Nanyuki Ranching Limited v Rockstocks Holding Limited (Miscellaneous Application E197 of 2024) [2024] KEHC 9220 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E197 OF 2024

A MABEYA, J

JULY 31, 2024

BETWEEN

NANYUKI RANCHING LIMITED ..... APPLICANT

AND

ROCKSTOCKS HOLDING LIMITED ..... RESPONDENT

RULING

1. This ruling determines two applications. The application by the applicant dated 5/3/2024 for setting aside the arbitral award dated 5/2/2024 by Hon. Professor Kariuki Muigua and the application by the respondent dated 15/4/2024 for recognition and enforcement of that award. I propose to start with the application for setting aside the award since its outcome will determine the enforcement application.

2. The application was brought pursuant to section 35(2) and (3) of the *Arbitration Act*, 1995 and rules 4 and 7 of the *Arbitration rules* 1997. It the setting aside of the said arbitral award on the grounds set out on the face of the Motion and the affidavit of Erick Murungi of even date.

3. The applicant contended that by an agreement dated 19/1/2022, the parties agreed that the respondent would purchase from the applicant 1000 acres of land known as LR No 2782/4 Nanyuki for a consideration of kshs. 850,000,000/-. That a deposit kshs. 85,000,000/- was paid but the respondent failed to pay the balance of the purchase price thereby breaching the agreement. That as a result of the breach, the applicant rescinded the agreement *vide* a notice dated 15/7/2022 and forfeited the 10% deposit in accordance with the agreement.

4. It was further contended that a new Letter of Offer dated 1/11/2022 was executed ("the 2nd agreement") by which a sum of kshs. 70,000,000/- from the forfeited sum in the 1st agreement was redeemed as deposit for the purchase price of 250 acres on LR 2782/4, Nanyuki of kshs.255,150,000/-. That the respondent was to make a further payment of kshs.100,000,000/- within 21 days. That by

that agreement, the respondent was required to make regular payments towards settling the balance of the purchase price.

5. That despite as aforesaid, the respondent yet breached the terms of the said letter of offer by failing to pay the additional sum of kshs. 100,000,000/- within 21 days, subdivision costs and executing the sale agreement. Consequently, on 27/1/2023, the applicant issued a notice of termination of the agreement. It refunded the sum of kshs. 100,000,000/- but withheld the sum of kshs 70,000,000/- that had been paid as deposit.

6. A dispute ensued and the same was referred to arbitration. The arbitrator held that the applicant had failed to follow the termination procedure by failing to issue a 21day completion notice. He therefore ordered that the deposit of kshs 70,000,000/- be refunded to the respondent together with interest of 12% and costs of the proceedings.

7. It was the applicant's contention that the award was in conflict with the public policy of Kenya and that the arbitrator dealt with issues beyond the scope of the reference.

8. The application was opposed by the respondent vide a replying affidavit of Hon James Githuku Mugambi sworn on 11/4/2024. He deponed that prior to the agreement dated 15/12/2022, the parties had entered into an agreement dated 19/1/2022 by which the respondent paid kshs. 85,000,000/- as deposit of the purchase price.

9. That the parties re-negotiated the contract and a fresh letter of offer of 1/11/2022 was issued by which the respondent would pay kshs. 70,000,000/- as the initial deposit which was to be utilized from the initial deposit. That an additional kshs. 100,000,000/- was paid and an agreement dated 15/12/2022 executed.

10. That the applicant had failed to establish the grounds laid out in section 35 of the *Arbitration Act* ("the Act") for setting aside an award since the application was challenging the facts and the law. That the arbitrator was correct in holding that there was a valid and enforceable agreement between the parties dated 15/12/2022 which the applicant breached. Further, that the arbitrator was well within the mandate of his appointment and he did not therefore deal with issues beyond the scope of the reference.

