



**Itoga Investment Holdings Limited v Ascon Construction Company
Limited & another (Commercial Arbitration Cause E001 of 2023)
[2023] KEHC 24702 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E001 OF 2023**

**DAS MAJANJA, J
OCTOBER 27, 2023**

BETWEEN

ITOGA INVESTMENT HOLDINGS LIMITED APPLICANT

AND

ASCON CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

**THE COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER
AFRIQUE) 2ND RESPONDENT**

RULING

1. The parties are currently involved in arbitration proceedings in respect of a dispute commenced by the 1st Respondent against the Applicant and 2nd Respondent arising out of the performance of a contract dated 09.10.2010 entered into by the Applicant and the 1st Respondent for the construction of 7 apartment blocks of 10 units each on the property known as L.R. No. 1/157, Marcus Garvey Road, Kilimani belonging to the Applicant for a contract sum of Kshs. 400 million (“the Contract”). The project was also being financed by the 2nd Respondent under a Joint Venture Agreement dated 08.10.2013 between the Applicant and the 2nd Respondent (“the JVA”).
2. In the course of those proceedings, the 2nd Respondent filed an application seeking that the 1st Respondent’s claim against it be marked as compromised or in the alternative, the said claim against it be discontinued. After considering the application, the Arbitrator rendered a ruling on 06.10.2022 (“the Ruling”) allowing the application after finding that the Respondents had successfully negotiated and signed a Partial Settlement Agreement dated 31.08.2021 (“the Settlement Agreement”) which compromised the dispute on their part and that the 2nd Respondent had fulfilled its obligations under the said agreement.



3. The Arbitrator rejected the Applicant's claim that the joint venture partnership it had with the 2nd Respondent made them one single legal entity and that they were, "joined at the hip". The Arbitrator held that a joint venture is a partnership under which the partners are jointly and severally liable for all obligations of the joint venture hence a partner may be sued for the full debt of the partnership and the claimant may choose which partner to sue. It found that the 2nd Respondent, having performed its obligation under the Settlement Agreement, was no longer a necessary party and that the 1st Respondent had no further claim against it and that the 1st Respondent had a right to choose which party to pursue its claim against.
4. The Applicant is dissatisfied with the Ruling. It seeks to set it aside through the Chamber Summons dated 30.12.2022 made, inter alia, under section 35 of the *Arbitration Act* ("the Act"). The application is supported by the grounds on its face and the supporting affidavit of Jesse Gacharira Ngari, a director of the Applicant, sworn on 30.12.2022. It is opposed by the 1st Respondent through the Notice of Preliminary Objection dated 03.04.2023 and the replying affidavit of its director, Benard Murage Kariuki sworn on 06.04.2023. The application is also opposed by the 2nd Respondent through the replying affidavit of its Senior Legal Officer, Kuria Njiinu, sworn on 05.05.2023. The parties have further supplemented their arguments by filing written submissions.
5. The Applicant avers under the Settlement Agreement, it was agreed inter alia that the 2nd Respondent would pay the 1st Respondent Kshs. 70,000,000.00 out of the amount of Kshs. 127,160,499.31 claimed and that the 1st Respondent would reserve the balance of the claim as against the Applicant only and discontinue and discharge the proceedings against the 2nd Respondent. That it was also agreed between the Respondents that the said settlement would serve as an application by them to the arbitrator for issuance of a partial award which would be recognized in the final award.
6. The Applicant contends that the Ruling allowing the Settlement Agreement amounted to a partial award which is capable of being challenged and that it is aggrieved by part of the Ruling removing and/or discharging the 2nd Respondent from the claim for the balance of the claimed amount as against the Applicant. It submits that the Arbitrator lacked jurisdiction and acted beyond the scope of his powers under the law. Further, that the Arbitrator purported to re-write the contract between the Applicant and the 2nd Respondent and acted contrary to the provisions of the law which is against the public policy of Kenya.
7. The 1st Respondent opposes the application on the ground that it is incompetent as it is not founded on the Act or any other applicable law and is barred by section 5 of the Act. It contends that the Court lacks jurisdiction to entertain the application by virtue of section 17(3) of the Act and that the application contravenes the provisions of section 24(3) of the Act.
8. On the substance of the application, the 1st Respondent avers that it is not privy to the Financial Agreement and the JVA and that the Applicant is therefore not at liberty to impose any contractual obligations of the parties in the two Agreements or made to suffer consequences as a result of the terms of both agreements. Be that as it may, the 1st Respondent avers that it was aware of the fact that the JVA was neither registered as a limited liability company nor a limited liability partnership, which left the parties to the JVA exposed to joint and several liability.
9. According to the 1st Respondent the project stalled and resumed when the Applicant and 2nd Respondent executed an Addendum dated 11.02.2014 ("the Addendum") which introduced them as the Employer to the Project. It states that the Addendum retained the provisions of the Contract including the procedure for interim valuation and making payments to the 1st Respondent. That the parties retained the procedure for making payments in clause 34 of the Contract which required the 1st



