



Equity Bank (K) Limited v Travels Corporation Limited (Miscellaneous Civil Application E318 of 2023) [2023] KEHC 22987 (KLR) (Commercial and Tax) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E318 OF 2023**

**JWW MONG'ARE, J
SEPTEMBER 25, 2023**

BETWEEN

EQUITY BANK (K) LIMITED APPLICANT

AND

TRAVELS CORPORATION LIMITED RESPONDENT

RULING

1. On 14/3/2023 pursuant to arbitration proceedings between the parties, the sole Arbitrator, Mr. Richard Kariuki, MCI Arb issued the final Arbitral Award which dismissed the claimants claim and awarded costs to the Respondent. Subsequently, the Applicant moved to this Court seeking to set aside the final award on the following grounds;
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to set aside, vacate and or dissolve the Arbitral Award issued on 14th March 2023 by the sole Arbitrator, Mr. Richard M. Kariuki.
 - d. That the Court do supersede the arbitration and proceed to determine the dispute.
 - e. That in the alternative to prayer 4 above, the Court do remit the dispute for arbitration afresh before an Arbitral Tribunal set up in accordance with the agreement between the parties dated 18th September 2015.
 - f. That the order for costs made by the sole Arbitrator, Mr. Richard M. Kariuki be varied and substituted with an order that costs of the Arbitration be paid by the Respondent.
 - g. That the Court grants any other or further relief that it deems fit; and



- h. That costs of this Application be provided for.
2. The application is supported by the grounds set on its face and the supporting affidavit of Roy Akubu, the General Manager, Legal Services of the Applicant, Equity Bank (K) Limited. The application is opposed and the Respondent has filed a replying affidavit sworn by Jessie Natalie Nesbitt, a director of the Respondent Company, Travel Corporation Limited.
3. The Applicant, in filing the present Application urges the Court to set aside the whole of the Arbitral Award on allegations of misconduct by the Sole Arbitrator, Mr. Richard M. Kariuki. The Applicant argues that the Arbitrator rewrote the contract between the parties resulting in an unjust enrichment of the Respondent and was biased against the Applicant. In addition, the Applicant argues that the Arbitrator dealt with a dispute not contemplated or falling within the terms of reference to arbitration or contains decision on matters beyond the scope of the arbitration and that the award was in conflict with the public policy of Kenya.
4. The Respondent on its part has opposed the application to set aside the whole of the Arbitral Award. The Respondent filed a Replying affidavit sworn by its director, Jessie Natalie Nesbitt. In opposing the grounds set out in the Applicant the Respondent argues that no valid reasons have been advanced by the Applicant as envisioned under section 35 of the Arbitration Act, and the factors upon which an Arbitral Award can be set aside have not been met.
5. The Respondent further argues that the Applicant in bringing the present application has not placed any material before the Court to prove that the Arbitration Clause in the contract was invalid or that it was unaware of the appointment of the Arbitrator. Further, the Respondent argues that the Applicant produced evidence to demonstrate how, if at all, the Arbitrator considered matters outside the scope of the arbitration or even to demonstrate fraud, bribery or undue influence. It is only upon proof of such factors that this Court can consider the application before it. The Respondent urged the Court to dismiss the application as filed.

Analysis and Determination: -

6. I have considered carefully the application, the supporting affidavit and the written submissions together with the oral highlights by the Applicant. I have also carefully considered the response and written submissions by the Respondent. Although the parties did set out various issues for determination I note that the only issue that this Court should consider is “whether the Application for setting aside the whole arbitral award has met the threshold set out under section 35(2) of the Arbitration Act.” Section 35(2) provides as follows:- “An arbitral award may be set aside by the High Court only if—
 - a. the party making the application furnishes proof—
 - i. 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;
 - a. 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 award is in conflict with the public policy of Kenya.
7. From the background provided by both parties herein, it is not in dispute that the parties executed an agreement for provisions of Card Services, within which the said agreement, contained an arbitration clause for settlement of disputes arising therein. It is also not in dispute that subsequently parties submitted themselves to the arbitral process before the sole Arbitrator, Mr. Richard M. Kariuki and that from the 28/2/2019 the process submitted themselves to the process. That on 20/7/2022, 22/8/2022, 31/8/2022 and 14/9/2022 the Applicant being the Claimant in the arbitral process, appeared before the Arbitrator and presented its case thereto including calling witnesses to testify and present its claim while the Respondent presented its case on 28/11/2019. Subsequently, the Arbitrator issued the final Arbitral Award to the parties on 14/3/2023. I note that at no particular time during the arbitration proceedings did the Applicant raise any issue with the process or the capacity of the Arbitrator. There is nothing documented in the arbitral proceedings and the final award to indicate that the Applicant raised issues or objections to the process or the proceedings. The Applicant was happy to participate until the end but has now taken issue with the process only after a decision has been made against it.
8. The Respondent in their submissions relied on the case of *Mabican Investments Limited and 3 others -v- Giovanni Gaida & 79 others*, (2008) eKLR where Ransley J (as he then was) observed as follows:- “a court will not interfere with the decision of an Arbitrator even if it is a 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.” I agree with the said holding by the Honourable Judge and similarly in the case before me note that once parties submitted themselves to the arbitral process, the courts have to respect the same and uphold the findings by the Arbitrator who is mandated by law to determine issues of fact within the confines of the contract by the parties.



9. I further note in the matter before me and as argued by the Respondent that the Applicant, being the claimant in the Arbitration proceedings has not placed material before this court as envisioned by Section 35(2) to prove that it was unable to properly present its case. Indeed, the record reflects that on 4 separate hearings the claimant presented its case while the Respondent did its response in one sitting. Secondly, the Applicant has not produced evidence that the Arbitrator relied on an invalid agreement. Both parties confirm that they had executed a valid agreement and that the same contained an arbitration clause.
10. The Applicant has also not produced evidence to demonstrated the allegations put forward of misconduct by the Arbitrator that, in my view, he considered matters outside the parameters of the dispute. I note from the award, the Arbitrator did point out that there was negligence on the part of the Applicant in failing to put together a system that was water tight and not easily abused. In my view, the Arbitrator was within his mandate to make the said observation. I therefore find that the parameters set out by Section 35(2) that would allow this court to set aside the whole of the Arbitration Award have not been met or proved to the required standard.
11. In conclusion, I find and hold that the application before me is not merited and I shall dismiss the same with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Mbaji for the Applicant.
2. Mr. Nyambuti holding brief for Dr. Khaminwa S.C. for the Respondent.
3. Amos - Court Assistant

