Teejay Estates Limited v Vihar Construction Limited (Miscellaneous Civil Application E184 of 2021) [2022] KEHC 121 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)

Neutral citation: [2022] KEHC 121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E184 OF 2021

A MABEYA, J

FEBRUARY 18, 2022

BETWEEN

TEEJAY ESTATES LIMITED ..... APPLICANT

AND

VIHAR CONSTRUCTION LIMITED ..... RESPONDENT

RULING

1. Before Court is an application dated 16/3/2021. It was brought under section 35 (2) (a) (iv) & (v) and b (iii) of the *Arbitration Act*, Rule 7 of the Arbitration Rules and articles 50, 159 and 165 (6) of *the Constitution*.

2. The application sought orders that the arbitral award dated 18/12/2021 by QS Kimani Mathu Arbitrator in the matter of an arbitration between Vihar Construction Limited (claimant) and Teejay Estates Limited (respondent) be set aside. It also sought orders that this court makes a final determination on the matters in dispute between the parties.

3. The application was supported by the affidavit of Joseph M. Ogeto sworn on 16/3/2021. The grounds thereof were that the applicant hired the respondent to construct 15 apartments and associate services within the respondent's property L.R.No. 209/7135.

4. Pursuant thereto, a dispute arose and the arbitrator was appointed by mutual agreement in terms of the Joint Building Council Agreement (JBC) dated 23/4/2008 between the parties (the contract). That after the hearing of the dispute, the arbitrator made a final award published on 18/12/2020.

5. The applicant contended that the arbitrator made the final award without considering the terms of the contract more so in his determination for liquidated damages on account of delay in completion, in

the applicant's claim for interest and in the applicant's claim for costs of reconstruction of demolished wall. That no reference was made to the contract in the determination.

6. It was also contended that the award was contrary to public policy as the arbitrator ordered the applicant to refund withheld tax to the respondent in contravention of the Income Tax (Witholding Tax) Rules 2001, which were applicable at the time, whereas the refund ought to have been made to KRA under that law.

7. That the arbitrator failed to consider the evidence before him, failed to apply equality of arms, was bound to determine the case with the procedure agreed on by the parties but failed to do so and infringed the applicant's right to a fair hearing. The applicant therefore prayed that the award be set aside and the Court does make a final determination on the issues in dispute.

8. The respondent opposed the application vide the affidavit of Hardeep Singh Rehal sworn on 30/4/2021. He averred that the dispute between the parties arose when the applicant declined to settle the balance of fees despite the Project Architect duly issuing the Completion Certificate dated 28/5/2010. That the arbitrator's award was final and binding. That the arbitrator had wide powers under clauses 45.8 and 45.9 of the contract.

9. That Certificate No. 21 was a final certificate which under clause 1.4 signified that the works had been carried out and completed and reinforced by clause 34.22. That the applicant did not establish that the amount of Kshs. 2,094,811.16 deducted from the respondent's fee was "withholding tax" as alleged as the applicant failed to prove that the amount was remitted to KRA.

10. That at the introduction of the award, the arbitrator specifically and exhaustively identified, set out and analyzed each of the pleadings filed by the parties, and specifically identified the relevant documents and details including pre-contract information, contract documents, contract implementation, contractual timelines and site meetings. That the arbitrator also specifically identified and listed each of the issues for determination before him and analyzed them all before making his determination. That the arbitrator was thus fully alive to all the documents and evidence submitted by the parties, distribution of responsibilities under the contract, prayers and arguments as well as areas in controversy between the parties both on fact and of law.

11. It was also averred that the application was an appeal in disguise as it was grounded on matters of fact which needed reference to evidence in contravention to Section 35 of the *Arbitration Act* ("the Act"). That section 35 (2) of the Act did not permit this Court to substitute the arbitrator's findings of facts with its own. That the applicant had failed to settle the balance of the fees since 2010 and was abusing judicial process by causing further delay.

