Holistic Educational Trust v Angwenyi (Miscellaneous Application E302 of 2021) [2022] KEHC 3362 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 3362 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E302 OF 2021

WA OKWANY, J

MAY 26, 2022

IN THE MATTER OF THE ARBITRATION ACT AND IN THE MATTER OF AND APPLICATION TO SET ASIDE AN ARBITRATION AWARD

BETWEEN

HOLISTIC EDUCATIONAL TRUST ..... APPLICANT

AND

SAMUEL AUNGA ANGWENYI ..... RESPONDENT

RULING

Introduction

1. On or about 1st August 2016, the parties herein entered into a lease agreement over the Respondent's property known as L.R No. Kajiado/ngong/33337, being a seven bed roomed house. Clause 11 of the lease agreement provided that the lessee would repair and/or replace any of the fixtures and fittings damaged or broken or lost during the lease period.

2. The respondent's case was that upon the termination of the lease and the applicant's exit from the demised property, he noted that the applicant caused extensive damage to the property, which it refused to repair despite several demands. A dispute therefore arose over the cost of the repairs to the suit property which dispute led the filing of a case before the Chief Magistrate Court at Ngong in Civil Suit 192B of 2019. The dispute was subsequently referred to arbitration pursuant to clause 25 of the Lease Agreement. The sole arbitrator Mr. Samuel Mbiriri Nderitu, FCIARB rendered his award on 25th January 2021 thus triggering the filing of the application that is the subject of this ruling.

Application

3. This ruling is in respect to the application dated 22nd April 2021 wherein the applicant seeks the following orders: -

    a) Spent.

    b) Thatpending the hearing and determination of this application, this Honourable Court be pleased to stay any enforcement and/or execution proceedings including, but not limited to, proceedings before the Arbitral Tribunal, Chief Magistrate Court at Ngong in Civil Suit 192B of 2019 and any other court of competent jurisdiction save for the one herein.

    c) Thatthis Honourable Court be pleased to set aside the award issued by sole arbitrator Mr. Samuel Mbiriri Nderitu, FCIARB dated 25th January 2021 in its entirety.

    d) Thatthe Costs of this Application be provided by the Respondent.

4. The application is supported by the affidavit of Mr. Mohamed Ismail Dido and is premised on the grounds that: -

    1. That the parties herein had entered into a lease agreement on or about the 1st of August 2016 over the Respondent's property located in Ngong. The same was for a period of five years from the date of execution unless terminated.

    2. That the Applicant terminated the same by providing ample notice which notice was noted by the Respondent.

    3. That thereafter the Respondent filed a suit against the Applicant at the Chief Magistrate Court at Ngong in Civil Suit 192B of 2019. The same was referred to arbitration pursuant to clause 25 of the *arbitration Act*.

    4. That Mr. Samuel Mbiriri Nderitu, FCIARB was appointed by the Chairman of the Law Society Kenya as the sole arbitrator contrary to what the aforementioned clause provided.

    5. That the above clause was very clear that it applies to disputes in respect of any clause of the agreement which dispute would be referred for determination to a single arbitrator and in accordance with the *Arbitration Act*.

    6. That the dispute envisaged under clause 25 was in regards to a Landlord/Tenant relationship and the application of the clauses in that context.

    7. That as at the time the Arbitrator was seized of this matter the Respondent was no longer the Landlord of the property as he had sold the property, without notifying the Applicant who was the tenant.

    8. That it therefore suffices that the dispute put forward by the Respondent to the arbitration is not in line with the arbitration clause 25 nor within the ambit of the jurisdiction of the arbitral tribunal.

    9. That what was determined by the Arbitral Tribunal was the special damages costs in regards to property that the Respondent herein no longer owned and in which the Applicant had requested to be allowed to make the necessary repairs.

    10. That the arbitrator apportioned liability under circumstances that were not within the ambit of the arbitral determination.

11. That from the foregoing, the Applicant has grounds to apply to this Honourable Court to set aside the arbitral award primarily on the fact that the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration, that it contains decisions on matters beyond the scope of the reference to arbitration and lastly the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

5. The respondent opposed the application through the replying affidavit sworn on 2nd June 2021 wherein he avers that: -

1) That on 23rd September, 2019, the respondent filed Ngong Magistrate's Court Civil Suit No. 192B of 2019 against the applicant wherein the respondent sought to recover the cost of repairs of the demised property.

2) That on 2nd October, 2019, the applicant herein filed a preliminary objection to that suit seeking to have the matter referred to a single arbitrator pursuant to clause 25 of the lease agreement between the parties.

