Vehicle and Equipment Leasing Limited v Oiko Credit, Ecumenical DevelopmentSociety U.A (Oiko Credit) (Miscellaneous Application 131 of 2020) [2022] KEHC 144 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)

Neutral citation: [2022] KEHC 144 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION 131 OF 2020

A MABEYA, J

FEBRUARY 25, 2022

IN THE MATTER OF ARBITRATION

BETWEEN

VEHICLE AND EQUIPMENT LEASING LIMITED ..... APPLICANT

AND

OIKO CREDIT, ECUMENICAL DEVELOPMENT SOCIETY U.A (OIKO CREDIT) ..... RESPONDENT

RULING

1. This is a ruling on the application dated 19/6/2020. It was brought under sections 1A, 1B, 3A of the *Civil Procedure Act*, sections 35 (2) (a) (iv) of the *Arbitration Act*, and rule 7 of the *Arbitration Rules*.

2. The application sought orders that the arbitral award dated 2/3/2020 and subsequent clarification of award dated 3/4/2020 delivered by sole arbitrator Ms. Jacqueline Oyuyo Githinji be set aside.

3. The application was supported by the affidavit of Pauline Mukundi sworn on 19/6/2020. The grounds for the application were that there was a dispute between the parties concerning a loan agreement dated 8/10/2015. That the dispute was determined by a sole arbitrator who delivered her final award on 2/3/2020 and published a clarification of the final award on 3/4/2020.

4. That the determination was a misapprehension of the contract and thus went beyond the scope of the arbitrator. That due to such misapprehension the arbitrator rewrote the terms of the contract and failed to strictly interpret the terms of the contract. That the arbitrator failed to consider the evidence produced before her and erred in law by finding that the respondent was entitled to recall the entire loan before the agreed 72-month period had lapsed.

5. The respondent opposed the application vide the replying affidavit sworn by Betty Ntinyari Kirai on 2/6/2021. It was admitted that the parties had entered into a loan agreement dated 8/10/2015. It was contended that the respondent granted the applicant a facility of Kshs. 180,000,000/= payable in 6 years. That however, the applicant failed to service the loan as agreed leading to the dispute.

6. It was contended that once the award was issued, on 22/7/2020 the applicant offered to pay the award amount in installments and proposed to make a lump sum payment of Kshs. 20,000,000/= before end of July, followed by monthly installments of Kshs. 5,000,000/= before the 10th of each month. That in return, the respondent was to consider waiving a portion of the amount awarded. The applicant's letter was annexed as "BKN-8".

7. That the respondent accepted the offer vide letter marked as "BNK-9". That the applicant proceeded to make the lump sum payment of Kshs. 20,000,000/= on 3/8/2020, and Kshs. 5,000,000/= in the months of September and October,2020.

8. That in December, the applicant breached the offer and only paid Kshs. 2,500,000/= and continued with such breach up-to February 2021 when payments stopped all-together. That in total, the applicant had paid Kshs. 36,870,500/=. That the applicant again wrote on 18/2/2021 and reaffirmed its commitment to pay, but no further payments were made. That vide letter annexed as "BNK-11", the applicant sought that the remaining amount be written off.

9. It was thus contended that the applicant benefited from the loan and even undertook to make payments after the award was delivered, hence the applicant could not now claim that the arbitrator had erred in making the award. It was also contended that the application had not met the circumstances warranting the setting aside of the arbitral award.

10. I have considered the pleadings, evidence and the parties' submissions. The sole issue for determination is whether the arbitral award ought to be set aside.

11. There is evidence that the applicant had partially complied with the award by the time it brought the instant application to set aside that award. The question is, whether it may not be an abuse of court process for a party to challenge an award that it has already complied with.

12. It is quite evident that the applicant had intended to settle the amount in the award and even paid a total sum of Kshs. 36, 870,500/=. It is noted that when the applicant was unable to make further payment, it requested the respondent to write-off the balance. When the request was declined, the applicant the brought the present an application to set aside that award.

13. It is therefore clear that the application was an afterthought.

14. Be that as it may, is the application meritorious? Section 35(3) of the *Arbitration Act* No. 4 of 1995 sets out the grounds for setting aside of an award as follows: -

> " 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 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

iv. 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 provisions 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: -

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."

15. A close consideration of the application will reveal that none of these grounds were relied on. Instead, the applicant set out grounds why the arbitrator ought not to have found in the respondent's favour. In a nutshell, the application was a complaint or challenge against the award. It amounted to an appeal against the arbitral award.

16. The law is trite that the Court is not to interfere with an arbitral process, unless the parties mutually agree to an appeal. There was no such agreement in this case. Section 10 of the *Arbitration Act* provides that: -

> " Except as provided in this Act, no court shall intervene in matters governed by this Act."

17. In *Talewa Road Contractors Limited v Kenya National Higway Authority* [2019] eKLR, it was held: -

> " Arbitration is a free choice made by the parties in the contract agreement and in a situation where parties agree on the finality of the arbitral award, hence the court's intervention cannot be invoked by any party to overturn the arbitral award through an appeal. The finality of an arbitral award is forfeited in no uncertain words by the provisions of section 10 of the *Arbitration Act* ..."

18. Further, section 39 of the *Arbitration Act* provides that the courts are only permitted to intervene against arbitral award through an appeal process where the parties have agreed to appeal and the appeal is restricted to determining any question of law arising in the course of arbitration or out of the award.

19. In *Kenyatta International Convention Centre vs Greenstar Systems Limited* [2018] eKLR, it was held: -

> " As already highlighted above, the Court in the Nyutu Agrovet case (supra) was categorical that this Court's right to intervene in matters arising from an arbitral process is limited to instances where the parties had either entrenched an automatic right of appeal to this court in the arbitration clause."

20. The upshot is that the application dated 19/6/2020 is without merit and is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE