



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CIVIL APPLICATION NO.124 OF 2019

KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT

-VERSUS-

PRIDE ENTERPRISES LIMITED.....1STRESPONDENT

NJERI KARIUKI(Sole Arbitrator).....2NDRESPONDENT

Introduction

1. The applicant and the 1st respondent herein entered into a contract for the reinstatement of Bondo- Kisian Road. A dispute arose over delayed payments due to the 1st respondent thereby necessitating reference of the dispute arbitration in the line with Clause 67.3 of their contract.
2. On 21st January 2019, the 2nd respondent delivered an award that precipitating the filing of the application dated 20th February 2019 (hereinafter “**the 1st application**”) wherein the applicant seeks, *inter alia*, orders to set aside the said award in its entirety and for the appointment of a new Arbitrator (other than the 2nd respondent), to rehear the dispute between the applicant and the 1st respondent.
3. Through an application dated 20th February 2019 the 1st respondent applied to the 2nd respondent for correction, interpretation and additional award and on 1st April 2019, the 2nd respondent published an additional award thus prompting the filing, by the applicant, of Miscellaneous Application E259 of 2019 between the same parties seeking the setting aside and/or quashing of the said Additional Award of 1st April 2019.
4. At the hearing of the application, the instant application and the application in Miscellaneous E259 were consolidated. This ruling is therefore in respect of the consolidated applications dated 20th February 2019 and 27th June 2019 (“**the 2nd application**”) in Miscellaneous 124 and E259 of 2019 respectively.

Applications

5. In the 1st application the applicant seeks, *inter alia*, orders to set aside the arbitral award published on 21st January 2019 in its entirety and for the appointment of a new arbitrator while the orders sought in the 2nd application is for the setting aside of the Additional Award published on 1st April 2019.
6. The 1st application is supported by the affidavit of the applicants Senior Legal Officer, **Jessica Mbae**, and is premised on the grounds that:

1. The applicant and 1st respondent referred a dispute to the 2nd respondent for determination.

2. In establishing the framework for their arbitration, parties made a choice of the laws that would govern the arbitration proceedings and the laws that would govern the contract between them. These were the Arbitration Act (as amended by the Arbitration (Amendment) Act 2010); The 2012 Rules of the Chartered Institute of Arbitrators (Kenya Branch) and the Law of the Republic of Kenya.

3. The parties called their respective witnesses after which parties filed their respective submissions.

4. In its submissions dated 22nd January, 2018, the applicant herein raised the following points of the law touching on

jurisdiction, limitation of actions and compliance with contractual and statutory notices.

a) The 1st respondent herein failed to comply with sub-clause 53.1 and 53.3 of the General Conditions of Contract (GCC) as conditions precedent on notices prior to commencement of arbitration.

b) The claimant neglected and failed to comply with the mandatory provisions of Section 67 of the Kenya Roads Act before commencing this action.

c) The claimant failed and/or neglected to comply with the condition precedent set out in sub-clause 67.1 of the GCC.

5. The 1st respondent responded to the applicant's points of law raised in the applicant's submissions dated 22nd January 2018.

6. Public policy mandated the 2nd respondent to take cognizance of and determine the points of law on jurisdiction, limitation of time and compliance with statutory and contractual notice periods.

7. Indeed the 2nd respondent when faced with these questions of law recognized the seriousness of the points of law raised when she directed parties to respond to the following question in their submissions.

“ What effect does the principle of law that parties are bound by their pleadings have in part 1 of the respondent's submissions considering that serious points of law have been raised?”

8. However, vide her Final Award made and published on 21st January 2019, the 2nd respondent refused to even consider the applicant's submissions on whether the respondent's claim was time/statute-barred and whether the respondent had complied with conditions precedent to filing the claim and whether she (2nd respondent) had jurisdiction to continue and determine the claim in the face of the statute barring provisions.

9. The 2nd respondent rendered herself, in part, that:

“ Accordingly, I FIND & HOLD that part 1 of the respondent's submissions dated 22nd January, 2018 shall have no bearing on this Reference and will forthwith be disregarded in determining the 6 issues in dispute between parties.”

10. By disregarding the points of law raised by the applicant, the 2nd Respondent's Award ousts and fails to apply mandatory sections of the law chosen by parties to apply to the merits of their dispute namely the law of the Republic of Kenya.

11. The 2nd respondent did not have jurisdiction to proceed to make and publish an Award on 21st January 2019 without first determining the points of law on jurisdiction, limitation of time and compliance with contractual and statutory notices raised by the applicants in Part 1 of its submissions.

12. In making the Award dated 21st January 2019 the 2nd respondent exceeded the scope of her jurisdiction by refusing to take cognizance of and apply mandatory provisions of the Laws of the Republic of Kenya.

13. The 2nd respondent's refusal to consider, determine and give effect Section 67(b) of the Kenya Roads Act is in conflict with public policy of Kenya as it is inconsistent with the requirement that a claim that is statute barred should not be heard or entertained in any manner whatsoever.

14. In making the award, the 2nd respondent failed to decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.

15. The legality of the Award is apparent on the face of it.

16. The applicant therefore seeks an order setting aside in its entirety the 2nd respondent's Award made and published on 21st January 2019.

17. The applicant no longer believes that the 2nd respondent is able to properly and faithfully conduct these arbitration proceedings by strictly applying the Law of the Republic of Kenya in the event that the Award is set aside. The applicant therefore seeks an order directing the parties to appoint a new Arbitrator,(other than the 2nd respondent), in the manner in which the 2nd respondent was appointed to re-hear the dispute between the applicant and the 1st respondent herein.

7. At the hearing of the application, **Mr. Obok**, learned counsel for the applicant, submitted that the award ought to be set aside as the arbitrator ignored all the points of law raised at the arbitration. Counsel argued that the arbitral award is contrary to public policy as it was not made in accordance with the law chosen by the parties.

8. It was submitted that under Section 19 of the Arbitration Act, the arbitrator had no choice but to consider the points of law which could be raised at any time and that an award that is inconsistent with the law goes against public Policy.

9. In respect to the 2nd application counsel also faulted the arbitrator for ignoring her earlier decision not to alter the final award only to revisit the award later and reverse it at the time when she was already *functus officio*.

The 1st respondent's case.

10. The 1st respondent opposed the application through the Notice of Preliminary objection dated 12th March 2019 wherein it lists the following grounds:

1. The application is bad in law, fatally and incurably defective and amounts to an abuse of the court process and the same should be struck out with costs.

2. The arbitral tribunal is yet to deliver its final award as the 1st respondent has filed an application dated 20th February 2019 under Sections 34(1) and 34(4) of the Arbitration Act seeking correction, interpretation and issuance of an additional award dated the 20th of February 2019 which is yet to be heard and determined by the 2nd respondent herein.

3. There is therefore no arbitration award that is capable of being set aside stayed or varied by this honourable court.

4. The Honourable court therefore lacks jurisdiction to entertain the Notice of Motion Application and grant the orders sought.

11. Through the replying affidavit of its director, **Navinchandra L. Shah**, dated 7th March 2019 the 1st respondent states that upon the publishing of the award, an error was noted in the said award that necessitated the filing of an application for correction in order to clarify ambiguities.

12. At the hearing of the application the applicant noted that the 1st respondents Notice of Preliminary objection and submissions regarding the alleged prematurity of the application had been overtaken by events following the tribunal's decision on the application for the Additional Award.

13. Through its counsel, **Miss Sere**, the 1st respondent submitted that the law is settled on the conditions/grounds for setting aside an arbitral award.

14. Counsel submitted that the alleged points of law were only brought to the attention of the arbitrator during submissions and were therefore belated and amounted to an ambush. Counsel cited Section 5 of the Arbitration Act which stipulates that:

“A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.”

15. It was submitted that the belated introduction of the points of law on jurisdictional issue went against the principle of fair hearing as it denied the 1st respondent the opportunity to rebut the same. Counsel submitted that the arbitrator was justified in ignoring the point of law owing to its late introduction maintained that not all provisions apply to arbitral proceedings. Counsel cited Section 34 of the Act in support of the argument that an arbitral tribunal may correct any clerical, computation or typographical error contained in an award within 30 days after the date of the award.

Analysis and determination.

16. I have considered the pleadings filed herein the submissions made by the parties' respective advocates together with the authorities that they cited. I find that the main issue for determination is whether the applicant has made out a case for the setting aside of the arbitral awards.

17. Section 35(2) of the Arbitration Act stipulates as follows on the subject of setting aside arbitral awards:

“An arbitral award may be set aside by the High Court only if the High Court finds that-

i. The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya;

ii. The award is in conflict with the public policy of Kenya.”

18. In the present case, the applicant argued that the Arbitral Award published on 21st January 2019 should be set aside for being in conflict with Public Policy as the 2nd respondent failed to consider the points of law it had raised regarding the court's jurisdiction, limitation of time and compliance with the statutory notice periods.

