National Oil Corporation v Tinfra Engineering Limited (Commercial Appeal 001 of 2020) [2023] KEHC 2665 (KLR) (Commercial and Tax) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 2665 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL 001 OF 2020

DAS MAJANJA, J

FEBRUARY 24, 2023

BETWEEN

NATIONAL OIL CORPORATION ..... APPELLANT

AND

TINFRA ENGINEERING LIMITED ..... RESPONDENT

(An Appeal from the arbitral award and decision of the Mr. Collins Namachanja, Sole Arbitrator, dated the 14{{^th}} November 2019 in the matter of arbitration between TINFRA ENGINEERING LIMITED and NATIONAL OIL CORPORATION)

JUDGMENT

1. This is an appeal that stems from the arbitral award published by Mr Collins Namachanja ("the Arbitrator") on November 14, 2019 ("the Award").

2. Before I determine the appeal, a brief background of the matter is necessary. In 2013, the Appellant ("National Oil") issued a tender for the provision of Interior Design Fit out works for its offices situated in South C, Nairobi County. The Respondent ("Tinfra") successfully applied for tender number NOCK/PRC/03(761) at an agreed sum payable of Kshs 149, 190,990.36 and as a result, the parties executed a contract dated September 1, 2014 ("the Contract") which was to run for a period of 20 weeks terminating on January 31, 2015 in accordance with clause 3 thereof.

3. Tinfra commenced the project but the Project Manager, Adventis in House Limited ("the Project Manager") suspended further interior works due to design challenges in the building. Tinfra was paid a sum of Kshs 30,392,387.20 on quantum meruit basis for the amount of work done. Since the contract had lapsed on January 31, 2015 before suspension could be lifted, parties engaged in negotiations for direct procurement which was unsuccessful leading to the termination of the procurement process.

4. National Oil thereafter advertised an open and fresh tender. Tinfra did not participate in the process and National Oil then awarded the tender to another company confirmed by a contract that was signed on November 9, 2016. It is against this background that the arbitral proceedings before the Arbitrator were commenced.

5. Tinfra's claim was that it had performed a substantial portion of its contractual obligations before National Oil suspended the works. It stated that it was ready to complete the contract if reinstated but National Oil failed to honour its obligations and was in breach of the Contract. It stated that National Oil had delayed in performing the Contract deliberately and without reasonable cause and it had delayed payments. It also complained that National Oil frustrated the Contract by re-advertising the works that it was carrying out. It therefore claimed, *inter alia*, general damages for breach of contract and Kshs 220,218,252.54 made up as follows:

    a. Extended preliminaries Kshs 5,043,517.00

    b. Loss of Profit Kshs 24,883,985.00

    c. Office Administration Expenses Kshs 43,151,264.00

    d. Interest of delayed payment Kshs 4,144,041.00

    e. Retained contract amount Kshs 2,681,264.11

    f. Accrued amount per Hudson Formula Kshs 140,314,126.43

6. National Oil admitted the Contract but stated that the building in which Tinfra was to undertake the works had a defective atrium which led to extensive flooding during the rainy season. Due to this defect, the interior work could not be done hence it was suspended to in order to deal with the flooding issue. Before the issue could be addressed, the Contract lapsed. National Oil therefore contended that the Contract was terminated in accordance with Clause 36.1.2 hence Tinfra was not entitled to profit as pleaded or at all. It added that Tinfra breached its obligation under the Contract by failing to comply with Clause 36 and that once the Contract came to an end, it was expected to stop work and leave the site as soon as possible hence it was not entitled to relief.

7. National Oil further stated that the Contract lapsed on January 31, 2015, nine days from the date works were suspended. That Tinfra did not declare a dispute or seek extension but instead submitted a fresh but unsuccessful bid on August 19, 2016. Further, negotiations between the parties failed. National Oil urged the Arbitrator to dismiss the claim as Tinfra was paid the amounts certified for work done and having participated in the fresh tender, it was estopped from making any further claims.

