



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E875 OF 2020

BETWEEN

DREAMERS GREEN HOUSES LIMITED.....APPLICANT

AND

AGRICULTURE AND FOOD AUTHORITY,

HORTICULTURE CROPS DIRECTORATE.....1ST RESPONDENT

TOTAL HERBS KENYA LIMITED.....2ND RESPONDENT

RULING

Introduction

1. The Applicant has filed a Notice of Motion dated 27th July 2020 seeking the following reliefs:

1. *THAT the honourable court do stay orders against the execution of the arbitral award of Kshs. 2,400,600 by Mr Benjamin Tito, Head of Directorate, Agriculture Foods Authority, Horticultural Crops Directorate.*
2. *THAT the court be pleased to set aside the arbitral award of Mr Benjamin Tito, Head of Directorate, Agriculture Foods Authority, Horticultural Crops Directorate.*
3. *THAT the honourable court be pleased to declare the decision of Mr Benjamin M. Tito, Head of Directorate, Agriculture Foods Authority, Horticultural Crops Directorate unlawful and contrary to the provisions of the law.*
4. *THAT the arbitral proceedings and the award be declared null and void.*
5. *THAT the honourable court give an inter-parties hearing dated on priority basis.*
6. *THAT costs of this application be in the cause.*

2. The application is supported by three affidavits; an undated one and two replying affidavits sworn on 24th August 2020 and 13th October 2020 by the Applicant's director, Charity Karamuta M. Kiambati. It is opposed by the 2nd Respondent through Grounds of Opposition dated 23rd July 2020 and the affidavit of the 2nd Respondent's Managing Director, Millicent Rutere, sworn on 13th August 2020. The 1st Respondent relies on the affidavit of Benjamin Tito, sworn on 22nd September 2020. The parties filed written submissions which were highlighted by their respective counsel.

Background facts

3. The facts leading to the Award are common ground and are set out in the parties' respective depositions.

4. The Applicant is a company incorporating several farmers under it engaged in farming horticultural crops. It engaged the 2nd Respondent to guide it in setting up a model herb farm. The 2nd Respondent was required to assist it put up required structures and systems, the right crop mix in line with the market demand and connect it to key markets to enable it become a key herbs exporter. Unfortunately, the Applicant was dissatisfied with the services rendered by the 2nd Respondent. Since the 2nd Respondent was not paid by the Applicant, it referred the matter to the 1st Respondent for resolution.

5. The 1st Respondent, the Agriculture and Food Authority (“the Authority”) is established under **section 3** of the **Agriculture and Food Authority Act, 2013** to, *inter alia*, administer the **Crops Act, 2013** and carry out such function as may be assigned to it under the **Act** and the **Crops Act**. The Horticultural Crops Directorate is a department of the Authority. The **Crops Act** gives the Authority several functions regarding the formulation of general and specific policies in regard to scheduled crops, regulation of scheduled crops, registration of dealers of scheduled crops and issuance of licences to dealers of scheduled crops. Germane to this case are **section 6(h)** of the **Agriculture and Food Authority Act** which provides:

6. The Authority shall have all the powers necessary for the proper performance of its functions under this Act and in particular, but without prejudice to the generality of the foregoing, the Authority shall have power to

(h) undertake any activity necessary for the fulfilment of any of its functions.

6. There is also **section 41** of the **Crops Act** which provides:

41. Dispute Resolution by Arbitration

For purposes of expeditious resolution of disputes arising between farmers and other crop dealers the Cabinet Secretary shall make rules to provide the procedure for arbitration of such disputes.

7. It is not in dispute that the 2nd Respondent made a Complaint to the Authority claiming that the Applicant had not paid it Kshs. 2,400,000.00 for services rendered. The Authority notified the Applicant of the Complaint by letters dated 16th March 2020 and 6th April 2020. The Applicant responded to the Authority by a letter dated 23rd March 2020 denying the claim and accusing the 2nd Respondent for failing to meet its commitments. It requested the Authority to intervene in securing a refund of Kshs. 1,897,400.00 it had paid the 2nd Respondent.

8. The parties held a meeting on 21st April 2020 as evidenced by the minutes dated 23rd April 2020 titled, “*MINUTES OF AN ARBITRATION MEETING BETWEEN TOTAL FRESH AND GREENSCAPE ON 21ST APRIL 2020 AT HCD BOARDROOM.*” The minutes show that the parties failed to agree on certain issues, the chair of the meeting ruled that, “*Given that no contract was signed, each party to provide their expectation on the consultation services.*” A further meeting was scheduled for 6th May 2020 to be held preferably in Isiolo.

9. Although a meeting was not held on 6th May 2020, the Authority’s technical personnel met with the parties on 26th May 2020 and prepared a report following which the 1st Respondent issued the Award which was contained in a letter dated 22nd June 2020. The 1st Respondent dismissed the Applicant’s complainants regarding the quality and inadequate nature of consultancy services rendered by the 2nd Respondent. The 1st Respondent concluded that, “*Dreamers Green Houses Ltd has no option but to pay balances amounting to Kshs. 2,400,600/= (Two million four hundred thousand six hundred only) to Total Herbs Ltd (complainant) within 30 (Thirty) days w. e. f the 22nd day of June 2020.*”

Competence of the application

10. The 2nd Respondent objected to the affidavit of Charity Kiambati filed on the Applicant’s behalf on the ground that she was not a director of the Applicant and the annexures attached to those depositions were defective. I am of the view that in light of the uncontested facts which I have set out above, it is not necessary to resolve those issues as they are not key in the determination of the jurisdictional issue. In any case, I have read the correspondence and minutes of the meeting which have been furnished by the parties and it is clear that the said Charity Kiambati represented the Applicant at the meetings and proceedings and she is a person with knowledge of the issues and competent to depone the affidavit on behalf of the Company. Further, I am also of the firm view that proceeding on that basis will not prejudice any party. I hold that this approach finds resonance in **Article 159(2)(d)** of the Constitution which enjoins this court to apply the law without undue regards to technicalities.

Setting Aside the Award

11. The thrust of the Applicant’s case was that there was no agreement on appointment of an arbitrator or referring the matter to an arbitration as required by the law. Counsel for the Applicant referred to **section 4** of the **Arbitration Act** which requires that the arbitration agreement be in writing. In this case, the Applicant submitted that there was no arbitration agreement in the correspondence exchanged by the parties. Counsel cited the case of **Nyutu Agrovet Limited v Airtel Networks Limited NRB CA Civil Appeal (Application) No. 61 of 2012 [2015] eKLR** where the Court of Appeal held that arbitration as a dispute resolution mechanism is not imposed on parties but is chosen by the parties freely. Counsel argued that since there was no basis for arbitration, it was entitled to apply to the High Court to set aside the award on the grounds set out in **section 35** of the **Arbitration Act**.

12. The 1st Respondent submitted that the arbitration was *sui generis* in the sense that it was distinct from the arbitration under the

Arbitration Act and in this case, the 1st Respondent was exercising arbitral powers under **section 41** of the **Crops Act**. Counsel for the 1st Respondent submitted that the arbitrator exercising those powers was not obliged to observe the requirements of the **Arbitration Act**. Counsel pointed out that the **Arbitration Act** only applies where the **Crops Act** is silent as **section 39** thereof provides that:

If any conflict arises between the provisions of this Act and any other Act with respect to the development, marketing or regulations of a scheduled crop, the provision of this Act shall prevail.