11. The application was canvassed by way of written submissions which I have considered. The applicant submitted that the arbitrator having held that the agreement dated 15/12/2022 was enforceable, he should have been bound by the same agreement and enforce fully the terms set out therein. That the arbitrator had no powers or authority to rewrite the contract between parties and had erred in deciding that kshs. 70,000,000/- was refundable contrary to clauses 1.7, 12.3 and 12.5 of the agreement.

12. That the arbitrator disregarded the aforesaid clauses and thereby ended up rewriting the agreement of the parties. That by awarding the respondent a refund of kshs. 70,000,000/- the arbitrator acted outside the scope of the reference.

13. The respondent submitted that the application did not meet the grounds for setting aside the arbitration award under section 35 of the *Act*. That the applicant did not show how the award offended public policy. That the application was but an appeal seeking to change the arbitrator's decision. That the application sought to re-litigate the issues before the Court contrary to the principle of finality of arbitral proceedings.

14. I have considered the parties averments and submissions on record. The main issue for determination is whether the applicant has met the threshold for setting aside the arbitral award as set out under section 35 of the *Act*.

15. Section 35 of the *Act* sets out the grounds for setting aside of an award as follows: -

> " 35. 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 laws 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
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> (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
>
> (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
>
> (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 in conflict with the public policy of Kenya."

16. The application was based on two grounds, that the award was in conflict with public policy and that it dealt with a matter outside the scope of the arbitral tribunal.

17. In *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, the Court held: -

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either

(a) inconsistent with the *Constitution* or any other law of Kenya whether written or unwritten, or

(b) inimical to the national interest of Kenya, or

(c) contrary to justice and morality".

18. In *Mall Developers Limited vs Postal Corporation of Kenya ML* Misc. No. 26 of 2013 [2014] eKLR, the court observed that: -

> "Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy."

19. Further, in *Kenya Shell Limited vs Kobil Petroleum Limited* [2006] eKLR, the Court of Appeal, addressed the effect of section 35 of the *Arbitration Act*, as follows: -

> "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 is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality."

20. From the foregoing, it is clear that public policy is a fluid term. Courts have endeavored to interpret the same to encompass; that which is inconsistent with the Constitution or laws of Kenya, contrary to national interest of Kenya or that is contrary to justice or morality. The spirit of arbitration is to respect the parties' autonomy and the principle of finality.

21. While the two principles set out above require that the High Court should not delve into the task of ascertaining the correctness of the decision of an arbitrator, since in doing so the court would be sitting an appeal over the decision, the court would however not close its eyes on a decision that is an outright affront to justice. A decision that disregards the intention of the parties as set out in their contractual documents would amount to being contrary to public policy.

22. The Court is aware, as correctly submitted by the respondent, that it cannot interfere with an award of the Arbitrator sorely that he misinterpreted the contract. In *Mahican Investments Ltd & 3 others v Giovanni Gaida & Others* [2005] eKLR, the court held: -

> "A court will not interfere with the decision of an Arbitrator even if it is apparently a misinterpretation of a contract, as this is the role of an Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the whole Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

23. Further, the respondent referred the Court to the Court of Appeal decision in *Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd* [2015] eKLR wherein that Court was emphatic that: -

> "We do not agree that the learned Judge erred in giving a narrow interpretation of misconduct. The interpretation he gave was correct one even under the repealed Arbitration Act. We agree with the finding of the High Court of Tanzania in *DB Shapriya and Co. Ltd*

v. Bish International BV (2) [2003]2 EA 404, (cited by learned counsel for the appellant) to the effect that;

"Courts cannot interfere with findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct."

24. In the matter before Court, what is being challenged is not the findings of fact or law by the Hon Arbitrator, but that his award is against public policy. It is the public policy of Kenya that once parties choose to have their disputes settled in a particular manner and forum, the same should be respected and enforced. That a court or tribunal would respect the parties' intentions as expressed in the contractual documents that sets out their relationship.

