



Lalji Mehji Patel & Company Limited v South Development Company Limited (Civil Case E388 of 2020) [2022] KEHC 16044 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E388 OF 2020
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

LALJI MEHJI PATEL & COMPANY LIMITED PLAINTIFF

AND

SOUTH DEVELOPMENT COMPANY LIMITED DEFENDANT

RULING

1. This ruling determines two applications; the application dated 12th March 2020 seeking to set aside the arbitral award and the application dated 2nd March 2020 for adoption of the award.
2. The applications originate from the arbitral award made in favor of the Plaintiff by Arch. MF Mutunga on 28th October 2019. While the plaintiff seeks the adoption of the Award, the defendant, on the other hand, seeks to set it aside. I will consider the application to set aside the Award first as its determination will have a bearing on whether or not the Award should be adopted.

Application dated 12th March 2020

3. The applicant (South Development Company) filed the application dated 12th March 2020 seeking the following orders:-
 1. That the arbitral award made by Arch Julius MF Mutunga on 28th October 2019 and received by the applicant on 9th January 2020 be set aside for being contrary to public policy to the extent that;
 - a. That the Honourable tribunal held that the respondent was not a consortium member contrary to the express provisions of, inter alia, the tender document and the Public procurement and Asset Disposal Act,



- b. The Honourable tribunal held that the respondent was not a consortium member despite the applicant adducing documentary evidence to that effect.
 - c. The Honourable tribunal held that the applicant was liable to pay the respondents interests contrary to the express terms of the Public Procurement and asset disposal Act tender documents and the contract between the parties herein
 - d. That whereas the Honourable tribunal found that the applicant was entitled to costs for the repairs undertaken by it in rectifying the defects it failed to award the same to the applicants;
 - e. That whereas the Honourable tribunal held that the respondent was not a consortium member it failed to award the applicants damages for delays in completing the project pursuant to the terms of the contract and;
 - f. That the Honourable tribunal failed to hold that the re tendering of the project was done in compliance with the Public Procurement and Asset Disposal Act
 2. That this Honourable court be pleased to make such further or other orders as it may deem appropriate including remitting the Arbitral award for corrective action on the impugned portions of the award on the issues in prayer (1) above
 3. That the costs of this application be provided for
 4. That this Honourable court do make any other order it deems mete and just
4. The application is supported by the affidavit of the applicant's Director Mr. David Kabubii Kuria and is based on the following grounds:-
1. That the arbitral award made by Arch Julius MF Mutunga (the arbitrator) on 28th October 2019 (the award) is in conflict with the public policy of Kenya.
 2. The award herein was received by the respondent and the applicant on 8th and 9th January 2020
 3. That subsequently both parties sought clarification, rectification and/or interpretation of the award pursuant to the provisions of section 34 of the Arbitration Act
 4. That upon consideration of the afore- mentioned requests the Honourable Arbitrator disposed of the same on 13th February 2020
 5. That pursuant to the provisions of section 35(3) of the arbitration Act the applicant herein has ninety (90) days within which to file the present application from the date of the disposal of the aforementioned requests,
 6. That the holding of the tribunal in its award has far reaching implications to enforce a contract entered into pursuant to a tendering process and have a negative implication to the well settled principles of public finance and its contrary to the public policy of Kenya having regard to the following amongst other factors
 - a. The constitutionally sanctioned principle of freedom of contract and parties right to contract as only they deem fit would be seriously eroded.



- b. It offends public policy for adjudicators of disputes such as the Arbitrator to depart from the well settled legal principles relating to interpretation of contracts.
 - c. Departure from the well settled legal principles aforesaid would occasion uncertainly, disorder and chaos to contracts generally and would undermine the certainty and predictability that is crucial to commercial contracts more so contracts governed by the Public procurements and assets disposal Act and contracts that utilize and are to be paid using public resources;
 - d. The award offends the guiding principles of public procurement as set out under section 3 of the Public Procurement and Asset Disposal act and the principles of Public finance as set out under article 201 of the Constitution
7. That it is in the interest of justice that this application is heard and be determined expeditiously.
 8. That this Honourable Court has jurisdiction pursuant to the provisions of section 35 to hear and determine issues raised herein.
5. The respondent (Lalji Mehji Patel Company Limited) opposed the application through the replying affidavit of its Legal Manager Ms. Cynthia Sheunda who states that the issue of applicant's membership to the consortium was one of the issues for determination before the arbitrator. She adds that the dispute between the parties was with respect to breach of the JBC contract. She avers that there were no prior engagements between the respondent and other entities that were material to the JBC Contract. She further avers that the respondent was, under the terms of the contract, not under a duty to supervise the applicant's agents and that the award does not contradict public policy.
 6. The application was canvassed by way of written submissions. The applicant submitted that the impugned Award offends public policy as it departs from the principles of interpretation of contract and Section 3 of the Public Procurement and Asset Disposal Act. It was submitted that the JBC was executed at the claimant's request to enable it procure financing for the project.
 7. The applicant argued that the court should interrogate the circumstances surrounding the execution of the contract and the conduct of parties prior to the execution of the contract. It was submitted that the arbitrator went against the general principles of interpretation of contracts thus offending public policy by holding that the claimant was not bound by the terms of the consortium agreement.
 8. It was further submitted that the claimant was not entitled to interest on delayed payments to the tune of Kshs 21,763,647.40 by virtue of being a member of the consortium.
 9. The respondent, on its part, submitted that the applicant had not established that the award offends public policy of Kenya. It was submitted that at no time did the respondent engage the Kenya Ports Authority Pension Scheme as the contract was only between the respondent and the applicant as private entities. The respondent maintained that parties herein are not state organs or public entities and that they are therefore not bound by the Public procurement and Asset disposal Act.

Analysis

10. I have considered the application, the respondent's response and the parties' respective written submissions. The main issue for determination is whether the application meets the threshold for setting aside an arbitral award as set out under Section 35(3) of the Act. The said section stipulates as follows:-



- (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 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 provisions 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.
11. The gist of the present application is that the arbitral award is against public policy. The applicant argued that the arbitrator departed from the principles governing interpretation of contracts thereby arriving at the finding that the respondent was not part of the consortium.
12. The respondent, on the other hand, maintained that the contract was between the applicant and the respondent and that at no time did the respondent enter into an agreement with the Kenya Ports Authority Pension Scheme. The respondent further stated that since both parties were private entities, the provisions of the Public Procurement and Assets Disposal Act do not come into play.
13. The issue of public policy was extensively discussed in the case of *Christ for All Nations vs Apollo Insurance Co. Ltd* [2002] 2 E.A 366, wherein the court held that:-
- “Public policy is a broad concept incapable of precise definition. An award can 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 any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality”.



14. Further, 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.”

15. The same issue was addressed by the Court of Appeal in *Kenya Shell Limited vs Kobil Petroleum Limited* [2006] eKLR, where it was held that:-

“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.”

16. In *Open Joint Stock Company Zambeznstony Technology vs Gibb Africa Limited* [2001] the court held as follows on public policy: -

“I may perhaps add that public policy, in my view, generally refers to the set of stoic-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure there from can be entertained. Public policy acts as a shield for safeguarding the public good, upholding Justice and morality and preserving the deep rooted interest of a given society.”

17. The Arbitrator held as follows in the Award:-

228: Under the circumstances and the documents before the tribunal and executed by the parties I am persuaded by the counsel for the claimant that a party cannot be bound by a contract they were not party to and neither was there an addendum to that contract to bind the claimant. Furthermore the claimant did not accept in writing the offer to replace EpcO Builders. Thus no contract existed on the basis of the offer as it was not accepted. The parties proceeded to sign the JBC Contract.

229 The respondent submission that the claimant is a consortium member is thus rejected

230 I find as a fact that the said memorandum of Agreement signed on 22.03.2006 was fatally mutilated by the time the contract was taking off with key members being replaced namely EpcO Builders Ltd and Mathu & Gichuri Associates with no corresponding Addendum as required of Contracts. It is never a question of a simple letter nor a question of trust.

231 The JBC Contract signed by the parties will thus prevail over the consortium Agreement

232 I therefore find and hold that the parties will be bound by JBC Contract signed on 16th 06.2009.

18. It was not disputed that the parties herein entered into a JBC contract dated 16th June 2009. The issue in contention is whether the Consortium agreement was binding on the respondent. The applicant faulted the arbitrator for not considering the circumstances of the case and the intention of the parties



in the contract. A perusal of the record reveals that the respondent herein was the company which replaced another company, Epco Builders Limited, in the project. While I note that the initial contract was by a consortium consisting of various professionals, no material was placed before this court to show that the respondent was aware of the consortium agreement or had, by its actions or intent, agreed to be bound by it. It is also noteworthy that interpretation of contracts does not fall under the purview of public policy.

19. In *Mahican Investments Limited and 3 Others vs Giovanni Gaida & Others* NRB HC Misc. Civil Application No. 792 of 2004 [2005] eKLR held that:-

“A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.”

20. I have perused the final award and I note that the arbitrator took time to address all the issues raised by the parties and gave a reasoned decisions over the same. I find that the mere fact that the applicant considers the Arbitrator’s interpretation of the terms of the contract and the law to be off the mark does not necessarily mean that the Award offends public policy. Indeed, as can be seen from the decision in *Mahican Investments* case (supra) courts have taken the position that they will not interfere with the Arbitrators interpretation of contracts as to do so would elevate the court to the appellate seat, thus going against the intent of the Arbitration Act on finality of Awards.
21. In the upshot, I find that the application does not meet the threshold for the setting aside of an award under section 35 of the arbitration Act. I find that the application lacks merit and I therefore dismiss it with costs.

2nd application for enforcement of the award dated 2nd March 2020

22. The application seeks the following orders:-

1. Spent
2. The Arbitral Award dated 28th October 2019 be recognized, adopted and enforced as an order of this court
3. Leave be granted to enforce the arbitral award as decree of this court
4. The costs of this application be provided for.

23. The application is supported by the affidavit of Parbat Premji Patel, the director of the plaintiff’s company, and is based on the following grounds:-

1. The parties submitted their dispute to be heard and determined by the Arbitrator pursuant to reference by the president of the architectural Association of Kenya on or about 18th December 2018.
2. The Arbitrator accepted the appointment of the sole Arbitrator on or about 10th January 2019
3. The parties were heard before the arbitrator and an award made in favour of the Applicant on the 28th October 2019



4. On the 22nd January 2020 the applicant sought clarification correction and/or interpretation of the award on 13th February 2020 the arbitrator affirmed the award made on 28th October 2019
 5. The statutory period of 30 days have lapsed, whereas the respondent has not taken steps to set aside the arbitral award.
 6. The arbitral award ought to be recognized. Adopted and enforced as order of this court.
 7. Leave of this court is required to enforce the award as the decree of the court
 8. There is no appeal preferred against the arbitral award and/or objection.
24. The main issue for determination is whether the application meets the conditions for the enforcement of an arbitral award. Section 36 of the Arbitration act sets out the legal framework governing enforcement and adoption of arbitral awards. 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.
25. In *Samura Engineering Limited vs Don-Wood Co Ltd* [2014] eKLR the court of held as follows:-
- “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...”
26. It is not disputed that the applicant has met the preconditions for enforcing the award and the application is unopposed. I have also seen the certified copy of the arbitral award and a copy of the arbitration agreement. I am satisfied that the applicant has met the conditions of Section 36 of the Arbitration Act.
27. In the upshot I find that the application dated 2nd March 2020 is merited and I therefore allow it as prayed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY



JUDGE

In the presence of:-

Mr. Kokebe for Osundwa for applicant.

Mr. Sichangi for respondent.

Court Assistant- Sylvia