8. Based on the parties' pleadings and submissions, the Arbitrator framed the following issues for determination:

    a. The legal position of the Contract.

    b. The intention of the parties as regards its performance.

    c. Whether the Contract was properly terminated.

    d. Whether National Oil was in breach or whether National Oil frustrated the Contract.

9. On the first issue, the Arbitrator held that the Contract was valid with a set term of 20 weeks commencing from September 1, 2014 to January 31, 2015 when it would automatically lapse regardless of the suspension period. The Contract was therefore terminated when time lapsed and was not terminated in accordance with clause 36 thereof. The Arbitrator however found that the Contract

was frustrated by the conduct of National Oil for suspending the works and failing to extend the timeline to enable Tinfra compete the work. The Arbitrator further held that since the Contract had expired, National Oil was within its right to initiate the subsequent procurement process which was independent of the Contact and was entitled to terminate the subsequent procurement process. Conversely, Tinfra did not waive its rights under the Contract by participating in the subsequent procurement process.

10. In respect to the reliefs, the Tribunal awarded Kshs 5,043,571.00 for extended preliminaries on the basis that the Tinfra was still in the premises of the site beyond the lapse of the Contract period while awaiting instructions to resume works. The Arbitrator also awarded Kshs 24,883,985.00 for loss of profit which Tinfra would have made had the contract not been suspended and for the sum of Kshs 2,681,264.11 being the retained Contract sum. The Tribunal rejected the award for administrative expenses, interest on delayed payments, accrued amount under the Hudson formula and general damages.

11. National Oil being aggrieved by the Award has filed this appeal. The grounds of appeal are set out in its Memorandum of Appeal dated January 15, 2020. Both parties have filed written submissions.

12. Although the Memorandum of Appeal is rather prolix, the Appellant has summarized its grounds of appeal into five issues. First, whether the Award contains decisions on matters beyond the scope of reference to Arbitration. Second, whether the Arbitral Tribunal erred in holding that the Respondent did not waive its rights under the Contract by participating in the subsequent procurement process. Third, whether the Arbitral Tribunal erred in awarding the Respondent Kshs 24, 883, 985.00 for loss of profit. Fourth, whether the Arbitral Tribunal erred in holding that the award of Kshs 24,883,985.00 in loss of profit did not lead to the risk of a double claim and last whether the Arbitral Tribunal erred in awarding the Respondent Kshs 5,043,571.00 for extended preliminaries.

13. In dealing with these issues, the court remains alive to the limitation of this court's appellate jurisdiction in appellate matters. This court, by a ruling delivered on July 14, 2022, dismissed the Respondent's Preliminary Objection and held that it has jurisdiction to determine the Appeal on the basis that the parties had reserved the right of appeal under the section 39 of the *Arbitration Act, 1995* which provides, in part, as follows:

> "39. Questions of law arising in domestic arbitration
>
> (1) Where in the case of a domestic arbitration, the parties have agreed that—
>
> (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
>
> (b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.
>
> (2) On an application or appeal being made to it under subsection (1) the High Court shall—
>
> (a) determine the question of law arising;
>
> (b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration."

14. From the aforesaid provision, it is clear that the court's jurisdiction is limited to consideration of matters of law. In considering the meaning of what constitutes a matter of law, the Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* NRB CA Civil Appeal No 300 of 2013 [2014] eKLR accepted the passage of Denning J, in the English case of *Bracegirdle v Oxley (2)* [1947] 1 All ER 126, 130 where he stated as follows:

> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts..."[Emphasis mine]

15. The approach to determination of appeals in arbitration matters was affirmed in *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited* NRB CA Civil Appeal No 102 of 2012 [2014] eKLR where the Court of Appeal cited with approval the following dicta by Steyn LJ, in *Geogas SA v Trammo Gas Ltd (The "Baleares")* 1 Lloyds LR 215:

> "The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. 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 arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.'

16. I now turn to the issues raised by the Appellant. The first issue is whether the Award contains decisions on matters beyond the scope of reference to Arbitration. The basis of the contention is part of the Award stating that, "The Respondent's conduct is the sole reason that led to the Claimant's inability to complete the works under the contract, or that it is the Respondent's conduct that made it impossible for the Claimant to perform the contract."