19. The 1st respondent on the other hand maintained that the application does not meet the conditions for setting aside of the arbitral award and that the award does not conflict with public policy.

20. Black's law Dictionary defines public Policy as follows:

“Policy: The general principles by which a government is guided in its management of public affairs.

Public Policy: Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is “contrary to public policy”

21. In *Glencore Grain Ltd v TSS Grain Millers Ltd* [2002] IKLR 606, it was held:

“A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan Society. It has been held that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.”

22. I have perused the final award published by the 2nd respondent on 21st January 2019 and I note that the final orders issued by the arbitral tribunal were as follows:

i. The respondent shall pay the claimant shillings one hundred and five million, one hundred and then thousand two hundred and thirty nine, cents eighty-eight (shs 105,110,239.88) VAT inclusive, where appropriate within thirty (30) days of the date that this award is taken up by either party.

ii. The respondent shall pay the claimant compound interest on the shillings Eighty –six million, three hundred and eleven thousand, five hundred and forty –seven (shs. 86,311,547.00) at the rate of 14% from the date of this my award until payment in full.

iii. The parties shall pay their costs.

iv. The parties shall pay and bear the costs of this Tribunal’s Award in equal shares in the sum of shillings three million, nine hundred and seventy –four, five hundred sixty –six cents thirty (shs 3,974, 566.30) (inclusive of VAT). If such costs shall have already been paid by the claimant, the respondent shall immediately reimburse the claimant the amount paid.

23. A simple reading of the impugned award shows that the respondent was ordered to pay certain amounts of money together with interest. Parties were also ordered to pay the costs of the tribunal award in equal shares. Taking into account the nature of the award, I am unable to find that the said award can be said to be contrary to public policy as it has not been shown that the said award is inconsistent with the Constitution or any other law in Kenya, is inimical to the national interest of Kenya or contrary to justice and morality. Public policy was defined in *Christ for All Nations v Apollo Insurance Company Ltd* [2002] 2 EA366 as follows:

“In 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 in Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of Section 25 of the Arbitration Act.”

24. While advancing the argument that the award is against public policy, the applicant contended that because the points of law it had raised, during submissions, were not considered by the arbitrator (2nd respondent), it meant that the said award was not legal. The applicant faulted the 2nd respondent for failing to adhere to the parties’ choice of laws that were to govern the arbitration proceedings.

25. One of the statutory provisions cited by the applicant as having been ignored by the 2nd respondent is Section 67 of the Kenyan Roads Act which stipulates as follows:

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-

a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director- General by the plaintiff or his agent; and

b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”

26. On its part, the 1st respondent argued that the alleged mistakes of law or fact by the 2nd respondent do not constitute a ground for the setting aside of an award within the meaning of Section 35 of the Act. The question which then arises is whether an error by the arbitrator failing to recognize a point of law, can form a basis for the setting aside of an award.

27. On the challenge made on the award for allegedly disregarding substantive points of law, the 1st respondent took issue with the timing of the said points of law. According to the 1st respondent, the points of law were raised too late in the arbitral proceedings when the same had

already reached the submissions stage thus denying the 1st respondent the opportunity to adequately respond to them. In addition to the timing, the 1st respondent also contended that the points of law introduced new issues outside the issues that had been agreed upon by the parties.

28. On its part the applicant argued that it is trite law that points of law can be raised at any time during the proceedings and that the mere fact that the same were raised during submissions could not preclude the 2nd respondent from considering them.

29. My finding is that Arbitral proceedings are special avenues for dispute resolution in the sense that they are voluntary in nature and that parties to an agreement can opt to refer their dispute to an arbitrator for resolution mainly for purposes of speedy resolution of the dispute and in order to overcome the procedural bottlenecks and delays that are associated with court proceedings.

30. As opposed to proceedings before a court, proceedings before an arbitrator are governed and regulated by the Arbitration Act and Rules. Section 5 and 17(2) of the Arbitration Act stipulate as follows:-

Section 5.

A party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

Section 17(2)

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.”

31. From the above provisions it is clear that the time within which an objection to the jurisdiction of the tribunal or in respect to non-compliance with the terms of the arbitration agreement is of essence. It cannot therefore be said that points of law can be raised at any time during the arbitral proceedings as the Act is categorical that when a party opts to proceed with arbitration without stating his objection to such non-compliance or jurisdiction, that he shall be deemed to have waived the right to object.

