



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

MISC. APPLICATION NO. E1285 OF 2020

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE

AN ARBITRAL AWARD

BETWEEN

DAS GROUP KENYA LIMITED.....APPLICANT

AND

MAYFAIR HOLDINGS LIMITED T/A PECHE FOODS.....RESPONDENT

RULING

1. The parties entered into a three-month processing agreement dated 29th December 2012 (“the Agreement”) where the Respondent was to process and store the Applicant's raw fish stocks into fillets and by-products, for purposes of export and local sale. The Agreement provided, inter alia, that the Respondent would process the whole fish availed by the Applicant of up to 90,000 Kgs per month at a consideration of USD 54,000 per month plus VAT, provided that, any quantities over and above the said ceiling would be processed at the rate of USD. 0.45 per kg whole fish plus VAT. Further, the Agreement provided that the contract price of USD 54,000 would be payable in advance and before the first day of the relevant month save that sums due on excess products would be payable with the payment of the succeeding month and in any event such sum shall be payable on or before the 7th of the succeeding month.

2. The Agreement also provided that the parties would undertake a reconciliation of all financial obligations of both parties under the Agreement at the end of every month and thereafter the Respondent would issue an invoice to the Applicant for outstanding amounts payable. In case of failure to pay in time, the Agreement stated that the Respondent would have the right of lien over any products, by-products, including fish maws and could sell the same at the prevailing market price by private treaty to recover the debt then owed, storage charges if any, as well as the cost of such sale.

3. A dispute arose between the parties when the Applicant claimed that the Respondent breached the Agreement by failing to call for a joint reconciliation and as a result, the Applicant contended Respondent could not issue an invoice to it and in turn the right of lien over stocks did not and could not arise. The Applicant accused the Respondent of breaching the Agreement by impounding and confiscating its stock held at its processing plant, in purported exercise of lien, leading to losses being suffered by the Applicant.

4. **Clause No. 12** of the Agreement provided that any dispute between the parties arising from the Agreement was to be referred for resolution to a sole arbitrator appointed Chartered Institute of Arbitrators, Kenyan Chapter if the parties fail to agree on one. As the parties could not agree on an arbitrator, the Institute nominated Ms Carole Ayugi, MCI Arb, as an arbitrator (“the Arbitrator”). The Arbitrator heard the Applicant’s claim and the parties’ arguments and thereafter published the Final Award dated 26th October 2020 (“the Award”) dismissing the Applicant’s claim.

5. Being aggrieved with this decision by the Arbitrator, the Applicant has now approached the court by the Originating Summons dated 7th December 2020 made, inter alia, under **section 35(2)(b)(ii)** of the *Arbitration Act, 1995* (“the *Arbitration Act*”) seeking to set aside the entire Award. The application is grounded on the affidavits of Samuel Adada Ondiek, the Applicant’s Managing Director, sworn on 7th December 2020 and 29th March 2021 respectively. The application is opposed by the Respondent through the replying affidavit of Pals Wagenaar, its Manager, sworn on 27th January 2021. The parties filed written submissions in support of their respective positions.

6. I have gone through rival pleadings together with the submissions and authorities cited by the parties. Apart from the substance of the application, the Respondent challenges the jurisdiction of the court on the ground that reference to arbitration was made in **Kisumu HCCC No. 44 of 2014** and arbitral proceedings took place in Kisumu. Without belabouring this point, I hold that proceedings to set aside an arbitral award are made under **Rules 6 and 7 of the Arbitration Rules, 1997** which do not require that the application be made in original suit in which the reference was made. In other words, the application to set aside an arbitral award is an originating application filed independently. On the issue of territorial jurisdiction, I hold that the High Court has country wide jurisdiction which is not limited by the **Arbitration Act or Rules** made thereunder. In any case, any objection to the proper High Court in which the matter ought to have been filed is a matter of convenience of the parties. I am of the view neither party is prejudiced in the manner in which the matter has been dealt with as they have had the opportunity to make their respective submissions.

7. The main issue for determination is whether the Award ought to be set aside on the ground that it is in conflict with the public policy of Kenya. It is common ground that the court's jurisdiction in setting aside an award is circumscribed by **section 35 of the Arbitration Act** which, at the part material to this application, provides as follows:

35 (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if-

(a)-----

(b) the High Court finds that-

(i) -----

(ii) the award is in conflict with the public policy of Kenya:

8. The Applicant impugns the Award mainly on the ground that it is in conflict with the public policy in Kenya. The Applicant contends that the Award was made in violation of settled law in Kenya that the courts and arbitral tribunal cannot re-write contract for the parties. The Applicant accused the arbitral tribunal of re-writing the contract contrary to the decision of the Court of Appeal in **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR** where the court observed that, "A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

9. The parties also accept the *dicta* of Ringera J., where he explained the scope of public policy as a ground for setting aside as an arbitral award in **Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366** as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality....."

10. It is not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. Ringera J., acknowledged this principle when he observed that:

[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act.

