Karatina Maternity & Nursing Home v Minet Kenya Insurance Brokers Limited (Miscellaneous Application E012 of 2021)
[2022] KEHC 14209 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E012 OF 2021

A MSHILA, J

OCTOBER 21, 2022

BETWEEN

KARATINA MATERNITY & NURSING HOME ..... APPLICANT

AND

MINET KENYA INSURANCE BROKERS LIMITED ..... RESPONDENT

RULING

1. The Chamber Summons dated August 9, 2021 was brought under Order 22 Rule 22 of the *Civil Procedure Rules, 2010* and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* for orders that;

    a. The Court to grant a stay of the application for the Bill of Costs in the impugned arbitral proceedings before Dr Wilfred A Mutubwa pending the hearing and determination of the Application dated April 16, 2021.

    b. The Court to grant a stay of execution of the arbitral award made by Dr Wilfred A Mutubwa on May 18, 2021 pending the hearing and determination of the Application dated April 16, 2021.

    c. The Court to grant any other orders as it may deem fit in the best interest of justice.

    d. The costs of this Application be borne by the Respondent.

2. The Application was supported by the sworn Affidavit of Dr Juma Mwangi Gachau who stated that the Applicant approached the Court under a Certificate of Urgency dated April 16, 2021. Whereas the Court fixed the matter for mention twice, the Applicant's Advocates became aware of the said mention dates from the judiciary e-filling portal ex post facto.

3. The matter was fixed for hearing an Interlocutory Application on July 20, 2021, which date was subsequently declared a public holiday. The Applicant's Advocates managed to access the Court's Registry on July 21, 2021 only to learn that the matter had been placed before the Deputy Registrar for directions earlier that morning.

4. The matter was fixed for mention November 1, 2021. The failure to attend Court during the aforesaid mentions on part of the Applicant's Advocates was neither deliberate nor intentional nor intended to delay the hearing and determination of the Application dated Friday the April 16, 2021 but was due to challenges associated with updates on the judiciary e-filling portal affecting many matters across the board in addition to restricted access to the Court's Registry under stringent COVID-19 protocols.

5. The Applicant stands exposed to suffer great prejudice and irreparable loss if the Orders sought are not granted.

6. The 2nd Application is a Notice of Motion dated April 16, 2021 brought pursuant to Order 39 Rule 4 and Order 46 Rule 16, of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* for the following orders;

    a. Conservatory orders be issued restricting the Respondent and or its agents from releasing the award for Costs pending the hearing of this Application inter partes and thereafter pending the hearing and determination of this Application.

    b. The Court to discharge or set aside the arbitral Award by Dr Wilfred A Mutubwa dated and published on January 10, 2021 and delivered to the Parties by email on March 23, 2021.

    c. The Court to make such further and other orders as it deems fit to meet the ends of justice.

    d. The costs of this Application be provided for.

7. The Application was supported by the sworn Affidavit of Dr Juma Mwangi Gachau who stated that the learned Arbitrator did not appreciate the dual nature of the Claim concerning two time periods namely 2016-2017 and 2017-2018.

8. The learned Arbitrator found that the Sign-off sums were fully paid without setting out a basis given that:

    (a) The proceedings capture Dr Juma Mwangi Gachau and James Kang'ara Wamutitu testifying for the Claimant on 13th and February 14, 2020;

    (b) There are no proceedings for October 8, 2020 when James Kang'ara Wamutitu further testified for the Claimant and Edwin Kegode testified for the Respondent; and

    (c) There being no proceedings for October 8, 2020, the learned Arbitrator lacked basis to find that the Claimant had not proved its case or that the Respondent had fully paid the Sign-offs.

9. The circumstances preceding the release of the Award more than two months after publication reek of apparent bias on the part of the Hon Arbitrator in favour of the Respondent. The Award be quashed as a matter of public policy for apparent bias and failure to record part of the proceedings.

10. The Respondent lodged a Response to the Motion Application vide a Replying Affidavit sworn on November 5, 2021 by Ms Rachael Mwenda opposing the Application in no uncertain terms and urging that the Orders sought vide the Applicant's Motion Application dated April 16, 2021 should not be granted and that the same be struck out with costs to the Respondent.

Applicant's Case

11. The Applicant argued that it is trite law that the burden of proof is an obligation imposed on a party by the law of evidence to prove a fact in issue. Whether a party discharges this burden to prove a fact in issue is decided by a tribunal after all parties have called their evidence. The applicable standard of proof is 'on the balance of probabilities' and the party that fails to discharge its burden of proof to the required standard loses on the issue in question.

12. The Respondent's letter dated December 10, 2018 (Folio 4 of the Claimant's bundle of documents) confirms in no uncertain terms that the impugned Sign-off Agreements were for the Scheme Period 2016-2017 as stated at paragraph 2 line 5 that 'Both sign offs were for services rendered during the Scheme period commencing on October 1, 2016 and ending October 30, 2017'.

13. For the avoidance of doubt, the reference of the impugned Sign-off Agreements respectively dated June 22, 2018 and August 29, 2018 (Folios 2(a) and 2(b) of the Claimant's bundle of documents) in regard to Folio 21) 'RE: TSC OP/NPS Account Clearance For The Period October 1, 2016-September 30, 2017' and in regard to Folio 21) 'RE: TSC Inpatient Clearance September 2017 And Prior'.

14. The Applicant submitted that neither the Respondent nor the impugned Award show how the Respondent allegedly met its financial obligations to the Applicant in respect of the subject Claim given that the Respondent submitted no proof that the impugned sign-off agreements were settled, fully or otherwise. Furthermore, the Tribunal turned a blind eye on the Respondent's burden to tender proof that it met its financial obligations to the Applicant. In the end, no basis is laid out to justify the impugned Award particularly in the absence of proceedings for October 8, 2020.

15. The impugned sign-off agreements were repudiated by a letter from the Applicant's Advocates dated December 19, 2018 as set out at the second paragraph thus 'That our clients reject your offer for settlement of the above debt given the above reasons' (Folio 5 of the Claimant's bundle of documents).

16. The Award identifies at page 26 paragraph 59 three issues agreed by the parties, namely.

> ' a. Whether the sign-off being the Claimant's exhibit marked as 'Folio 2(a)' dated June 22, 2018 discharged the Respondent's obligation, and settled the Claimant's dues at Kshs 9, 500,000 under the Service Provider Agreement for the 2016-2017 period, for the TSC Out-Patient Account;
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> b. Whether the sign-off being the Claimant's exhibit marked as 'Folio 2(b)' dated August 29, 2018 discharged the Respondent's obligation, and settled the Claimant's dues at Kshs 400, 860 under the Service Provider Agreement for the 2016-2017 period, for the TSC In- Patient Account; and
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> c. Whether the Claimant vide its Advocates' letter dated December 19, 2018, effectively repudiated the above sign-offs for reasons contained in the said letter and those adduced at the hearing before the Tribunal?'

17. It was the Applicant's position that the Award is however silent on the Respondent's forth issue set out at page 4 paragraph 1 of its submissions, namely 'Whether the Claimant has indeed proven to the Tribunal on a balance of probabilities that indeed it is owed the amount as stated in their submissions' but proceeds at page 29 paragraph 68 to observe in respect of the Respondent's case that: 'The Respondent claims that the Claimant's claim arises out of gross failure by the Claimant to follow procedure as set out in their Master Service Provider Agreements.'

18. Further, it was submitted that the proceedings giving rise to the impugned Award reveal that the Tribunal was apparently biased by not placing upon the Respondent a burden of proof and failing to avail a complete record of the proceedings, which compelled the Applicant to approach this Court to preserve its honour and dignity and maintain public confidence in arbitration as a dispute resolution mechanism.

19. Sir Johnson Donaldson MR in *National Oil Company [19871 2 ALL E R 769* at page 779 aptly addresses the Applicants concerns in the following words:

> ' Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in Richardson Vs Mellish, 'it is never argued at all, but when other points fail, it has to be shown that there is an element of illegality or that enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised'

20. The Applicant argued that the status of the arbitration proceedings and refusal to grant uncontroverted claims under Scheme Period two without any justification whatsoever dovetail into the definition of that which ought to be sufficient public policy consideration to justify the setting aside of an arbitral award.

21. In addition, the Applicant submitted that the Respondent's unproven claim that it fully met its financial obligations to the Applicant, an incomplete record of proceedings and apparent bias by the Tribunal cannot sustain the impugned award dated January 10, 2021.

22. The Applicant invited the Court to set aside the impugned Award pursuant to section 35(2) (b) (ii) read together with section 19(A) of the *Arbitration Act* on public policy grounds more particularly for not demanding that the Respondent discharges its burden of proof that it met all its financial obligations against the Applicant and failing to produce proceedings for October 8, 2020. This Court has residual jurisdiction at Article 159 of the *Constitution*, Section 3(1) of Cap 8 and sections 1A & 1B of Cap 21 to review the record and make a determination that aligns the interests of justice in with public policy.

Respondent's Case

23. In response the Respondent submitted that proceedings to set aside arbitral awards are anticipated and grounded under Section 35 (1) and (2) of the *Arbitration Act*. The Applicant has not placed on record cogent proof of existence of any of the statutory grounds warranting this Court to consider disturbing the arbitral award.

24. The Motion Application herein is a targeted approach at re-litigating issues already addressed by the Arbitrator, bereft of statutory grounding as to the circumstances under which this Court has power to revisit arbitration proceedings.

25. The principle of finality of Arbitral awards as established by the Supreme Court of Kenya in *Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR* to the effect that this Court can only determine disputes relating to arbitral awards, only within the limits of the provisions of the *Arbitration Act*.

26. The Respondent urged the Court not to interfere with the arbitral award as the parties had voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute. The same view has been adopted in *Anne Mumbi Hinga v Victoria Moki Gathara Civil Appeal No 8 of 2009*; *[2009] eKLR*,

Micro-House Technologies Limited v Co-operative College of Kenya Civil Appeal No 228 of 2014; [2017] eKLR

27. Further, the Applicant introduced the claim for the 2017-2018 period, in a bid to misdirect this Court that the amount subject of the period was uncontested before the arbitral tribunal. Nothing could be further from the truth. This issue was already substantively canvassed before the arbitral tribunal, and witnesses called to demonstrate the nature of the dispute. This being an issue involving various categories of claims; valid claims, invalid claims, approved claims, disallowed claims, pre-authorized claims, it was testified at the arbitration that the Parties would call meetings to reconcile the Claims, whereby all valid claims were paid by the Respondent.

28. The Respondent submitted that the public policy ground is not available to the Applicant, as in fact, any attempt at failing to give effect to the arbitral award, would be against public policy and the principle of finality. The test for public policy laid out in *Continental Homes Ltd vs Suncoast Investments Ltd [2018] eKLR* where the court observed that in order to set aside an award for contravening public policy, the Applicant must point at an illegality on the part of the Arbitrator and show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award.

29. As a matter of public policy, it is in the public interest that there should be an end to litigation and a finality to Arbitration Awards. For the Applicant to succeed in setting aside the award, it must show that the award is inconsistent with the *Constitution* or other laws of Kenya, whether written or unwritten or inimical to the national interest of Kenya or contrary to justice or morality.

Issues For Determination

30. After consideration of the pleadings and submissions by parties through Counsel, the issues that commend themselves for determination are;

    a. Whether to stay the proceedings in the instant matter pending hearing of this application and/or until the Respondent's OS application dated May 20, 2019 and filed in the High Court of Kenya at Nairobi is heard and determined.

    b. Whether the Court should set aside the Final Award of February 13, 2019.

Analysis

Whether the Court should set aside the Final Award of 13th February, 2019

31. The main issue for determination is whether the defendant has made out a case for the setting aside the Arbitral Award. Section 35 of the *Arbitration Act* provides as follows: -

    35 An arbitral award may be set aside by the High Court only if—

        (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 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) 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.

32. The Applicant sought to set aside the Arbitral Award dated January 10, 2021 for being in conflict with public policy. It was the Applicant's argument that the Arbitrator's refusal to grant uncontroverted claims under Scheme Period two without any justification.

33. This Court notes, having perused the impugned Award, that at Paragraph 65 of the final award, the arbitrator succinctly captured the Claimant's case concerning the two time periods being 2016-2017 and 2017-2018, where the issue of an allegedly uncontested claims for the period 2017-2018 is also captured. At Paragraph 75 of the award, the arbitrator labors in restating the Respondent's position that the Claimant was not able to produce evidence to support the specific amounts claimed.

34. Paragraph 85 of the award shows that the amounts for the period were in fact not proved as owed as a result of reconciliation of valid claims. The tribunal found that it was not clear whether all the entries in the 12 volumes of claims represented the totality of the Applicant's claim before the tribunal.

35. At Paragraph 86, the arbitral tribunal restates that throughout the arbitration, the Applicant herein failed to produce evidence to correlate the entries in the 12 volumes of documents with its claim of Kshs 24, 098,965. Paragraph 89 of the final award also noted that when taken through the entries, the Applicant's accountant admitted that some of the payments in the volumes had indeed been made.

36. In opposition to the Applicant's assertions, the Respondent submitted that the onus of proving that the award was contrary to or against the public policy rested with the Applicant. It was the Respondent's argument that the Applicant failed to provide any tangible proof that the award is contrary to public policy or that the alleged errors and mistakes of facts and law were inconsistent with public policy of Kenya.

37. In Christ for all Nations vs Apollo Insurance Co Ltd (2002) EA 366 Ringera J (as he then was) explained the scope of public policy as a ground for setting aside an arbitral award as follows:

> ' An award could be set aside under page 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 to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.'

38. In *Mall Developers Limited vs Postal Corporation of Kenya ML Misc No 26 of 2013 [2014] eKLR* the court observed that:

> ' Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.'

39. In *Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR*, the Court of Appeal, addressed the effect of Section 35 of the *Arbitration Act*, as follows:

> ' An award could 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 to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.'

40. Considering the Applicant's arguments regarding its claim that the award is contrary to public policy; it is clear that the Applicant is inviting this court to consider the merits of the Award under this ground. The Arbitrator determined all the issues that were listed by the parties for determination and this was done on the basis of the evidence presented before him by both Parties herein through their respective witnesses. The Arbitrator also considered the submissions rendered by the parties' respective Counsel.

41. Further, the Applicant has not showed how the Award was against the public policy of Kenya or contrary to law, justice or morality. The Applicant is simply discontented with an Arbitrator's decision which was arrived at based on the evidence placed before him.

42. It is trite that the Court cannot interfere with the manner in which the Arbitrator dealt with the evidence before him because that was well within his jurisdiction. It also matters not whether the findings of fact by the Arbitrator were right or wrong. They are matters this court cannot reconsider.

43. The principle being that parties opted to go the arbitration way to resolve their disputes. Interfering with the Arbitrator's decision making process would place this court in the position of a Court of Appeal, which is against the principle of finality that informs the preference of arbitration to litigation in commercial disputes.

44. In *Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016] eKLR* the court held that;

> ' The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.'

45. In Continental Homes Ltd vs Suncoast Investments Ltd [2018] eKLR where the court held that;

> ' In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the

arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.'

46. This Court is satisfied that the Applicant has failed to demonstrate how the Arbitral Award was in conflict with the public policy of Kenya. The jurisdiction of this court in setting aside the arbitration Award is limited to circumstances spelt out under Section 35 of the *Arbitration Act* and therefore this court lacks the authority to make an assessment on the merits of the arbitral award as to do so would be tantamount to the court sitting on appeal over the decision in question.

47. Having so determined, this court will not belabor itself in addressing the issue whereby the Applicant sought stay of execution pending the determination of; the upshot is that this Application thus fails.

Findings And Determination

48. For the forgoing reasons this court makes the following findings and determinations;

    i. This Court finds the application to set aside the Final Award of February 13, 2019 devoid of merit and it is hereby dismissed.

    ii. The application to stay the proceedings in the instant matter pending hearing of this application and/or until the Respondent's OS application dated May 20, 2019 and filed in the High Court of Kenya at Nairobi is heard and determined is found to be devoid of merit and it is hereby dismissed.

    iii. Mention on December 8, 2022 for directions on the OS dated May 20, 2019

    iv. Each party to bear its own costs on the application.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Miss Matasi for the Respondent

Oigara for the Applicant

Lucy----------Court Assistant