The Registered Trustees of the Management University of Africa v Solyana Company Limited (Miscellaneous Application E319 of 2021) [2022] KEHC 36 (KLR) (Commercial and Tax) (28 January 2022) (Ruling)

Neutral citation: [2022] KEHC 36 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E319 OF 2021

A MABEYA, J

JANUARY 28, 2022

IN THE MATTER OF THE ARBITRATION ACT 1995 (AS AMENDED) AND THE RULES THERETO

AND

IN THE MATTER OF AN ARBITRATION AWARD BETWEEN

BETWEEN

THE REGISTERED TRUSTEES OF THE MANAGEMENT UNIVERSITY OF AFRICA ..... APPLICANT

AND

SOLYANA COMPANY LIMITED ..... RESPONDENT

RULING

1. By a Notice of Motion dated 30/4/2021, brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, Article 159 of the *Constitution* and sections 35(2)(b)(ii) and 33(4) of the *Arbitration Act*, the applicant sought a raft of orders.

2. The applicant sought for the correction of the Final Award and a re-tabulation of the amount owed to the respondent by deducting Kshs.40,389,028/- being actual repayments already made to the respondent and an identified error in computation of the award in the sum of Kshs.36,210, 229/-.

3. There were also prayers that the applicant be allowed to settle the re-tabulated amount by 3 semesterly installments over a period of twelve years at an interest rate of 5%. Finally, that the final award be set aside and a finding be made that the investment proposal formed part of the contract dated 15/11/2016.

4. The application was premised on the grounds that the parties entered into a contract whereby the respondent would be the developer of the applicant's main campus in Kisaju, Kajiado County. A dispute arose and the respondent referred the matter to arbitration.

5. That the tribunal issued a final award directing the applicant to pay the respondent a sum of Kshs. 218,219,418.79 by 30/4/2021. In default, the respondent would be at liberty to transfer to itself or to a nominee such parcels of land given as security for repayment of the development costs. An additional award on costs of Kshs. 5,124,388.36 was also made.

6. The applicant contended that the tribunal and the respondent had failed to recognize that it had made substantial payments amounting to Kshs. 40,389,028/-, that were not released or disclosed at the time of the arbitration hearing. These were actual payments that had already been made to the respondent. That there was also an identified error in the computation of the award in the sum of Kshs. 36,210,229/-.

7. If the two figures were taken into account, it would reduce the award by a considerable amount. The applicant was therefore apprehensive that it would lose its parcels of land that were used as security thereby affecting its 1000 students and effectively shut down the entire university and the branches.

8. The respondent opposed the application vide a replying affidavit of Eskindir Habte sworn on 12/5/2021. He averred that the applicant had earlier contested the arbitrator's jurisdiction which was dismissed by Okwany J. That the application did not disclose any grounds upon which the arbitral award may be set aside in accordance with the *Arbitration Act*, 1995 (hereinafter 'the Act').

9. That the application was partly a merit appeal from the decision of the arbitrator whereas by law, no appeal lies from an arbitral award save where the parties have expressly reserved a right of appeal on questions of law to the High Court.

10. That the arbitral award was clear as to the manner in which monies that were paid by the applicant to the respondent during the course of the proceedings up to the date of the award. That there was no error whatsoever in the award. That the plea to pay the sums due by installments over a period exceeding a decade is audacious and ought to be disregarded as the same would amount to substituting the arbitrator's final decision.

11. The respondent further contended that the present application had been brought outside the statutory timelines and ought to be struck out with costs.

12. The applicant filed an amended supplementary affidavit on 28/5/2021 in response to the respondent's replying affidavit. It reiterated that prior to the parties entering into an agreement dated 15/11/2016, it had submitted a proposal on 10/10/2016 for the respondent's consideration which formed the basis of the agreement. That the Court can set aside an award if it finds that the same is contrary to public policy. That due to the massive errors regarding the tabulation in the award, thousands of students will lose their opportunity to conclude their undergraduate studies.

13. That the Supreme Court of Kenya allowed appeals from arbitration in the case of Supreme Court Petition No. 12 of 2016: *Nyutu Agrovet Limited —vs- Airtel Networks Kenya Limited and another* and observed that 'the use of the overriding objective principles to intervene where there is an extraordinary wrong, calls for extra-ordinary remedies'.

14. That a grievous wrong on account of re-tabulation of the award allows the Court to exercise its inherent jurisdiction and order the tribunal to re-tabulate the award and take into account what has already been paid to the respondent as the loss of such a huge amount will pose a public concern.

