REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 114 OF 1990

PATRICK MUTURI ……..PLAINTIFF/RESPONDENT

Versus

KENINDIA ASSURANCE COMPANY LIMITED……..DEFENDANT

JUDGMENT

Arbitration Law: Enforcement or setting aside of award

[1] I have before me two applications. One is dated 9/12/15 and the other 17th December 2015 for enforcement, and setting aside of the award dated 5th November, 2015 respectively. The court, with the consent of the parties directed the two applications to be canvassed together by way of written submissions. These applications are essentially the different sides of the same coin and are capable ofbeing handled together especially now that both are due for hearing. Again, the grounds for setting aside an award in section 35 and those for refusal of recognition or enforcement of award in section 37 of the Arbitration Act are strikingly similar. However, in normal course of things the one for enforcement of an arbitral award should not be filed until after the time allowed under Section 35 (3) of the Arbitration Act has lapsed. Accordingly, I will, therefore, decide first:

Whether the award herein should be set aside.

The determination of this issue, invariably will dictate whether the award will be adopted as an order of the court and on what terms.For avoidance of muddling up titles of parties, I will use the primary title of Plaintiff and Defendant as they appear in the original pleading of the suit. I herewith first set out the legal argument of the parties.

The Defendant's gravamen

[3] The Defendant has argued that the subject matter was referred to arbitration through a court order made on 18th June, 1990 but the arbitration never took off until 2015. Again the arbitrator Charles Mokua Obiria conducted the arbitral proceedings in a manner that excluded the defendant from participation. First, the arbitrator did not give the defendant an opportunity to cross examine witnesses or challenge the plaintiff's evidence or even present its defence. Accordingly to the defendant, the arbitrator violated all known rules of natural justice. Second, the arbitrator award was irregular and unlawful as it contained decisions in matters outside the policy document; it did not address issues arising out of the dispute between the parties. As a result, the arbitral award was gravely exaggerated and not supported by evidence or the law. Third, the arbitral award and the manner it was arrived at contravene public policy and it is therefore unenforceable. They beseeched the court to set aside the arbitral award in order to give way for a proper arbitration to take place.

[4] The affidavits by Regina N.Kitheka, the defendant's Chief Manager – Legal Department amplified the above grounds. Further enunciation of the said grounds is also found in the submissions by the defendant. The defendant gave an account of events that took place before this matter was finally referred to arbitration: that a judgment of Kshs. 4,258,000 by Kuloba J was set aside on appeal for the reason that arbitral process had not been undertaken as per the contractof insurance between the parties. The Defendant also placed a lot of emphasis on the fact that they made frantic efforts to have arbitration herein promptly undertaken but for one reason or other the matter dragged on for a long time. They gave explanations of the specific intervening circumstances which they said caused the delay herein. Contrary to the allegations by the plaintiff, the defendant took the view that they are not to blame for the delay. See paragraph 3.3 of the submission by the defendants. The defendant did notstop there. They argued that the arbitrator did not accord parties equal opportunity to present their case as envisaged in Section 19 of the Arbitration Act. He did not also give directions onthe procedure tobe followed in the proceedings as required in Section 20 of the Arbitration Act. Moreover, the arbitrator did not give an opportunity to choose the juridical seat of the proceedings under Section 21 of the Arbitration Act. And finally, the defendant urged that the arbitrator did not give advance notice to the hearing of the case to all parties in the arbitration. These arbitration obligations were not overridden or washed off by the direction given by this court on 3rdJune, 2015 and 3rd July 2015. According the defendant the plaintiff hasnotexhibited inhis affidavit a single letter or notice by the arbitrator to the defendant or its counsel, thus he failed to complywith Part IV ofthe Arbitration Act. Infact,the defendant asserted that it was never served with any hearing notice in the matter. All these things, the defendant said made the arbitral award herein irregular and enforceable. They cited the decisionby ***Kimaru J*** in the case of **RURAL HOUSING ESTATES vs. ELDORET MUNICIPAL COUNCIL [2009] EKLR** in which a procedure that was adopted by the arbitrator wasfound to be inappropriate to meet ends of justice, and for which the award was setaside.