17. As I understand, National Oil complains that the Tinfra did not plead in its Amended Statement of Claim that National Oil by its conduct frustrated the completion of works. It points out that the allegation that the suspension of the work, delay in reinstating the contractual duties of the Respondent frustrated the Contract were only made in passing at paragraph 31 of the Amended Statement of Claim and the issue of the frustration of the Contract by the Appellant was only raised during submissions. National Oil submits that a party is required to plead a frustrating event and that the Arbitrator erred in considering a matter that was not pleaded. It cites several cases including *Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny and Another* [2002] eKLR and *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR to support its case.

18. I disagree with the National Oil that the Arbitrator exceeded the scope of the reference. National Oil in fact proposed the following issue for determination; "Whether the contract dated September 1, 2014 was frustrated or breached by the Respondent in any way or at all?" The Appellant cannot now argue that the Arbitrator exceed the scope of the reference. Moreover, on this issue, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No 71 of 2016 [2020] eKLR set out the basic considerations as follows:

> "In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc. (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings."

19. The scope of the Arbitrator's jurisdiction is grounded on the arbitration clause, reference and the law and in this case, National Oil has not shown that the Award was outside the scope of the reference.

20. On the second issue that the Arbitral Tribunal erred in holding that the Tinfra did not waive its rights under the contract by participating in the subsequent procurement process, National Oil complains that in the Award, the Arbitrator failed to consider the totality of the evidence before the Arbitral Tribunal and its contention is that Tinfra acquiesced to the suspension of works which led to the delay in completion of the Contract. That it is therefore estopped by conduct from alleging that the Appellant's conduct frustrated the contract.

21. When considering this issue, the Arbitrator was of the view that the procurement process and subsequent negotiation was intended to resolve the issue of the stalled works and could not be considered as a waiver by Tinfra of its rights. The Arbitrator involved Clause 43 of the Contract which provided, *inter alia*, that, ''No ... waiver of any of the provisions of this Contract shall be effective unless specifically consented to by the parties, put in writing and signed by, or on behalf of the parties.''

22. In my view, whether or not there was waiver is a question of fact. The Arbitrator addressed the legal issues and came to the conclusion based on the Contract, that Tinfra could not have waived its rights under the Contract. These findings are within the province of the Arbitrator and the Appellant has not shown that they are perverse to invite this court's interference.

23. The final three issue concern the reliefs awarded to Tinfra. National Oil complains that the Arbitral Tribunal erred in awarding the Respondent KES 24, 883, 985.00 for loss of profit. It also attacks the award of KES 5,043,571.00 awarded on account of extended preliminaries.

24. According to Tinfra, the claim for Kshs 5,043,571.00 was founded on the fact that it remained on the site for period longer than was necessary. The Tribunal found that it was not in dispute that the Tinfra remained on the site following suspension of the works on January 22, 2015 pending further instruction from the Project Manager and since the Contract was not terminated as contemplated, the claim for Extended Preliminaries was merited.

25. National Oil submits that the claim for Extended Preliminaries was in the nature of special damages which in law, ought to have been pleaded and proved before they can be awarded. It cited several

decisions of the courts including *National Social Security Fund Board of Trustees v Sifa International Limited* [2016] eKLR and *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR. National Oil submits that the figure claimed was not supported by any evidence and that it ought to be set aside. On its part, Tinfra supports the decision of the Tribunal and urges that the claim was pleaded and indeed proved through evidence; the testimony and documents.

26. In the Amended Statement of Claim dated August 6, 2018, the claim for Extended Preliminaries is pleaded as special damages resulting from suspension and failure to remit the balance of the monies due to it and which it incurred through no fault of its own. Tinfra noted that the claim was based on the Tender Evaluation document which provided the amount to be charged for several items and for what period. In this respect, it broke down the amounts as follows: Kshs 1,000,000.00 for insurance issued for 2 years; Kshs 1,902,857.14 on account of Plant, tools and vehicles calculated on the basis that it would be paid Kshs 4,000,000.00 which works out at Kshs 20,000.00 per week, Kshs 713,517.43 for storage of materials at Kshs 7,500.00 per week and security of works at Kshs 15,000.00 per week amounting to Kshs 1,427,142.85.

