Lexis International Limited v Blueline Properties Limited & another (Miscellaneous Application E936 of 2021 & E010 of 2022 (Consolidated)) [2023] KEHC 18161 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E936 OF 2021 & E010 OF 2022 (CONSOLIDATED)

FG MUGAMBI, J

MAY 26, 2023

BETWEEN

LEXIS INTERNATIONAL LIMITED .... APPLICANT

AND

BLUELINE PROPERTIES LIMITED .... 1ST RESPONDENT

SIMON SAILI MALONZA .... 2ND RESPONDENT

RULING

1. The applicant and the respondents entered into a standard form Joint Building Council agreement dated 2nd December 2013, for the development of 13 townhouses on Land Reference Number 7741/42 and 7741/180 in Kitusuru.
2. The applicant was the contractor and the 1st respondent the employer. A dispute arose between the parties and the matter was referred to arbitration. The 2nd respondent Mr. Simon Saili Malonza was appointed by the Architectural Association of Kenya as the arbitrator. The arbitrator published a final award on 4th October 2021 in favour of the respondent. It is this award that has prompted the two (2) applications filed by the applicant and the 1st respondent before this court.
3. The first application was filed in Miscellaneous Application No E936 of 2021, dated 31st December 2021. The applicant, Lexis International Limited seeks that the arbitral award made by a sole arbitrator dated 4th October 2021 be set aside in its entirety or in part as the court may deem just and expedient. The second was Miscellaneous Application No E010 of 2022 dated 18th January 2022 in which the 1st respondent, Blue Line Properties Limited seeks to have the final award recognized as binding and enforced by this Honourable Court.

4. The two applications were consolidated with Miscellaneous Application No E936 of 2021 being the main file. Parties filed their respective responses to the two applications and filed written submissions canvassing the two applications. This ruling therefore determines both applications.

Application dated 31st December 2021

5. The application dated 31st December 2021 is brought under section 35 of the *Arbitration Act* 1995, Rule 7 of the Arbitration rules 1997 sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law.

6. The application seeks the following orders;

   i. This Honourable court be pleased to set aside in its entirety or in part as the court may deem just and expedient the final Arbitral award of Mr. Simon Saili Malonza (the arbitrator) published and dated 4th October 2021.

   ii. This Honourable court be pleased to direct the arbitrator to refund to the parties herein the total monies paid to him for the conduct of the arbitral proceedings

   iii. The costs of this application be borne by the respondents.

7. The application is premised on grounds on the face of it, on the supporting affidavit sworn by MICHAEL MWANGI MAINA on 31st December 2021 and written submissions dated 22nd August 2022.

8. The crux of the applicant's case is that the award published on 4th October 2021 conflicted with the public policy of Kenya. This is because it had some inconsistent determinations in as far as it awarded the respondent monies not assessed by the Quantity Surveyor. It is also alleged to be illegal and contravenes provisions in *the Constitution* and other laws especially the *Arbitration Act*.

9. It has particularly been argued that the award is not reflective of the rules of natural justice, fairness and equality and is a result of bias and unfair determination. The applicant's particular contention was that it was not afforded a fair and reasonable opportunity to present its case with respect to directions or a response to the application dated 3rd August 2021.

10. On the same ground of public policy, the applicant avers that the award is an afront to the public policy that requires that the laws that are in place should be obeyed, because of certain findings that it makes. The applicant also avers that public policy requires that adjudicating tribunals adhere to contracts between parties and uphold the sanctity of contracts, which was not done in this process.

11. Secondly, it was the applicant's contention that the arbitrator had failed to determine the net sums due with respect to the final account submitted by the Project Surveyor. As a result, the sum of Kshs 84,546,539.59 remained unaccounted for.

12. The applicant also bases his case on the fact that the arbitrator's award was in blatant disregard of the provisions of the agreement between the parties for various reasons. The applicant took issue with the arbitrator failing to find that the applicant was entitled to payment of works done. With respect to time, the applicant's contention was that the agreement under clause 36.5 provided that the applicant was entitled to extension of time. The applicant submits that the arbitrator erred in holding that the 1st respondent was entitled to terminate the agreement.

