



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. E 040 OF 2018

ARIF AHMEDALI SITAFALWALA.....APPLICANT

-VERSUS-

AFRICARE LIMITED (MEDANTA)..... RESPONDENT

RULING

1. The Notice of Motion dated 19th June 2018 seeks to set aside the Arbitral award published on 24th May, 2018.
2. The award determined a dispute between Arif Ahmedali Sitafalwala (**the Applicant or Arif**) and Africare Limited (Madanta) (**the Respondent or Africare**). Arif and Africare entered into a Framework Agreement (the Agreement) dated 5th November 2013 for transfer of business as a going concern and related terms. Arif contends that Africare only partially honoured its obligations under the Agreement.
3. Arif invoked the Arbitration clause in the Agreement and because Africare declined or failed to accept or refuse any of the Arbitrators proposed by him, the appointment of the Arbitrator fell to the chairman of the Chartered Institute of Arbitrators, Kenya Section who appointed Timothy Kamau Njenga.
4. Arif is dissatisfied with the arbitral process undertaken by Mr Njenga and states that the Award failed/ignored to address the scope of the dispute and prayers sought. Further, that the award was contrary to the principles of Public Policy because;
 - (i) The was inconsistent with Article 159(2)(d) of the Constitution which is said to allow for an inquisitorial as opposed to an adversarial process.
 - (ii) The award contravenes section 32 of the Arbitration Act (the Act) which requires the Arbitrator to provide reasons for his findings.
 - (iii) The Award attempts to import the provisions of the Civil Procedure Rules.
 - (iv) The Award is contrary to justice and morality.
5. Africare resists the Application. Africare argues that Arif has failed to provide evidence and point out issues of procedure which make the award counter the provisions of Article 159 (2) of the Constitution. Second, that the Award is a 46 paged document in which the Arbitral Tribunal identifies a raft of issues and reasons for the position taken.
6. Africare contends that at no point in time did the Arbitrator import the Civil Procedure Rules and states that the directions issued during the proceedings identifies the Arbitration and Chartered Institute of Arbitrators Rules as the foundation of procedure in the matter.
7. Regarding the procedure adopted, Africare thinks that the Arbitrator is free to choose between inquisitorial and adversarial procedures. In addition, the Arbitrator can, to some extent, inquire from the parties on an issue he believes needs clarity.
8. That is not all to the matter. Introduced through a further affidavit of Arif sworn on 24th October 2018, is that the Arbitrator was not impartial. It is not contested that the Arbitrator is an employee in the law firm of Kariuki Muigua & Co. Advocates. Arif avers that upon conducting a search on Victor Thairu, who is the legal officer of Africare, he discovered that Thairu practices under the same law firm.
9. Because the question touched on the integrity of the Arbitration process, the Court directed that the Arbitrator be served with the Application and affidavit so that he could respond to it if he so wished. The Arbitrator sworn an affidavit on 18th October 2019 in which he

states that his appointment as a sole Arbitrator was made in his personal capacity as an arbitrator and not as an employee of the law firm. Further, that at the time of his appointment, Mr. Thairu was not an employee of the law firm. Moreover, that Mr. Thairu did not act as counsel for Africare at the Arbitration as they were represented by the law firm of Maina & Onsare partners.

10. As the Court turns to deal with the substance of the application, it must first attend to a preliminary issue raised by Africare. It is contended that the application before Court is premature as the Award is not final. It is argued that recourse to section 35 is only as against a final award, and that really is the position.

11. Africare thinks the Award to be inconclusive because of the order on costs made by the Arbitrator. This is what he said;

“The Respondent shall forthwith pay to the Claimant 40% of the costs and expenses of these Arbitration proceedings. The Parties will be at liberty to agree on the quantum of these costs. In the event that parties do not agree on the quantum. The Claimant shall file a bill of costs before this Tribunal for Taxation.”

12. Africare leans on a proposition found in Halsbury’s Laws of England, 4th Edition, Volume 2 para 610 that;

“The Award must be final, and therefore a conditional award is bad unless it provides an alternative in case the condition is not fulfilled.”

13. This Court has no doubt about the finality of the Award including the limb of Costs. The Arbitrator made a specific finding on Costs when he declared that the claimant would be paid 40% of Costs. The Award then provides a definite road map on how the actual figure on Costs will be arrived at; first, through agreement but in default by way of taxation. There is nothing interim or conditional about that order.

14. I turn to the next issue. Conflict of interest or impartiality is not one of grounds raised in the Notice of Motion of 19th June 2020. It was introduced into the proceedings through an additional affidavit. The Respondent protests the expansion of the application in this manner.

15. I would think that a fundamental issue is brought into focus in respect to the very nature of an application brought under section 35 of the Act, which reads;

35. Application for setting aside arbitral award

(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.”

16. First, it does not seem permissible that an applicant can properly, without leave of Court, argue grounds not raised in the application as originally presented. This because it is only fair that the respondent has notice that the Application has been formally expanded and that the matter may indeed be determined on the basis of grounds which he initially did not have to confront. Such leave gives the respondent a fair opportunity to respond to the new grounds.

17. Now, the bringing of applications under section 35 are time bound to within 3 months of the party making the application having received the arbitral award (subsection (3)). The rule emphasizes the objective of speedy disposal and finality principle of arbitration. There may be no difficulty in granting leave if an application to introduce new grounds is brought within the time lines set by subsection 3. However, once time has passed then the matter is not as straightforward. The application will be, not just for leave to bring in new grounds, but also to expand the time. Should the Court consider that it has jurisdiction to expand time (a debate that is continuing), then it will have to decide whether the application for leave to expand time discloses an exceptional reason so as to warrant its grant.

18. In the matter before Court, it is common cause that the new ground was taken up way after the three-month timeline and without leave of Court being sought. Obviously, it is not properly before Court and cannot fall for determination. That does it for the issue of conflict of interest and impartiality.

19. The issues properly before Court are:-

- a) Is the Award inconsistent with the Constitution and the Arbitration Act?
- b) Did the Tribunal decide matters outside the terms of the contract?
- c) Did the tribunal fail to appreciate the scope of the dispute?
- d) Is the award of costs by the Arbitrator a question of public policy?
- e) Is the award against the principles of justice and morality?

20. All these matters are raised under the banner of “against Public Policy”. The decision of **Christ for All Nations vs Appollo Insurance Co. Ltd [2002] 2 E.A 366** is often quoted when the concept of public policy is under discussion. Hon. Justice Ringera famously stated:-

“Public policy is a broad concept incapable of precise definition. An award can 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 any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

21. The Arbitral Tribunal is criticized for the following finding:-

“.....The documents attached by the Claimant to its bundle of documents and marked AAS 8 do not offer guidance to the Tribunal on how the projected average monthly revenue share of Kshs 474,446/= has been arrived at. In addition, the documents are neither authenticated by a signature nor do they show who prepared them.”

22. Arif argues that the Tribunal determined the matter on a technicality and that is contrary to the provisions of Article 159 (2) (d) of The Constitution and Section 19 and 20 of the Act as well as Rules 14 and 25 of the Arbitration Rules, 2016.

23. Article 159 (2) (d) of the Constitution provides as follows:-

“(d) Justice shall be administered without undue regard to procedural technicalities.”

24. Sections 19 and 20 of the Act read:-

19. Equal treatment of parties

The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case.

20. Determination of rules of procedure

(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.

(2) Failing an agreement under subsection (1), the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.

(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.

(4) Every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court.

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation and may for that purpose administer or take the necessary oath or affirmation.”

25. As is clear from the law, the Arbitral Tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence. The Arbitrator appreciated that power. Before reaching his decision, the Arbitrator stated as follows:-

“.....Section 20(3) of the Arbitration Act provide that 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.”

26. The Arbitrator gave reasons for rejecting the documents and why he thought they would not be proof of the monthly revenue. This was not a matter of procedural technicality. This was within the realm of substantive law. A party who fails to discharge his onus of proving a matter should not be allowed to turn around and blame the arbitral tribunal.

Of scope of the dispute:

27. An argument is made by the Applicant that the Arbitrator failed to appreciate that the dispute was a continuing dispute. The Court has read the award and cannot fault the Arbitrator's appreciation of what he needed to resolve. To demonstrate this may require that I reproduce extensive portions of the Award but I choose just a few.

28. This Court has looked at the Statement of Claim of the Applicant in which he sought the following prayers:-

1. Kshs.20,163,943/= (Kenya Shillings Twenty Million One Hundred and Sixty Three Thousand, Nine Hundred and Forty Three Only) being the projected revenue sharing income for the remainder of the agreement term.
2. Accrued eight months interest on the May 2017 revenue income of Kshs.496,117/= at Court rates.
3. Accrued six months interest on the July 2017 revenue income of Kshs.378,920/= at Court rates.
4. Accrued five months interest on the May 2017 revenue income of Kshs.79,680/= at Court rates.
5. Costs of the suit.
6. Interests on (a) at Court rates.

29. The Arbitrator addressed each of the reliefs sought and gave reasons for the findings he made.

30. It is argued by the Applicant that the Arbitrator failed to address the issues raised in Paragraph 6 of the Statement of Claim which reads:-

[6] The Respondent has consistently failed and/or refused to fulfil its obligation under contract by erratically making payments and ultimately failing to make any revenue sharing payments since May 2017.”

I am sure that this is not a fair commentary of the Award because the Arbitrator extensively weighed in on the matter and then concluded:

“.....The analysis above shows that the Respondent has not made the revenue share payments to the Claimant for the months of May 2017, July 2017 and August 2017. I am persuaded by the evidence presented by the Claimant that the revenue share payments for the months of May 2017, July 2017 and August 2017 are due from the Respondent. However, I will only award the Claimant the Revenue share payments for May 2017 and July 2017 that is reliefs no 2 and 3 of the Statement of Claim. Relief no 4 fails since the Claimant claims revenue income again for May 2017 in the sum of Kshs. 79,680/= and no evidence has been presented by the Claimant to prove that such an amount is due.”

31. The Tribunal's finding on Costs is reproduced elsewhere in this Ruling. Arif asserts that it should have been awarded the full amount of

costs as he succeeded and costs follow the event. What Arif forgets is that the substantial portion of his claim failed. The event was a small success of the entire claim. The Arbitrator cannot be faulted for granting only a portion of costs.

32. The Applicant has filed an application which simply discusses the merit of the decision of the tribunal. There are no Public Policy issues. A Court hearing and determining an application under Section 35 of the Act does not sit on appeal over the decision of an Arbitrator. The Motion of 19th June 2018 is without merit and is dismissed.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mohochi for Applicant

Wangu for Respondent