REPUBLIC OF KENYA

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 260 OF 2019

VILLA CARE MANAGEMENT LIMITED.....APPLICANT

-VERSUS-

KENGEN RETIREMENT BENEFITS SCHEME.....RESPONDENT

RULING

Background

1. Sometime in July 2009, the respondent herein, Kengen Retirement Benefits Scheme, a scheme established under the Retirement Benefits Act No. 3 of 1997, contracted the applicant (Villa Care Management Ltd) to manage its apartments, market the apartments to prospective tenants, let and collect rent from tenants residing in the apartments and bank the rental income in the respondent's bank account. The terms of their agreement were reduced into writing in an agreement dated 24th April 2012.

2. Under the agreement the applicant was obligated to indemnify the respondent against all liabilities, obligations, loss and damages suffered as a result of breach of the terms of agreement by the applicant.

3. Following the termination of the agreement, an audit was conducted on the services that had been rendered by the applicant which report blamed the applicant for financial loss in the sum of Kshs. 166, 102,388.

4. The respondent issued a demand letter to the applicant for the said sum of Kshs. 166, 102,388 which the applicant did not pay thus necessitating reference of the dispute to arbitration pursuant to an arbitral clause contained in the agreement. Under the said agreement, the applicant was required to account for all the rent collected from respondent's apartments.

5. The arbitral proceedings were conducted by way of oral hearings where the respondent presented the evidence of six witnesses while the applicant called two witnesses. On 20th May 2019, the arbitrator published an award in favor of the respondent in the following terms:

> (iii) ***The applicant pays the respondent the sum of Kshs. 166,102,388/=***
>
> (iv) ***The sum of Kshs. 166,102,388/= shall attract interest at the rate of 12% per annum from the date of filing the Statement of Claim being 13th February 2017 until payment in full;***
>
> (v) ***The applicant pays the respondent the sum of Kshs. 5,806,533/= being the legal costs incurred in the arbitration proceedings;***
>
> (vi) ***The sum of Kshs. Kshs. 5,806,533/= shall attract. interest at the rate of 12% per annum from the date of the award until payment in full; and***
>
> (vii) ***The applicant pays the respondent all the arbitration costs incurred in these proceedings being the Arbitrator's fees and other outgoings.***

6. The arbitral award precipitated the filing of 2 applications that are the subject of this ruling, namely; the application dated 14th August 2019 and 29th November 2019. Both applications were canvassed by written submissions which the parties' respective advocates highlighted on 11th March 2021.

Application dated 14th August 2019

7. Through the application dated 14th August 2019 the applicant seeks to set aside the arbitral award of the sole arbitrator Dr. Kariuki

Muigua, CIArb published on 20th may 2019, (the Award) in the matter of an arbitration between ***Kengen Staff Retirement Benefits Scheme vs. Villa Care Management Limited.***

8. The application is supported by the affidavit of the applicant's Managing Director **Mr. Daniel Ojijo** and is premised on the grounds that: -

i. The award dealt with issues that were outside the scope of the arbitration agreement

ii. The award is inimical to the precepts of public policy including natural justice, fairness and equity

iii. The arbitral procedure was not in accordance with the arbitration Act 1995 and

iv. It was deprived of the opportunity to present its case in the course of the Arbitration proceedings

v. The issues, facts and circumstances that progressively arose from the year 2009 and that cumulatively led to the alleged loss of the Kshs 166,102,388/= occurred prior to the execution of the Arbitration agreement. Accordingly, the Arbitral award dealt with disputes outside the scope of the Arbitration Agreement

vi. Firstly, the tribunal's reliance on the Audit report in reaching its conclusion was offensive, illogical, torturous, unfair and ultimately ran counter to public policy for the following reasons: -

a) Its preparation was shrouded in mystery and devoid of any notice or reference to the Applicant herein prior to its preparation, in spite of being the subject of the audit

b) The witness unequivocally testified that he did not make any inquiries from the respondent concerning any single issue for which clarification was required

c) The respondent had failed to furnish it with the Statement of account for the Custody or trustee account, in spite of the oral evidence having been adduced in the course of proceedings to the existence of the said account

d) The Auditor failed to adhere to the International standards of auditing including making direct enquiries about the existence of fraud from operating personnel not directly involved in the reporting process so as to accord the applicant an opportunity to convey information to the auditor which may not otherwise have been communicated and

e) The audit report was prepared by an unqualified person who had more so, expressly admitted shortfalls in his qualifications to conduct the audit and who had expressly admitted shortfalls in his qualification to conduct the audit and who had expressly admitted that the audit report concerned itself with Probable and not Actual loss.

f) The applicant was deprived the opportunity to present its case. The respondent willfully failed to involve it in the preparation of the Audit report in addition to failing to furnish it with pertinent information that led to the Auditor arriving at his decision. The report is what ultimately informed the Arbitrators decision.

9. The respondent opposed the application through the replying affidavit of **Mr. Josphat Muriuki** who states that the application does not disclose any ground for setting aside the arbitral award as the award dealt with a dispute contemplated by the parties in the agreement dated 24th April 2012. He adds that the award was not contrary to public policy. He further states that the claim that the arbitration agreement only dealt with matters that arose between 24th April 2012 and 30th September 2015 should have been raised during the arbitral proceedings. He further avers that the applicant was accorded the opportunity to present its case before the Tribunal and that the award will not unjustly enrich the respondent as it is in respect to money held in trust for the pensioners.

10. Parties canvassed the application by written submissions.

11. The applicant submitted that the award dealt with issues that were outside the scope of arbitration by determining allegations of breach falling on or before 24th April 2012 and after 30th September 2015 which are periods that were not contemplated under the arbitration agreement.

12. The applicant submitted that the tribunal's reliance on the Audit report in reaching its conclusion contravened public policy as it had the effect of depriving the applicant of the benefit of the principles of natural justice. It was submitted that the award offends public policy, is unfair, unjust, and punitive as it will unjustly enrich the respondent.

13. It was the applicant's case that the arbitrator failed to consider the fact that the terms of the agreement had been mutually varied by the parties such that the applicant, on the respondent's instructions, ceased to collect rent from early 2009.

14. The respondent, on the other hand, submitted that under the doctrine of *kompetenz kompetenz*, the arbitral tribunal had the authority to determine any questions relating to its jurisdiction and that the applicant ought to have raised the issue at the tribunal before submitting its defence. The respondent submitted that the applicant was accorded the opportunity to present its case at the tribunal where he had the chance to challenge the audit report and cross examine the witnesses. Counsel cited the decision in ***National Oil Corporation of Kenya Limited Vs Prisco Petroleum Network Limited [2014] eKLR*** where the court observed that the issue of the respondent being denied an opportunity to be heard would not arise since Section 26(c) of the Arbitration Act allows the tribunal to continue with the proceedings when a party to an arbitration fails to appear.

15. On to public policy, the respondent submitted that the burden of proof rested on the applicant to prove that the award was against public policy. Counsel submitted that allowing the orders sought in the application will be akin to the court sitting on appeal in the decision of the Tribunal which is not the intention of Section 35 of the arbitration Act.

Analysis and Determination

16. I have carefully considered the application, the response tendered by the respondent and the parties' rival arguments. I note that 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.

17. The applicant herein seeks to have the arbitral award set aside the Arbitral award for reasons that;

a. The award dealt with issues that were outside the scope of the arbitration agreement

b. The award was inimical to the precepts of public policy including natural justice, fairness and equity

c. The arbitral procedure was not in accordance with the arbitration Act 1995 and

d. It was deprived of the opportunity to present its case in the course of the Arbitration proceedings

18. On the claim that the award dealt with issues that were outside the scope of the arbitration agreement, the applicant contended that the issues and facts in controversy arose in the year 2009 when the loss of Kshs 166,102,388/= is alleged to have occurred. According to the applicant, this was the period before the execution of the arbitration agreement on 24th April 2012 in which case, the arbitral agreement was not applicable to the alleged loss. The applicant maintained that the arbitration agreement could only deal with matters that arose between 24th April 2012 and 30th September 2015 and that any matter or claim falling before or after the above mentioned dates fell outside the Tribunal's purview.

19. In a rejoinder, the respondent observed that any contention by the applicant that the arbitration agreement could only deal with matters that arose between 24th April 2012 and 30th September 2015 ought to have been raised during the arbitral proceedings.

