



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 514 OF 2014

KENYA AGRICULTURAL AND

LIVESTOCK RESEARCH ORGANIZATION

(Formerly Kenya Agricultural Research Institute.....APPLICANT

- VERSUS -

NJAMA LIMITED.....RESPONDENT

RULING

1. The application before me seeks to set aside the Final Arbitral Award which was published on 31st August 2012 and which was thereafter delivered on 19th August 2014.

2. The following are the grounds upon which the application was founded;

“(b) The award as delivered is fundamentally, flawed, has no foundation in law and facts in all respects, inter alia;

(i) **THAT** the award as delivered by the Arbitrator contradicts the pleadings as filed by the parties and or prayers thereof.

(ii) **THAT** the award as delivered by the Arbitrator ignored the evidentiary materials submitted by the Applicant herein and having wholly relied on the Respondent’s documents and evidence, the Arbitral award and proceedings are premised on open biasness and prejudice.

(iii) **THAT** the Arbitral award as delivered by the Arbitrator goes beyond the Scope of Arbitration.

(iv) **THAT** the Arbitral Award as delivered by the Arbitrator is an unjust decision, against public policy and stand to occasion gross injustice to the applicant by loss of Public Funds unless set aside by this Court”.

3. The applicant submitted that the arbitrator acted contrary to the provisions of Section 29 (5) of

the Arbitration Act.

4. He is said to have done so when he ignored the Fixed Contract Price of Kshs. 30,919,100/0 when he calculated the amounts allegedly owed to the Respondent. As the sum of Kshs. 17,042,742.07 had been paid, the Applicant pointed out that the only amount of money that could then have outstanding would be in the sum of Kshs. 2,725,731.93, from the Fixed Contract Price. That figure is arrived at after also deducting the sum of Kshs. 1,150,545, which was the “*Supervision Fees*”.

5. Therefore, it was the opinion of the Applicant that the figure of Kshs. 4,463,699/- was picked from air, by the arbitrator as it was neither reflected in the pleadings nor proved by evidence.

6. As the cumulative effect of awarding the sum of Kshs. 4,463,699/- was that the total value of the contract exceeded the Fixed Contract Price, the Applicant submitted that the Arbitrator engaged in the re-writing of the contract between the parties.

7. Secondly, the Respondents is said to have failed to offer any evidence to prove the sum claimed. According to the Applicant, the Arbitrator awarded the sum of Kshs. 4,463,699/- only because it was cited in the plaint.

8. A perusal of the Statement of claim shows that that sum was said to be the value of the completed works under Valuation No. 6.

9. In **ROBERT GHONZI KIMANI VS DABID BWIRE KHISA & ANOTHER, CIVIL APPEAL NO. 4 B OF 2009** (at Kisumu), Chemitei J. cited the following words of the late Justice Madan in the case of *CMC Aviation Limited Vs Cruisair Limited (No. 1.) [1978] KLR 103*, at page 104;

“The pleadings contain the averments of the parties concerned: Until they are proved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.

The pleadings in this suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted, as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents”.

10. Notwithstanding that clear legal position, the Respondent is said to have produced no invoices, receipts or any other contractual documents to prove the bare statements made in the Statement of claim.

11. Furthermore, the claim for Kshs. 4,463,699.00 was described by the Applicant as Special Damages.

12. Therefore, the said claim ought to have been specifically pleaded and strictly proved.

13. The applicant relied on the following decisions of the Court of Appeal, to support its contention regarding the need to plead Special Damages and to thereafter prove the same specifically:

(a) In *Charles Sande Vs Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992*, wherein the Court of Appeal said;

“As we have pointed out at the beginning of this judgment Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special

damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law”.

(b) In Coast Bus Service Ltd Vs Murunga Danyi & 2 others Civil Appeal No. 192 of 1992 (unreported), the Court of Appeal said;

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of the trial. If at the time of filing suit the particulars of special damages were not known, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars....”

14. In this case, I understand the Applicant’s case to be that although the Respondent did make a claim for Kshs. 4,463,699.00, the said claim was thereafter not proved at all.

15. It was because of the alleged failure to provide strict proof of the claim that the Applicant faulted the Arbitrator for awarding the sum in issue.

16. Meanwhile, on the twin issues of the interest rates and the due date, the Applicant submitted that the Arbitrator’s decision to award interest at 26% per annum was without justification or explanation. Indeed, the sum was so punitive that it more than doubled the Respondent’s claim.

17. Therefore, the Applicant asked the court to reject the unfair and unjust deviation made by the Arbitrator.

18. The said submission was premised on the Applicant’s contention that;

a) The Arbitrator fully appreciated that the rate of interest was unfair, yet proceeded to award it;

b) The Arbitrator rejected the Applicant’s similar arguments on the same point. Therefore, the Arbitrator applied double-standards between the parties.

c) The contract provided for the applicable rates of interest. However, the Arbitrator ignored the terms of the contract, and applied rates which went beyond the scope contemplated by the contract.

19. The Arbitrator directed that the interest would accrue from 8th July 2007.

20. As the parties both knew that the contract was terminated on 14th May 2009, the Applicant submitted that interest could only accrue after the date of termination.

21. In conclusion, the Applicant submitted that the Arbitral Award was plainly wrong as it flouted the fundamental tenets of judicial proceedings and decision in Kenya.

22. Therefore, if the award was not set aside, the Applicant believes that that would constitute an act of fraud from a public body. The Applicant pegged that submission upon its understanding that the Respondent had not only done less work than it had claimed for, the work already done was also shoddy and unprofessional by all standards.

23. In answer to the application, the Respondent submitted that the said application was actually

an appeal which was clothed as an application to set aside the award.