13. The applicant took issue with the arbitrator awarding the respondents damages for delay in completion of the project contrary to clause 43.1 which required the delay to be certified in writing by the project architect. This caused unjust enrichment to the respondents.

14. The applicant also avers that the arbitral award contained decisions on matters beyond the scope of the arbitration. The arbitrator is said to have made a determination in a way that was extraneous to the agreement.

15. The application was opposed. The 1st respondent filed a replying affidavit dated 10th February 2022 sworn by STEVE GICHOHI, a director of Blue Line Properties Limited. The 1st respondent also filed written submissions dated 26th October 2022 outlining authorities in support of its arguments.

16. The 1st respondent objects to the application on grounds that the application was couched as an appeal of the decision of the arbitrator and the court was not entitled to upset the findings of the arbitrator. The 1st respondent reiterates that the High Court does not have jurisdiction to interrogate matters of fact which ought to have been heard and determined by the arbitrator to finality.

17. It was averred that the applicant's allegations of the arbitrator's bias were baseless and only meant to attack the integrity and competence of the arbitrator. The 1st respondent further observed that there was no evidence of bias presented before court and any allegation ought to have been brought before the arbitrator during the hearing. With respect to public policy the respondent stated that the applicant did not demonstrate how the arbitral award offends public policy and the arbitrator did not contravene any provision of *the Constitution*, statute or the contract. There was no evidence of provisions of the law that had been violated by the award.

18. It was stated that the arbitrator restricted himself to the terms of the contract signed by the parties contrary to the applicant's allegations. It was further submitted by the respondents that the payment allowed by the arbitrator to the third party was recognized under clause 38.5 of the contract.

Analysis

19. I have carefully considered the pleadings, authorities submitted and rival arguments made by the opposing parties. The main issue for determination is whether the defendant has made out a case for setting aside the arbitral award as provided for under section 35 of the *Arbitration Act*. This section provides as follows;

    35"An arbitral award may be set aside by the High Court only if—

    a. the party making the application furnishes proof—

       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

(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—

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."

20. The applicant argues that the award conflicts with the public policy of Kenya, that the arbitrator failed to adhere to the agreement of the parties and that the award dealt with matters beyond the scope of Arbitration agreement.

21. Ringera J. (as he then was) in the case of Christ for all Nations Vs Apollo Insurance Co. Ltd. (2002) EA 366 explained the scope of public policy as a ground for setting aside an arbitral award as follows:

> "An award could be set aside under page 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."

22. The same position was upheld by the court in Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR where 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.

23. The Court of Appeal, in Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR, 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."

24. In order to prove that an award is against the public policy the applicant has to demonstrate that it was inconsistent with *the Constitution* or any written law, inimical to the national interest of Kenya or

contrary to justice and morality. Applying the principles laid out above to the circumstances of this present case, I fail to find sufficient evidence to support any finding that is against public policy.

25. Secondly, the applicant raises several issues around the interpretation of the contract. The applicant takes issue with the computation of the final account, the interpretation of the clause on extension of time and damages for the delay after time had been extended

26. I have perused the arbitral award and with reference to the final account, the arbitrator correctly held that the final account would be prepared by the project Quality Surveyor. The other issues raised as to whether the applicant was entitled to the full amounts as assessed in the final account are matters of fact that were deliberated upon by the arbitral tribunal.

27. The issue of extension of time is also provided for in the agreement and I note that the arbitrator in paragraph 783 relied on clause 43.1 which allowed for damages for the delay after time had been extended pursuant to clause 36 of the agreement. In any case, I am guided by the case of Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited [2018] eKLR where the Court stated thus:

> " In any event, matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are matters over which only the Arbitrator had jurisdiction to deal; and which this Court would have no mandate to interfere.

28. I would therefore concur with the decision in D. Manji Construction Limited vs. C & R Holdings Limited [2014] eKLR in which again the Court observed that:

> " The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few...those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts..."

29. I also find persuasive the following passage from an English case of Geogas S.A vs. Trammo Gas Ltd (The "Baleares") which was cited with approval by the Court of Appeal in Kenya Oil Company Limited & Another vs. Kenya Pipeline Co. [2014] eKLR.

> " 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."

Similarly, in Mahican Investments Limited and 3 others vs Giovanni Gaida & Others [2005] eKLR, Ransley J. was of a like view when he held that: "A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator.

To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

30. I concur wholly with the arguments advanced in these decisions. Faulting an arbitrator's findings cannot be said to be inconsistent with any law or contrary to justice and morality. This does not substantiate a finding of bias as well. No evidence has been presented in support of the allegation of bias. In a nutshell the application seeks to invite the court to make an assessment on the merits of the arbitral award and to do so the court would be sitting on appeal of the decision in issue.

31. The next ground is that the award contained decisions on matters beyond the scope of reference to arbitration. In order to establish whether the arbitral tribunal has dealt with a dispute not contemplated within the terms of reference for arbitration, this court stands guided by the case of Synergy Credit Limited v Cape Holdings Limited NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR where the Court of Appeal observed 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.

32. Clause 45 of the agreement provides for settlement of disputes. Clause 45.2 particularly provides that

> " The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith including any matter or thing left by this contract to the discretion of the architect, or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions or rights and liabilities of the parties subsequent to the termination of contract.

33. The applicant faulted the respondent for holding that payments made to a third party were applicable in assessing alleged remedial works undertaken. From the arbitration agreement, clause 38.6 allows the employer to pay a subcontractor goods delivered or works conducted after the termination of the contract by the contractor. The amount paid by the contractor is then deducted from any money due or to become due by the contractor.

    In this regard, I find no fault on the part of the arbitrator.

34. The applicant has failed to demonstrate that there exist sufficient grounds to warrant the setting aside of the arbitral award under section 35 of the *Arbitration Act*. Having come to this conclusion, I must now deal with the second application that relates to this matter.

Application dated 18th January 2022

35. This application was filed by the 1st respondent in the previous application. The same is brought under section 36(1) of the *Arbitration Act*, 1995, and rules 4(2) and 9 of the Arbitration Rules 1997. It seeks the following orders;

i. THAT the final arbitral award dated 4th October 2021 by Simon Saili Malonza CIArb and annexed herewith be recognized as binding and enforced by this Honourable Court.

ii. THAT the costs of this application be borne by the respondent.

36. The application is supported by the affidavit of STEVE GICHOHI dated 17th January 2022 and was opposed by way of a replying affidavit dated 15th July 2022, sworn by MICHAEL MAINA. The parties' have reiterated their respective submissions and averments as elaborated in Miscellaneous Application No E936 of 2021.

Analysis

37. This Court enjoys jurisdiction under section 36 of the *Arbitration Act* to recognize and enforce domestic arbitral awards on the following terms:

> 36 (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37
>
> (2) ...
>
> (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish the original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it.

38. Section 37 of the *Arbitration Act*, on the other hand, provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows;

37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) At the request of the party against whom it is invoked, if that party furnishes the High Court proof that;

(i) a party to the arbitration agreement was under some in capacity; 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, under the law of the state where the arbitral award was made;

(iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or

(vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;

(b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

39. From the record before me, I confirm that the applicant in this subsequent application has furnished the court with a certified copy of the arbitral award as well as the arbitration agreement it, in compliance with section 36 of the *Arbitration Act*.

Determination and orders

40. Having determined the previous application for setting aside the award as I have, it is my finding that the applicant has failed to establish any grounds that would make the award unenforceable. In the premises, I find no merit in the application dated 31st December 2021 and the same is dismissed with costs.

41. Conversely, I find and hold that the 1st respondent has met the conditions for recognition and enforcement of an award under section 36 of the Act. I allow the application dated 18th January 2022 on the following terms;

i. That the final award published on 4th October 2021 be and is hereby recognized and adopted as a judgment of this court.

ii. That the respondent in that application shall bear the costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF MAY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.