Omar v Muigai (Miscellaneous Application E005 of 2021)
[2022] KEHC 303 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E005 OF 2021

WA OKWANY, J

APRIL 28, 2022

BETWEEN

FATUMA MOHAMED OMAR ..... APPLICANT

AND

EDWARD NGIGI MUIGAI ..... RESPONDENT

RULING

1. The applicant and the respondent herein entered into a lease agreement in which the applicant agreed to pay a deposit of Kshs 5,450,000 and monthly rent of Kshs 150,000. A dispute however arose between the parties, which they referred to arbitration. The arbitrator made a finding in favour of the applicant and published the award on 17th April 2020. The applicant subsequently filed the application dated 23rd February 2021 seeking the following orders;

    1. THAT the arbitral award dated and delivered at Nairobi on the 17th Day of April 2020 by Dr. Ken Nyaundi (sole arbitrator) between the parties herein be recognized, adopted, enforced as a decree of the court.

    2. THAT the Court be at liberty to make such further and other orders that as it deems fit to meet the ends of justice and

    3. THAT cost of this application be borne by the respondent.

2. The application is brought under Section 36 of the *Arbitration Act*, Order 46 rule 18(1) of the *Civil Procedure Rules*, Rules 6,9,and 11 of the *Arbitration Rules*.

3. The application is supported by the applicant's affidavit and is premised on the following grounds: -

1. THAT a dispute emerged between the parties herein concerning a dispute on a lease agreement signed on 16th June 2018.

2. THAT the parties failed to amicably resolve the dispute among themselves.

3. THAT consequently a Sole Arbitrator was appointed on 24th May 2019 to arbitrate on the matter.

4. THAT the Sole Arbitrator, Dr. Ken Nyaundi heard the parties herein and delivered his award on the 17th Day of April 2020 and

5. THAT the propriety of the award has never been challenged or otherwise disputed since its delivery.

4. The respondent opposed the application through the Grounds of Opposition dated 28th September 2021 replying affidavit dated 17th November 2021. He avers that the applicant is guilty of non-disclosure for failing to disclose that on 25th January 2021 the Arbitrator issued a supplementary award wherein he acknowledged that there was an error in the computation of the award. He states that the arbitrator did not correct the error citing lack of jurisdiction. He avers that adopting the award as is with the error would amount to unjust enrichment.

5. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has met the conditions set, under the *Arbitration Act*, for the enforcement of an arbitral award.

6. The applicant maintained that the award should be adopted as it has not been challenged or otherwise set aside since its publication. On its part, the respondent argued that the award should not be adopted in its current state in view of the arbitrator's acknowledgement of the computation error. The respondent's case was that adopting the award as it is would amount to the applicant's unjust enrichment. The respondent urged the court to exercise its discretion and enlarge time within which the award may be corrected.

7. Section 36 of the *Arbitration act* sets out the legal parameters governing enforcement an adoption of an arbitral award. It provides as follows;

> " 36.
>
> (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
>
> (2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
>
> (a) the duly authenticated original arbitral award or a duly certified copy of it; and
>
> (b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified 'translation of it into the English language.

8. In *Samura Engineering Limited vs Don-Wood Co Ltd* [2014] eKLR it was held: -

> " Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the *Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed..."

9. In the instant case, I find that the applicant has met the preconditions for the enforcement of the award. The onus therefore shifts to the respondent to demonstrate why the award should not be adopted.

10. Section 37 of the *Arbitration Act* guides the court in determining whether or not it should recognize and enforce an award. The respondent's case is based on an error in the computation of the award. I have perused the supplementary award dated 25th January 2021 and I note that the Arbitrator observed that: -

> " 9. Section 34 (1) of the *Arbitration Act* provides for a notice of motion to correct, in the arbitral award any computation errors, any clerical or typographical or other errors 'within 30 days after receipt of the arbitral award'. Herein lies the difficulty. The award herein was delivered on 17th April 2020. The notice of motion to correct the award was filed on 29th October 2020. Whilst the parties may on their own agreement and consent correct this error, it appears to me that the arbitrator is bereft of jurisdiction to deal with this matter. With sympathy am afraid I must leave the correction to the parties to deal with. The error which is acknowledged is regretted. I must commend counsel for the claimant for acknowledgement of the error and implore him, in the same spirit to give credit to the respondent. That is all I may say on this issue."

11. Section 34 of the *Arbitration Act* empowers the Arbitral Tribunal to correct any computation, clerical or typographical errors where an application for such correction is made within 30 days after receipt of the award. The respondent did not comply with the provisions of the said section and made his request for amendment outside the stipulated time.

12. In *Kenya Oil Company Limited & Another vs Kenya Pipeline Company Limited* NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR the Court of Appeal cited, with approval, the following dicta by Steyn LJ., in *Geogas S.A vs Trammo Gas Ltd (The "Baleares")* 1 Lloyds LR 215: -

> " The arbitrators are the masters of the facts. On an appeal, the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour

the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

13. Further in *Anne Mumbi Hinga vs Victoria Njoki Gathara* [2009] eKLR the court held that;

> " We therefore reiterate that there is no right for any court to intervene in the arbitral process, or in the award except in the situations specifically set out in the *Arbitration Act* or as previously agreed in advance by the parties and simultaneously there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the *Arbitration Act*."

14. In view of the foregoing, I note that the respondent has not demonstrated that any of the grounds in Section 37 of the *Arbitration Act* exist in order to persuade the court to reject the application to recognize and enforce the arbitral award. I find that the respondent's suggestion that this court should issue an order to extend the time within which to correct the computation errors falls outside the jurisdiction of this court. Moreover, the respondent did not explain why it took him so long to approach the Arbitrator to correct the Award.

15. Consequently, I find that the application dated 23rd February 2021 is merited and I therefore allow it with costs to the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Mbaji for the respondent.

Mr. Kaaya for Wachira for Applicant.

Court Assistant- Sylvia