SK Archplans Architects & 3 others v International Leadership University (Civil Application 499 of 2016) [2022] KEHC 12486 (KLR) (Civ) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPLICATION 499 OF 2016

DO CHEPKWONY, J

AUGUST 2, 2022

IN THE MATTER OF: THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF: THE FINAL AWARD DATED 10TH JUNE, 2019 BY HON. MR. WALTER AGGREY ODUNDO, SOLE ARBITRATOR

AND

IN THE MATTER OF: AN APPLICATION FOR EXTENSION OF TIME TO FILE AN APPLICATION FOR SETTING ASIDE AN ARBITRAL AWARD PURSUANT TO SECTION 35(1)(2) & (3) OF THE ARBITRATION ACT, 1995

BETWEEN

SK ARCHPLANS ARCHITECTS ..... 1ST CLAIMANT

LUI CONSULTING ..... 2ND CLAIMANT

GEOMAX CONSULTING ENGINEERS ..... 3RD CLAIMANT

SPAN ENGINEERS ..... 4TH CLAIMANT

AND

INTERNATIONAL LEADERSHIP UNIVERSITY ..... RESPONDENT

RULING

1. This is a ruling in respect of three (3) applications, being:

a) Miscellaneous Application No 004 of 2020 dated January 22, 2020 in which the applicant, SK Archplans Architect and others, are seeking for the enforcement of the arbitral award. The same is opposed by grounds of opposition dated February 6, 2022.

b) Miscellaneous Application No 015 of 2020 dated March 17, 2022, where the applicant, International Leadership University is seeking to have the time to challenge the arbitral award dated June 10, 2019 enlarged. The same is opposed vide a replying affidavit sworn by STanley Kabathi on June 17, 2020.

c) A notice of motion Application No 499 of 2016 in which the applicant is seeking to have the consent order dated May 24, 2017. That led to the arbitral proceedings set aside. This is opposed by the replying affidavit of the 1st respondent.

Analysis and Determination

2. In considering the nature of prayers that have been sought by the parties in the three(3) applications and the parties respective perspective, I find it fit, practical and for good order in the ruling, to make a determination as per the issues raised in the following order:-

a) Whether a case has been made out to warrant that setting aside of the consent order entered into on May 24, 2017;

b) Whether leave should be granted for filing an application challenging the arbitral award; and

c) Whether the arbitral award made on June 10, 2019 should be adopted and enforced as Judgment of this court.

a) Whether A Case Has Been Made Out To Warrant The Setting Aside Of The Consent Order Entered Into On May 24, 2017.

3. On May 24, 2017, parties herein entered into a consent agreement in this proceedings in the following terms:-

> "By consent of the parties, the notice of motion dated November 2, 2016 and filed on the same day be and is hereby withdrawn on the basis that the applicant is liable to the respondents in respect of professional fees and any interest the quantum whereof shall be agreed upon between the parties and in default of such agreement, the issue of quantum shall be determined by the arbitrator in the extant of the arbitration proceedings. Secondly the costs of the application shall be the costs in the settlement or in the arbitration"

This is the consent that gave rise to the arbitral proceedings which are now the interest of contestation in this matter. The same were determined and an arbitral award dated June 10, 2019 was arrived at.

4. According to the applicant, International Leadership University, the said consents was entered into without instructions and diametrically at variance with the interests of the applicant, which at all times maintained it had a negative balance sheet. The applicant has also stated that their then advocate, Mr Fred Ojiambo was also the Chairman of the respondent's Board of Trustees, hence was under some incapacity due to conflict of interest which materially and adversely affected his ability to offer the applicant effective representation, leading to an arbitral process that resulted into a manifestly unconsiderable, top-sided, inequitable and unenforced final award.

5. In response, the respondent has stated that by its conduct, the applicant approved the representation by Mr Ojiambo and the firm of M/S Kaplan & Stratton both in this matter and in the arbitral proceedings.

6. A consent judgment or order is in the nature of a contract. To determine the issue raised in regard to the consent that was entered on May 24, 2017, it will be necessary to consider whether the principles that appertain to setting aside of a consent order are well established in a line of cases which include *Brooke Bond Liebig v Malya* [1995] EA 266, where the court stated that:-

> "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, eg on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case, the parties and their parties to the proceedings or actions, and those claiming under them ..... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court..... or if the consent was given without sufficient material facts or in general for a reason which would enable a court set aside an agreement."

