



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO.E363 OF 2019**

**RENTWORKS EAST AFRICA LIMITED .....PLAINTIFF**

**-VERSUS-**

**KENYA AIRWAYS LIMITED.....DEFENDANT**

**RULING**

**Background**

1. Through the plaint filed on 8<sup>th</sup> May 2018, the plaintiff herein, **RENTWORKS EAST AFRICA LIMITED**, sued the defendant, **KENYA AIRWAYS LIMITED** seeking the following orders:-

*a) USD 966,821.10*

*b) Interest thereon at contractual rates as provided in each Rental Schedule.*

*c) An order of injunction compelling the defendant to return all equipment and machinery leased to the defendant pursuant to contract numbers 01135KEA0048,01170KEA0051,01185KEA0053,0121KEA0054, 01224KEA0055,01226KEA0056, 1227KEA0057,01261KEA0058, 01267KEA0061, 01302KEA0063, 01305KEA0065, 01306KEA0066, 01309KEA0067, 01319KEA0068, 01331KEA0069, 01331KEA0070, 01341KEA0072 and 01362KEA0073 between the plaintiff and the defendant.*

*d) Costs of the suit and interest thereon.*

2. A summary of the plaintiff's case is that on 13<sup>th</sup> November 2007, it entered into Master Rental Agreement (MRA) wherein it was agreed that the defendant would lease equipment and/or machinery from the plaintiff by executing Rental Schedules for the equipment or machinery leased. The plaintiff 's claim is that pursuant to the MRA, the parties executed several Rental Schedules on the basis of which the defendant rented several ICT Equipment after which the parties made supplemental contracts. A dispute however arose concerning the MRA that necessitated the filing of the suit.

3. The defendant filed its Memorandum of Appearance to the plaintiff's suit on 23<sup>rd</sup> May 2018. Concurrently with the Memorandum of Appearance, the defendant filed an application seeking the stay of the suit pending its reference to arbitration on the basis that the MRA contained an Arbitration Clause.

4. Through a consent order recorded in court on 31<sup>st</sup> July 2018, the parties agreed to stay the suit before the court and instead refer it to Arbitration. The matter was then subjected to Arbitration after which the Arbitrators award was collected on 20<sup>th</sup> May 2019. The said Award gave rise for the two applications that are the subject of this ruling.

**Application dated 29<sup>th</sup> August 2019**

5. Through the application dated 29<sup>th</sup> August 2019, the applicant/plaintiff seeks orders for the recognition and adoption of the final Award of **Dr. Kariuki Muigai** on 7<sup>th</sup> May 2019 as the judgment of this court. The applicant also seeks orders that judgment be entered for the plaintiff against the defendant/respondent in terms of the said award and further, that the court grants the applicant leave to enforce the said Award as a decree of this court.

6. The application is supported by the affidavit of applicants Managing Director **Mr. Johan Taljaard** and is based on the grounds that the

respondent is indebted to the applicant in terms of the Final Award which amount the respondent had not settled.

**Application dated 11<sup>th</sup> October 2019.**

7. Before dust settled on the applicant's application for the recognition, adoption and enforcement of the Final Award, the respondent filed the application dated 11<sup>th</sup> October 2019 seeking orders to stay the enforcement and further proceedings based on the impugned Final Award, and to set aside the said Award in its entirety.

8. The application is supported by the affidavit of the respondent's Senior Legal Counsel **Ms Laura Wandera** and is premised on the main grounds that:

*i. The Arbitrator in his Award, awarded the plaintiff/respondent herein ('the respondent') among others the sum of USD 966,821.10 together with simple interest at the rate of 10% per annum from the date of filing the statement of claim until payment in full.*

*ii. The Arbitrator awarded the respondent the amounts indicated above in complete disregard of the established legal position as held by the Court of Appeal in National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another (2001) eKLR to the effect that the Court of Law cannot re-write a contract between the parties and that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.*

*iii. The Award dealt with a dispute not contemplated by parties or not falling within the terms of reference to arbitration or contained decision on matters beyond the scope of the reference to arbitration.*

*iv. On 17<sup>th</sup> June, 2019 the applicant applied to the Arbitrator for correction of computation error and clarification or removal of ambiguity in the Award pursuant to Section 34(1) (a) and (b) of the Arbitration Act, 1995('the act').*

*v. On 14<sup>th</sup> August, 2019 the Arbitrator rendered his determination on the applicant's request for correction of computation error and clarification or removal of ambiguity in the award. The Arbitrator declined the applicant's request and ordered that the Award as published by Tribunal on 7<sup>th</sup> May, 2019 stood as rendered.*

9. The applicant also opposed the application through the replying affidavit of its Managing Director sworn on 27<sup>th</sup> November 2019.

10. Parties canvassed both applications by way of written submissions. I will now turn to consider the submissions presented by the respondent in support of its application to set aside the Arbitral Award. It is worthy to note that the two applications are like two sides of the same coin meaning that a determination of the application to set aside the Award will have a direct bearing on the application to recognize, adopt and enforce the Award.

**Defendant's submissions.**

11. At the hearing of the application to set aside the Award, **Mr. Kibe**, learned counsel for the respondent submitted that the respondent challenges the jurisdiction of the Arbitral Tribunal on the basis that the dispute revolved around payment of money due to the claimant which made the claim an accounting dispute and not a legal issue. It was submitted that to the extent that the Arbitrator relied on the Sale and Cession Agreement, which was a separate and distinct Agreement, the Arbitrator went beyond the scope of the Arbitration Agreement. For this argument counsel relied on the decision in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR wherein it was held that a court of law cannot rewrite a contract between parties.

12. Reference was also made to the decision in *Equity Bank Limited v Adopt -A- Light Limited* [2014]eKLR where the court held:-

*"An Arbitrator sitting as a Tribunal has the authority to interpret contractual documents. The law must give them enough latitude to interpret those documents in a manner which makes them more effective, without re-writing the contracts. This court will accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties".*

13. Counsel submitted that the arbitrator erred in law in awarding interest when the same was not proved or provided for in the Agreement. It was further submitted that the provisions of the Civil Procedure Act (CPA) do not apply in arbitral proceedings in which case, Section 26 of the Civil Procedure Act cannot be invoked to justify the Arbitrators award on interest.

**Plaintiff's submissions**

14. **Mr. Nyaanga**, learned counsel for the plaintiff, submitted that the challenge on the jurisdiction or competence of the arbitrator is misplaced and cannot be an issue for determination as the appointment of the arbitrator was by consent of the parties.

15. Counsel submitted that the defendant cannot challenge the determination of facts by the Arbitrator and that the challenge on jurisdiction should have been raised at the earliest opportunity and if necessary an appeal be preferred. For this position counsel cite the decision by Gikonyo J. in *Justus Nyang'aya v Ivory Consult Limited* [2015] eKLR wherein it was held:

*"I have said this before and I will repeat it here, unless it is shown that the arbitrator veered off the path cut out for him by the*

*law as his jurisdiction; courts of law should hesitate to interfere with the award on ground of jurisdiction which is raised for the first time before the National court. The issue of jurisdiction should be raised at earliest time possible before the arbitral tribunal and should be followed through by an appeal under Section 17(1) of the Arbitration Act, if a party feels so strongly about it. In all other cases, the national court should develop great deprecation against claims of lack of jurisdiction of the arbitrator being raised before them except in accordance with Section 17(6) of the Arbitration Act.”*

16. It was submitted that the arbitrator did not go beyond the scope of the terms of the reference to the arbitration as the parties filed a list of agreed issues for determination which issues the arbitrator set out in the award before proceeding to render himself on each of the issues. Counsel reiterated that the arbitrator did not go on a frolic of his own and only resolved the matters that had been identified by the parties as requiring resolution.

17. Counsel noted that since the defendant did not challenge the admissibility of the reassignment notices or the Sale and Cession Agreement which were produced at the tribunal, the current purported challenge is misconceived and should be ignored. Counsel argued that Section 20(3) of the Arbitration Act (herein after **“the Act”**) grant the arbitral tribunal the power to determine the admissibility, relevance materiality and weight of any evidence.

18. On the award of interest, counsel cited the provision of Section 32C of the Act which allows the tribunal to order for the payment of simple or compound interest. It was submitted that the issue of interest was raised and dealt with before the arbitrator and cannot be the subject of the application to set aside the Award.

#### **Analysis and determination.**

19. I have carefully considered the applications for setting aside and, enforcement of the Award. It is noteworthy that the grounds for opposing the enforcement of the Award are the same grounds that have been put forth for setting aside the award.

20. I find that the main issue for determination is whether the defendant has made out a case for setting aside the Arbitral Award as provided for under Section 35 of the Arbitration Act which stipulates as follows:

***(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) 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.***

***3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.***

***(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”***

21. Courts have taken the position that the grounds for setting aside of an arbitral award as out under the above section are strict and spell out the jurisdiction of the court in setting aside an Arbitral Award. This is the position that was taken into **Midco oldinHoldingsHhHhhhHhhhhhhhhhhholHoldings Holdings Limited v Summit Textiles (EA) Limited [2014]** wherein it was held:

**“[36] Section35(2) of the Arbitration Act circumscribes the grounds upon which an arbitral award can be set aside, and an applicant seeking to set aside an arbitral award must bring himself strictly within the legal bounds of that Section. See the case of TRANSWORD SAFARIS LTD V EAGLE AVIATION LTD & 3 OTHERS NBI MISC APPLICATION NO. 238 OF 2003, Nyamu J. (as he then was). The applicants have advanced the following four grounds on which they seek the arbitral award to be set aside;**

**a) That the arbitral award is contrary to public policy of Kenya.**

**b) That the honourable Arbitrator breached the rules of natural justice contrary to Article 50 of the Constitution of Kenya.**

**c) That the Arbitral award went outside the contemplated dispute and/or failed to determine issued referred to the Arbitrator.**

**d) That the Arbitrator is guilty of misconduct.**

22. In the present case, the defendant seeks to set aside the Award on the basis that:

a) The Award dealt with a dispute not contemplated by parties and not falling within the (scope) terms of reference to arbitration.

b) The Arbitrator lacked the jurisdiction to make the money Award.

c) The Arbitrator erred in making an award for interest.

#### **Consideration of matters outside the reference.**

23. In advancing the argument that the Arbitrator considered matters outside the scope of the reference and dealt with a dispute not contemplated by the parties, the defendant argued that to the extent that the arbitrator relied on the Sale and Cession Agreement which was a separate and distinct Agreement, the arbitrator went beyond the scope of the Arbitration Agreement. On its part, the plaintiff argued that the Sale and Cession Agreement formed part and parcel of the plaintiff's bundle of documents submitted for the consideration of the arbitrator and that the defendant did not object to the production of the said documents.

24. In determining whether the Arbitrator went beyond the matters under reference, it is important to examine terms of the Agreement between the parties in relation to the arbitration at Clause 24.2 thereof which stipulates as follows:

**“Should any dispute arise between any of the parties concerning this agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation) and such dispute cannot be resolved by the parties, such dispute shall upon application by any party, be referred for arbitration to a single arbitrator to be appointed in accordance with the provisions of Clause 24.3”.**

25. It was not in dispute that a disagreement arose between the parties herein over the interpretation of Clause 17 of the Agreement which provides as follows:-

**Clause 17.1 “.....At the conclusion of the Term, you may either return the equipment or request us under clause 22 to agree to extend the Term or vary Equipment rented. You must in either case give us written notice of your intention at least 90 Business Days prior to the expiry of the Term. We will give you at least 30 days’ notice within the above- mentioned period you agree that, unless we otherwise notify you in writing, the Term will be automatically extended for a further term of twelve (12) months.”**

26. It is the said disagreement in the interpretation of Clause 17 of the Agreement that precipitated the filing of the suit that was later, by consent, referred to arbitration.

27. My finding is that the wording of Clause 24.2 of the parties is wide and covers any dispute or difference that may arise between the parties concerning the agreement. In this case, I find that the dispute concerned the interpretation of Clause 17 of the Agreement thus falling squarely within the purview of the Arbitration Clause.

28. I further note that in advancing the argument that the Arbitrator went beyond the scope of the reference, the defendant alluded to the fact the arbitrator erred in considering the Sale and Cession Agreement between the plaintiff and CBA Bank, NIC Bank and Cooperative Bank who were not parties before Arbitration.

29. I have perused the Final Award and the documents filed by the parties before the arbitrator. I note that the Sale and Cession Agreement forms part of the bundle of documents that the plaintiff presented before Arbitrator. I also note that the Defendant did not object to the said documents and that they therefore formed part of the evidence that the Arbitrator needed to consider in determining the dispute between the parties. It is also noteworthy that the dispute between the parties that led to arbitration was not the issue of documents but rather, the interpretation of Clause 17 of their Agreement. I further note that the parties herein compiled and filed a list of agreed issues for determination by the arbitration as follows:

a) *Whether the dispute between the parties is primarily an accounting or legal matter/issue?*

b) *In light of the answer in (1) above, whether the Tribunal has jurisdiction to determine the matter herein.*

c) *Whether Rentworks has the locus standi to make the claim as initiated herein.*

d) *Whether Rentworks' claim is capable of being arbitrated on.*

e) *Whether in the circumstances obtaining, Clause 17 of the Master Rental Agreement dated 13<sup>th</sup> November, 2017 was activated and if so, whether the Contract Term was automatically extended for a further twelve months?*

f) *What reliefs should the tribunal grant?*

30. A perusal of the Arbitral Award shows that the Arbitrator tackled and determined each of the issues that were listed by the parties for determination.

31. In *Mahican Investment Limited v Giovani Gaid & 80 Others* it was held:

***“ In order to succeed ( in showing that the matters objected to are outside the scope of the reference to arbitration) the applicant 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.”***

32. In the instant case, I find that the Arbitrator confined himself to the issues listed by the parties as requiring determination and hold that he cannot be said to have gone into a frolic of his own.

33. Regarding the alleged reference to the Sale and Cession Agreement by the Arbitrator I note that Section 20(3) of the Act grants the Arbitrator the latitude to determine the admissibility of any evidence. The said Section stipulates as follows:

***“(3) The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.”***

34. Having regard to my finding that the defendant did not object to the production of the Sale and Cession Agreement before the Arbitrator and taking into account the above-cited provisions of Section 20(3) of the Act, I am not persuaded by the defendant's argument that the Arbitrator went beyond the scope of the reference.

#### **Arbitrator's jurisdiction**

35. The defendant argued that since the dispute between the parties concerned a money award and not a legal issue, the Arbitrator lacked the jurisdiction to deal with the dispute. The legal position is that an Arbitrator draws his mandate and jurisdiction from the contract made by the parties. In the present case, I have already noted that the Master Rental Agreement contained an arbitration Clause (24-2) and that the parties consented to the reference of the dispute to arbitration. A perusal of the Final Award at Clause 4.0 shows that both parties participated in the appointment of the arbitrator as they jointly nominated him.

36. The arbitrator accepted his nomination as a sole arbitrator after which he went ahead to set down the matter for preliminary meetings and directions and later, the hearing of the dispute. The defendant filed an application before the Tribunal challenging the jurisdiction of the arbitrator. In its determination on the challenge on jurisdiction, the arbitrator held as follows in the Final Award:-

***“Neither party in its contestations on jurisdiction has contended that a dispute contemplated under Clause 24.2 has not arisen. Both parties agree that a dispute which requires arbitration before a single arbitrator has arisen. Therefore, the bone of contention between the parties is appointment of the arbitrator under Clause 24.3 of the MRA.***

