



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. APPL. NO. 62 OF 2017

IN THE MATTER OF PHOENIX .

OF (E.A) ASSURANCE CO. LTD.....APPLICANT /RESPONDENT

VERSUS

LEONARD GICHORA KIIRU.....RESPONDENT/CLAIMANT

RULING

1. By a notice of motion application dated 6.6.2017 supported by an affidavit sworn by Lillian Simiyu, the applicant (**PHOENIX OF (E.A) ASSURANCE CO. LTD**) seeks to set aside the arbitral award delivered on 7.4.2017 together with the award on costs. It is premised on grounds that the arbitral award was contrary to the provisions of the **Arbitration Act (no. 4 of 1995)** as it was made on a risk that was excluded under the policy document by failing to differentiate between war, civil war, political risk and terrorism clause in the clause document and the free additional benefits of riots, strike and civil commotion.

2. The applicant denied liability on the basis that the nature of loss and damage was excluded from the policy taken by the respondent as the respondent (**LEONARD GICHORA KIIRU**) had insured his vehicle with a comprehensive cover the period between **13th Dec. 2007 to 12th Dec 2008** yet the vehicle was damaged on or about the **3.12.2007**.

3. The matter was referred to an arbitrator and an award made on 7/4/2017 that the insurance policy covered riots, strikes and political commotion, being perils which led to the respondent's loss, and the respondent was duty-bound to indemnify him over the loss. The respondent was thus awarded a sum of Kshs.1,029,400/- together with interest from 12th January 2010 being the date when the arbitration was set in motion.

4. It is the applicant's case that the court is mandated to interfere with an arbitration award where it is shown that the arbitrator in arriving at the decision has a wrong understanding or interpretation of the law.

5. The respondent by a replying an undated affidavit filed on 1.11.2017 deposed that the arbitral award was not against public policy nor was it injurious to the interest of the public, so there would be no basis for setting aside. Further that there was no time frame set down by the parties to determine period the arbitration proceedings would take and the proceedings solely depended on the law and evidence. He urged the application be dismissed for want of merit.

Applicant's submissions

6. The background to this matter is that the respondent had taken a comprehensive cover for motor-vehicle registration **No KAW 606V** which covered the period 13th December 2007-12th December 2008. On 3rd December 2007, the said vehicle was damaged during the post-election period which was characterized by violence in many parts of the country. Subsequently, the respondent made a report to the applicant but the applicant denied liability on grounds that the nature of the loss and damage was expressly excluded under the policy document, and there was no endorsement that had been done to cover this damage/loss/risk.

7. The matter was canvassed by written submissions where counsel for the applicant argued that this court could only interfere with an arbitral award if it is shown that the arbitrator misinterpreted the law. Reference was made to Section 35(1)(2)(a)(ii), (b)(ii) of the **Arbitration Act no. 4 of 1995** which gives this court jurisdiction to set aside an arbitral award to the effect that:

“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). In addition the court was referred to the decision in **Rashid Moledince & Co. (Mombasa) Ltd & Anor v. Herma Ginnors Ltd** (1967) EA 645.

8. The dispute is founded under the insurance contract. The respondent relied on the brochure (Ex1) to prove that it had free extra benefits

listed as personal accident, riot, strike and civil commotion whereas the policy document excluded the same under clause 10. The award by the arbitrator was on the basis that the insurance cover by the respondent covered the riots, strikes and it is contended that it was contrary to the law and principles governing invitations to treat contracts generally. The applicant argues that the brochure was an advertisement tool aimed at inducing the purchase of product being marketed. That it was speculative and based on assumptions thus could not be a formal contractual document. The arbiter is faulted for referring to its terms and conditions, drawing from the decision in *Standard Chartered Bank Ltd v. Danielo Moses Mogeto Okebiro* (2014) eKLR which stated that brochures are used for marketing purposes and is not binding upon parties as there was no intention by either party to be bound by the same.

9. Citing the case of *Christ for All Nations v. Apollo Insurance Co. Ltd* (2002) 2EA 366, where public policy was defined as,

“is a broad concept 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 other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of Kenya or (c) contrary to justice and morality.”

On this basis the award is faulted as inconsistent with the law of contract and insurance act thus contrary to public policy, and urged the court to allow the application.

10. It was the respondent’s submission that the arbitral award could not be set aside as the same did not meet the requirements by the law and that this court had limited jurisdiction to interfere with arbitration since the arbitral award was final and binding upon parties. In this regard the court was referred to section 32A of the Arbitration Act which provides that:

Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no other recourse is available against the award otherwise than in the manner provided by the Act

11. Also that in *Anne Mumbi Hinga v. Victoria Njoki Gathara* (2009) eKLR it was held parties had to give a consent to arbitration and the consent can only be a question of law. In *National Cereals Produce Board v. Erad Suppliers & General Contracts Limited* (2014) eKLR one could apply to set aside an arbitral award if it was based on fraud, bribery, undue influence or corruption.

12. It is argued that arbitration is a model dispute solving option without recourse to the courts, thus parties should honor it and embrace the consequences, the same being restricted by the provisions of section 35 of the Act setting out instances when an arbitral award can be set aside.

13. This court is urged to consider the views held in *Nyutu Agrovet Limited v. Airtel Networks Ltd* (2015) eKLR the court opined that there was nothing contrary to public policy in the finality of the arbitrator’s awards, failure to adhere to the strict rules on limitation of intervention by the court in arbitration matters is what would constitute going against public policy. See also *Kenya Shell Ltd v. Kobil Petroleum Ltd* (2006) 2KLR 251.

14. The respondent further urged that the arbitration process was less adversarial and designed to deliver justice. It was unfair and it was against public policy to drag a party to a dispute resolution mechanism set own bare minimums on what to expect and how to proceed during and after the process and thereafter go against it. The court is urged to disallow the application.

Analysis

15. The main issue arising for determination is whether the award was contrary to public policy as to warrant being set aside. The Constitution of Kenya recognizes arbitration as an alternative form of dispute resolution under Article 159(2) (c), promotion of arbitration and other dispute resolution mechanisms is one of the fundamental principles that guide court in the exercise of the judicial authority. The High court can only set aside the arbitral award pursuant to Section 35 of the Arbitration Act. It provides 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;

16. The parties do not dispute that they all agreed the dispute to be handled by an arbiter. **Clause 10 of the Phoenix Total Protection Motor Plan-Commercial vehicle policy (LSI)** indicates that all differences arising out of this policy should be referred to the decision of an arbitrator to be appointed by parties in differences. The matter proceeded from diverse dates of August 2013 to 24.2.2015. The respondent testified together with his two witnesses whereas the applicant's Eldoret Branch Manager testified on its behalf.

17. Section 35 (4) (iv) above sets out the instances when this court can interfere with the award by setting it aside. The respondent testified that his vehicle had been destroyed during the post election violence and he was to be indemnified by the applicant since he had paid for comprehensive cover. Section 1 of the commercial vehicle policy provides when it can indemnify the insured in cases of loss or accidental damage to the motor-vehicle and its accessories and spare parts as follows:

a) By accidental collision or overturning.

b) By fire, external explosion, self-ignition or lightning or burglary, wear and tear, house breaking or theft.

c) By malicious act.

d) Whilst in transit (including the processes of loading and unloading incidental to such transit) by road, rail, inland waterways, lift or elevator.

There is an exception clause to the above that if the same is caused by wear and tear, overloading or strain, damage is caused by explosion then the insurance shall not be liable.

18. There is a clause on general exceptions on war, civil war, political war and terrorism exclusion clause. The applicant relied on the same and stated that the post election violence was in furtherance of political turmoil and the vehicle was damaged by fire as a result of the violence during that time. The applicant had asked the respondent to pay for excess which he did. From the start if the applicant knew they would not indemnify the respondent then why ask him pay for the excess fee for his vehicle registration no. **KAW 606 V**.

19. The applicant's witness had testified that there was a brochure which was used to advertise and it contained different clauses from the one in the commercial policy which was issued to him later. It was argued that the award had been issued contrary to the contract law and insurance act and therefore this court should set aside the award. The court *Christ for All Nations v. Apollo Insurance Company* (supra) held

"161. I need not re-invent the wheel about what constitutes "Contrary to Public Policy" as a ground to set aside an arbitral award. Ringera J (as he then was) stated that;

"... I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough."

20. The applicant has not demonstrated that the arbitrator made a decision which was contrary to public policy or failed to follow the Arbitration Act in any way. The applicant had compiled the policy document and they chose arbitration as a mode of dispute resolution. The application was on section 35 (1)(2)(a)(ii). The award arbitral agreement had been drafted by the respondent since they were the makers of the policy and cannot say it was not valid under the law to which the parties have subjected it to and that it was contrary to the public policy. The award shows the arbitrator adhered to and considered the evidence by the parties and the documents produced in court. I hold and find that the application has no merit and it is dismissed with costs to the respondent.

DELIVERED, SIGNED AND DATED THIS 27TH DAY OF JUNE 2019 AT ELDORET

H. A. OMONDI

JUDGE