20. In ***Synergy Credit Limited vs Cape Holdings Limited*** **NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR where the Court of Appeal** observed as follows regarding the issue of a dispute not contemplated in the terms of the reference: -

"In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be

considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc. (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

21. I note that at Clause 11 of the parties' agreement provided for arbitration as follows: -

11.1 The parties agree that they will make every effort to resolve the disputes between them in an amicable and formal manner. However, in the event that this is not possible, the disputes shall be referred for arbitration upon which the parties shall agree on the arbitrator

11.2 If the parties fail to agree on the arbitrator, they shall refer the matter to the tribunal of the Chartered institute of Arbitrators Kenya Branch upon which request of either party in accordance with the provisions of the Arbitration Act 1995(or any other succeeding legislation) the appointment of the arbitrator shall be final and binding on the parties

11.3 The parties further agree that all disputes, differences or questions between the client and the manager with respect to any matter or thing arising out of or in relation to the agreement except and in so far as may be otherwise provided in the agreement shall be referred to one arbitrator. Arbitration shall take place in Nairobi, in the republic of Kenya. The decision of the Arbitrator shall be final and binding on the parties and may be made an order of competent jurisdiction.

11.4 It is further agreed by the parties that during the pendency of any arbitration, the parties shall continue with the services in accordance with the provisions of this agreement.

22. The dispute between the parties herein arose following an audit that was conducted concerning the services that were rendered by the applicant after the term of the agreement had lapsed when the respondent alleged breach of contract. I have perused the record and the pleadings of the arbitral proceedings as well as the arbitration clause and I note that a simple reading of the arbitral clause especially at clause 11.3 shows that the parties agreed to refer all disputes, differences or questions between them with respect to <u>any matter or thing arising out of or in relation to the agreement</u>, except and in so far as may be otherwise provided in the agreement, to arbitration.

23. It is not in dispute that arbitral award related to breach of the agreement and was therefore on a matter directly arising out of the agreement. I find that if a certain period of the parties' engagement was to be excluded from arbitration, then nothing would have been easier than for the parties to state so in the agreement. It is therefore my finding that the award was on matters that fell within the scope of the arbitration.

24. On public policy, the applicant argued that the award was contrary to public policy and that the tribunal's reliance on the audit report was offensive illogical, torturous, unfair and ultimately contravened public policy.

25. On its part, the respondent submitted that the onus of proving that the award was contrary to or against the public policy rested with the applicant. According to the respondent, 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.

26. 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."

27. 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 <u>national interest</u>. 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."

28. 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."

29. 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."

30. Having regard to the position taken in the above cited cases, it is clear that in order to prove that an award is against the public policy the applicant has to demonstrate that it is inconsistent with the Constitution or any written law, inimical to the national interest of Kenya or contrary to justice and morality. My finding is that the applicant's claim that the award is offensive, unfair and unjust was not backed by any tangible evidence and does not rise to the level of a violation of public policy so as to warrant the setting aside of the award. I further find that the mere fact that the applicant perceives the Award to be or a large sum of money does not necessarily mean that the respondent was not entitled to the amount awarded by the arbitrator or that the award is against public policy so as to warrant its setting aside.

31. On the issue of whether the arbitral proceedings were conducted in accordance with the arbitration Act, the applicant submitted that the procedure adopted by the tribunal deprived it of an opportunity to present its case. The applicant faulted the tribunal for relying on the Audit report without taking cognizance of the fact that the applicant was not involved in the preparation of the report in breach of section 20(3) of the arbitration Act. The applicant further stated that the tribunals adoption of a procedure that deprived the applicant of an opportunity to present its case by dint of its reliance on hearsay evidence violated public policy thus warranting setting aside of the award.

32. The respondent on the other hand argued that by asking the court to re-assess and reevaluate the evidence placed before the arbitrator, the applicant is effectively inviting the court to sit on appeal on the said award.

33. My finding is that the jurisdiction of this court in setting aside the arbitration Award is limited to circumstances spelt out under Section 35 of the Arbitration Act. The procedure adopted in the arbitration proceedings is not one of the grounds listed in the arbitration Act under the Section 35 for setting aside an award. I therefore find that 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.

34. Turning to the claim that the Tribunal's reliance on the audit report was unfair and unlawful as it was not informed of that an audit was being conducted. I note that the applicant did not state that it was precluded from conducting its own audit or from cross examining the respondent's witness who carried out the audit. I am therefore unable to find that there was any unfairness or illegality in the adoption of the audit report submitted by the respondent.

35. My further finding is that by electing arbitration as their dispute resolution mechanism, the parties herein expressly limited the court's interference or involvement in the matter. I am guided by the decision in ***R. Durtnell vs Secretary of State for Trade and Industry [2001] 1 ALL ER (Comm) 41*** where the court stated as follows while referring to a debate in the House of Lords on the English Arbitration Act of 1996: -

> ***"We started from the principle that if parties have chosen arbitration rather than courts to resolve their dispute, this decision must be respected l...] We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward or where there has been a manifest injustice [...] we are freeing up the process from unwarranted reference or unwanted inference by them" (Emphasis added).***

36. For the above reasons, I find that the applicant did not establish a basis for setting aside the arbitral award dated 20th May 2019. Consequently, I dismiss the application dated 14th August 2019 with costs to the respondent.

Application dated 29th November 2019.

37. The respondent filed the application dated 29th November 2019 seeking the following orders: -

> ***1) The honourable court be pleased to order the respondent to deposit the entire award in the sum of Kshs 222,487,835.90 as security within 14 days from the date of such order.***
>
> ***2) In default, the application dated 14th August 2019 be dismissed***
>
> ***3) The costs of this application be borne by the respondent***

38. The application is brought under Section 37(2) of the Arbitration Act, is supported by the affidavit of **Mr. Josphat Muriuki** and is premised on the following grounds: -

> ***1) The respondent has filed Miscellaneous Cause No 260 of 2019 seeking to set aside the arbitral award published on 20th May 2019***
>
> ***2) The applicant has reason to believe that the respondent will not satisfy the arbitral award in the event Miscellaneous Cause No 260 of 2019 is dismissed***
>
> ***3) The applicant is not aware of any assets belonging to the respondent in Kenya***
>
> ***4) The sum awarded is funds for pensioners. It is vital that it is secured***
>
> ***5) It is in the interest of justice and fairness that this application is allowed***

39. The applicant opposed the application through grounds opposition dated 25th February 2020 in which it listed the following grounds: -

a) The application is premised on a misapprehension of the provisions of the law, and in particular the interplay between sections 35, 36 and 37 of the Arbitration Act, No. 4 of 1995. The proceedings referred to in Section 37(2) of the Act are proceedings for recognition or enforcement of an award under section 36 of the Act and not an application for setting aside under section 35 of the Act.

b) The effect of the prayers sought in the application, if entertained, is to undermines and/or take away crucial protection that exist for the due process rights of Applicants seeking the setting aside of awards under section 35 of the Arbitration Act.

c) The application portends manifest injustice and will unfairly prejudice the applicant by causing it to mobilize enormous funds towards the performance of an Award that it contends to be fundamentally flawed. The effect of this would be that an extremely onerous burden is unfairly imposed on the Applicant before the Applicant is afforded an opportunity to be heard on the substantive grievances underpinning the application for setting aside.

d) The application essentially seeks to circumvent and/or usurp the conservatory orders issued by the Honourable Court on 18th September 2019 and thereby subvert judicial process to the Applicant's great unjust detriment.

40. The respondent submitted that it had spent significant amount of resources in sustaining litigation both before the arbitrator and the court. It added that, according to the investigator's report, the applicant has no known assets despite being involved in real estate business. The respondent submitted that the application for setting aside the award does not disclose any reasonable grounds for setting aside the arbitral award and that the respondent has reasonable chances of success. The respondent added that it is genuinely apprehensive that the applicant will not be able to satisfy the award sum. It was further submitted that no prejudice would be suffered if the court directed the applicant to furnish security before its application.

41. Section 37(2) of the arbitration Act which provides that: -

If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper adjourn its decision and may also, on the application of a party claiming recognition or enforcement of the arbitral award order the other party to provide appropriate security.

42. My finding is that since the court directed that the two applications be canvassed together, and having dismissed the application for setting aside the arbitral award, the application for deposit of security has effectively been overtaken by events and is therefore struck out with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kyalo for Mwangi for the Applicant in the application dated 4th August 2019 and Respondent in the application dated 29th November 2019.

Mr. Owiti and Kering for the Respondent Kengen Staff.

Court Assistant: Sylvia