7. Essentially, form the above authorities, it can be inferred that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for reasons which would enable a court set it aside. So can it be said that these grounds have been established in the instant case where the applicant, International Leadership University is claiming that it was represented by a firm of advocates where the Senior Partner was also the Chairman of its Board of Trustee at the time of entering into the impugned consent, hence was incapacitated due to conflict of interest and unable to offer effective representation and without any instructions.

8. Contrary to what the applicant has submitted, the respondents have submitted that the applicants have not demonstrated either of the grounds or adduced evidence in support of its allegations against their said counsel. The respondents have submitted that whereas the applicants disputes having instructed its ertwhile advocates to compromise the matter by way of consent, part IV of the Code of Standards of Professional Practice and Ethical conduct provides on the conduct expected of an advocate and the recourse thereof. Lastly, the respondents have argued that the challenge taken to set aside the consent order has been brought too late in the day after the conclusion of the arbitral proceedings which the applicant also participated in. The respondents are therefore persuaded that the application to set aside the consent order referring the matter arbitration is not only frivolous, but is also based on malicious intent since the applicant does not dispute owing professional fees for the respondent.

9. I have observed that those submissions are supported with excerpts from the cases of *Mereka & Co Advocates v Zaklem Construction (Kenya)* [2014] eKLR and *Obaga v Akiba Bank Ltd* [2008] I EA 300, wherein the court stated that a retainer may be implied where the client acquiesces and adopts the proceedings and he therefore is estopped from denying the advocates right to act. In reliance to these authorities, the respondents have argued that the Applicant is estopped from asserting that the consent order was entered into without instructions since the applicant acquiesced, participated in and adopted the arbitral proceedings.

10. The respondents have further relied on the cases of *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1980] eKLR, *Flora N Wasike v Detimo Wamboko* [1988] eKLR and the persuasive Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Ltd v Jin Cheng International Trading Ltd* where the courts were agreeable that a consent judgment cannot be set aside when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter into a consent but has general instructions to act in a matter, the position would not change unless aspects of fraud, collusion, and mistake are shown.

11. From the onset, it is a common ground from the submissions filed by the parties that a consent order will not generally be set aside except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. It would even serve a repetition to further add that a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. (See the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1982] KLR 485.)

12. Similarly, I am persuaded that where a party acquiesce and adopt proceedings while being represented by an advocate to its conclusion, that party is precluded from denying having retained such an advocate even in the absence of a written retainer.

13. In this case, the applicant does not deny having participated in the arbitral proceedings while represented by Senior Counsel Mr Fred Ojiambo, who was a member of its board of trustees, to it's logical conclusion so that, without any evidence that the said counsel was not properly instructed, this court reiterates the rebuttable presumption that the applicant, having participated in and adopted the arbitration proceedings in which it does not deny having been aware of, is estopped from denying having retained Learned Senior Counsel, Mr Fred Ojiambo to act on its behalf.

14. I am also unable to agree with the submissions that the applicant is placed in a disadvantageous position compared to the respondents for having been represented by a counsel who is also a member of its board of trustees. In my view, the position could be intuitively convincing were it to be shown that Learned Senior Counsel, Mr Fred Ojiambo, while acting for the applicant was serving or attempting to serve two or more interests which are not compatible or was serving or attempting to serve two or more interests which are not able to be served consistently or was honoring or attempting to honor two or more duties which cannot be honored compatibly, and thereby failed to observe the fiduciary duty owed to the applicant.

15. It was not enough for the applicant to merely state that the learned senior counsel was acting in conflict of interest without adducing any evidence to support such allegations. In the end, it is this court's finding that the applicant has not placed any evidence before the court to demonstrate that the consent that was entered into as between the parties on May 24, 2017 was obtained illegally or through fraud.

b) Whether The Applicant Should Be Granted Leave For Extension Of Time To File An Application Challenging The Arbitral Award

16. The application seeking such orders is dated March 17, 2020 and is likewise filed by the International Leadership University and for purpose of discussion, hereinafter referred to as the "applicant." It is the applicant's argument that under section 35 (3) of the *Arbitration Act*, an application challenging the arbitral award may not be made after three (3) months have passed from the date the applicant receives the arbitral award.

17. In this case, the arbitral award although delivered on June 10, 2019, the applicant avers that the same was released to parties on September 19, 2019. However, the delay in filing the application is blamed on the leadership transition in the applicant's institution sometimes between July 1, 2019 and November 13, 2019 when a new Vice Chancellor assumed office and the fact that the then advocate ignored to file an application challenging the award on time. The applicant then implored the court to take notice that its decisions are made by a constituted body which may take sometime together with the fact that the applicant ought not be punished by failure and mistakes of a former counsel, and should then

exercise its discretion to allow for the extension of time. For the respondent's, its case is simple; that the applicant has not made a case for extension of time has been sought.