[5] The Defendant also elaborated upon matters they say the arbitrator considered and determined which felloutside the terms of reference to arbitration. It stated that the awardcontained decisions outside the scope of reference. These matters that were never contemplated by the parties to the Insurance policy but which the arbitrator made awards about included: (a) Kshs. 2,190,000 for loss ofuser and (b) Kshs. 9,679,800/- for commercial interest rates of 17% p.a. for 26 years. According to the defendant these awards were based on***"consequential loss"*** that was never contemplated by the insurance contract. They cited the case of **MADISON INSURANCE COMPANY LIMITED vs. SOLOMON KIHARA T/A. KISII PHYSIOTHERAPY CLINIC KISUMU C.A.C.A. NO. 263 OF 2003**. To them the policy was for a cover limit of only Kshs. 356,000. This was a standard form contract that did not have a provision for "loss of user" or commercial rates of interest" awarded. Thus, by awarding these reliefs, the arbitrator acted without jurisdiction for which the award should be set aside. See also case of **NJUTU AGROVET vs. AIRTEL NETWORKS** on cogency and acceptability award. And based on this decision the defendants were ofa firm view that the award of Kshs. 14,769,800 made herein cannot stand the test of acceptability and only leads to travesty of justice. It ought tobe set aside.

The plaintiff says award be sustained.

[6] The plaintiff on the other hand averred that the award herein is perfectly in order and should not be set aside. He filed replying affidavit sworn on 4thJanuary 2016. He also filed submissions and list of authorities in support of his position. Gathering from his pleadings and annexures the Plaintiff blames the defendant for causing delay in the finalization of the arbitral process herein. He referred to correspondences marked as PW3 (a) and PW3(b) to show that he made efforts to set the arbitral proceedings down for hearing but in vain. H did not tire. He fixed the referral case for mention on 10th March 2015 and 4th June 2015 so that directions could be made on arbitration but the defendant failed to attend court. On 4th June, 2015 the court issued direction by appointing Charles Mokua as the plaintiff's arbitrator and also required the defendant tobe given Notice for 21 days to provide particulars of their arbitrator. Both the Order and Notice were served on the defendant and their counsels. The Notice for 21 days lapsed but without any action from the defendants. Then he proceeded to file documents before the arbitral tribunal. He proceeded exparte since the defendants had not filed any documents. Ultimately, the award was made and served on the defendants on 13th November 2015. He believes the award is the one which prompted action from the defendant. According to the plaintiff it is not correct therefore for the

defendant to allege that they were not involved in the arbitral process. Indeed he argued that the defendant was responsible in making the matter to remain unresolved from 1990. He accused the defendant of blatant disobedience of court orders to his detriment. He added another twist in this matter; that failure by counsel to attend court after service is a matter falling within profession negligence but which should not be visited on him. All actions and omissions by the defendant and his counsel are *malafides* and mischievous and should prevent them from getting favourable exercises of discretion. He was of the view that natural justice principles and the constitution dictate that cases should be heard expeditiously. The defendant has acted to the contrary; has come to court with unclean hands and equity should deny him remedy. He asked the court to dismiss the defendant's application.

[7] In the submissions, the plaintiff urged that the defendant has failed to bring his application withinthe ambit of Section 35 of the Arbitration Act. He cited the case of **ANN MUMBI HINGA vs. VCTORIA NJUKI GAITARA [2009] Eklr** to support his view. He said that the defendant is engaged in a fishing expedition by not stating exactly how the arbitrator dealt with matters outside the reference or contract. He added that the ground on violation of public policy is unsubstantiated as required. Therefore in the absence of material to support the grounds cited, the application must fail; they so argued.

DETERMINATION

Bad times

[8] Bad times come when an enthusiastic suitor such as the Plaintiff herein has been seeking justice against the Defendant for over 25 years now. The initial judicial journey ended in the setting aside of the judgment of this court (Kuloba J) and the matter was referred back to arbitration. The arbitration took different and annoying turns; with most of the delay being occasioned by the Defendant due to one reason or other. The counsel for the Defendant is not also blameless here for they did not attend court on occasions when they were served with notices to appear. The Plaintiff eventually procured an award from the arbitrator, but his journey was far from being over; the award has been challenged vigorously by the Defendant on various fronts of the law. It is those grounds set forth which I will carefully consider and decide whether the award should be set aside. But first let me set out the law applicable.

The legal threshold

[9] The legal threshold on whether an arbitral award should be set aside is set out in Section 35 of the Arbitration Act. A party dissatisfied with the arbitral award must, therefore, bring his application within the strictures of Section 35 of the Arbitration Act. In view of the arguments by the parties, I am content also to cite literary works by **Mustill and Boyd** in ***"Commercial Arbitration'', 2nd Edition at page 554*** that;

> ***"An award will be entirely void if the parties never made a binding arbitration agreement; if the matters in dispute fell outside the scope of the agreement; if the arbitrator was not validly appointed, or lacked the necessary qualifications; or if the whole of the relief granted lay outside the powers of the arbitrator. The award will be partially void if the relief granted related to a matter which was not referred or if for some other reason it was outside the jurisdiction of the arbitrator. In all these situations, the primary active remedy is for the Court to declare that the award is void, in whole or in part."***

And as ''Contrary to Public Policy'' has been taken as a ground to set aside the arbitral ward herein, help comes from the decision by Ringera J (as he then was) in the case of **CHRIST FOR ALL NATIONS vs. APOLLO INSURANCE CO LTD, NAIROBI H.C.C.C. NO. 477 OF 1999** 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. …"

I have stated the law. But, what are the exact grounds that have been pleaded by the defendant as the basis of setting aside of the arbitral award made on 5th November, 2015?

Grounds disclosed

[10] As I have stated, the applicant must bring his application within the confines of Section 35 of the Arbitration Act if he is to ever anticipate success. This means that he mustplead appropriate grounds and place material sufficient to prove thosegrounds. From the arguments it seems the defendant is seeking to the set aside this award on the grounds that:

(a) The defendant was not given proper notice of the arbitral proceedings or was otherwise unable to present case.

(b) The award dealt with a dispute not contemplated by or not falling withinthe terms of reference to arbitration or contained decisions on matters beyond the scope of the reference to arbitration.

(c) That the arbitral procedure adopted was not as a result of consentof parties or failing such consent, was not in accordance with the Arbitration Act,and

(d) The award is in conflict with the public policy of Kenya.

Of arbitral proceedings and procedure

[11] All arbitral proceedings must be conducted in accordance with the Arbitration Act; the said Act provides that proceedings shall adhere to procedure agreed by parties or in default of such agreement according to such other procedure that the arbitral tribunal shall apply as being appropriate to the circumstances of the case. See Section 20 and 29 of the Arbitration Act. The procedure adopted must however be one that serves justice and fairness of the case; of course it must accord the parties a fair and reasonable opportunity to present their cases. This demand of the law and Constitution incorporates need to observe the tenets of natural justice. In this case, the Defendant was aware of the appointment of the arbitrator and was even served through its counsel with an order of the court requiring them to provide particulars of their arbitrator. These overtures did not, however, elicit any response from the Defendant or its counsel. I must remind the Defendant that arbitration is a consensual process which places responsibility on both parties to facilitate expeditious and smooth resolution of the dispute at hand. Therefore, a party who deliberately impedes the process of arbitration, as is the case here, breaches its statutory obligation under the principle of overriding principle. Contrary to the submissions made by the Defendant, they were aware of the arbitral proceedings but did nothing to facilitate the arbitration process. There is nothing to show that they attempted to participate in the proceedings or to file or filed documents but were denied or rejected. In the circumstances, the Defendant cannot later on be heard to say that he was not facilitated to participate in the arbitration proceedings or that he was prevented from presenting his case. In light thereof, these challenges on due process ought to have been raised in the arbitral tribunal before the making of the award. Accordingly, nothing much turns on this ground. See the case of **ANNE MUMBI HINGA**(**supra**). I am not therefore unable to find a violation of public policy in the sense of the law and as expounded in the case of **CHRIST FOR ALL NATIONS vs. APOLLO INSURANCE CO LTD (supra).** The ground fails.Let me examine the potency or otherwise of the other grounds stated by the Defendant.

Matters not contemplated in the contract

[12] This ground is straight-forward. The Defendant argued that the award dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration or contained decisions on

matters beyond the scope of the reference to arbitration. According to the Defendant, the contract of insurance to which the arbitration relates is a Standard Form Contract which ordinarily does not contemplate remedy for consequential loss such as *''loss of user''* or *''Commercial interest rates of 17% p.a. for 26 years''* which the Arbitrator awarded in the sum of Kshs 2.190,000 and Kshs. 9,679,800 respectively.Apart from stating generally that the Defendant is engaged in a fishing expedition by not stating exactly how the arbitrator dealt with matters outside the reference or contract, the Plaintiff did not specifically address this issue. He simply insisted that the award was in order and should be sustained. In the law of Insurance, any type of consequential loss can be insured except it must be specifically described in the Policy of Insurance and insured as such. The basis for this reasoning is that insurable event and sum insured in such type of insurance must be specific and identified rather than being left at large. See ***McGilvary&Parkington on Insurance Law, 8th Edition.*** See also the case of **MADISON INSURANCE COMPANY LIMITED VS. SOLOMON KINARA T/A KISII PHYSIOTHERAPY CLINIC [2004] eKLR**where the Court of Appeal held that:-

> ***''It follows that loss of profits and other forms of consequential loss must be described in the policy and insured as such''***

Doubtless loss of user was a form of consequential loss. I have perused the Policy of Insurance provided herein and it is Standard Form Contract which does not specifically provide for loss of user. The policy in its clause 3 is specific that:

> ***''...The Insured's estimate of value stated in the Schedule shall be the maximum amount payable by the Company in respect of any claim for loss or damage''.***

The Schedule provided that the value of the insured motor vehicle shall be Kshs. 350,000. Accordingly, meticulous perusal of the policy of insurance does not reveal anything which may support a kind of importation or implication of loss of user as one of the losses covered by the said policy of insurance.The Arbitrator noted that the motor vehicle in question was insured for Kshs. 365,000 but without making any reference to this fact, he awarded value of new motor vehicle as at the time of the award in the sum of Kshs. 2,900,000. I have stated that the insured sum was Kshs. 350,000 which was the maximum sum payable for the value of the vehicle. Thus, on this front, any other award would not be contemplated in the contract. Therefore, the award dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration or contained decisions on matters beyond the scope of the reference to arbitration.

On interest

[13] Under section 32C of the Arbitration Act, an Arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rates as may be specified in the award. But the interest awarded by the arbitrator was on *''commercial rates''* and was on the *''loss of user''*as well as the *''current value of the vehicle''*which I have found to be outside the scope of the contract of the parties. Therefore, the award of interest provided in the award is not in accordance with section 32c of the Arbitration Act; it is tinctured for it is the fruit of offensive reliefs of ''loss of user'' and ''current value of the vehicle''. Accordingly, the arbitrator veered of the path cut out for him by the contract herein and proceeded to act on the wrong premises. The Value Added Tax was also based on the aggregate of the loss of user and interest awarded. It also falls by the way side. See what Kimondo J said about veering off course of an arbitrator in the case of **AIRTEL NETWORKS KENYA LIMITED vs.NYUTU AGROVET LIMITED[2011] eKLR**:

> ***"In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up a contract period to run to the year 2013 and to employ the arithmetic and multipliers above, he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the margins of contract into the world of tort and damages for negligence. ..... The Arbitration clause in the distributorship agreement had limited the dispute to those arising out of or relating to this agreement and breach thereof.....while it is true that in***

> ***the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the Arbitrator exceeded his jurisdiction ....”***

[14] Now that I have found these two items of the award were not contemplated by or falling within the terms of reference to arbitration, and so constituted decisions on matters beyond the scope of the reference to arbitration, should I set aside the entire award? I will fall back to the law. First, according to **Mustill and Boyd** in ***“Commercial Arbitration’’, 2nd Edition at page 554***;

> ***“An award will be entirely void if the parties never made a binding arbitration agreement; if the matters in dispute fell outside the scope of the agreement; if the arbitrator was not validly appointed, or lacked the necessary qualifications; or if the whole of the relief granted lay outside the powers of the arbitrator. The award will be partially void if the relief granted related to a matter which was not referred or if for some other reason it was outside the jurisdiction of the arbitrator. In all these situations, the primary active remedy is for the Court to declare that the award is void, in whole or in part.”***

Our Arbitration Act, specifically section 35(2) (a)(iv) provides that an award which is tainted by the fact that it dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration or contained decisions on matters beyond the scope of the reference to arbitration may be partially void provided that the offensive decisions can be separated from those which are within the reference or the scope of the agreement or jurisdiction of the arbitral tribunal.In this case, all the three heads of relief granted are offensive to the law and are the linchpin of and the only items in the entire award. The question of separation of the wheat from the chaff does not, therefore, arise. I note also that the arbitrator did not even address the question of general damages which was before him for consideration. I have said enough. Accordingly, the order that commends itself to me is to set aside the entire award. I hereby set aside the award made on 5th November 2015. As a natural consequence, there is no award to recognize or enforce. As such the application dated 9/12/15 is no longer feasible. Given the conduct of the Defendant and the circumstances of this case, I order that each party shall bear own costs in the applications herein. Nonetheless, I note that the Defendant is bent at delaying the arbitration for as long as it takes. I will not allow that. I therefore direct parties to appoint arbitrators strictly as per their arbitration agreement herein without delay. Towards that end, I will assign this case a mention date within 60 days, which is on 16th June, 2016 in order to gauge progress of the arbitration; this is in line with the Constitution which commands courts to facilitate alternative dispute resolutions. It is so ordered.

Dated, signed and delivered in open court at Meru this 21st day of April 2016

F, GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate for Mugambi advocate for defendant.

Plaintiff in person.

F, GIKONYO

JUDGE