Lalji Meghji Patel & Company Limited v Presbyterian Foundation (Miscellaneous Application 113 of 2020) [2024] KEHC 11286 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 113 OF 2020

JK NG'ARNG'AR, J

SEPTEMBER 26, 2024

BETWEEN

LALJI MEGHJI PATEL & COMPANY LIMITED ..... APPLICANT

AND

PRESBYTERIAN FOUNDATION ..... RESPONDENT

RULING

1. The Applicant filed a Chamber Summons application dated 6th July 2020 seeking that the court stays recognition and enforcement of arbitral award published by Arch. Julius M.F. Mutunga on 6th April 2020 and any consequential orders or directions arising therefrom pending the hearing and determination of the application, that the court sets aside the said arbitral award, that in the alternative to the setting aside order, the court makes such further orders and directions in respect to all or part of the arbitral award published by Arch. Julius M.F. Mutunga on 6th April 2020 including but not limited to remitting the same for corrective measure and/or reconsideration by the Arbitrator so as to eliminate the ground for setting aside the award, and that costs of the application be provided for.

2. The matter went before Hon. Lady Justice D. O. Chepkwony who on 23rd April 2021 delivered a ruling setting aside the arbitral award, referred the dispute back to the Arbitrator for fresh consideration in accordance with the ruling, ordered the parties to agree on when the fresh consideration of the award should be done by the Arbitrator, and that each party was to bear its own costs.

3. The parties appeared before Arch. M.F. Mutunga for directions pursuant to the decision of Hon. Lady Justice D. O. Chepkwony. However, a disagreement arose between the parties on interpretation of the ruling. That the Applicant was of the view that the court ordered a fresh arbitration on the entire dispute while the Respondent was of the view that the Arbitrator was directed to consider the documents that had been disregarded and come up with a fresh award. There being no consensus, the Arbitrator referred the parties back to this court for interpretation of the terms of the ruling.

4. On 27th June 2024, the court herein gave directions for parties to file their submissions. The Applicant in their submissions dated 12th July 2024 argued that through their application dated 6th July 2020, the Applicant requested this court to set aside the whole of the arbitral award and not part of it. That the law is clear that the two instances under which an arbitral award can be returned for Arbitration by court is under Section 35(2) of the *Arbitration Act* which envisages the setting aside of an award in its entirety, and Section 35(4) which envisages a referral of a dispute back to the Arbitrator before the Court has rendered a final decision on a setting aside application.

5. The Applicant submitted that a court has no discretion to set aside a portion of an arbitral award or to render a conditional setting aside order where an applicant has sought the setting aside of the entire award. That to set aside means to annul or vacate and once the award was set aside, then the slate was completely wiped clean, the award ceased to have any legal basis and cannot be enforced. That absent of any provision of the law under the Act or its rules on how parties are to proceed after a setting aside order is issued such as in the instant case, it then falls on the parties to agree on how to proceed.

6. The Respondent in their submissions dated 10th July 2024 contended that the judge interfered with the award and remitted the same to the Arbitrator for consideration on two main grounds. That the first ground is found in paragraph 42, 43 and 44 of the ruling that on reconsideration of the award, the Arbitrator should consider the rejected documents and submissions of the parties in respect thereof and no more. That the second ground can be gleamed from paragraph 51 to 55 of the ruling that the judge's direction was strictly on interpretation of the contract by the Arbitrator in paragraph 320(e) of the award. That according to the Respondent's interpretation, the judge did not direct a fresh hearing of the dispute.

7. The Respondent submitted that the Arbitrator should therefore admit and consider the documents which had been rejected in the Arbitrator's ruling of 2020, that the Arbitrator should consider submissions by the parties in respect or in answer to the documents and that the Arbitrator should thereafter prepare an award taking into consideration the court's interpretation of the contract. That from the foregoing, the Claimant's assertion that the Arbitral process must commence afresh has no basis and should be rejected.

8. I have perused the Chamber Summons application dated 6th July 2020, the submissions thereto and the ruling of Hon. Lady Justice D. O. Chepkwony delivered on 23rd April 2021. I have also considered the parties' submissions herein dated 10th July 2024 and 12th July 2024. The purpose of this court is to interpret the ruling of Hon. Lady Justice D. O. Chepkwony delivered on 23rd April 2024 on whether the court ordered fresh arbitration on the entire dispute or a fresh arbitration ought to have been on a few issues.

9. The Judge carefully considered the application, the affidavits in support and in opposition and submissions by the parties, and found that the main issue for determination is whether the Applicant has made out a case for setting aside the Arbitral award as provided for under Section 35 of the *Arbitration Act*. The Judge concluded the ruling by holding: -

> " 56. In the end, it is my finding that: -
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> a. the Arbitrator reached an unfair and a partial finding which guided his conclusion that the Applicant was in breach of the contract by refusing and/or failing to complete the project within the contract period.

b. Further, that the Arbitrator strictly applied the strict rules of evidence to arbitration proceeding notwithstanding the provisions of Section 2(1) of the *Evidence Act* and the rules of natural justice, thereby arriving at an award as a whole that is in conflict with public policy and infringed on the Applicant's right to a fair hearing.

Those two are perfect grounds to warrant setting aside of an award and so be it in this case.

57. I therefore, refer the dispute back to the Arbitrator for fresh consideration in accordance with this ruling. Parties shall agree on when the fresh consideration of the award should be done by the Arbitrator.

58. Each party shall bear its own costs."

10. From a simple reading of the said ruling, there is no indication that setting aside of the Arbitral Award is only on a select number of issues. It is my understanding that when an order of the court is set aside, the same is in its entirety unless specified.

11. Unfortunately, the perception of the ruling by parties herein has created an ambiguity in their minds and therefore a subject for interpretation and/or correction. This court is clothed with inherent jurisdiction which may be invoked to meet the ends of justice. This includes the mandate to apply the 'slip rule' to an order of the court to correct apparent errors.

12. The court in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others* (2017) eKLR on dealing with the 'slip rule' held as follows: -

> " This Section as quoted, embodies what is ordinarily referred to as the "Slip Rule". By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior Courts demonstrates, this is the true import of the Slip Rule.
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> ...does not confer upon this Court, jurisdiction, or powers, to sit on appeal over its own Judgments. Neither, does it confer upon the Court, powers to review any of its Judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. Indeed, any corrections made pursuant to this section become part of the Judgment or Order as initially rendered..."

13. Accordingly, the orders of this court are as follows: -

a. The Arbitral award published by Arch. Julius M. F. Mutunga on April 6, 2020 is set aside in its entirety.

b. The dispute is referred back to the Arbitrator for fresh consideration.

c. Parties to agree on when the fresh consideration of the award should be done.

d. Each party shall bear its own costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH SEPTEMBER, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Shikanda Advocate for the Applicant

Githiri Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi