REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 481 OF 2013

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 222 OF 2019

UNLIMITED DIRECTIONS KENYA LIMITED.....APPLICANT

-VERSUS-

WASINI RESORTS LIMITED.....RESPONDENT

RULING

Background

1. On 26th November 2010, Unlimited Directions Kenya Limited (hereinafter **"Unlimited**") entered into an agreement with Wasini Resorts Limited (hereinafter "**Wasini"**) for the management of Wasini's apartment known as "**Wasini Luxury Homes."** A dispute however arose over the said agreement that was eventually referred to arbitration. The sole Arbitrator, **Mr. Chacha Odera**, rendered an Award dated 14th July 2013 in favour of Unlimited. Dissatisfied with the said award, the Applicant herein (**Wasini**) filed the Originating Summons dated 8th November, 2013 under Section 39 of the Arbitration Act (hereinafter "**the Act**") and pursuant to Rule 3 of the Arbitration Rules 1997.

2. The respondent (**Unlimited**), on the other hand, moved court through Miscellaneous Application 222 of 2019 ***Unlimited Directions Limited v Wasini Resorts Limited*** seeking enforcement and recognition of the said arbitral award.

3. Directions were thereafter taken that both applications be consolidated and heard together.

4. Parties canvassed both the originating Summons and the Miscellaneous Application for the enforcement and recognition of the award by way of written submissions which I have considered.

5. The issues for determination are as follows: -

a) Whether the parties had reserved the right to have the award set aside on matters of law.

b) Whether this court should set aside the Award.

c) Whether this court should recognize and enforce the Award.

Analysis and determination

6. Wasini's case was that the parties appeared before the Sole Arbitrator and by consent reserved the right to challenge the eventual award on issues of law as envisaged under Section 39 of the Arbitration Act.

7. On its part, Unlimited submitted that there was no agreement by the parties that would affect the finality of the Arbitral Award and that the same was as binding as an order of the court. Unlimited submitted that the Management Agreement did not provide for any challenge on the arbitral award rendered by the Arbitrator. They submitted that courts have consistently held that an arbitral award is final and binding. For this argument reference was made to the decision in ***Kenya Shell Limited v Kobil Petroleum Limited*** Civil Application 57 of 2006 wherein the Court of Appeal rendered itself as follows on the finality of an Arbitral Award:

"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts in this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations in which event the Arbitration Act, Act No. 4 of 1995 (the "Act") would apply and the courts take a back seat. In the matter before us, the parties had an arbitration clause and therefore the Act applies…. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to the courts……We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy."

8. Reference was also made to the decision in ***Nyutu Agrovet Limited v Airtel Networks Limited*** [2015] eKLR wherein it was held:

"Parties cannot settle for arbitration, which they know very well does not readily brook judicial intervention and then turn round and complain that the limitations inherent in their chosen dispute- resolution mechanism are illegal or contrary to public policy…..there is nothing contrary to public policy in the finality of the arbitrator's award…….I would add that in light of the express recognition or arbitration as an alternative dispute resolution mechanism by the Constitution of Kenya, the clear legislative intent on finality or arbitral awards as manifested in the provisions of the Arbitration Act, as well as the rationale behind the finality of arbitration awards very well-articulated by my sister, Karanja, J. A. in her ruling, there is nothing illegal or unconstitutional about the limitation of judicial intervention in matters that are subject to arbitration."

9. Section 39 of the Act stipulates as follows: -

39. Questions of law arising in domestic arbitration.

Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall—

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned."

10. I have perused the proceedings that were conducted before the Sole Arbitrator and I note that at the preliminary meeting the parties agreed on a raft issues and that at the tail end under the Right of Appeal, it was agreed as follows: -

"Parties reserved right of appeal on points of law."

11. My finding is that having reserved the Right of Appeal, the Originating Summons is properly before this court but only to the extent that the appeal is a point(s) of law.

Whether the award dated 14th July 2013 should be set aside.

12. As I have already stated in this judgment, the parties agreed that an appeal against the Arbitrator's award could be instituted only on points of law. The question which then arises is what amounts to points of law. The answer to this question can be found in ***Kenya Oil Company Ltd & Another v Kenya Pipeline Company Ltd*** [2014] eKLR where the Court of Appeal stated as follows on what amounts to a

point of law:

> ***"……. counsel for the appellants also drew our attention, to the English case of Vinava Shipping Company Ltd v Finelvet A.G. (The "Chrysalis") [1983] 1 Lloyd's L.R 503 in which Mr. Justice Mustil of the Queens' Bench division, when dealing with an appeal from an interim arbitral award, suggested how an award can be shown to be wrong in law. He proposed that the arbitrator's reasoning process should be divided into three stages. First, that the arbitrator ascertains the facts by making findings on any facts in dispute. Secondly, the arbitrator ascertains the law and thirdly the arbitrator reaches a decision in light of the facts and the law. In his view, the second stage of ascertaining the law is the proper subject matter of an appeal. He stated that: -***
>
> ***"The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases, an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct for the court is then driven to assume that he did not properly understand the principles which he had stated."***

13. It was Wasini's case that the Sole Arbitrator erred in law by re-writing the terms of the management agreement and by awarding costs to Unlimited despite finding that Unlimited breached the terms of the agreement when it failed to disclose that it was managing a competing business. For this argument, Wasini referred to Clause 3.9 of the management agreement which stipulates as follows: -

> ***"Clause 3.9 (a) that "as soon as the same are available, but in any event prior to December of each calendar year during the term, the respondent herein would prepare and submit the annual plan to the applicant."***
>
> ***Clause 3.9 (e) that " the parties agree that the approved Annual Plan for each fiscal year shall be annexed hereto (in the management agreement) and initialed by the parties for purposes of identification."***

14. The question which then arises is whether the finding by Sole Arbitrator, that Wasini had approved the Annual Plan, amounted to rewriting the agreement between the parties.

15. In arriving at the finding that the Annual Plan (AP) was approved by Wasini, the Arbitrator rendered himself as follows: -

> ***a) "Article 3.9 makes provision with respect of the AP"***
>
> ***b) Acceptance by the Respondent of the AP is evidenced by approval.***
>
> ***c) The Respondent's sole witness conceded that he approved the AP but did not sign it off.***
>
> ***d) Under Article 3.9 of the Agreement, the word used in accepting the AP is 'approval'.***
>
> ***e) Having conceded that the AP was approved albeit not signed off, it is my finding that there was an agreement with respect to the AP.***
>
> ***f) My finding is further buttressed by the fact that in throughout the period material to the AP leading to the termination of the Management Agreement, the performance of the business and by extension of the Claimant's was pegged upon the numbers set out in the AP.***
>
> ***g) Paragraph 957 of the 16th Volume of Halsbury's Laws of England states that on the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppels by record and estoppels in pais. The principle that a person may not approbate and reprobate expresses two propositions.***
>
> ***i. That the person in question, having a choice between two courses of conduct, it to be treated as having made an election from which he cannot resile; and***
>
> ***ii. That he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.***
>
> ***26. In this case the claimant prepared an AP and after deliberations the respondent's word and conduct was such as to represent that the said AP had been approved and indeed the parties benchmarked the performance based on the AP of 2012 prepared by the claimant.***
>
> ***27. The notice of termination of the Management Agreement is dated 4th May 2012 and the ground upon it was issued is premised upon Article XI Clause 11.1 (1) of the Agreement.***
>
> ***28. Article X1 Clause 11.1 (1) provides that notwithstanding anything contained in the agreement, the agreement may be terminated with a written notice given by one party to the other and the agreement would stand terminated on the date set forth in***

such notice, which date shall in no event be sooner than ten(10) days not later than thirty(30) days, after the delivery thereof, in any of the following events (Events of Default]…..if the parties are unable to reach agreement on the AP within 60 days of its submission by UDL to the Owner for approval in accordance with Section 3.9(a).

29. Having found that the AP represented by the Claimant had been approved by the Respondent, I hold in the premises that the Respondent was not entitled to issue the termination notice dated 4th May 2012 based on Article X1 Clause 11.1 (1) of the Agreement."

16. From the above extract of the Sole Arbitrator's/Award, I find that the finding that the Annual Plan had been approved was a finding of fact based on the testimony admission of Wasini's Sole witness and cannot therefore be said to have been tantamount to rewriting the terms of the agreement by the arbitrator.

17. On the issue of award of costs, Wasini submitted that the Arbitrator's exercise of discretion in the awarding costs to Unlimited was not justiciable in light of the finding that Unlimited was in breach of the Agreement. Wasini relied on the decision in ***Price & Another v Hilder*** [1984] eKLR where the Court of Appeal stated:

"The leading local decision is the case of Mbogo v Shah [1968] EA page 93 in which De Lestang VP (as he then was) observed at page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

18. The impugned final Award of the Arbitrator was as follows: -

i. The termination of the Agreement for the Management of Serviced Apartments known as Wasini Luxury Homes dated 26th November 2010 by the Respondent, Wasini Resorts Limited, was in breach of the said Agreement;

ii. The Respondent, Wasini Resorts Limited do pay the Claimant a sum of Kshs 1,000,000/- in respect of the management fees for the month of May 2012 (which sum shall attract simple interest at the rate of 12% p.a. simple from 1st June 2012 until payment in full) together with a further sum of Kshs 160,000/- in respect of Value Added Tax. Alternative to paying the VAT amount to the Claimant, the Respondent is at liberty to furnish the Claimant with a certificate withholding the VAT amount;

iii. The Respondent shall further pay to the Claimant a sum of Kshs 7,000,000/- being the amount the Claimant would have earned as management fees for the period between June 2012 and December 2012 which sum shall attract simple interest at the rate of 12% p.a form 30 days after collection of this award until payment in full;

iv. The claim by the Respondent for general damages is dismissed.

v. The Respondent's cross claim is dismissed.

vi. The Claimant shall have costs of the claim and the cross claim; and

vii. The Arbitrator's costs shall be shouldered by the Respondent.

19. From the above extract of the final Award, it is clear that the party found to have breached the Agreement was Wasini and not Unlimited as has been suggested by Wasini. I am therefore unable to find that there was any error in law in awarding costs of the arbitration to Unlimited.

20. Needless to say, it is trite that the award of costs follows the event, which means that costs are ordinarily awarded to the successful party. In the present case, the successful party in the arbitration was Unlimited and I therefore find no error in law in the awarding of costs to Unlimited.

21. Having regard to the findings and observations that I have made in this judgment, I find that the Originating Summon is not merited and I therefore dismiss it with costs to Unlimited.

22. Turning to the application for the recognition and enforcement of the Award, I find that having dismissed the Originating Summon seeking to set aside the Award, nothing stands in the way of this court in allowing the application dated 11th July 2019. Consequently, I allow it with costs to Unlimited.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 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. Omullo for Makabila for Unlimited Directions.

Mr. Keneth Wilson for Wasini Resorts.

Court Assistant: Sylvia