Educor Kenya Limited v Smart Start Kinder Academy Limited (Arbitration Cause E064 of 2023) [2024] KEHC 9866 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9866 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E064 OF 2023

JWW MONG'ARE, J

JULY 25, 2024

BETWEEN

EDUCOR KENYA LIMITED .... APPLICANT

AND

SMART START KINDER ACADEMY LIMITED .... RESPONDENT

RULING

1. The Applicant("Educor") is in the business of running educational and related institutions with a focus on early childhood education and operates various campuses in Kenya by the brand Montessori House which included one campus located at Gigiri within Nairobi County by the name Gigiri Montessori House ("the school"). Sometime in 2020, Educor made a decision to sell the School to the Respondent ("Smart Start") following a series of discussions which culminated into the signing of the Business and Assets Purchase agreement dated January 31, 2020 ("the Agreement"). As per the Agreement, Smart Start was to pay an Initial Purchase Price of Kshs.35,000,000.00/= and a Final Purchase Price which was to be determined in January 2021 as "2.0x the net revenue...." of the school for the year 2020 but subject to a cap of Kshs.43,500,000.00/=.

2. The parties could not agree on the calculation of the Final Purchase Price as set out in Clause 4 as read with Schedule 4 of the Agreement. Consequently, and pursuant to Clause 20.1 of the Agreement, Smart Start declared a dispute that was referred to arbitration for determination. By an arbitral award dated May 10, 2023, the Arbitrator rendered a decision in favour of Smart Start and ordered that Educor do refund it a sum of Kshs.5,000,000.00/=, that this amount was to attract an interest of 12% p.a from January 1, 2021 until payment in full and that it was to pay Smart Start costs of the arbitration to be assessed by the Arbitrator if not agreed by the parties ("the Award").

3. It is the Award that forms the basis of the instant applications before the court where Educor seeks to set it aside and Smart Start seeks to enforce it. Educor's application is brought by the Chamber Summons

dated August 10, 2023 made *inter alia* under sections 19, 35(1) (2) (a)(iv),35(2)(b)(ii) and 35(3) of the *Arbitration Act*(Chapter 49 of the Laws of Kenya) and Rules 7 and 11 of the *Arbitration Rules* as read together with Articles 159 (2)(c), 201 and 227 of the *Constitution*. The application is supported by grounds set out on its face and the supporting affidavit of Educor's Director Prisca Muyodi sworn on August 10, 2023. It is opposed by Smart Start through the replying affidavit of its Director, Karim Manji sworn on September 26, 2023. Smart Start's application is brought by the Chamber Summons dated September 26, 2023 made under *inter alia* section 36(1),(3)(b) of the *Arbitration Act* and Rules, 4 and 6 of the *Arbitration Rules*. It is opposed by Educor through the replying affidavit of Prisca Muyodi sworn on November 7, 2023. The parties have also filed written submissions in support of their respective positions which I have considered and will make relevant reference to in my analysis and determination below. Since Educor's application calls for the setting aside of the Award, I shall first deal with it before considering the Smart Start's application for recognition and enforcement of the arbitral award, if at all.

Analysis and Determination

4. Educor contends that the Award is in conflict with the public policy of Kenya, was in excess of the Arbitrators' scope of reference and that it would amount to unjust enrichment. On public policy, Educor avers that the Award is in violation of Article 50 of the *Constitution* which guarantees the right to a fair hearing and Article 159 of the *Constitution* which requires that justice shall be done to all, irrespective of status, justice shall not be delayed and justice shall be administered without undue regard to procedural technicalities. Educor contends that the Arbitrator failed to take judicial notice of the following prevailing factors of the year 2020 such as the Covid-19 pandemic where schools remained closed until October 12, 2020 when a directive was issued by the Ministry of Education that grade 4, class 8 and form 4 learners resume physical learning. That as late as December 30, 2020 most schools remained closed and a further directive was issued by the Ministry of Education that schools would resume fully from January 4, 2021.