13. The 2nd Respondent opposed the application on the ground that the Applicant ought to have complied with the provisions of the **Arbitration Act** and the **Arbitration Rules, 1997**. Counsel cited the provision of **sections 12** and **14** which provide for the procedure of challenge of the Arbitrator within a prescribed time and the manner of recourse to the High Court. It also relied on **section 14(2)** of the **Arbitration Act** to argue that the 1st Respondent was immune from liability for any acts or omission done in good faith in discharge of his duties. The 2nd Respondent impugned the application by submitting that the Applicant has not stated with precision the grounds for setting aside the award under **section 35** of the **Arbitration Act**. Finally, the 2nd Respondent urged that the application ought to have been brought by summons in chambers as required by the **Arbitration Rules, 1997**.

14. Arbitration is one of the accepted modes of dispute resolution in Kenya. This court, under the provisions of **Article 159(2)(d)** of the Constitution is enjoined to promote alternative dispute resolution as means of resolution of disputes. **Article 159** of the Constitution provides as follows:

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law. [Emphasis mine]

15. This means that where there are statutory provisions that provide for alternative dispute resolution the court ought to defer to and support such processes. This principle has been embraced by the court in several decisions of our courts and was well articulated by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425** where it held that;

In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

16. The case at hand involves arbitration as a mode of dispute resolution. The **Black's Law Dictionary (10th Ed)** at p. 125 defines arbitration as, "A dispute resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute." The key feature of arbitration is the parties' ability to choose a neutral third party to make a final and binding decision. In **Goodison Sixty One School Limited v Symbion Kenya Limited [2017] eKLR**, Mwangi J., observed as follows regarding different approaches to arbitration in Kenya;

*32. For ease of characterisation, it may thus be safe to refer to arbitration when conducted under the provisions of special proceedings of court as court-annexed arbitration. In this type of arbitration under **Order 46 (of the Civil Procedure Rules)**, the court has a more extensive involvement in the arbitral process, for example, setting the time for making the award (see rule 3(1)), issuing directions on the statement of a special case for the opinion of the court (see rule 12), and the court superseding the arbitration where the award is set aside (see rule 16(3)).*

*33. On the contrary, arbitration that is wholly consensual at inception proceeds under the **Arbitration Act**. Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of **section 4**, signifying the clear intent of the parties' to resolve their dispute through arbitration.*

17. Another form of arbitration is statutory mandated arbitration which is found in certain statutes involving public authorities. For example,

section 62(1) of the *Kenya Ports Authority Act (Chapter 391 of the Laws of Kenya)* provides that:

62(1) In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Registrar of the Nairobi Centre for International Arbitration established under the Nairobi Centre for International Arbitration Act, 2013.

A similar provision is to be found in section 33 of the *Kenya Airports Authority Act (Chapter 395 of the Laws of Kenya)* while section 83 of the *Kenya Railways Act (Chapter 397 of the Laws of Kenya)* provides that the Chief Justice shall appoint a single arbitrator if parties fail to agree on an arbitrator. Another instance is to be found in section 56(3) of the *National Government Constituencies Development Fund Act, Act No. 30 of 2015* which provides that disputes of a civil nature under the Act shall, where necessary, be referred to an arbitration panel in the first instance before being referred to court.

18. The Supreme Court in *Modern Holdings (EA) Limited v Kenya Ports Authority SCK Pet. No. 20 of 2015 [2020] eKLR* upheld the constitutionality of these statutory mandated arbitration clauses as part of the constitutional dispute resolution architecture while preserving the jurisdiction of the High court to intervene. It stated as follows:

50. To the above extent, we agree with the respondent that the High Court maintains jurisdiction over the arbitrations under Section 62 of the KPA Act, but for two reasons. One, arbitration awards are adopted by courts and enforced as court decrees—Section 36(1) of the Arbitration Act. Secondly, arbitrations are quasi-judicial proceedings. As such, they are also subject to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution. It follows therefore that, if the arbitration under Section 62 of the KPA Act is not conducted in accordance with the law of the land, the aggrieved party still has recourse to the High Court for relief.

