



**Anaheim Investments Limited t/a Soho's Bar & Restaurant v Gurbash Singh
Kenya Limited & another (Miscellaneous Application E658 of 2021) [2021]
KEHC 48 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 48 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E658 OF 2021
DAS MAJANJA, J
SEPTEMBER 23, 2021**

BETWEEN

**ANAHEIM INVESTMENTS LIMITED T/A SOHO'S BAR &
RESTAURANT APPLICANT**

AND

GURBASH SINGH KENYA LIMITED 1ST RESPONDENT

KENYA SHIELD AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant has moved the court by the Notice of Motion dated 6th September 2021 seeking several reliefs against the Respondents. In the main, the Applicant invokes section 35 of the *Arbitration Act*, 1995 ("the *Arbitration Act*") and seeks to set aside the arbitral award of Phylis Wangwe, the sole arbitrator, published on 27th July 2021 ("the Award") on the ground that it is contrary to public policy. The Applicant also seeks to restrain the Respondents from proceeding with the attachment and sale of its moveable properties and consequential orders releasing and or returning the attached properties.
2. The application is supported by the affidavit of Rhavinder Jhite, a director of the Applicant, sworn on 6th September 2021. It is opposed by the Respondents through the replying affidavit of its director, Jaswinder Singh Rihal, sworn on 13th September 2021. Both parties filed written submissions.

Background

3. The fact leading to this application are set out in the parties' respective deposition. The Applicant was at all material times a tenant of the Applicant on its premises along Maua Close, Westlands, Nairobi under a lease agreement dated 2nd October 2018. Following a dispute between the parties regarding rent



and whether the Applicant could be allowed to sell its interest to another party, the matter was referred to arbitration. After hearing the matter, the Arbitrator dismissed the Applicant claim and allowed the 1st Respondent's counter-claim on the following terms:

- (a) The Claimant shall pay to the Respondent the sum of outstanding rent inclusive of associated charges as at 1st October 2020 together with simple interest thereon at a rate of 10% per the Tenancy Agreement from May 2019 until payment in full.
 - (b) The Claimant's claim from general and exemplary damages for breach of contract is hereby disallowed.
 - (c) Each party to bear its costs.
4. The parties agree that there are two issues for determination. First, whether the Award should be set aside on the ground that it is contrary to the public policy of Kenya and second, whether the attachment of the Applicant's moveable properties is unlawful, irregular and should be set aside.

Whether the Award is contrary to public policy

5. On the first issue, the meaning of the term public policy for purposes of section 35(2)(b)(ii) of the Arbitration Act was elucidated in *Christ for all Nations v Apollo Insurance Co. Ltd*, which was quoted with approval by the Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* (Supra), Ringera, J., stated 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.

6. Although framed broadly, public policy, as a ground for setting aside an arbitral award, must be narrow in scope and assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then must show which part of the award conflicts with that public policy. This point is also illustrated by the decision of the court in *Mall Developers Limited v Postal Corporation of Kenya 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. [Emphasis mine]

7. The Applicant submits that in the Award, the Arbitrator acted contrary to the *Evidence Act* and evidentiary rules applicable in Kenya and disregarded the Applicant's clear evidence of negligent misrepresentation presented by the Applicant on the leased or lettable area of the demised premises. It stated that in doing so, the Arbitrator denied the Applicant's claim for refund of excess rent paid by the Applicant as a result of the said misrepresentation when there was no controverting evidence presented by the 1st Respondent.
8. The Applicant urges that whereas the Applicant demonstrated that the basis of its Claim in this regard that there was an actual survey carried out by its Architects, it was demonstrated that the 1st Respondent's never visited the leased premises to ascertain the lettable space and that its valuation presented before the arbitrator was desk valuation done by its valuers.



9. In response, the Respondents submit that the Applicant has not demonstrated at all the manner in which the said arbitral award violates public policy of Kenya. They contend that there is no evidence tendered by the Applicant that the award is inconsistent with the Constitution or other laws of Kenya, inimical to the national interest of Kenya or is contrary to justice and morality.
10. One of the issues framed by the Arbitrator is whether 1st Respondent was liable for negligent misrepresentation on the actual lettable space and if so, whether the 1st Respondent was liable to refund the excess rent paid. On the basis of the evidence the Arbitrator found that the allegations had not been proved. The Applicant seeks, in substance, an appeal against the decision of the Arbitrator. The Arbitral is entitled to review the evidence and come to its own conclusion. The fact that the decision may be wrong does not, of itself, violate the public policy exception. Indeed, Ringera J., made this point in the Christ for All Nations Case (Supra), as follows:

[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. It has been emphasized time and again that the arbitrator is the master of facts and the court must resist the temptation to become an appellate court. In *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012*, the Court of Appeal cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd (The "Balears") 1 Lloyd's*:

The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

12. In conclusion, I find and hold that the Applicant has not demonstrated that the Award is contrary to the public policy of Kenya.

Whether the attachment is irregular

13. Turning to the issue of attachment, the undisputed facts are the 1st Respondent instructed the 2nd Respondent to proceed with levying of distress on account of outstanding rent. The 2nd Respondent attached the Applicant's goods and advertised them for sale. The Applicant submits that the intended sale should not be allowed to proceed as it is premature and is vitiated by procedural flaws.
14. The Applicant contends that by proceeding with distress, the 1st Respondent bypassed mandatory provisions of section 36 of the Arbitration Act which provides for recognition of the Award before enforcement. It submits that the proclamation for rent by the Respondents on 27th August 2021



proceeded after an Award of a sole Arbitrator on 27th July 2021 which is before the Award was recognised and a decree thereon issued. It urges that it is only upon recognition and enforcement, that the 1st Respondent could execute or distress for rent.