25. In this regard, the court will not allow an arbitrator to selectively apply or enforce the parties' contract. Further, the court will not permit an arbitrator to re-write the parties' contract. Indeed, the Supreme Court of Kenya, in opening the very narrow appellate jurisdiction of the Court of Appeal in matters arbitration, held in the case of *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* that the Court of Appeal would have jurisdiction to hear an appeal from the High Court where the decision is so perverse that it closes the door of justice to one of the parties. What the apex court was restating was that justice, is so central that it would be against public policy not to do justice.

26. In *Charles Gatheca v Atlas Copco Cmt Management Ltd & 2 others* [2019] eKLR, the court held: -

> " After considering the foregoing, it appears to me, that although the Hon. Arbitrator did very well in justifying her decision by reasons, she nevertheless misdirected herself by rejecting and/or ignoring clear evidence and submissions presented by both sides. In so doing, her award run contrary to public policy because she refused to interpret and enforce the contract of service that was presented to her by the parties instead, she re-wrote the contract for them by deciding which parts to enforce and which to leave out."

27. Then in *Nyutu Agrovet Ltd vs. Airtel Networks Kenya* Civil Appeal (Application) No. 61 of 2012, cited by the applicant, the Court of Appeal held: -

> " Parties may by mutual consent limit the extent of liability in the event of breach of contract, and that is exactly what happened in this case. In the circumstances, can an arbitrator be allowed to import extraneous matters while determining an issue which is outside the arbitration clause?
>
> ...
>
> Even if we were to be persuaded that the damages for tort and breach of contract were foreseeable, and therefore an indirect consequence of the alleged breach, hence recoverable, there is yet a major obstacle to their recovery. The parties in their wisdom clearly excluded liability for damages for consequential loss under clause 13.7.1. The court looks at the contractual text to determine whether a claim arises out of the agreement, and if so, whether it is recoverable under the contract. In the circumstances of this case, we find and hold that damages for consequential loss were not contemplated and were excluded in clause 13.7.1. Accordingly, the learned judge was correct in disallowing damages for tort and breach of contract."

28. The long and short of what the courts above were stating is that, an arbitrator cannot purport to go out of the contractual text of the parties in making his award. That would be against public policy.

He may make errors in his findings of fact or law but cannot interpret and enforce a contract of the parties selectively.

29. In the present case, the Hon. Arbitrator correctly found that the second agreement of 15/12/2022 was enforceable. Having found that the same was binding upon the parties, he was bound to enforce the terms and conditions thereof wholly as agreed by the parties and not selectively. He had to give effect to the intention of the parties.

30. There are 4 clauses that are pertinent here, Clauses 1.7, 12.1, 12.3 and 20.1. Clause 1.7 was clear that the initial deposit of Kshs.70m was un-refundable; Clause 12.1 required the issuance of a completion notice; Clause 12.3 excluded the application of Clause 12.1 in the event there was failure on the part of the respondent to pay the additional deposit of kshs.100m and Clause 20.1 that delay in enforcing a power or right did not lead to a waiver.

31. Parties are bound by the contracts which they enter even if the same are to their disadvantage. It is not in the purview of either a tribunal or court to re-write it. Clause 12.3 of the contract between the parties was categorical by use of the words 'Notwithstanding clause 12.1 above'.

32. It was not open to the Hon Arbitrator to ignore that part of the agreement. Failure to issue the notice under Clause 12.1 did not entitle the Hon Arbitrator to ignore the parties' agreement as to the remedies under the contract. In arriving at the conclusion that the initial deposit was refundable, the Hon Arbitrator clearly re-wrote the contract of the parties and his award was contrary to public policy.

33. Further, Clause 20.1 was clear that the delay in exercising any power or right by any of the parties to the contract did not operate as a waiver. That was a clause enforceable as were the rest in the contract.

34. Accordingly, I find that the application dated 5/3/2024 is merited and I allow the same. That being the case, the application by the respondent dated 15/4/2024 does not fall for consideration and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE