Muigai v Kipagi Limited (Miscellaneous Application E021 of 2021) [2021] KEHC 388 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)

Neutral citation: [2021] KEHC 388 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E021 OF 2021

DAS MAJANJA, J

DECEMBER 22, 2021

BETWEEN

JOSEPH MUIGAI .... APPLICANT

AND

KIPAGI LIMITED .... RESPONDENT

RULING

1. By a sale agreement dated 19th January 2018 ("the Sale Agreement"), the Applicant agreed to sell and the Respondent agreed to buy the property known as Thika Municipality Block 19/1966 together with the developments thereon ("the Property") at a consideration of KES 26,500,000.00. After making initial payments towards purchase of the Property, the Respondent claimed that it discovered material defects in the Property building resulting in a dispute between the parties.

2. The dispute was referred to arbitration as per Clause VI of the Sale Agreement and Samuel Mbiriri Nderitu, FCIArb appointed by the Chairman of the Chartered Institute of Arbitrators as the sole arbitrator ("the Arbitrator") to adjudicate the claim commenced by the Respondent.

3. The Respondent claimed that the Applicant acted in bad faith and in breach of the Sale Agreement by misrepresenting and/or failing to disclose material defects in the Property's building. He stated that as a result of the breaches, he suffered a total loss of KES 7,705,938.25 being KES 6,500,000.00 paid to the Applicant and KES 1,205,938.25 on account of bank interest paid. The Respondent prayed for judgment against the Applicant for a declaration that the Applicant was in breach of the Sale Agreement, payment of KES 7,705,938.25, interest, general damages for breach of contract, the Arbitrator's fees and expenses, costs and interest thereon.

4. After hearing the matter, the Arbitrator published the Final Award on 31st March 2021 ("the Award") by declaring that the Applicant was in breach of the Sale Agreement and that he should pay to the

Respondent KES 7,548,055.54 comprising KES 6,500,000.00 and KES 1,048,055.54 prayed for and interest at the rate of 10% p.a. of the unreleased monies being KES 3,850,000.00 from 11th July 2018 when it became due to the Respondent at the date of the Award. As regards costs, the Applicant was condemned, inter alia, to bear all the costs and expenses of the arbitration and directed to reimburse the Respondent any amounts paid by him to the Arbitrator to enable the delivery of the Award to the parties.

5. The Applicant now seeks to set aside the Award while the Respondent seeks to enforce it. Both applications were canvassed by way of written submissions with the parties advancing their respective positions.

The Applicant's Application

6. The Applicant's application is brought by way of the Notice of Motion dated 30th June 2021 made, inter alia, under section 35(1), (2)(a) (iv) and (b)(ii) of the *Arbitration Act*. The application is grounded on the facts set out on its face and the Applicant's supporting affidavit sworn on 30th June 2021. It is opposed by the Respondent through the relying affidavit of its director, Kevin Njiriani sworn on 19th July 2021.

7. The Applicant's case is that the Award contains decisions and matters that are beyond the scope of reference to the arbitration. He assails the Arbitrator for failing to decide the reference in accordance to the terms of contract between the parties as contemplated in the Sale Agreement on several grounds as follows:At Clause C, the Respondent agreed to purchase the property, "as is, where is".At Clause III (a), the parties agreed to sell and purchase the property upon the terms and conditions contained in the Sale Agreement;At Clause IV(i), the Respondent agreed it had inspected the property and that it purchased the Property with full knowledge of its actual state and condition and agreed to take the Property as it stands.

8. The Applicant avers that at Para.181 of the Award, the Arbitrator held that the Respondent 'failed in its duty to inspect the Property and it would probably not have entered into the contract if it had done proper inspection…' and that at para. 137 of the Award, the Arbitrator agreed with Applicant's submissions that it was the Respondent's duty to carry out inspection prior to signing the Sale Agreement. The Applicant laments that notwithstanding the aforesaid findings, the Arbitrator proceeded to make a finding that the Applicant was in breach of warranty under the Sale Agreement.

9. The Applicant further contends that the Sale Agreement did not contain any provision that the parties required or would subject themselves to an engineer's examination and report and that the invitation of the engineer's report and its consideration by the Arbitrator amounted to introducing an exterior issue to the Sale Agreement.

10. The Applicant further faults the Award for purporting to re-write the terms of contract between the parties and that it is in conflict with the public policy of Kenya.

The Respondent's Reply

11. The Respondent opposes the application and submits that under Clause VI (a) of the Sale Agreement which contains the arbitration clause gave the Arbitrator unfettered jurisdiction to determine any dispute relating to the interpretation, rights, obligations and/or implementation of any one or more of the its provisions. The Respondent cites *National Bank of Kenya Limited v Moeish Consult Limited [2020] eKLR* to support the submission that such an arbitration clause is wide and covers any difference which may arise between the parties concerning the Sale Agreement.

12. The Respondent asserts that the issue between the parties is largely who was in breach of the Sale Agreement and the parties before the Arbitrator sought determination as to who was in breach of certain clauses and the Sale Agreement in general. That after considering the clauses therein, the Arbitrator found that the Applicant was in breach of the Sale Agreement, therefore the issue of who was in breach of contract was within the Arbitrator's jurisdiction, purview and scope of reference.

13. The Respondent further states that the Applicant is asking this court to sit on appeal based on the contention that the Arbitrator erred in interpretation of the facts presented before him. The Respondent further submits that the partiessubmitted to arbitration under the provisions of the *Arbitration Act* and Clause VI {b(i)} of the Sale Agreement precludes this court from sitting on appeal on the Arbitrator's interpretation of facts, even if the same were a misinterpretation. The Respondent maintains that the manner in which the Arbitrator deals with evidence and reaches conclusions is beyond the reach of the court exercising jurisdiction under section 35 of the *Arbitration Act* as this is not an appeal and the Applicant cannot therefore, challenge the correctness or otherwise of the findings.

Analysis and Determination

14. The key issue for resolution is whether the Award is to be set aside or recognized and/ or enforced.

Whether the Award should be set aside

15. The applicable provision for setting aside an Award is circumscribed under section 35 of the *Arbitration Act* where the part material to this application, provides as follows:

> 35. Application for setting aside arbitral award
>
> (1) ....
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) the party making the application furnishes proof—
>
> ....
>
> (iii) ....
>
> (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) ....
>
> (vi) ....;
>
> (b) the High Court finds that—
>
> (i) ....; or
>
> (ii) the award is in conflict with the public policy of Kenya. [Emphasis mine]

16. The Applicant's application is mainly grounded on the facts that the Arbitrator went beyond matters within the scope of reference to the arbitration and that the Award is in conflict with the public policy of Kenya.

17. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Respondent has rightly cited and relied on the Court of Appeal decision in *Synergy Credit Limited v Cape Holdings Limited NRB CA Civil Appeal No. 81 of 2016 [2020] eKLR* which observed as follows:

> 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.

18. The same principle was explained by the court in *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited ML HC Misc. Application No. 129 of 2014 [2015] eKLR* that the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law. Hence the express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether the issues raised by an applicant are contemplated by the agreement or fall within the terms or scope of the reference to arbitration.

19. The arbitration clause in the Sale Agreement provides, in part, that "Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and /or implementation of any one or more of the provisions of this agreement….shall be referred to arbitration…". The parties also agree that the entire dispute arose based on the performance and completion of the Sale Agreement. In the arbitration, the parties opted to frame their respective list of issues and specifically, the Applicant framed the following issues for determination:

    i. Whether the Claimant can go against the agreement dated 19th January 2018 and in particular clause IV(i). ii.

    ii. Whether the Claimant can introduce matters outside a written agreement duly signed by all parties.

    iii. Whether the Respondent is entitled to damages for loss of user after having all tenants vacate to give the Claimant vacant possession.

    iv. Whether the Claimant is in breach of the agreement dated 19th January, 2018.

    v. Whether the Claimant is in total breach of the agreement dated 19th January, 2018.

    vi. Who between the Claimant and the Respondent is entitled to the cost of these proceedings?

20. Even though the Arbitrator noted that the Applicant never raised the issue of the admissibility of the engineer's report in his list of issues set out above, the Applicant introduced it in his submissions. Nevertheless, the Arbitrator still went ahead to frame it as an issue for determination and condensed the issues raised by the parties to the questions of whether there were defects on the Property and if yes, what were their nature; which party was in breach of the contract; whether parties are entitled to the reliefs sought and; who should bear the costs of the proceedings. The Arbitrator then went ahead to itemize the issues and sequentially determined them.

21. Having regard to the subject matter and the arbitration clause I have set out above, I do not find any issue which the Arbitrator dealt with that was not mooted by the parties or that was beyond the scope of reference to the arbitration. The Arbitrator considered the parties' evidence, arguments and submissions, the issues as raised by the parties and made a determination accordingly. I thus reject the Applicant's contention that the Arbitrator never considered his submissions when the Award clearly indicates that he summarized each of the parties' submissions and considered them in his determination. I find that the Applicant has not demonstrated that the Arbitrator ventured on a frolic of his own to determine issues outside the Sale Agreement and his scope. On the contrary, the Arbitrator restricted himself to determining only those issues that were raised in the pleadings and related to the dispute that was before him. As the court noted in *Mahican Investments Limited & 3 Others v Giovanni Gaida & 80 Others NRB HC Misc. Appl. No. 792 of 2004 [2005] eKLR [2005] eKLR*, "In order to succeed (in showing that the matters objected are outside the scope of the reference to arbitration) the application must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute." [Emphasis mine]

22. The Arbitrator had the authority and sufficient latitude to interpret the Sale Agreement and the parties' arguments in a manner which makes the Sale Agreement more effective, without re-writing the Agreement (see *Equity Bank Limited v Adopt a Light Limited ML HC Misc. Application 435 of 2013 [2014] eKLR*). In that regard, the Arbitrator is entitled to review the evidence and come to his own conclusion and even if the same is wrong, or that the court might have a different opinion to his findings and interpretation of the agreement, that alone does not provide a door to section 35 of the *Arbitration Act* as it was never intended to elevate the court to an appellate court in arbitration matters. This was aptly captured in *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR* where the Court of Appeal cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd (The "Baleares")* 1 Lloyds LR 215:

> 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.

23. Having found that the Applicant has not furnished proof that to the court that the Award beyond matters within the scope of reference to the arbitration, I am constrained to reject the Applicant's claim that the Award offends Kenya's public policy. I would point out that the two grounds; exceeding the scope of the reference and that the award is contrary to the public of Kenya are distinct. An applicant

may fail to establish that the arbitral tribunal exceeded the scope of the reference yet prove that the award is contrary to the public policy of Kenya. In this case, the Applicant pegs its argument that the award is contrary to public policy of Kenya on the ground that the Arbitrator exceeded the scope of the reference. Since it has failed to establish the first ground, the ground based on public policy must fail. In any event, I do not find any grounds to set aside the Award on grounds of public policy.

24. In conclusion I find and hold that the Applicant's arguments are shy of being a full throated appeal and an attempt to invite the court to sit and act like an appellate court when Clause VI(b)(iii) of the Sale Agreement is categorical that the Award is final and binding upon the parties. This court declines the invitation and it is for these reasons, I dismiss the application dated 30th June 2021.

Whether the Award should be enforced

25. The Respondent's application for recognition and enforcement is brought by way the Chamber Summons dated 19th July 2021 and is made, inter alia, under sections 36 of the *Arbitration Act*. It is supported by the grounds set out on its face and the supporting affidavit of Kevin Njiriani sworn on 19th July 2021. The application is opposed by the Applicant through his replying affidavit sworn on 13th September 2021.

26. The Respondent reproduces the final disposition of the Award as stated in the introductory part and avers the same is due and that it is desirous of executing the same and thus seeks that the Award be recognized as an order of the court. In his opposition to the recognition and enforcement of the Award, the Applicant more or less gives the same reasons he does for setting aside the Award in his application

27. Under section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the *Arbitration Act*. This court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards. Section 37 of the *Arbitration Act* sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award which are more or less similar to those that can convince the court to set aside the Award under section 35. In essence, section 37 of the *Arbitration Act* prohibits a court from recognizing or enforcing an award if the conditions stated therein are shown to be present (see *Castle Investments Company Limited v Board of Governors – Our Lady of Mercy Girls Secondary school NRB HC Misc.Application No. 780 of 2017 [2019] eKLR*).

28. I have already found that the Applicant does not have solid and substantive grounds to attack the Award. I therefore hold that there are no reason proffered by the Applicant for the court to decline to recognize and enforce the Award as a decree of the court against him.

Conclusion and Disposition

29. Having set out the conclusions reached above, I now order as follows:

    a. The Applicant's application dated 30th June 2021 is dismissed.

    b. The Respondent's application dated 19th July 2021 is allowed on terms that the Final Award published on 31st March 2021 by the Sole Arbitrator, Samuel Mbiriri Nderitu, FCIArb, be and is hereby recognized as a judgment of this court and leave is granted to the Respondent to execute the decree therefrom.

    c. The Applicant shall pay the Respondent's costs for both applications.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Khisa instructed by P. N. Khisa Advocates for the Applicant.

Ms Omwenga instructed by Meritad Law Africa LLP Advocates for the Respondent.