***The parties mutually appointed me as a Sole Arbitrator in this dispute vide a letter dated 4<sup>th</sup> July 2018. This is uncontested. Since the appointment was by mutual agreement of the parties, a challenge to the appointment can only be brought founded on reasons that the challenger became aware after the appointment in accordance with Section 13(4) of the Arbitration Act.***

***The respondent admitted at paragraph 15 of its Amended Statement of Response that it received the claimant's demand letter and notice of intention to institute these proceedings. In its final written submissions filed on 28<sup>th</sup> March 2019, it has extensively reproduced excerpts of a demand letter dated 12<sup>th</sup> March 2018 from the claimant in which Clause 4 and Clause 18 of the MRA were invoked. This means that the respondent was aware about the nature of the Claimant's claim and the provisions of the MRA which it was alleged to have breached as a result of non-payment before making a decision on appointment if the Arbitrator.***

***In spite of that knowledge, the respondent agreed to the appointment of the Arbitral Tribunal as presently constituted. It has not been demonstrated by the respondent either through its application, supporting affidavit or written submissions that there are any reasons it has discovered after mutual appointment of the Arbitrator that would necessitate the challenge to appointment. Therefore, the respondent's jurisdictional challenge based on lack of qualification on part of the Arbitrator is dismissed with***

*costs to the Claimant.*

*Finding on this issue.*

***I find that the Tribunal has jurisdiction to hear and determine the dispute between the parties.”***

37. Having regard to the above findings by the arbitrator on the issue of jurisdiction and bearing in mind that the appointment of the arbitrator was by consent and full knowledge of both parties, I find that the challenge on the arbitrator’s jurisdiction is an afterthought. Furthermore, a decision having already been made by the arbitrator regarding his jurisdiction I find that any further challenge on jurisdiction can only be through an appeal against the decision as envisaged under Section 17(6) of the Arbitration Act.

38. Courts have adopted the position that they will not set aside arbitral awards on the basis of lack of jurisdiction unless it is shown that the arbitrator dealt with matters not contemplated by or not falling within the reference to arbitration. This was the position adopted in *Associated Engineering Company v Government of Andra Pradesh & Another* [1991] PDSCC 153 wherein the court observed:

***“.....the umpire decided matters strikingly outside his jurisdiction. He out went the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary.” See the case of ASSOCIATED ENGINEERING COMPANY V GOVERNMENT OF ANDRA PRADESH & ANOTHER [1991] R.D.S.C.C 153 [1992 AIR 232 15<sup>TH</sup> JULY 1991]”***

39. In the present case, I have already stated the arbitrator did not go beyond the matters under reference and I am therefore unable to say that the arbitrator lacked jurisdiction to determine the dispute.

**Interest.**

40. The defendant also took issue with the arbitrators award on interest as a ground for setting aside the Award. Section 32C of the Arbitration Act stipulates as follows;

***“Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple of compound interest calculated from such date, at such rate and with such rests as may be specified in the award.”***

41. In the instant case, I note that the arbitrator awarded the plaintiff interest in the following terms:

***“Interest thereon at contractual rates as provided in each Rental Schedule – Awarded simple interest at the rate of 10% per annum from the date of filing the statement of Claim being 30<sup>th</sup> July 2018 until payment in full.”***

42. Having regard to the above cited provisions of Section 32C of the Act, I do not find that there was anything untoward in the arbitrators award on interest that would necessitate the setting aside of the Final Award.

43. For the reasons that I have stated in this ruling, I find no merit in the application to set aside the Arbitral Award and therefore dismiss it with costs to the plaintiff.

**Application for recognition and enforcement of the Award.**

44. The application to enforce the award was opposed by the defendant on the basis that there was already an application to set aside the subject Arbitral Award. Flowing from this court’s decision to dismiss the application to set aside the Award, I find that nothing stands in the way of recognition and enforcement of the said Award.

45. Consequently, I allow the application dated 29<sup>th</sup> August 2019 with costs to the plaintiff.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of May 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 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Dachi for Mugisha for the plaintiff

Mr. Kiche for the respondent

Court Assistant: Sylvia