- Respondent to present interim payment certificates to the Employer for payment and the Employer was obliged to pay make payments within 14 days of presentation failure to which interest would become payable by dint of clause 34.6 of the Contract. Further, that the Addendum did not disclose the various duties and responsibilities assigned to the individual joint venturers and that as it is expected in respect of liability of partners in a general partnership, the 1st Respondent was at liberty to claim for payment from any of the two joint venturers either jointly or severally as they were both Employers.
10. The 1st Respondent avers that following refusal by the Applicant to concur to the Settlement Agreement, the 1st Respondent moved the court to adopt it. The 1st Respondent supports the Ruling and urges that the Arbitrator had jurisdiction to entertain the application before it. That the Applicant responded substantively to the 1st Respondent's application seeking to amend its statement of claim in order to remove the 2nd Respondent from the proceedings, since the 1st Respondent had recovered a portion of its claim from the 2nd Respondent and elected to recover the balance from the Applicant. That the Applicant only doubted the Arbitrator's jurisdiction to hear and determine the application without making any legal arguments or making a prayer for orders to the effect that the Arbitrator lacked jurisdiction. Therefore, that the Applicant was deemed to have waived its right to object and conceded to the Arbitrator's jurisdiction by dint of section 5 of the Act. The 1st Respondent submits that if the Applicant had justifiable legal reasons to challenge the Arbitrator's jurisdiction to hear and determine the application for amendment of the 1st Respondent's Statement of Claim, it ought to have made an application challenging the Arbitrator's jurisdiction under section 17 of the Act but it failed to do so.
 11. The 1st Respondent submits that section 24 of the Act grants the Arbitrator powers to allow amendment of pleadings in the course of the proceedings, unless he considers it inappropriate to do so. That the Arbitrator exercised his powers within his jurisdiction and allowed the amendment of the 1st Respondent's Statement of Claim in accordance with the application, after considering the merits of the arguments of both parties as contained in their submissions.
 12. The 1st Respondent contends that the Applicant did not challenge the JVA hence the question of its validity or otherwise was not before the Arbitrator hence the Ruling did not amount to re-writing the JVA. The 1st Respondent asserts that the arbitration proceedings concerned the Contract which was later amended by the Addendum and not the JVA. That from the copy of the JVA filed as a document in support of the application, it is clear that if there was any dispute emanating from the JVA, it would be resolved in accordance to the dispute resolution clause under part VIII of the said Agreement and not under Clause 45 of the Contract.
 13. The 1st Respondent avers that the Arbitrator considered all the issues for determination and was well guided by the relevant applicable laws in arriving at the Ruling. It points out that sections 4 and 22 of the *Partnerships Act*, 2012 provides for unlimited liability of partners to a partnership and section 22 (4) specifically provides that, "If a partner pays an amount to discharge the whole or a part of his personal liability for a partnership obligation, the partnership obligation is discharged to the extent of the amount paid by the partner."
 14. The 1st Respondent's contends that the liability of the Joint Venture partners is informed by the fact that the Joint Venture is unincorporated, thereby making the Applicant and the 2nd Respondent ordinary partners with joint and several liability to settle any claims instituted by third parties like the 1st Respondent in the matter before the Arbitral Tribunal. That the 1st and 2nd Respondent negotiated a partial settlement and the two entered into the Settlement Agreement in which the Respondents agreed to partially settle the 1st Respondent's claim in the amount of Kshs. 70,000,000.00 and that it was a provision of the Settlement Agreement that upon the partial settlement of the 1st Respondent's