27. Tinfra's argument is that the amount for Extended Preliminaries was required to be paid under the Contract as long as it remained on site. From the tender documents, the nature and purport of Preliminaries are those payments required to facilitate the contractor to take over the site before commencing the actual contract. Under the schedule on preliminaries, the price for each item is set out under the schedule and agreed at Kshs 1,430,000.00. There is nothing in the Contract that states that the amount for preliminaries would be paid as long the contractor was on site. It was a one off payment and since the contract came to an end, there was no basis to award this sum. Moreover, Tinfra had already been paid for Preliminaries, it could not claim the same or similar amount again as this would amount to double compensation. I therefore find and hold that there was no basis on the Contract to award Kshs. Kshs 5,043,571.00 as Extended Preliminaries. That aspect of the Award is therefore set aside.

28. The Tribunal held that Tinfra was entitled to Kshs 24,883,985.00 as loss of profit on the basis that it was projected to make 40% profit from on the Contract and that it was based on what Tinfra expected to make in return had it been able to complete the works under the Contract. The Tribunal pointed out that National Oil did not quite interrogate the workings provided by the Tinfra and since the claim was reasonable, it was awarded. The Tribunal rejected the contention by National Oil that the award would amount to double compensation as the Tinfra's workings were based on the Contract balance and not what it had been paid hence there was no risk of a double compensation.

29. Resolution of this issue brings into fore the question under what circumstances an award for loss of profit may be made. As in any case of breach of contract, the general rule concerning the calculation and award of damages was established in the *Hadley v Baxendale* [1843 -60) All ER Rep 461 where the court held that in cases of breach of contract only damages as may fairly and reasonably be considered either as arising naturally from such breach and which may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, are payable. Thus, it is important that an aggrieved party establish that as a result of the breach it suffered a loss which is a foreseeable consequence of the breach. Having found that the National Oil frustrated performance of the Contract, then next step for the Tribunal was to assess the damages.

30. Tinfra claimed that it was expected to make a profit of 40% profit on the Contract sum hence its claim, which the Tribunal accepted, was based on 40% of the balance of the Contract sum. In accepting the proposed sum of Kshs 24,883,985.00, the Tribunal observed that, "[It] finds it reasonable that the Claimant would have anticipated to make a profit of Kshs 24,883,985.00 against the given Contract Sum."

31. To establish its case, Tinfra relied on a schedule showing its loss of profit was 40% of the balance of the Contract price. In his testimony, its witness merely pointed out that it was claiming 40% profit. From the documents and testimony, it is not evident how the figure of 40% profit was reached. It was not enough for the Arbitrator to hold as such as this figure was not interrogated since the burden of proof lay on Tinfra to establish its claim. I accept the holding by the Arbitrator that a profit element is already factored into the contract price hence the any profit must be the profit lost on account of the breach or frustration. In this case Tinfra has not demonstrated the loss it made as a result of the breach, the period for that loss or whether the loss expressed is gross or net profit.

32. In *Hydro Water Well (K) Limited v Sechere & 2 others (sued in their representative capacity as the officers of Chae Kenya Society* (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax) (10 August 2021) (Judgment) the Court held that for a party to claim loss of profit, it must prove three elements; that the conduct upon which the claim is based caused the lost profit damages, that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct and that the lost profit damages are capable of proof with reasonable certainty. While I accept that a claim for loss of profits was indeed contemplated by the parties should breach of contract occur, in this case I find and hold that Tinfra did not prove that nature and extent of its loss in that respect. I am therefore constrained to allow the appeal on this aspect and dismiss the claim for loss of profit.

33. As a result of the findings I have made, I allow the appeal to the extent that I set aside the award for Extended Preliminaries and Loss of Profit. Since I have upheld the substance and reasoning or the Arbitral Tribunal but set aside the award of damages, I direct that each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Ms Muthee instructed by Muriu, Mungai and Company Advocates for the Appellant.

Mr Odongo instructed by Garane and Somane Advocates for the Respondent.