11. This point is also underpinned by the decision of the court in **Mall Developers Limited v Postal Corporation of Kenya HC ML Misc. No. 26 of 2013 [2014] eKLR** where 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.

12. With the principles I have outlined above in mind, I now turn to consider the award and whether it violates the public policy of Kenya. I have gone through the Award and note that on 12th September 2018, the parties by consent, agreed on a joint list of issues for determination which included:

*a) Whether by **Clause 2** of the Agreement consideration from the Claimant was to be prorated; USD 54,000 per 90,000 kilograms of fish processed per month plus VAT, usd 0.45 per kilogram whole fish plus VAT for any fish processed above the monthly ceiling of USD 54,000 for 90,000 kilograms?;*

*b) Whether in accordance with **Clause 3** of the Agreement, invoice payment by the Respondent to the Claimant could issue without*

and before a joint reconciliation of accounts and financial obligations by the parties

c) Whether in accordance with **Clause 3** of the Agreement, payment could be rightly demanded and made before issuance of an invoice for payment after a joint reconciliation of accounts and financial obligations by the parties?

d) Whether by **Clause 3** of the Agreement a right for lien over the Claimant's stock could accrue before issuance of an invoice for payment, issued after a joint reconciliation of accounts and financial obligations by the parties

e) Whether the Claimant called upon the Respondent to undertake a joint reconciliation of accounts, to enable ascertainment of the chargeable sums before issuance of an invoice and before payment, in accordance with **Clause 3** of the Agreement?

f) To the extent that the Respondent declined several invitations to undertake a joint reconciliation of accounts and financial obligations, before issuance of an invoice to the Claimant, whether duty to pay had accrued to the Claimant, under **Clause 3** of the Agreement

g) To the extent that a joint reconciliation of accounts and financial obligations was never undertaken, whether any invoice was issuable by the Respondent, under **Clause 3** of the Agreement;

h) To the extent that a joint reconciliation of accounts and financial obligations was never undertaken, a valid invoice never issuable or issued, and as a result there never arose a situation of "failure to pay in time" by the Claimant, whether a right of lien accrued to the Respondent to impound/confiscate the Claimant's stock for non payment?

i) Whether as a result of the impound/confiscation of its stock by the Respondent, the Claimant suffered justiciable loss, under the Agreement?

j) Whether the Claimant suffered loss as particularized at paragraph 29 (a-n) of the Statement of Claim?

k) Whether the Claimant is entitled to the reliefs in the Statement of Claim.

13. A further perusal of the Award indicates that the Arbitrator highlighted the parties' arguments in each of the issues raised above and by making references to the said arguments and provisions of the Agreement, gave a decision on each issue and an interpretation of the Agreement based on evidence and arguments.

14. Having read the Award, I find that the Arbitrator was meticulous and in determining issue (a) above, even cautioned herself on the danger of re-writing the Agreement in arriving at the conclusion that consideration from the Applicant for any quantity up to 90,000 kg was not to be prorated and was charged at USD 54,000 and which was required to be paid in advance, however for any quantity processed above the monthly ceiling of 90,000 kg, the rate has been provided in the Agreement as USD 0.45 per kilogram whole fish plus VAT. The same can also be said of the Arbitrator's decision to interpret **Clause 3** of the Agreement to the effect that the Respondent's right of lien over the Applicant's stock accrued when the Applicant failed to make the advance payment before the first day of every month and that the same could accrue before issuance of an invoice for payment. This conclusion and interpretation cannot mean that the Arbitrator violated the public policy on the law of the right to liens.

15. In effect what the Applicant seeks is for the court to reconsider the arguments made and come to a different conclusion that favours its position. In effect the Applicant wishes the court to exercise appellate jurisdiction. The court cannot set aside the Award or declare the same to be against public policy simply because the Arbitrator came to a wrong conclusion or that the court would have interpreted the Agreement differently (see **Instalaciones Inabensa SA v Kenya Electricity Transmission Co. Ltd ML HC Misc Application No. 445 of 2019 [2021] eKLR**). The manner in which an arbitral tribunal deals with the evidence is within its province and jurisdiction and this court cannot interfere as doing so would be as if the court is sitting as an appellate court which is not within the intendment and purview of **section 35** of the **Arbitration Act**. It also does not matter how obvious a mistake on issues of fact might be, or what the scale of the financial consequences of the mistake of fact may be, the court cannot convert itself into an appellate court (see **Kenya Oil Company Limited & Another vs. Kenya Pipeline Co. NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR**).

16. Ultimately, the Arbitrator examined and determined all the issues presented by the parties in detail and within the brackets of the Agreement. I therefore find and hold that the findings and conclusions set out in the Award do not rise to the level of a violation of public policy to warrant the setting aside of the Award.

17. I dismiss the application with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mukuha instructed by Echessa & Bwire Advocates, LLP for the Applicant.

Mr Yogo instructed by Otieno, Yogo and Ojuro Advocates for the Respondent.