5. Educor states that the Arbitrator failed to appreciate the principles of the doctrine of frustration and that the Agreement had been negotiated and entered into between the parties prior to the Covid -19 pandemic and on the presumption that the business of the School would continue to operate normally and in a similar regulatory environment as at the date of the Agreement. Educor further faults the Arbitrator's reliance on a faulty and irregular audit report, which it argues, was not backed by evidence and that the report was not complete or conclusive and was not accompanied by bank statements, the fees structures for the different terms, receipts, a schedule of the students who paid fees in the year 2020. That the audit report was not compliant with Schedule 4 of the Agreement, it was not signed or stamped by an auditor and its veracity was wanting yet the Arbitrator went ahead to rely on the same in making a determination on the dispute before him. It is Educor's further position that the Arbitrator granted an order for specific performance yet the Agreement was not concluded since the proper formalities had not been performed. Further, that as a matter of principle, an order of Specific Performance should not have been issued where its performance would be prejudicial to one party. That the Arbitrator also failed to appreciate that Smart Start was at fault for running down the school yet as a principle; an equitable remedy was not available to Start Smart who comes to court with unclean hands.

6. Educor further states that the dispute presented to the Arbitrator was to be strictly determined according to the Agreement between the parties but the Arbitrator disregarded the same, specifically on the requirements of the Audit report and went ahead to find in favour of Smart Start based on a faulty report. Therefore, Educor avers that the Award is tantamount to unjust enrichment to its detriment

and that in the instant case, it was condemned to shoulder the sum of Kshs.5,000,000/- for no fault of its own and that it was more of a punishment for the pandemic.

7. It is common ground that under section 35(2)(b)(ii) of the *Arbitration Act*, an award can be set aside if it is contrary to public policy. The parties have both rightly submitted that the phrase "public policy" was well enunciated by the court in *Christ for All Nations v Apollo Insurance Co Ltd*(*supra*) where Ringera J. explained its as a ground for setting aside an arbitral award as follows:-

> "I take the view that although public policy is a most broad concept incapable of precise definition, … an award will 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 it was either (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……"

8. The court in *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR also stated as follows:-

> "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."

9. I have gone through the Award and juxtaposed the same with the grounds advanced by the Applicant and I am unable to agree with the Applicant that the Award is contrary to public policy for a number of reasons. First, I agree with Smart Start, that Educor is inviting the court to delve into factual issues that have already been determined by Arbitrator and in effect make this court sit as an appellate court on the decided issues. It should not be lost that the arbitral tribunal remains the master of facts and it is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrator on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts (See *Kenya Oil Company Limited & another v Kenya Pipeline Company* NRB CA Civil Appeal No. 102 of 2012 [2014]eKLR).

10. While the Supreme Court in *Nyutu Agrovet limited v Airtel Networks Kenya Limited* [2019] eKLR stated that there could be legitimate instances where a party can appeal a decision stemming from arbitration, the apex court cautioned that courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice

11. It is for the above reasons that I decline the entreaty and invitation by Educor to delve into the merits of the Arbitrator's Award. Doing so would be a usurpation of the arbitral tribunal's jurisdiction and *ultra vires* of the court's jurisdiction to set aside an award under sections 10 and 35 of the *Arbitration Act*. The parties agreed that the Arbitrator should determine as an issue (issue no.9 in the Award) whether the performance of the Agreement by Educor was frustrated and made impossible by the outbreak of Covid-19. The Arbitrator made a factual finding in the negative that the performance of the Agreement or made impossible by the outbreak of the pandemic. The Arbitrator determined whether implementation of the Agreement was affected by circumstances such as force majeure. It analyzed the doctrine holding that the Agreement had no *force majeure* clause but, in any case, determined whether notwithstanding the absence of such a clause, whether the pandemic triggered the *force majeure* and

who was to bear the risk of failure of further performance of the Agreement. From the Award, I note that the Arbitrator went through the parties' evidence and positions and the law on this issue and concluded that force majeure did not apply to Educor's performance of its obligations nor were its obligations frustrated by the effects of the Covid-19 pandemic.