18. Section 35 (2) of the *Arbitration Act* provides grounds under which a court of law may set aside an arbitral award whilst sub-section (3) thereof sets the timeline within which an application to set aside an award should be made. Sub-section states as follows:

> " An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award..."

19. Although the applicant asserts that by use of word "may" the above provision is not structured in mandatory terms, my view is that the intendment of the legislature was that an application to set aside an arbitral award should be made within three months after receiving the award. Even going by the word of the applicant that it received the award on September 19, 2019, the three months period lapsed on December 20, 2019, hence the applicant was bound to explain the delay exhibited since then and the March 17, 2020 when it filed its application.

20. In my view, the explanation offered that the applicant's decisions are made by a constituted body which at times takes quite some time, and that this was worsened by the transition period, is not fully persuasive. The period between July 1, 2019 and November 13, 2019 when the transition is said to have happened was well within the three months within which an application to challenge the arbitral award could have been made. I am therefore not persuaded that transition period complained of was a contributory factor for the delay. Even assuming that decisions by the applicant are not made instantly and may take time as alleged, it would be inordinate to assume that the applicant, between the November 13, 2019 when the transition was completed and March 17, 2020 when it filed the application, was still making a decision on whether or not to challenge the arbitral award.

21. In as much as I appreciate that whether or not to extend time is a matter within the discretion of the court, it must be noted that the same has to be exercised judicially, taking into account the circumstances of each case. The Supreme Court in the case of *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR observed that;

> " If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established that he was not at fault"(Emphasis added)

22. In view of the foresaid discussions, and given the decision of the Supreme Court above, I am not persuaded that the applicant herein has made a case for the prayer it seeks to enlarge time and the same is as well denied.

c) Whether The Arbitral Award Should Be Adopted And Enforced As Judgment Of This Court

23. Lastly, SK Archplans Architests, Lui Consulting, Geomax Consulting Engineers and Span Engineers, jointly made an application dated January 22, 2020 seeking leave to enforce the arbitral award dated June 10, 2019 and judgment be made for Kshs 116,849,508.26 and interest thereon at the rate of 13.5% Per annum. The application further sought for other costs incurred in the arbitration including but not limited to half the arbitrator's fees at Kshs 1,189,000.00, the final award in the fee note for Kshs

986,000/=, costs for arbitration at Kshs 148,658.00, fees of appointment of the arbitrators at Kshs 21,750, and interests thereon at rate of 13.5% percent until payment in full.

24. The argument advanced in support of the applicants case is that the final arbitral award is dated June 10, 2019 and the respondent has failed to honour the same despite the award having been certified as the original copy in Misc Application No 466 of 2016. They submitted that the final award should be recognized and enforced as an award of the court so as to allow the respondent enjoy the fruits of a successful judgment.

25. In this case, the arbitral award is not contested, and the fact of the matter is that the award was, and has so far not been challenged or set aside within the prescribed period of time, and neither is there an appeal pending on the same. I am alive to the fact that section 36 of the *Arbitration Act* states that a domestic arbitral award, is to be recognized as binding and, on application to court in writing, it shall be enforced unless the court refuses to recognize it on grounds set out in section 37 thereof. Neither of the parties has shown the grounds dictated under section 37 and I have read through the certified copy of the arbitral award dated June 10, 2019 attached to the application dated January 22, 2020, thus satisfying the requirements under section 36 of the *Arbitration Act*.

Disposition

26. Having considered the three applications, responses and submission thereto as well as the law and the decisions relied on by parties, and upon giving due consideration to all those, the conclusion I come to is as follows:

    (a) The applications dated June 25, 2020 and March 17, 2020 are hereby dismissed for want of merit with cost to the respondents therein.

    (b) The application dated January 22, 2020 is allowed to the extend that the arbitral award dated 10th June, 2019 be and is hereby recognized and adopted as order of the court for purposes of enforcement and The applicants therein shall have costs of the application.

    It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF AUGUST 2022.

DO CHEPKWONY

JUDGE

In the presence of:

Mr Walele holding brief M/S Maluza for plaintiff/respondent.

Mr Odero for plaintiff.

Mr Kenya for defendant/applicant.

Court Assistant Sakina.