claim by the 2nd Respondent, the 1st Respondent would stop the recovery proceedings against it and pursue the balance of the claim from the Applicant.

15. The 1st Respondent asserts that the Applicant and the 2nd Respondent are jointly and severally liable to settle its claim and that where parties are jointly and severally liable to settle a claim, then each party is liable to settle the full liability of the claim, and a third party such as the 1st Respondent has the discretion to direct the claim against any of them or both of them provided that the 1st Respondent does not recover more than the decretal sum. That since its claim was for payment of the sum of Kshs. 127,160,499.31 from the Applicant and the 2nd Respondent, it was within its right to drop its claim against the 2nd Respondent after payment of Kshs. 70,000,000.00 under the Settlement Agreement and pursue the balance of Kshs. 58,760,583.18 from the Applicant. That Clauses 2.2.3 and 5.2.6 of the JVA makes it clear that the liability of the parties was joint and several hence the Applicant and the 2nd Respondent are at liberty to make claims against each other in terms of indemnifying each other. That under the JVA, after the 1st Respondent has recovered different amounts from the Applicant and the 2nd Respondent, the two are at liberty to pursue each other to settle their accounts.
16. The 2nd Respondent opposes the application and urges the court to dismiss it. It states that on 29.09.2020, the Applicant challenged the jurisdiction of the arbitral tribunal and on 25.11.2020, the tribunal ruled on the challenge by holding that it had jurisdiction to determine the dispute between the parties. Thus, the 2nd Respondent submits that Applicant's present challenge on the jurisdiction of the Arbitral Tribunal is statute barred as the issue was determined on 25.11.2020.
17. That the parties appeared before the tribunal several times thereafter but in all the initial sessions the Applicant frustrated efforts to compromise the dispute even when requested by the Arbitrator to consider being part to the negotiations. That in view of the above, the Respondents executed the Settlement Agreement which was filed before the Arbitral Tribunal and occasioned the 1st Respondent's application seeking leave to amend its Statement of Claim and at the same time, the 2nd Respondent's application seeking that the claim against it be marked as compromised. The 2nd Respondent states that in the Ruling, the Arbitrator considered both applications and made a decision which is final and binding upon the parties. The 2nd Respondent avers that the Court lacks jurisdiction to consider the merits of the dispute between the parties as it is still live and pending before the Arbitral Tribunal.

Analysis and Determination

18. Based on the application, responses and submissions, the court is being called upon to determine whether it ought to set aside the Ruling. The Applicant contends it was a Partial Award in accordance with the Settlement Agreement. The Applicant attacks the Ruling on the ground that it was made without jurisdiction and that the Arbitrator acted beyond the scope of his powers under the law. The Respondents countered this position by stating that the issue of jurisdiction had been determined by the arbitral tribunal and that the Applicant's contention was contrary to section 17(3) of the Act which provides that, "A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."
19. I agree with the 2nd Respondent's position as the record confirms that the tribunal ruled on its jurisdiction on 25.11.2020. If the Applicant was aggrieved by that decision, it ought to have moved the court under section 17(6) of the Act which provides that, "Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter." Since



the Applicant chose not to challenge the decision on jurisdiction, it is deemed to have acquiesced to the tribunal's jurisdiction and is now estopped from claiming that the tribunal lacked jurisdiction to make the Ruling.