15. As regard the 2nd Respondent, the Applicant contends that in levying distress, he contravened the *Auctioneers Rules, 1997* and that therefore the proclamation was irregular, illegal and unprocedural. The Applicant states that contrary to Rule 12 (1) (c), (d) and (g), the 2nd Respondent proclaimed and simultaneously carted away its goods on 27th August 2021 without giving the Applicant the opportunity to redeem the goods. It avers that the purported proclamation cannot be a continuation of an earlier proclamation in 2019 as alleged by the Respondents as the two proclamations are different.
16. The Applicant stated that contrary to Rule 12 (1) (f) which requires at least 7 days elapse before the sale, the 2nd Respondent advertised the goods on 3rd September 2021 for sale on 8th September 2021, only 5 days after the advertisement. Rule 12 (1) (b). The Applicant states that the Proclamation Notice as well as the advertisement does not contain an inventory of specific items proclaimed. The Applicant therefore submits that the Respondents should be ordered to return the goods to the Applicant.
17. The Applicant also stated that on 27th August 2021, it lost KES.300,000.00 from its safe during the purported proclamation which loss was reported to the police. The Applicant urges that the Respondents do not controvert this allegation and should be held liable as money is not distrainable property.
18. The Respondents submit that the dispute between was based on the lease agreement dated 2nd October 2018. They state as a result of failure by the Applicant to pay rent, the 1st Respondent commenced distress for rent against the moveable properties of the Applicant in August 2019 as provided in the *Distress for Rent Act* (Chapter 293 of the Laws of Kenya). The Applicant filed High Court Commercial Case No. E285 of 2019 and obtained ex-parte orders restraining the attachment and sale of the proclaimed goods pending determination of the dispute in arbitration. Those orders were extended by the arbitrator pending the award.
19. The Respondent submit that following the Award which was determined in its favour, they were at liberty to continue with levying of distress without the necessity of applying for enforcement of the award. The 1st Respondent's states that in HC COMM No. E285 of 2019 it contention was that there was actually no dispute capable of reference to arbitration as the issue of non-payment of rent by the Applicant was not disputed.
20. The Respondents submit that the attachment of the Applicant's moveable goods is not illegal as it is allowed by the *Distress for Rent Act* as well the lease agreement. They contend that the provisions of the *Distress for Rent Act* and the Lease are independent run parallel to the provisions of section 36 of the *Arbitration Act* and are not in conflict with each other at all.
21. The Respondents further submit that the Applicant does not deserve equitable relief as it owes KES. 27,553,345.86 which has accrued since May 2019 and which was affirmed by the Arbitrator. The Respondents also contend that the Application is an abuse of the court process as HC COMM No. E285 of 2019 is pending and the present Application should have been filed in that cause.
22. I agree with the Respondents that the right to levy distress by a landlord is an independent and statutory right (see *Royal Gardens Hotel v Ebrahim Omenyi Ambwere KKG HCCC No. 10 of 2018*). This is expressed in section 3(1) of the *Distress for Rent Act* which states as follows:

3(1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the



same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.

23. It is not in dispute that the Applicant, as tenant, owed rent and prior reference of the dispute to arbitration the right to distrain for rent had in fact accrued. The injunction issued in HC COMM E285 of 2020 was only pending reference to arbitration. Once the Award was issued, the injunction was discharged and the 1st Respondent was entitled to proceed with distress. Execution of the Award would only be possible when the Award is duly recognition under the provisions of section 36 of the *Arbitration Act*. I therefore find and hold that the distress was lawful and not inconsistent with section 36 of the *Arbitration Act*.

24. Flowing from the conclusion that the 1st Respondent is entitled to proceed with distress, the question them is whether the distress is irregular and procedural for the reasons set out in the application. In answer to the Applicants plea, section 15 of the *Distress for Rent Act* provides as follows:

15. **Distress for rent not unlawful for any irregularity**

Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose:

Provided that—

- (i) when the plaintiff recovers in that suit, he shall be paid his full costs of suit and have the same remedies for them as in other cases of costs
- (ii) no tenant or lessee shall recover in any suit for any such unlawful act or irregularity, if tender of amends has been made by the party distraining or his agent before the suit is brought.

25. From the aforesaid provision, it is clear that if there is any irregularity in the distress, the Applicant recourse if a suit for damages. As I have stated the Applicant owes rent and the 1st Respondent was entitled to exercise its statutory right of distress. The present application is one for setting aside an arbitral award and is not the appropriate forum for determining the issues of distress for rent. I therefore decline to issue orders restraining the distress for rent.

Disposition

26. For the reasons I have set out, I now dismiss the Notice of Motion dated 6th September 2021 with costs to the Respondents. The interim orders in force are hereby discharged.

DATED and DELIVERED at NAIROBI this 23rd day of SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Malonza instructed by S. M. Kilonzo Advocates for the Applicant.

Mr Koech instructed by Harit Sheth Advocates for the Respondents.