19. Turning to section 41 of the *Crops Act* which the 1st Respondent relied upon to underpin his powers, it is evident that the provision is purely facilitative as it requires the parties and not the Cabinet Secretary to make rules. The assertion of the authority of the 1st Respondent to arbitrate a dispute and make a final and binding award leaves a lot of questions which cannot be resolved in the absence of rules. I will only highlight two problematic issues which, assuming section 41 of the *Crops Act* grants the 1st Respondent power to arbitrate over disputes, arise.

20. First, power to make rules is limited to disputes between farmers and dealers. The word dealers is not defined in the *Crops Act* but section 2 thereof states; “*dealing in crop*” includes collecting, transporting, storing, buying or selling crops products but in the case of food crops, excludes non-commercial activity”. Is a consultant such as the 2nd Respondent engaged to provide consultancy services a dealer in light of the statute?

21. Second, what is the role of choice of the parties in appointment of the arbitrator? The statutory provisions I have cited earlier in this decision all provide for the parties to agree on an arbitrator in the first instance before a default appointment is made by another authority. Section 41 of the *Crops Act* does not provide for the appointment of an arbitrator or the default appointment in the event the parties fail to agree on one. In the statutory provisions I have cited, I have not seen a situation where a public authority itself is the arbitrator in the manner assumed by the 1st Respondent in this case.

22. I find and hold that section 41 of the *Crops Act* is merely facilitative as it requires the Cabinet Secretary to make rules of procedure. Such rules will of necessity deal with some of the issues I have raised. I also find and hold that the Authority, except with the consent of the parties, does not have the power to impose arbitration on the parties and issue a binding award. The Award issued by the 1st Respondent cannot be enforced as such unless there are rules of procedure promulgated for that purpose. It is therefore null and void.

23. Before I conclude, I propose to deal with the application of the *Arbitration Act* which the parties relied on in their submissions. An arbitration to which the *Arbitration Act* applies must be consensual in nature hence the requirement in section 4 thereof, that the arbitration agreement must be in writing. There is no allegation by either the Applicant or the 2nd Respondent that in their dealings they agreed to refer any dispute to an arbitrator and in particular to the 1st Respondent. Since the process was neither voluntary nor consensual, the *Arbitration Act* does not apply to an arbitration conducted under *Crops Act* in the absence of an agreement by the parties.

Recourse to the High Court

24. In *Modern Holdings (EA) Limited v Kenya Airports Authority (Supra)*, the Supreme Court made it clear that even where the arbitration is underpinned by statute, the supervisory jurisdiction of the High Court is not ousted. The High Court may intervene in an appropriate case and a party aggrieved may approach the court for relief in any manner provided by the law. In this case, I have already found that the 1st Respondent lacked authority to arbitrate the dispute referred to it by the 2nd Respondent and reach a binding award.

25. I would be remiss if I did not comment on the issue of procedure. I have looked at the correspondence between the parties and it is not clear that the complaint was commenced as an arbitration. The 1st Respondent did not alert the parties that he was in fact conducting an arbitration that would result in the binding decision. During the entire process, the 1st Respondent did not preside over the sessions. In fact, meetings between the parties were presided by different officers from the Authority. It is thus difficult to determine who was the neutral third party engaged to resolve the matter. All this goes to show that the legislative intent of promoting arbitration must be underpinned by rules guiding and facilitating the process.

26. Having reached this position, I do not propose to deal with the merits of the Award as the parties are at liberty to pursue their remedies elsewhere.

Disposition

27. For the reasons I have set out above, I allow the Notice of Motion dated 27th July 2020 on terms that the *arbitral award dated 22nd June 2020. by Mr Benjamin Tito, Head of Directorate, Agriculture Foods Authority, Horticultural Crops Directorate* be and is hereby set aside.

28. In light of the circumstances of this case, I direct that each party bear their own costs.

DATED and DELIVERED at NAIROBI this 18th day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Muchiri instructed by Maina Muchiri Company Advocates for the Applicant

Mr Mutai instructed by Kipsang' Mutai and Company Advocates for the 1st Respondent.

Mr Abubakar instructed by Magee Law LLP for the 2nd Respondent.