3) That the parties appeared in the lower Court on 6th November, 2019 and BY Consent of both parties, the matter was referred to arbitration as provided in the lease agreement.

4) That my advocates on record wrote to the Law Society of Kenya and requested that a single- Arbitrator is appointed to handle the matter. (Attached herein and marked SA 1 is copy of the letter dated 18th November, 2019 attesting as much)

5) That the Law Society of Kenya appointed a single Arbitrator to handle the matter. The applicant herein did not raise any objection to the Law Society of Kenya appointing the single Arbitrator for the parties or to the appointment of one, Mr. Samuel Mbiriri Nderitu, FCIARB, who was appointed as the single Arbitrator herein.

6) That on 15th January, 2020 the Arbitrator informed the parties of his appointment and called parties for a preliminary meeting. Both parties attended the meeting at the Arbitrator's chambers on 28th January, 2020. (Attached herein and marked SA 2 is copy of the letter dated 15th January, 2020 and the agenda thereof attesting as much).

7) That at the preliminary meeting, the Arbitrator inquired whether both parties were agreeable and comfortable to his appointment as the Arbitrator and both parties confirmed in the affirmative. The Arbitrator went ahead and issued order of directions on how the arbitration was to be conducted. (Attached herein and marked SA 3 is copy of the letter dated 6th February 2020 and the order of directions thereof attesting as much).

8) That the parties herein exchanged pleadings and the applicant participated in the proceedings herein until conclusion of the hearing. At no point before or during the proceedings did the applicant contest the appointment of the Arbitrator or his jurisdiction to determine the dispute herein.

9) That the applicant ought to have raised any issue about the Arbitrator's jurisdiction before the hearing of the matter. All issues raised at this stage by the applicant are a mere afterthought and diversionary tactics.

10) That On 25th January, 2021, the Arbitrator herein confirmed that the award was ready and asked both parties to pay the balance of the Arbitration fees of Kshs 600, 000/= equally, and collect the award. (Attached herein and marked SA 4 is copy of the letter dated 25th January, 2021 and the invoice thereof attesting as much).

11) That the applicant herein gave a myriad of excuses and blatantly refused to pay his share of Kshs 300,000/= being the arbitration fees. The parties herein exchanged several emails asking the applicant to pay his share of the arbitration fees and enable parties to access the award. The applicant took the parties in circles and finally refused to pay the legal fees. (Attached herein and marked SA 5 is a bundle of emails attesting as much).

12) That after over three (3) months of excuses and deliberate delays from the applicant, I was constrained to pay the applicant's share of fees in installments. The Arbitrator demanded a professional undertaking from my advocates on record before he released the award. I have so far paid Kshs being the arbitration fees including the applicant's share and I currently have a balance of Kshs 100, 000/=. (Attached herein and marked SA 6 is a copy of the receipts attesting as much).

13) That the foregoing series of events demonstrate a party who is willing to go to any length to frustrate the legal process and fair administration of justice. The applicant's attitude and conduct has been extremely unprofessional and unbecoming to deserve any discretionary relief from this Honourable Court.

14) That the applicant herein is a party who has no respect to the Court and Quasi-Judicial processes at all. The applicant has acted with utter contempt and exhibited unparalleled arrogance before and after the proceedings as demonstrated in the emails above.

15) That the applicant herein has not adduced any evidence of matters that were considered beyond the ambit of the arbitrator's jurisdiction. There is nothing that has been placed before the Honourable Court to impugn the arbitrator's award herein as contemplated under section 35 of the *Arbitration Act* 1995.

16) That there is no evidence that the award herein contravenes public policy or at all. The Arbitrator confined himself to the dispute before him and rendered the award as provided under the law.

17) That the dispute herein emanates from extensive damage that was done to my house by the applicant which included total demotion of walls, Jacuzzi, wardrobes, toilets and other expensive amenities culminating into exponential loss in value of the house. The total estimated value of the cost of repairs was Kshs 6,572,676.00/= as per the valuation by the Government Valuer. (Attached herein and marked SA 7 is a copy of the valuation report attesting as much).

18) That I have suffered immense losses from the deliberate and wanton destruction of my house by the applicant. I lost my house at a throw away price after the applicant literally demolished the same. My financial loss and the sentimental attachment I had to the house cannot even be compensated by the award herein. I urge the Honourable Court not to entertain any further delay in this matter by the applicant.

19) That I am a man of means and able to refund the award herein. I urge the Honourable Court to refuse the orders herein and allow me to recover the award from the applicant.

20) That in the circumstances, I draw the court's attention to the reality that grant of such sought orders against the respondent have the consequential effect of causing more harm than good, since I have already suffered damage and I am seeking to recover the said damage from the applicant.

21) That in any event, I invite the court to note that the applicant herein was aware that the award was delivered on 25th January, 2021 and it has been frustrating the respondent from getting the award. Grant of any orders herein will be aiding the applicant in its quest to frustrate the respondent and delay justice. The applicant cannot now purport to create an emergency at its convenience and favour.

22) That from the hereinabove, I humbly urge the Court to deduct an irresistible conclusion that the blanket orders sought herein by the plaintiff against the respondent are made in bad faith, vexatious, frivolous, made with an ulterior motive of frustrating the respondent, untenable and an abuse of the due process of court.

6. The respondent also filed Grounds of Opposition dated 29th June 2021 in which he listed the following grounds: -

i) That the application as laid is materially and incurably defective.

ii) That the Honourable Court has no Jurisdiction to entertain this application or grant the orders sought herein.

iii) That the application is misconceived, an unmitigated abuse of the court process.

iv) That the application as laid cannot sustain the orders sought therein.

v) That the application does not meet the criteria as provided in law for the grant of the orders sought.

7. Parties canvassed the application by way of written submissions which I have considered. The main issues for determination are as follows: -

i. The validity of the Replying Affidavit.

ii. Whether the arbitral award should be stayed pending the hearing and determination of this application.

iii. Whether the award should be set aside.

8. On the first issue, the applicant submitted that the replying affidavit is fatally defective and falls short of the requirements of Order 51 Rule 14(4) of the *Civil Procedure Rules* (CPR) as it was not signed by the alleged deponent. The applicant observed that the filing of a supplementary affidavit could not rectify the defect in the replying. For this argument, the applicant cited the decision in *Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR where the deponent did not sign the replying affidavit and the Supreme Court held: -

> "(8) We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence, it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and

dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.

(9) A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely."

9. The applicant urged the court to strike out the replying affidavit and allow the application on the basis that that it is technically unopposed.

10. The respondent conceded that he filed an unsigned replying affidavit in the court's e-filing portal by mistake but added that he corrected the error by filing a supplementary affidavit. He argued that the replying and supplementary affidavits did not occasion any prejudice to the applicant.

11. The respondent faulted the applicant for not filing the original copies of the award and lease agreement, with the application, and for sneaking the same into the court record without leave. He urged the court to strike out the documents from the record.

12. My finding is that the facts of this case are distinguishable from the facts in the above-cited Gideon Sitelu Konchellah case (supra) where the only document filed by respondent was an unsigned replying affidavit. I note that in the instant case, the respondent also filed Grounds of Opposition, in which case, even if the replying affidavit was to be struck out, the application cannot be said to be entirely unopposed. Order 51, rule 14 stipulates as follows on the manner in which a respondent may oppose an application: -

(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

13. Turning to the prayer for stay of execution, he applicant conceded that the prayer has been overtaken by events but added that it is apprehensive that the Respondent herein may proceed to file for the enforcement of the award ex-parte thus removing any possibility of a recourse to the Applicant. The applicant submitted that it may be condemned unheard and the instant application may be rendered impotent unless the status quo is maintained. Reliance was placed

on the decision in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 where it was held that in exercising the discretion of whether or not to grant an order of stay of execution, a court must consider if an appeal will be rendered nugatory if a stay was not granted.

14. The applicant referred to the decision in *Siegfried Busch vs MCSK* [2013] eKLR where the court advised in part that;

> "A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment..."

15. A simple reading of the prayer for stay of execution reveals that the stay sought is for the period pending the hearing and determination of the application as opposed to the period in the cases the applicant cited. I find that in the circumstances of this case, the prayer for stay has been overtaken by the events. Moreover, the impugned award has not been adopted by this court, in which case, its execution does not arise at this point.

16. Furthermore, courts have taken the position that in light of the provisions of Section 10 of the *Arbitration Act*, they are not clothed with the jurisdiction to entertain applications founded on the provisions of the Civil Procedure Act and Rules as the said section makes the *Arbitration Act* a complete code. For this reason, I find that even assuming that the prayer for stay of execution had not been overtaken by events, this court still does not have the jurisdiction to intervene in the matter in any manner except as specifically provided for in the *Arbitration Act*.

17. Turning to the substantive prayer to set aside the arbitral award, the applicant submitted that the dispute was determined by the Chairman of the Law Society of Kenya contrary to the provisions of Clause 25 of their agreement, which provided for the reference of the dispute to a single arbitrator. According to the applicant, the arbitrator was a stranger to the agreement.

18. The applicant further submitted that the disputes envisaged under Clause 25 of their agreement was in respect to a Landlord/Tenant relationship yet, as at the time of the arbitration, the Respondent was no longer its landlord as he had sold off the leased property. The applicant maintained that the Arbitral Tribunal lacked the jurisdiction to determine the dispute as the respondent no longer owned the premises in question having been taken over by a third party, in which case, the arbitration clause relied upon no longer applied as between the parties.

19. In a rejoinder, the respondent submitted that contrary to the applicant's allegations, he did not sell the leased premises which he had charged to a bank and still belonged to him as at the time of the hearing of the application. The respondent further noted that the issue of ownership of the suit property was not raised before the arbitrator.

20. A perusal of the impugned arbitral award reveals that at no time was the issue of ownership of the suit premises raised before the arbitrator. It was not disputed that the parties herein entered into a lease agreement which at Clause 25 thereof provided for arbitration in the event of any disagreement as follows: -

> "That any dispute that arises between the Lessor and the Lessee in respect of any clause in this agreement shall be referred for determination to a single Arbitrator in

accordance with *Arbitration Act* 1995 appointed by both parties and his award shall be final and binding on both parties."

21. From the above clause, it is clear that the Applicant and Respondent chose their forum and process of dispute resolution. The record shows that parties referred their dispute to arbitration by consent and voluntarily participated in arbitration proceedings. The arbitrator heard the dispute and rendered his verdict. I therefore find that the applicant herein, having subjected itself to the jurisdiction of the arbitral tribunal cannot, through this application, contest the arbitrator's jurisdiction. In any event, it is trite that parties are bound by the terms of their agreement.

22. Furthermore, the applicant's claim that the suit premises had been sold to a third party as at the time of the arbitration was not supported by any concrete evidence and neither was the alleged new owner included in these proceedings as an interested party.

23. Section 35 (1) (2) (3) of the *Arbitration Act* provides as follows on the circumstances under which the court may set aside an arbitral award:-

> "(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) The party making the application furnishes proof—
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration 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
>
> (v) 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 a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or (vi) ...

(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."

24. On public policy, the applicant argued that allowing the award where the same was outside what the arbitration clause would be unconscionable considering that the Applicant is a nonprofit organization serving underprivileged children. Reference was made to the definition of *Public Policy in Cape Holdings Ltd vs Synergy Industrial Credit Limited*, [2016] eKLR where Kariuki J. adopted, with approval, the definition given by Ringera J. in *Christ For All Nations V Apollo Insurance Company Limited*, NRB HCC No. 477 of 1999 where it was held: -

> "... 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..."

25. The applicant argued that, based on the set of facts it had highlighted, the award is against public policy as it unjustly enriches the Respondent.

26. Having found that the parties voluntarily entered into a lease agreement that contained an arbitral clause and having found that the arbitrator heard and determined the dispute based on the facts presented before him by the parties, I find that the applicant cannot turn around and claim that the award is against public policy merely because it does not favour him.

27. This court is alive to the well-hackneyed principle that it should be slow to interfere with an arbitral award. In *Erad Suppliers & General Contracts Limited v National Cereals & Produce Board* [2013] eKLR it was held: -

> "Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision. The jurisdiction of the court is statutory and cannot be increased or cut down. In our case this position is reinforced by the provision of Section 10 of the *Arbitration Act* which states that except as provided in the Act, no court shall intervene in matters governed by the Act. Again the arbitral awards are insulated by Section 32A of the *Arbitration Act* wherein it is provided that except as otherwise agreed by the parties to it, no recourse is available against otherwise than in the manner provided by this Act. It follows that what must be borne in mind is that there is no appeal, in the ordinary sense, from the award of an arbitrator. The parties have chosen their tribunal and they must, generally speaking, accept the result

whether it is right or wrong. The circumstances in which the court will intervene are exceptions to the general rule..."

28. Similarly, in *Rashid Moledina & Co (Mombasa) Limited & Others vs Hoima Ginners Limited* (1967) EA. 6455 it was held that courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum or the resolution or settlement of their dispute.

29. The burden therefore rested on the applicant to demonstrate, through tangible evidence, that award violates public policy. In the circumstances of this case, I am unable to find that the there was any evidence to show that the award goes against justice/morality and or offends the provisions of the Constitution.

30. For the reasons that I have stated in this ruling, I find that the application dated 22nd April 2021 is not merited and I therefore dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Mohamed for Applicant.

Mr. Bundi for Respondent.

Court Assistant:- Sylvia