12. The applicant filed a supplementary affidavit sworn on 27/5/2021 and a further supplementary affidavit sworn on 11/6/2021 by Joseph M. Ogeto. The applicant reinstated his position that the award failed to make reference to any law, party's submissions, viva voce evidence from witnesses, contractual provisions and evidence. That though the arbitrator had discretion under the contract, he ought to have applied it judiciously.

13. That in the arbitrator's award for full arbitrator's costs and expenses of Kshs. 6,200,200/=, the arbitrator failed to consider the half portion already paid by the applicant for arbitrator's expenses.

14. I have considered the parties' contestations and submissions on record. The main issue for determination is whether the applicant's application meets the required threshold for setting aside an

arbitral award as set out in section 35(3) of the Act. Section 35 of the Act 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 it 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. Before delving into the application, I think it is important first to set out the jurisdiction of this Court in matters arbitral. The *Arbitration Act* and Rules provide for both the substantive and procedural manner in which matters arbitral are to be dealt with. The role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the Act. Section 10 of the Act provides: -

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

16. By this section, the jurisdiction of the Court is limited and restricted and may only be invoked in very clear circumstances specified under the Act. Further, section 32A of the Act provides: -

> " Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act".

17. The restriction on the jurisdiction of this Court on matters arbitral is founded on the fact that arbitration is simply a matter of agreement between parties. When parties agree that their dispute is to be settled by an arbitrator, and not by the national courts as by law provided, they also agree to accept the arbitrator's view of the facts and the meaning of the contract between them. In this regard, courts will not sit to hear the claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. This is the party autonomy that is embedded in the *Arbitration Act*.

18. The above position has been well reiterated by the courts of this country. In *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2020] eKLR, the Court of Appeal delivered itself thus: -

> " One of the significant features of the *Arbitration Act* (the Act) is the principle of party autonomy, which entitles parties to have their disputes resolved by the forum and in the manner of their choice. For that very reason, the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act".

19. In *Geo Chem Middle East v. Kenya Bureau of Standards* [2020] eKLR, the Supreme Court of Kenya quoted with approval Ochieng J's holding in the High Court that: -

> " It is not the function nor mandate of of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal".

20. It is with the foregoing in mind that the Court will examine the application before it. The grounds for the instant application were that; the arbitrator failed to determine the dispute within the confines of the contract between the parties; and that the award was contrary to public policy. I wish to begin with the ground that the award was contrary to public policy.

21. The issue of public policy was extensively discussed in the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, wherein the court held: -

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality".

22. In the above case, the court adopted the Indian position as set out by the Supreme Court of India in the case of *Renusagar Power Co. v General Electric Co.* AIR [1994] S.C 860. In that case, the Supreme

Court of India held that in order to succeed in an application for setting aside an arbitral award on the grounds of public policy, an applicant must establish that the award to be contrary to fundamental policy of Indian Law, violation of India's laws and further that the enforcement of such an award would be contrary to justice and morality.

23. In the present case, the applicant contended that the award was contrary to public policy because of several grounds: That the arbitrator introduced the notion of the "at large" on contractual timelines; was biased on the applicants' counterclaim; ordered the refund of withheld taxes and reimbursement of costs of arbitration including expenses already incurred by the applicant.

24. It was not disputed that the applicant had withheld an amount of Kshs. 2,094,811.16. The arbitrator made a finding that when the applicant was called upon to adduce evidence by way of a withholding tax certificate to prove that the amount had been remitted to KRA, the applicant failed to do so. He therefore ordered it be refunded to the respondent.

25. The applicant contended that this determination was contrary to *the Constitution*, the Laws of Kenya, and contrary to justice and morality. Taxes are not to be consumed by any tax payer. Once the applicant had withheld the said sums in accordance with the law, it could only account for them to the KRA and no one else. There was no evidence that KRA had demanded the same from the respondent.

