munga Naadwa [1005 -1998] E.A. 289.***

10. For the matter at hand the arbitrator is faulted for awarding nominal damages even after finding that the Respondent breached the contract and that he court ought to have been guided by the common law principle of *restitutio in integram* and that where there is breach there must to be a remedy.

11. Tied to the foregoing were submissions to the effect that in arriving at the nominal damages of Kshs.1,125,000 the arbitrator took into account irrelevant consideration. Those factors, to the applicant, include the earlier request by the applicant that the contractual rates be reviewed, the consideration that after taking into account overheads the Applicant would only retain Kshs.500 per container which was then multiplied by the 15 containers the trailers would move per day for the entire contract duration of 150 days.

On those submissions the Applicant prayed that the application be allowed as prayed.

12. For the Respondent, Ms Mtende in both written and oral submission attacked the application as not being in tandem with the law cited and sought to make submissions on three broad issues namely; the arbitral award was final, whether there was jurisdiction to substitute the award of nomince damages with one for substantial damages and if the application merited the Orders sought.

13. On finality of the award reliance was placed on the provisions of section 32 A of the Act that an arbitral award is final and can only be challenged on the basis provided under the Act under section 35 and 39.

14. To the respondent a recourse to court in arbitral matters under section 35 is only upon the parameters set out in subsection 2 & 3 thereof and limited to setting aside and not variation or substitution. Under section 39 a recourse may only be made to court by an application or appeal pursuant to an agreement by the parties. In this matter the respondent points out that there is no agreement for a determination by court of the matter and therefore the thresholds to invoke the courts jurisdiction under section 39 have not been met.

15. The decision in ***Anne Mumbi Hunga vs Victna Njoki Gathera [2009] eKLR*** was cited for the proposition of law that a court of law has no liberty to interfere on an arbitral award unless the intervention is expressly provided for under the Act or pursuant to an agreement by its parties.

16. Also relied upon was the court of Appeal decision in ***Nyutu Agrovet Ltd vs Airtel Network Ltd [2015] eKLR*** for the proposition that sections 10,32A, and 39 set parameters upon which courts intervention in arbitral matters is allowed and that it is not an open intervention for such open intervention would make those otherwise clear provisions unnecessary. The last reliance on the point of finality of arbitral awards was made on the decision in ***Evangelical mission for Africa & Another vs Kimani Gichehi & Another [2015] eKLR*** to the effect that there exist a public policy in Kenya that arbitral awards should be upheld as being final.

17. On party autonomy and the question whether or not the award should be varied, the Respondent took the stand that the law recognizes that parties have a right to choose their forum for dispute resolution and once a choice is made the court should be hesitant to intervene unless the decision offends the structures imposed by the law. ***Kenya Oil Company Ltd & Another vs Kenya Pipeline Company [2014] eKLR*** was relied upon to have rested the principle of party autonomy.

18. On the charge that the arbitrator considered irrelevant factors or was utterly wrong on the decision arrived at on award of nominal damages the Respondent takes the position that the reasoning of the arbitration could not be successfully faulted in so far as the arbitrator correctly remarked that the Applicant could not be awarded damages as if the claimant had wholly performed the contract. The court

was urged to note that the arbitrator took into account the fact that to perform the contract the claimant had inevitable overheads that had to be factored as his reasonable expenses and subtracted from the proved gross takings.

19. Efforts was then made to show that in awarding nominal damages as opposed to substantial damages the arbitrator was within his mandate. The case of ***Kanyi Naran Patel vs Noor Essa & Another [1965] E.A 484*** and ***Kinakia Co-operation Suety vs Green Hotel [1988] KLR 242*** were both cited on when nominal damages are due for award the final consideration being that where there is breach, the offended party need to further prove the loss.

20. On competence of the application, it was submitted that the application was incompetent for having been brought outside the timelines set under Order 46 Rule 17 as anchored under section 39(4) of the Act being 30 days from the date the applicant receives the notice of filing the award or from the date set by the court, within 30 days of the date so set. For that reason the Respondent contends that the application was filed out of time and without leave and is therefore incompetent.

21. On the authorities cited by the applicant, the Respondent took the view and position that the decisions in **Harrison Kinyanjui [supra]** was inapplicable as there was no unique or peculiar situation raising a substantial question as the case involved the point whether or not the award should be interfered with. The Decision in **Republic, *exparte* felex – Sistemi Integri Ltd [supra]** was distinguished on the basis that the arbitration Act doesn't seek to limit the jurisdiction of the court but only seek to limit instances of intervention to protect the principle of party autonomy. On rest of the decision setting instances when an appellate court would interfere with an award of damages, the Respondent took the position that the Applicant had not reached the threshold of justifying such interference hence the decision were of no help to it.

Issues Analysis and determination

22. I have had the benefit of reading the submissions by the parties and I must start by appreciating the industry employed in highlighting the law applicable together with the issues that I consider aptly isolated by both sides. Having so read and appreciated parties input I have on my part deemed it appropriate that the following are the issues that I need to determine for the parties:-

i) How competent is the application for intervention by court on the arbitral award?

ii) Does the court have the requisite jurisdiction to make the orders sought or any of them?

iii) Who should bear the costs of the application?

The competence of the application

23. It cannot be gain said that the right to access to justice is a constitutional right enshrined in the constitution. However that is not to say that the only law we have now is the constitution and all other law in the statutes and decided cases have become otiose.

24. The constitution must be left to occupy its known pedestal as the supreme law of the land to be enabled and facilitated by the law enacted by parliament in its constitutional mandate as well as the law as enunciated by the courts in its constitutional mandate to interpret the law. The law in the statutes like the Arbitration Act, is to this court a facilitative statute to article 159(2) C. It is intended to not only promote expeditious disposal of legal disputes but also allow and encourage disputants that it is their right to choose an acceptable dispute resolution outside the otherwise our burden mainstream court system. That Arbitration Acts sets under what circumstances a party may challenge his choice of forum should never be seen as a fetter to access to justice. Rather it is an acknowledgment that a party is the best custodian and protector of own right including the right to access justice including the right to choose forum. It does not oust the court's jurisdiction but streamlines when a party should question the forum it consciously choose. I find that to the extent that the parties in negotiating and concluding their agreement

chose arbitration as the preferred mode of dispute resolution they are bound by that choice and that choice is governed by a statute duly and legally enacted by parliament in execution of its constitutional and exclusive mandate to enact laws.

25. It follows that the invitation of Articles 48, 165(3) and 159(2) D could only be resorted to where there was lacking a straight forward and detailed statutory provisions in handling the matter at hand. I find that the Arbitration Act sufficiently covers when to approach the court for intervention in arbitration proceedings.

26. Having said that has this applicant brought itself within the law to merit the orders sought.

27. I find that section 10, 32A, 35 and 39 of the Act other than giving to the parties the liberty to choose where to take their dispute, regulates that relationship to ensure fidelity to the choice.

28. In the instant case none of the set grounds for setting aside an arbitral averted under section 35(2) & (3) nor the requirement of an agreement by the parties under section 39 have been established. To the contrary the Applicant concedes that there is no agreement but that such limitation cannot override the applicants right to access justice. My only answer to this complaint is that the arbitration Act, is clearly a facilitative legislation to Article 159(2)(c) and has not been rendered otiose by the constitution. It is equally an established principle of law that parties are bound and accountable to their bargain and should not seek the assistance of this court to redo for them an agreement duly executed. See ***Lalji Kassam Rabadia & 2 Others vs Commercial Bank of Africa Ltd [2015] eKLR***.

29. On timelines, section 35(3) of the Arbitration Act and not Order 46 Rule 17 is applicable in these circumstances. I take the view that Order 46 Rule 17 when read with Order 46 Rule 11 – 16 point to the fact that the application contemplated there by is one pursuant to reference to arbitration by the court not by the agreement of the parties.

30. Where, like in this case, arbitration is conducted pursuant to an agreement, section 35(3) provides:-

> "**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".**

31. In this matter the applicant says, and the Respondent does not dispute the fact that the invitation to the parties was done on the 22/2/2016 but the award was collected by the applicant only on the 27/5/2017. The merits and justification for taking over 3 months to go for the award notwithstanding, the fact is that the date availed to court is the 27/5/2017. That is the time when the time set of three months started to run. Therefore by the time the current application was filed, time was about to run out but the matter was filed within time. I therefore find that the application was indeed filed within time but the grounds upon which it is premised are not within the law that would have permitted it being considered on the merits.

32. The foregoing findings would be enough to dispose of the matter but I have earlier on set out other two issues for determination which I will consider even though the determination may not change the fate of the application.

Is there jurisdiction in the court to make the order sought?

33. I have found that when to intervene on an arbitral award is governed by the Act under sections 35 and 39. The court's jurisdiction would only be properly invoked where an applicant brings itself within the statutory parameters allowable for the court to intervene. Those factors are those set under section 35(2) and the need for an agreement of the parties under section 39. Court of Law have no room to maneuver beyond the application of the law as enacted and even when called upon to interpretate an apparent ambiguity the purpose of the enactment must be sought and established. As was said in the case **of**

EVANS THIGA GATURU VS KENYA COMMERCIAL BANK LTD [2012] eKLR the Court must apply the law as it is.

34. In this matter the law is that for this court to intervene, the applicant must bring itself within those dictates of section 35(2 or section 39. I have found that it has failed to do so and it thus follows that this court has no justification to intervene.

35. It is however of note that the applicant first prayer in the application is for an order that the arbitral award be recognized as binding on the parties. For that prayer the applicant cannot be faulted but must be commended for yielding to the law under section 32A itself encoding the final nature of the award as a policy and sanctioning the principle of party autonomy. It is therefore recognized and declared to be binding as the parties chose their forum for dispute resolution.

36. Having so found it to be binding, and ensuing that the Respondent did so recognize the binding nature of the award and found itself obligated to be so bound by paying the value of the award. This court finds that it would be contradictory to find the award binding, find the parties bound and yet seek to vary it or to substitute its own view for the finding of the trier of facts.

37. I may just add that this being not an appeal as contemplated under section 39 Arbitration Act nor under section 79 Civil Procedure Act, all the decisions cited by the applicant on when an appellate court would interfere with an award of damages are of no or very little assistance to the applicant's case and to the court in its duty to determine the application.

38. Save for finding that the award is binding on the party as the law mandates it, I find no merit in the application dated 26/8/2017 and I dismiss it with costs to the Respondent.

Dated and delivered at **Mombasa** this **19th** day of **April 2017**.

HON. P.J.O. OTIENO

JUDGE