20. While I accept that the Applicant was entitled to raise a subsequent challenge to the Arbitrator's jurisdiction if a new issue arose, it could only do this before the tribunal in the first instance and it is only after the tribunal's decision on the challenge that the Applicant could move to the court for the subsequent determination. Issues of jurisdiction of the arbitral tribunal must be resolved at the outset by the arbitral tribunal and not by this court. The statutory act of reserving the authority to determine objection to the jurisdiction of the arbitral tribunal, aims at paying due deference to and serves as a mark of recognition of arbitration as a recognized mechanism for Alternative Dispute Resolution (ADR) by preventing the Court from usurping the jurisdiction of the arbitral tribunal to determine its own jurisdiction and allowing it to exercise such jurisdiction without court interference. (see *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited* ML Misc. Civil Case No. 27 of 2014 [2014] eKLR).
21. I therefore find and hold that the Applicant's attack on the Arbitrator's jurisdiction to make the Ruling lacks merit and is dismissed. This leaves the contention that the Ruling is against Kenya's public policy as it purported to re-write the contract between the Applicant and the 2nd Respondent and was contrary to the provisions of the law.
22. It is common cause that the court may set aside an award under section 35(2)(b)(ii) of the Act on ground that it violates the public policy of Kenya. In *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 E.A 366 Ringera J., explained the scope of public policy as a ground for setting aside an arbitral award as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with *the constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.....”
23. In same decision, the learned judge recognized that it is not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. He added that:

[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the *Arbitration Act*.
24. The question for the court is whether it was against the public policy of Kenya for the tribunal to allow the 1st Respondent to amend its Statement of Claim and for the 2nd Respondent to be discharged from the arbitration proceedings due to the Settlement Agreement reached between the Respondents?



25. Parties to arbitration proceedings have the right to amend their pleadings subject to an agreed procedure as set out in section 24(3) of the Act which provides that:

24(3) Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

26. In its response to the 1st Respondent's application, the Applicant never contended that the tribunal could not allow an amendment of the pleadings or that the manner in which the 1st Respondent sought the amendment was contrary to the parties' agreed procedure. Based on the position taken by the parties, it was open to the tribunal to exercise discretion to allow or reject the amendment as it deemed appropriate and this aspect of the Ruling is beyond the reach of this court.

27. Was it wrong for the Arbitrator to discharge the 2nd Respondent from the arbitral proceedings in light of the settlement agreement with the 1st Respondent? In order for the court to answer, the court has to consider the merits of the Ruling which is not permitted under section 35 of the Act as the court is not sitting as an appellate court. Doing so would amount to usurpation of the arbitral tribunal's jurisdiction and ultra vires of the court's statutory jurisdiction to set aside an award (see [Kenya Oil Company Limited & another v Kenya Pipeline Company NRB](#) CA Civil Appeal No. 102 of 2012 [2014]eKLR).

28. It is for the above reason that I decline the Applicant's invitation to delve into the merits of the Arbitrator's decision to release the 2nd Respondent from the arbitral proceedings. The much I can say is that the tribunal had the jurisdiction and discretion to enforce a compromise of the matter or part of the matter between the 1st Respondent, who was the claimant, and the 2nd Respondent. How the Arbitrator chose to interpret the relationship between the Applicant and the 2nd Respondent in arriving at this decision was within the purview of the tribunal and as stated, the court cannot interrogate that finding unless it is demonstrated that it violates the public policy of Kenya. On this ground I find and hold that the Ruling is not inconsistent with [the Constitution](#) or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality. In reaching its decision, the tribunal exercised its discretion in line with general principles enunciated by the courts for recording a compromise or settlement.

Disposition

29. The Applicant's Chamber Summons dated 30.12.2022 lacks merit. It is dismissed with costs to the Respondents. The Applicant shall pay Kshs. 80,000.00 as assessed costs to each Respondent.

SIGNED AT DUBAI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 27th day of OCTOBER 2023.

A. MABEYA

JUDGE