26. To the contrary there was evidence that the applicant had been subjected to an audit and found to be clean. To that extent, the arbitrator could not order that taxes due to the tax authorities be refunded to the respondent. That was clearly against the law and the public policy of Kenya.

27. The other complaint was the introduction of the notion of "at large". The contract between the parties was clear on timelines. The moment the arbitrator introduced the notion of "at large" two things happened. He went outside the parameters of the contract, which he was not entitled to, and secondly, he was supposed to ask the parties to address him on that notion which was clearly not in the contemplation of the parties. That was clearly a re-writing of the contract and determining a matter not submitted to him for determination.

28. In *Soh Beng Tee & Co. Pte Ltd v Fairmont Dev. Pte Ltd* [2007] SGCA 28, it was held: -

> " In The Vimeira [1984] 2 Lloyd's Rep 66, Ackner LJ stated that At 76:
>
> The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.
>
> Robert Goff LJ noted at 75
>
> In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal."

29. Clearly, the award was contrary to public policy of Kenya. The arbitrator breached the rules of Natural justice by introducing notions unknown to the parties.

30. There was complaint about bias. That the arbitrators' attitude was skewed against the applicant. The applicant complained that when dealing with its counterclaim, the arbitrator started by making a statement that suggested pre-conceived attitude. That "these prayers are essentially a shield ...they are not a sword." .....That;

> " the respondent through a letter dated 01/09/2014 to the claimant again vaguely referred to claim entitlements without diligent follow up action."

31. The applicant further complained of other statements in the award which according to it demonstrated the arbitrator's dim view of its claim.

32. The Court has carefully considered the statements complained of. While the language a judicial officer or, as in this case, an arbitrator uses in his determination may not be evidence perse or bias, the same can however lead to an implication of bias depending on how it is used.

33. In the present case, while the arbitrator was out rightly harsh and dismissive of the applicant, he was very accommodative of the respondent. A case in point is on how he dealt with the applicant's claim for damages for relocation of the wall or offending structures. While he used strong words such as "vaguely, squandered" for the applicant, he used such terms as "probably driven by the need for quick" and " ..in good faith,....residual responsibility" in respect of the respondent's action of accepting to reinstate the wall but later declined. I trying to explain the respondents change of position, the arbitrators clearly exhibited bias against the applicant.

34. An arbitrator must conduct himself in a manner that does not destroy the confidence of the parties, or either of them. None of the parties should leave the arbitration with a feeling that; 'I have not had a fair hearing'.

35. In *Mistry Jadva Parbat & Co. Ltd vs Grain Bulk Handlers Ltd* [2016] eKLR the court held: -

> " When considering the issue of bias, the court looks at the impression which would be given to other people. Even if he (Arbitrator) was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances; there was a real likelihood of bias on his part that he should not sit. And if he does sit, his decision cannot stand."

36. In the present case, the strong language used in respect of the applicant as opposed to that of the respondent leaves a lot to be desired. The applicant's complaint cannot be said to be far-fetched or to be without a basis.

37. The other complaint was that the award of the arbitrators costs including those incurred by the applicant. All that a party is entitled to is a refund of the expenses he has incurred in a proceeding. The arbitrators action of ordering reimbursement of the arbitrators' costs including the share paid by the applicant led to unfair enrichment. It is against public policy for a tribunal to order un-fair enrichment. That amounts to a mockery of justice.

38. The respondent submitted that the applicant's complaints amounted to an appeal against the award. I do not think so. There is nothing wrong to go through the award to ascertain whether the alleged ills amount to a ground under section 35 of the *Arbitration Act*.

39. In my view, the applicant's complaints justify the allegation that the award was against the public policy of Kenya. It breached the principle of equality of arms, rules of natural justice and led to unlawful enrichment.

40. The upshot is that the application dated 16/3/2021 is meritorious and is allowed in terms of prayer No. 1 with costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCI Arb

JUDGE