Bomas of Kenya Limited v Standard Investment Bank Ltd (Miscellaneous Case E230 of 2021) [2022] KEHC 17011 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)

Neutral citation: [2022] KEHC 17011 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CASE E230 OF 2021

A MABEYA, J

NOVEMBER 25, 2022

BETWEEN

BOMAS OF KENYA LIMITED ..... APPLICANT

AND

STANDARD INVESTMENT BANK LTD ..... RESPONDENT

RULING

1. Before Court are two applications for determination. The first is dated March 29, 2021 seeking orders to enforce a Final Arbitral Award. The second one is dated May 17, 2021 and seeks to set aside that Award.

2. Vide directions issued on June 24, 2021, the second application was ordered to be the lead application. Accordingly, Bomas of Kenya Limited is henceforth referred to as 'the applicant' and Standard Investment Bank Limited 'the respondent'.

3. The first application dated March 29, 2021 by the respondent was brought under Order 46 Rule 14 and 18 of the *Civil Procedure Rules*, Sections 36(1) and (3) of the *Arbitration Act* 1995, and Rules 4(1) and (2), 6 and 9 of the *Arbitration Rules 1997*.

4. The application sought orders that the Final Award published on May 4, 2020 by Hon Collins Namachanja FCIArb be corrected to reflect VAT applicable to costs of the reference as 16% and not 14% and that judgment be entered in favor of the respondent as against the applicant in terms of the said Final Award.

5. The application was supported by the Affidavit of Job Kihumba sworn on March 29, 2021. It was contended that the arbitrator was appointed on August 15, 2019 following a dispute between the parties. After hearing the dispute, he published the Final Award on May 4, 2020.

6. That the award was collected on February 18, 2021 due to the applicant's delay in paying its share of costs of the arbitral reference. That at the time of publication of the award, VAT had been revised to 14% from 16% as an economic relief during the Covid-19 Pandemic but the same was reversed back to 16% as of January 1, 2021.

7. The applicant responded to that application by filing a replying affidavit of Peter Gitau sworn on June 4, 2021 and the 2nd application dated May 17, 2021 that sought to set aside the Arbitral Award. It was brought under section 35(1), 35 (2) (iv) & 35 (2) (b) (ii) of the *Arbitration Act*, 1995 and Rule 4(2) of the Arbitration Rules 1997.

8. The grounds were that the dispute arose out of a contract by which the applicant had contracted the respondent for consultancy services to carry out a feasibility study on the proposed development of the Bomas International Convention and Exhibition Centre (BICEC). That the feasibility study was to be undertaken in four phases, but the respondent failed to complete the study within the contract term and failed to submit the Draft Final report and the Final report.

9. That the respondent declared a dispute and referred the matter to arbitration, and the applicant now sought to challenge the award published therein. The applicant identified two grounds. The first was that the arbitral award contained decisions beyond the scope of the reference to arbitration.

10. It was contended that the arbitrator addressed issues not in dispute between the parties being (a) the role of the transaction advisor, sequential nature of the reports, and requirement of standard of quality of the first three reports 11. The second ground was that the award was in conflict with the public policy of Kenya as it was tainted with bias and mala fides.

11. In opposition to that application, the respondent filed the Preliminary Objection dated May 18, 2021. It was to the effect that section 35(3) of the *Arbitration Act* bars any challenge to an Arbitral Award after 3 months from the date of delivery of the award as was held by the Court of Appeal in *Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR*.

12. That the notice by the Arbitral Tribunal is sufficient delivery so as to bar unnecessary delays as was held in *Transworld Safaris Limited v Eagle Aviation Limited d & 3 others [2018] eKLR High Court Miscellaneous Application No 238 of 2003 (unreported)*. That in the premises, the date of delivery was the date of notification by the Arbitral Tribunal that the award was ready, that is, May 4, 2020. That the application is out of time as it was to be filed by August 4, 2020.

13. The applicant responded to the preliminary objection vide the Replying Affidavit of Peter Gitau sworn on June 8, 2021. It was contended that upon conclusion of the hearing, the arbitrator wrote to the parties informing them that the award was ready for collection upon payment of the tribunal's final fee note. That the respondent paid its share vide cheque dated June 4, 2020 and communicated the same vide email dated June 5, 2020. That the applicant paid its share in two installments in August 2020 and February 2021 and communicated vide emails dated August 28, 2020 and February 11, 2021. That the arbitrator informed vide email dated February 17, 2021 that the award could be collected.

14. The applicant thus contended that the 3 months envisioned in section 35(3) of the *Arbitration Act* time by which an application to set aside the award ought to be brought began running on February 18, 2021 and ended on May 18, 2021. That the Court ought to interpret that law in the unique context of Covid-19 Pandemic which forced the applicant to close down its facilities, restaurants and cultural shows two months before the Arbitral Award was issued, thus causing it financial distress.

15. That the applicant wrote to the arbitrator vide letters dated July 21, 2020, June 9, 2020, September 29, 2020 and October 18, 2020 and made a proposal to make two installments and the arbitrator accepted the proposal. The email correspondences were marked as PG 13.

16. That the respondent had an opportunity to pay the balance of the tribunal's fees and was written to by the arbitrator on October 19, 2020. That vide letter dated October 21, 2020, the respondent communicated that it was unable to pay due to economic challenges occasioned by the Covid 19-Pandemic.

17. It was therefore contended that, the delay in settling the tribunal's fees was reasonable.

18. The applications and Preliminary Objection were canvassed by way of written submissions. The respondent's submissions were dated August 20, 2021 and December 6, 2021, while those of the applicant were dated October 28, 2021.

19. This court has considered those submissions as well as the entire record. Before going into the merits of the application dated May 17, 2021, the Court will first address the preliminary objection.

20. A preliminary objection was defined in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696* to be that which consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and if argued as a preliminary point may dispose of the suit.

21. The preliminary objection herein is based on a plea of limitation and thus raises a pure point of law. It therefore meets the ingredients of a preliminary objection. It revolves around section 35(3) of the Act. The section provides that a challenge to an award cannot be made more than three months from the date of its publication.

22. It is not in dispute that the award was published on May 4, 2020. The applicant however argued that due to the financial impact of the Covid -19 Pandemic, it was unable to promptly pay the Tribunal's fees. It only paid the first instalment in August 2020 and the second instalment in February 2021. That in the premises, time ought to have started to run from February 18, 2021 when it collected the award and ended on May 18, 2021. That the application was brought on May 17, 2021 and was therefore within the time stipulated by the Act.

23. Section 35(3) of The Act provides that;

> ' 3) 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.'

24. In *University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR*, the court was faced with a strikingly similar situation as the one before Court. In that case, the award was collected after a considerable amount of time due to none payment of the tribunal's fees by the applicant seeking to set aside the award. The court held: -

> ' This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy

of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.

Should it be any different because the arbitral tribunal has withheld the delivery of the award because of none payment of fees and expenses (Section 32B (3)? Counsel Ngatia argues that it would be a legal absurdity to deem that the award has been delivered when in fact it has been withheld. With respect I am unable to agree. Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.'

25. Further, in *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others [2005] eKLR*, it was held: -

> ' The question arises as to the meaning of 'had received' the arbitral award. This question was raised before Mr Justice Nyamu in the case of Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others HC Misc Application No 238 of 2003 where he held that in order to comply with Sec 35(3) the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection.
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> In its normal meaning 'receipt' means the actual obtaining of the arbitral award. In his ruling Nyamu, J has this to say about 'receipt': at page 27 B
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> 'Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the *Arbitration act* reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality.'

26. This Court associates itself with the foregoing. It is settled that the notice given by the arbitrator on May 4, 2020 was delivery, and any delays in actually collecting the award was on the applicant's part and cannot be visited upon the tribunal, nor the respondent. Consequently, the applicant only had till August 4, 2020 to bring the application, but instead brought it on May 17, 2021, 10 months out of time.

27. It is important to note here that, arbitration is a voluntary process which is undertaken on the assumption that it is speedy and convenient to the parties. It is therefore assumed that the parties will accept its results. That the finality of the process is buttressed by the strict timelines given for challenging the outcome.

28. As regards the reason advanced for the delay in collecting the award, the Covid-19 Pandemic, such an argument would have been suitable in an application to extend the time stipulated under section 35(3) of the Act, and not in an application to set aside the award.

29. The applicant's position is not that it was prevented from collecting the award due to lockdown, but because COVID-19 led to financial distress. The Court's view is that this can hardly be a reason for putting off the effective day to a later date. It may be a premise upon which a request for extension of time can be made. This observation is made the Court being aware that there is a school of thought that because of the absence of specific provisions for extension of time under section 35(3) of the Act, then the timelines set are cast in stone and can never be expanded. However, this Court believes that in exceptional circumstances, the Court has the inherent power to extend the timelines given.

30. In Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR, the Court of Appeal held that: -

> ' Besides the issue of jurisdiction as explained above, section 35 of the *Arbitration Act* bars any challenge even for a valid reason after 3 months from the date of delivery of the award. The last date for the challenge was 15th February, 2008. All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction.'

31. I say no more. The upshot of the foregoing is that, the preliminary objection is upheld and the application dated May 17, 2021 is struck out with costs.

32. The Court now turns to the application dated March 29, 2021. The same seeks the recognition and enforcement of the award. It is not disputed that the parties' contractual terms stipulated that any dispute between them be resolved by arbitration. It is also not in dispute that the parties referred their dispute to the arbitrator who published the final award.

33. Under section 32(A) of the Act an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act. The High Court under section 36 has the power to recognise and enforce domestic arbitral award on the following terms:

34. Section 37 of the Act, on the other hand, provides for grounds upon which the Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced.

35. The Court is satisfied that the applicant has met the pre-condition for enforcement of the award. It has provided the certified copies of the Contracts which contain the arbitral clause and a certified copy of the arbitral award. The applicant having established a case for recognition and enforcement of the Final Award, the burden is on the respondent to demonstrate that the Court should not recognise the same based on the grounds set out in section 37 of the Act.

36. The Court having struck out the application for non-recognition, the grounds therein cannot be entertained. The grounds set out in the replying affidavit dated June 4, 2021 are the same ones set out in the struck-out application. They are untenable.

37. Consequently, the Court finds no reason put forward by the applicant why the application dated March 29, 2021 should not be allowed.

38. However, the Court declines to allow prayer 2 which seeks orders to correct the applicable VAT on costs as 16% and not 14%. At the time the award was published being May 4, 2020, the applicable VAT rate was 14% as correctly observed by the arbitrator. The applicable VAT rates on the costs awarded is 14%.

39. The application dated March 29, 2021 partly succeeds and prayer 3 thereof is allowed as prayed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

A. MABEYA, FCIArb

JUDGE

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