12. On the Audit report relied on by Smart Start, the record of the arbitration proceedings indicates that the same was listed by Smart Start in its statement of claim and produced without objection by the Educor. Educor, in its memorandum of response responded to the same and the parties agreed that the Arbitrator should determine as an issue (issue no. 8) whether the said report was in compliance with Schedule 4 of the Agreement, which the Arbitrator determined in the affirmative. On the award of Kshs.5,000,000.00/=, this was also an issue agreed by the parties that the Arbitrator was to determine. The Arbitrator made a finding that "on a balance of probabilities" that this sum was refundable by Educor to Smart Start. This was after the Arbitrator found that the Final Purchase Price was determined by the calculations of the 2020 net revenue as certified by the auditor and that Smart Start paid the initial purchase price in the sum of Kshs.35,000,000.00/= to Educor. That applying the formula at Schedule 4, the Arbitrator found that scenario C therein captured the facts as presented to him. Once again, these and the above were factual determinations within the purview of the Arbitrator and I find nothing inconsistent with any law that would entreat the court to intervene on the ground that the Award was inconsistent with Kenya's public policy. This ground by Educor fails.

13. It was common ground that the dispute between the parties arose from the Agreement hence the reason why the parties agreed to refer it to the Arbitrator for determination in the first place. The arbitral clause provided that "any dispute, controversy or claim arising out of or relating to…." the Agreement was to be referred to arbitration. As this court expressed itself in *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* ML HC Misc. Application No. 129 of 2014 [2015] eKLR, the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether the issues raised by an Applicant are contemplated by the agreement or fall within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in an arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract.

14. The parties in this case advanced their respective positions on the dispute and agreed on the issues for determination by the Arbitrator. The Arbitrator itemized and made a determination on each of the agreed listed issues based on the parties' pleadings, submissions and evidence before him. Therefore, I fail to see how it can be said that he made a determination outside the parties' Agreement when both the dispute and the issues for determination were agreed upon and the matter determined as per the parties' agreement. The fact that the Arbitrator made an interpretation of the parties' obligations under the Agreement that was not in favour of Educor does not mean that he went outside the scope of the parties' agreement. A reading of the Award shows that the Arbitrator laid out the salient terms of the Agreement, the parties' submissions and evidence and as stated, the agreed issues for determination as presented by the parties themselves. He reviewed the facts and application of the law in some of the issues while highlighting the parties' obligations under the Agreement. All in all, all issues that were presented to the arbitral tribunal and as agreed by the parties were determined and were within the confines of the Agreement. It is for these reasons that I also decline to find that the Award was made in excess and outside of the scope of the terms of the Agreement or the Arbitrator's mandate.

15. My findings above obviously point to the inevitable conclusion that the Educor's application to set aside the Award is not merited is only available for dismissal. This means that I can now determine whether Smart Start's application for recognition and enforcement of the Award is merited. Under

section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the *Arbitration Act*. This court, under section 36 of the *Arbitration Act*, has the power to recognize and enforce domestic arbitral awards once the original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it have been furnished to court. Section 37 of the *Arbitration Act* sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award. Since Educor opposed the recognition and enforcement of the Award on the same grounds it had relied on to advance its opposition to set aside the Award and since I have already dismissed those grounds, I see no valid reasons why Smart Smart's application should not be allowed as the Award and the arbitration agreement are common to the parties

Conclusion and Disposition

16. In the foregoing, I dismiss Educor's application dated August 10, 2023 allow Smart Start's application dated March 9, 2022 by recognizing the Award dated 10th May 2023 by the Arbitrator Peter M. Gachuhi as a judgment of the court and direct that the same be enforced as a decree of the court. The costs of both applications shall be borne by Educor.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

1. Ms. Muriranja for the Applicant (Educor)

2. Mr. Munene for the Respondent (Smart Start)

3. Amos - Court Assistant