32. In the present case, it was not disputed that the applicant registered its objection to the arbitration on points of law long after the conclusion of the hearing at the submissions stage. It is also to be noted that the applicant conceded to the Statement of Common Grounds prepared with the consent of both parties. I therefore find that by opting to proceed with the arbitration to its conclusion without any objection, the applicant waived its right to object and could not be seen to present the said objections as an afterthought at the eleventh hour in its submissions before the award was made.

33. My understanding of the provisions of Section 5 and 17(2) of the Act is that a party should seize the earliest opportunity to raise his objections to arbitration and not wait until the same is finalized before raising his objection. The reasons for an early registration of an objection to arbitration cannot be gainsaid in light of the objective of arbitration which is to resolve disputes with finality and in an expeditious manner. Needless to say, early registration of an objection would have the effect of saving the parties the time and expenses attendant to an arbitral process. I also note that contrary to the applicants assertion that its objections were not considered by the 2nd respondent, the said objection were extensively considered by the 2nd respondent who held as follows:

“Issues that relate to jurisdiction or any lack thereof within arbitration proceedings must, per force, be brought to the attention of a tribunal at the earliest opportunity and canvassed accordingly, the reasoning behind this being that if, indeed, a tribunal lacks the requisite jurisdiction behind this being that if, indeed, a tribunal lacks the requisite jurisdiction, then proceedings must be brought to a screeching halt as to do otherwise would be a waste of precious resources in terms of time and expense.

In this case, the respondent has waited until the very last to raise issues of jurisdiction and admissibility....

I go further to note that it was also open to the respondent (applicant herein) to raise the issue of the claim being time –barred under Section 67(b) of the Kenya Roads Act as a preliminary issue (provided there was intimation in the pleadings) but, again, the respondent failed or neglected to do so. To allow a party to raise issues such as jurisdiction and inadmissibility willy-nilly at any point of an arbitral proceedings will make nonsense of the reason for arbitration in the first place...”

34. Having regard to the above findings and observations, I find that the applicant has not made out a case for the setting aside of the Arbitral Award published on 21st January 2019.

35. Turning to the Additional Award of 1st April 2019, the applicant sought its setting aside on the basis that the 2nd respondent entertained an application for an additional award when the tribunal was already functus officio. Section 34 of the Act stipulates as follows:

1. Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties-

a) A party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and

b) A party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity

concerning specific point or part of the arbitral award.

2. If the tribunal considers a request made under subsection (“1) to be justified it shall, after giving the other party 14 days to comment, make a correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.

3. The arbitral may correct any error of the type referred to in subsection (1) (a) on its own initiative within 30 days after the date of the arbitral award.

4. Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.”

36. In the present case, it was not in dispute that following publishing of the Arbitral Award on 21st January 2019, the 1st respondent notified the applicant of its intention to make an application under Section 34 of the Act. It is clear that Section 34(3) of the Act empowers the tribunal to correct any computation, clerical or typographical errors or any other errors of a similar nature in the arbitral award and that the power to correct the award can even be exercised at the arbitrator’s own instance.

37. In this regard, the decision by Odera J. in *Albatross Aviation Limited & Another V Phoenix of East Africa Assurance Company Limited* [2015] e KLR comes to mind. In the said case the court observed that:-

“The power of an Arbitral Tribunal to review its own decision is internationally accepted and is embodied in the International Centre for Settlement of Investment Disputes(ICSSID) Arbitration Rules (2006} as well as the United Nations Commission on International Trade on International Trade Law(UNICITITL) Arbitration Rules on which the Kenya Arbitration Act No. 4 of 1995 was based. Section 34(a) of the Arbitration Act allows an Arbitral Tribunal to correct errors, clarify ambiguities, or complete an award by deciding any questions that may have omitted to decide in its award. This is an exception to the “functus officio” principle which binds a tribunal upon delivery of the final award”

38. In the instant case, the applicant argued that because the 2nd respondent had on 8th February 2019 declined to correct or make an additional award upon a request being made by the 1st respondent for such correction, the 2nd respondent was then *functus officio* and this precluded from considering the 1st respondents subsequent application for correction.

39. My findings is that Section 34 of the Act does not bar any party from seeking correction or clarification of an award as long as such clarification is sought within the time stipulated under the section upon notice being issued to the other party. My finding is that the 1st respondent was justified in seeking the additional award so as to get the arbitrators clarification/correction of the arbitral award.

40. Having regard to the findings and observations that I have made in this ruling, I find that the applications dated 20th February 2019 and 27th June 2019 are not merited and I therefore dismiss them with no orders as to costs.

Dated, signed and delivered via skype at Nairobi this 29th day of April 2020 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 Obok for the applicant

C/A & DR – Hon. Tanui