15. The applicant contended that the tribunal issued its additional award on 19/2/2021 therefore it was within its statutory timelines to seek the intervention of the Court.

16. The Court has considered the respective parties' representations. The issues that fall for determination are; whether the application was brought out of time and whether a case has been made for the grant of the orders sought.

17. From the record, the Final Award was published on 2/11/2020. However, the tribunal reserved the right to make an additional award on costs in the event the parties failed to agree. There was no agreement by the parties and the tribunal published the additional award on 19/2/2021.

18. In my view, although the final award was published on 2/11/2020, by reserving the right to rule on costs, the tribunal retained jurisdiction on the process. The time for challenging the award did not start to run until the jurisdiction of the tribunal was extinguished by the latter publication. It is my view that it was not in the contemplation of the Legislature that there be more than one challenge to an arbitral award.

19. I say so because, if a final award is challenged, then after reserving the right to rule on costs, the tribunal subsequently makes an audacious or outrageous award on costs, the losing party would again be forced to yet again lodge another challenge thereto. I do not think that was the intention of the Legislature. The provisions of challenging an arbitral award kicks in once the tribunal becomes functus officio.

20. In this regard therefore, the tribunal became functus officio on 19/2/2021 after it published the additional award. Accordingly,the application was made within time.

21. On the second issue, the applicant prayed that the amount awarded by the tribunal be amended to reflect a payment that was allegedly already made to the respondent in the sum of Kshs. 40,389,028/- and further to have an error of Kshs. 36,210,229/- in the tabulation struck off. That the amendments would drastically reduce the final award to Kshs. 141,620,162/-. This was opposed on the ground that there were no grounds upon which the arbitral award may be interfered with.

22. Section 35(2) of the Act sets out the grounds upon which this Court can interfere with an arbitral award. The orders sought, if granted, would amount to setting aside the award. These grounds are; that a party to the arbitration agreement was under some incapacity; or the arbitral agreement is not valid under the law to which the parties have subjected it or, lack of notice of the appointment of an arbitrator or a party being unable to present own case; or the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or the award is tainted with fraud, bribery, undue influence or corruption.

23. Apart from the foregoing, the court will also interfere with an arbitral award if it finds that the subject matter was not capable of settlement by arbitration under the law of Kenya or the award is in conflict with the public policy of Kenya.

24. None of the aforesaid grounds were either pleaded or proved. The alleged sum already paid was also not proved. Firstly, there was no reason that was advanced to show why they were not produced to the tribunal. If it was sheer negligence, then the applicant has to live with it. No ground exists for review on that sum.

25. Secondly, I looked at the letters that constituted the alleged payment. The amount did not exceed Kshs.9 million. The letters dated 7/4/2021 and 20/11/2020 had their page 2 missing. That beg the question whether it was a coincidence or it was deliberate to hide the contents thereof from the Court.

26. As regards the alleged error of Kshs. 36,210,229/-, the same was arrived at after a thorough re-calculation of what the applicant thinks should have been the calculation of interest. That in my view is not an obvious error that can warrant an order to the tribunal to re-calculate the amount. It hinges on merit.

27. Obviously where there is a blatant error apparent on the face of the record, jurisdiction exists for this Court to remit the award back to the tribunal to correct the same. This is so because allowing a blatant error to stand will be against public policy that justice must not only be done but must be seen to be done.

28. On the other issues raised by the applicant, the Court finds that the tribunal dealt with them and rendered its decision thereon. They were not ignored as alleged by the applicant. It is clear that the arguments relating to the investment proposal and pre-contract negotiations were considered and determined in the award. Further, in paragraph 226 of the award, the tribunal directed that the installments that had been paid by the applicant to the respondent be deducted from the arbitral award.

29. Here, I will echo what the court stated in *Simba Villas Limited v Kenya Commercial Bank Staff Pension Fund Registered Trustees* (2015) eKLR. In that case, the court stated: -

> "It was evident from the Applicant's arguments that the issues it raised mainly touched on points of law. A perusal of the Arbitral Award shows that the Arbitrator considered the facts and legal issues that were placed before him and made a determination of the same. The interpretation the Arbitrator made in respect of the contract between the parties herein was a matter of law and he adequately addressed the same in his Arbitral Award. . .the Court has no jurisdiction or power to determine whether or not the said Arbitrator had properly interpreted the contract between the parties as doing so would be tantamount to hearing an appeal arising out of the Arbitral Award in a round-about way... The public policy in Kenya leans towards finality of Arbitral Awards and parties to 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*".

30. I think I have said enough to show that the application is without merit. The same is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE