Mhasibu Properties Limited v Jinsing Enterprises Company Limited (Miscellaneous Application E050 & E052 of 2022 (Consolidated)) [2023] KEHC 17782 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17782 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E050 & E052 OF 2022 (CONSOLIDATED)

FG MUGAMBI, J

MAY 26, 2023

BETWEEN

MHASIBU PROPERTIES LIMITED ..... APPLICANT

AND

JINSING ENTERPRISES COMPANY LIMITED ..... RESPONDENT

RULING

Brief facts

1. The facts leading to this case are that the parties entered into an agreement dated June 15, 2016 for building works on property known as LR No 2/406 in Nairobi. A dispute ensued when the applicant terminated the contract and the respondent claimed an amount of Kshs 54,807,338.22 on account of alleged loss of anticipated profit. The dispute was referred to arbitration.

2. The Chairperson of the Architectural Association of Kenya appointed Steve Oundo as the sole arbitrator. The arbitrator on December 15, 2021 awarded the respondent a sum of Kshs 16,442,201.50 together with interests and and 2/3 of the costs and dismissed the counterclaim by the applicant.

3. This is what prompted the two (2) applications before this court. The application dated August 4, 2022 seeks to set aside the arbitral award and the application dated August 30, 2022 seeks recognition and adoption of the arbitral award.

Application dated August 4, 2022

4. The application was brought under Sections 35 and 39 of the *Arbitration Act*, Articles 48 and 50(1) of the *Constitution of Kenya, 2010*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and all enabling provisions of the law.

5. The applicant seeks the following orders;

    i. Spent

    ii. That this Honourable Court be pleased to set aside the award of Architect Steven Oundo, the sole Arbitrator dated December 15, 2021 and issued on July 7, 2022 in a dispute between the applicant and the respondent

    iii. That the respondent be compelled to bear the costs of this application and the Arbitral proceedings before the arbitrator.

6. The application is premised on the grounds on the face of it and the supporting affidavit sworn by Muthini Ngola dated August 4, 2022 and buttressed by the written submissions dated January 19, 2023.

7. It was the applicant's case that following a competitive process, the respondent was prequalified for the building contract on LR No 2/406 in Nairobi. The Project Finance Agreement and the agreement for conditions of contract building were signed.

8. Following the award, the applicant alleged that the respondent had misrepresented to the applicant that they were the most pre-qualified contractor for the contract. The applicant alleged that the respondent lacked the financial muscle to undertake the development project as per the financial statements submitted during the tender process.

9. The applicant further stated that the evidence adduced by the respondent in support of its financial capability did not amount to a letter of credit and that there was no proof of an office or evidence of office service facilities. In view of the above reasons the applicant terminated the contract resulting to the present dispute which was referred to arbitration.

10. The applicant avers that the arbitrator rendered a decision that was manifestly wrong in law and against public policy for various reasons. The applicant states that the arbitrator erred in finding that the Joint Building Council and the Project Financing Agreement did not form part of the contract; that the arbitrator disregarded the applicant's evidence particularly the Quantity Surveyor's expert evidence; that the arbitrator gave no reason for awarding the respondent 30% of the amount claimed, 2/3 of the costs and the tribunal's costs and 12% interest per annum; that the arbitrator's award is full of contradictions and inconsistencies and finally that the award was dated December 15, 2021, signed on December 21, 2021 yet the same was published and released to the parties on July 7, 2022.

11. The applicant also faulted the arbitrator for failing to give the parties an opportunity to come up with the rules of procedure on admissibility of evidence. It was the applicant's submissions that its right to a fair hearing was violated by the arbitrator and had the arbitrator listened to the expert evidence his decision was bound to be different.

12. The respondent opposed the application through a replying affidavit dated November 3, 2022 sworn by Carolyne Muthue and further bolstered by the written submissions dated January 22, 2021. The respondent took issue with the form of the application and argued that the same was defective and incompetent. It was also averred that the application is brought under the wrong provisions of the law.

13. The respondent also observed that the application for setting aside an award should be brought not more than three months from the date of receiving the award. The respondent confirmed that the award was ready for collection on December 15, 2021 when the notice was sent to the parties by the arbitral tribunal. It was contended that the award was said to be received by the parties when the notice to the parties was sent informing them that it was ready for collection.

14. The arbitrator wrote to the parties again on June 28, 2022 indicating that the respondent had cleared the arbitrator's fees but that the applicant had not yet done so. Eventually, through a letter dated 6th July 2022, the arbitrator confirmed the payment of the arbitrator's fees by the applicant. Counsel therefore submitted that the court lacked jurisdiction to entertain the application for it was brought outside the three months provided for by law.

15. The respondent further submitted that the applicant had not met the conditions for setting aside the arbitral award and that it had instead invited the court to sit in its appellate capacity. Counsel submitted that the court could not sit on an appellate capacity to review the merits of the award as its role was only supervisory. It was the respondent's argument that the issues raised by the applicant in the application had been conclusively addressed by the arbitral tribunal.

16. The respondent also submitted that the applicant had not proved any grounds laid out in section 35(2) of the *Arbitration Act* for setting aside the award. It was submitted that the parties were all given a fair hearing and given an opportunity to file documents, examine witnesses and file submissions. With respect to the rules of procedure at the arbitral tribunal, counsel submitted that at the preliminary hearing the parties set out the rules of procedure as well as the roadmap for the conduct of the arbitration.

Analysis

17. Before getting into the substance of the issues raised, I must first determine whether the application is defective and what the purport of that is. It has been submitted that the application should have been brought by way of a Notice of Motion as opposed to an Originating Summons. It was also averred that the application is brought under the wrong section of the law, referring to section 39 of the *Act.*

18. Section 35 of the *Arbitration Act* does not prescribe the procedure of approaching court. The *Arbitration Rules 1997* rule 7 provide that;

> An application under section 35 of the Act shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator.
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> The above rule does not expressly provide that applications should be made by way of notice of motion even though I note that it is common practice to approach the court by way of notice of motion, supposedly because of Order 51 rule 1 of the Civil Procedure Rules.

19. The purport of this is that failure to follow procedure does not go into the jurisdiction of the court. In the case of *Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another* Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 Ringera, J (as he then was) expressed the same viewpoint as follows:

> "...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it... Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...

Following this, I do not find the application to fatally defective.

20. Having said this, I turn to the question as to whether the court has jurisdiction to hear and determine the application for setting aside the award. The *Arbitration Act* under section 35(3) gives the timeline within which an application for setting aside an award can be filed. It provides that;

> (3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

21. In *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR the court held that;

> " This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties."

22. Similarly, in *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others* [2005] eKLR it was stated thus;

> " The question arises as to the meaning of "had received" the arbitral award. This question was raised before Mr. Justice Nyamu in the case of Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003 where he held that in order to comply with Sec 35(3) the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection. In its normal meaning "receipt" means the actual obtaining of the arbitral award.
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> In his ruling Nyamu, J has this to say about "receipt": at page 27...Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the *Arbitration Act* reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

23. I concur with these decisions that time starts running after the arbitrator has given notice to the parties to inform them that the award is ready for collection. In the present case, the Arbitrator by a letter dated December 15, 2021 informed both parties that the award was ready for collection and stated that it would be issued upon full payment of the arbitrator's fee.

24. In view of this, the application for setting aside the arbitral award ought to have been made within three months from December 15, 2021. The present application was filed on 4th August 2022, about eight (8) months later and certainly outside the three (3) months prescribed by law.

25. Having so observed, the question then becomes, can the court enlarge the time for the application? In the case of *Dinesh Construction Company (K) Limited Vs Kenya Sugar Research Foundation* [2018] eKLR the High Court held that in the absence of any specific provision under *Arbitration Act*

governing a procedure sought by a party the Court would lack jurisdiction to entertain such an application. It was specifically stated as follows:-

> " Thus, there being no specific provision in the *Arbitration Act* for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either to grant stay of execution, or set aside the enforcement order of 11th July 2017, or to extend time for purposes of setting aside the Arbitral Award."

26. The importance of the strict timelines was addressed by the Court of Appeal in *Ezra Odondi Opar v Insurance Company Of East Africa Limited* KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR, where it observed that:

> The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015 "the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient..." while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made.

27. No leave was sought by the applicant to file the present application out of time. Even then, and without any reason having been given for the delay, I must note that this court does not have the jurisdiction to extend time for the application for setting aside the award. In the premises the application was filed contrary to section 35(3) of the *Arbitration Act*. This court is therefore bereft of the jurisdiction to address the substantive issues raised in the application.

28. The result of this is as has always been stated in the often-cited case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* that if this court lacks jurisdiction, then it must lay down its tools. On this basis I shall say no more on this application save to state that the applicant has failed to establish the basis for setting aside the award.

Application dated August 30, 2022

29. The respondent subsequently filed the application dated August 30, 2022 under section 36 of the *Arbitration Act*, Rule 9 of the *Arbitration Rules 1997* and all other enabling provisions of the law.

30. The application seeks the following orders;

    i. That this Honourable court be pleased to recognize and adopt the Final award dated December 15, 2021 published by Stephen Oundo as a judgment of this Honourable court.

    ii. That the applicant herein be granted leave to enforce and execute the final award dated December 15, 2021 as a decree of this Honourable court.

    iii. That this Honourable court be pleased to make an order as to costs.

31. It is supported by the affidavit sworn by Carolyne Muthue dated August 30, 2022 and written submissions dated January 19, 2023. In response thereto, the applicant filed a replying affidavit sworn by Morris Njagi dated November 24, 2022 and written submissions dated January 22, 2023. The parties have respectively reiterated their positions in the converse application.

Analysis

32. The legal parameters for enforcement of an arbitral award are set out by section 36 of the *Arbitration Act*. It states that;

> 36.
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> (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
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> (2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
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> (a) the duly authenticated original arbitral award or a duly certified copy of it; and
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> (b) the original arbitration agreement or a duly certified copy of it.
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> (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified 'translation of it into the English language.

33. In *Samura Engineering Limited vs Don-Wood Co Ltd* [2014] eKLR the court held: -

> " Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the *Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed..."

34. I have considered the application and I note that the respondent has filed the certified copies of the award and arbitration agreement in compliance with the *Arbitration Act*. The award has not been affected by the grounds set out in section 37 of the act and since the application for setting aside the award has failed the court finds that this is a proper case for adopting the award as a judgment of the court.

Determination and Final Orders

35. For the reasons I have stated, I find that the application dated August 4, 2022 is without merit and is dismissed with costs. I find merit in the application dated August 30, 2022 and allow it on the following terms.

i. That the final award published on December 15, 2021 by Stephen Oundo is hereby recognized and adopted as a decree of this court

ii. Leave is hereby granted to the respondent to enforce and execute the award.

iii. The respondent shall have the costs of this application

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

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.