24. The court was reminded about the finality of arbitral awards, which therefore precluded the courts from interfering with arbitral awards.

25. It is common ground that pursuant to paragraph 37.9 of the Contract it was expressly stipulated thus;

“The award of such arbitrator shall be final and binding upon the parties”.

26. However, Section 35 of the Arbitration Act gives window of opportunity for setting aside an arbitral award. The window is a very narrow one. It specifies the only instances in which the High Court may set aside an arbitral award.

27. For the purposes of this case, I understand the Applicant to be saying that the award should be set aside because;

(i) *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 arbitration; and*

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

28. One of the issues which I have to determine is whether this is an appeal couched as an application under Section 35 of the Arbitration Act.

29. Secondly, if it is an application which falls within the ambit of Section 35 of the Arbitration Act, I will have to determine whether or not the Applicant had satisfied the requirements that would justify the setting aside of the arbitral award.

30. The Respondent submitted that the applicant was simply questioning the factual findings of the Arbitrator.

31. Two problems arise from that: First, the record of the proceedings before the Arbitrator were not made available to this court, so the court could not verify the accuracy of the complaint lodged by the Applicant. Secondly, pursuant to the provisions of Section 39 (2) (a) of the Arbitration Act, the High Court was only mandated to determine the issues of law which arose. Therefore, if the issues raised were those of facts, it would not be open to the court to interrogate them, with a view to determining the efficacy of the determination upon which the issues arose.

32. The Respondent also submitted that the Applicant has abandoned its assertion that the award contradicted the pleadings.

33. On the question of Public Policy, the Respondent submitted that the arbitral award did not offend public policy.

34. As far as the Respondent was concerned, the Project Manager, who testified on behalf of the Applicant, did not assess the value of the work which had been done in relation to Valuation No. 6. Therefore, as the Project Manager had, allegedly, not denied that the work was done, the Respondent contends that it had, on a balance of probability, proved the claim for Kshs. 4,463,699/90.

35. As relates to the rate of interest of 26% per annum, the Respondent pointed out that even the Applicant had, in its counterclaim, sought interest at the same rate. Therefore, the Respondent submitted that that rate of interest cannot have been unconscionable.

36. The Respondent expressed the view that the Applicant ought not to be treated differently from other persons simply because it was a public body. All persons are equal before the law, emphasized the Respondent.

37. In determining this matter, I wish to start from the foregoing last submission made by the Respondent. I do accept that parties ought to be treated in an equal manner, before the law. To my mind, that means that there was no law which should be applied differently to different persons simply by virtue of their status. A public body ought to be looked at through the very same lens as other parties, in similar circumstances.

38. That would imply that if the claims of one party was dismissed because the same;

“have not been supported documentarily;”

the Arbitrator should have arrived at the same conclusion in respect to the claims of the other party.

39. The arbitrator expressed himself thus;

“I dismiss the claims for lack of proof of the actual losses incurred by the Claimant. This Tribunal cannot speculate on the amounts. The claims ought to have been properly identified, quantified and priced”.

40. That finding confirms the Arbitrator’s understanding of the requirement that special damages have to be pleaded with as much particularity as possible, and that thereafter such pleaded particulars need to be specifically proved.

41. If thereafter the Arbitrator made an award in respect of special damages which were not specifically proved, such a decision would be deemed to be inconsistent with public policy.

42. In this case the Arbitrator held as follows;

“In the absence of the consultant’s Final Account, the Claimant’s Final Account sum of Kshs. 4,463,699 as particularized in the plaint succeeds.

....

The Claimant’s failure to certify becomes the Employers default. I shall therefore Award simple interest on the sum of Kshs. 4,463,699/- with effect from 8th July 2007 until 31st August 2012, the date of this Award at the rate of 26% p.a. This translates to Kshs. 5,980, 867/49”.

43. The Arbitrator did not award the sum of Kshs. 4,463,699/- because the Respondent proved it. He did so because the consultant did not make available the Final Account which could have reflected that sum. That meant that Arbitrator did not heed his own well-stated understanding, which had made it abundantly clear that the special damages should be pleaded and thereafter be specifically proved.

44. Meanwhile, the fact that one party makes submissions on an aspect of a matter which was before the arbitrator does not, of itself, make that aspect of the matter an issue for determination.

45. An issue must arise from pleadings. One party would make an assertion and if the other party denies it, there would arise an issue.

46. In this case, the Respondent stated, at paragraph 4 of the Statement of Claim that;

“The successful bid was awarded by the Respondent to a company known as Conduct of Kenya Ltd for the contract sum of Kshs. 20,919,001/00 and the contract period was to run for 20 weeks commencing on 17th April 2005”.

47. Later, at paragraph 6 of the Statement of Claim, the Respondent made it expressly clear that Conduct of Kenya Ltd;

“assigned all its contractual responsibilities and rights under the tender to the claimant herein”.

48. The Applicant herein expressly admitted paragraph 6 of the Statement of Claim. Thus there was no dispute about the assignment of all the contractual responsibilities and rights to the Respondent.

49. According to the Statement of Claim, the contract was for a sum of Kshs. 20,919,001/00. Therefore, if the whole contract was assigned to the Respondent, that would be inclusive of the provision which specified that the contract was for a sum of Kshs. 20,919,001/00.

50. Pursuant to the provisions of Section 29 (5) of the Arbitration Act, the arbitral tribunal is enjoined to decide the dispute in accordance with the terms of the particular contract. Therefore, when the Arbitrator awarded Njama Limited a sum whose quantum would render the value of work done at more than double the contract sum, then the Arbitrator cannot have acted in accordance with the terms of the contract.

51. Furthermore, when the claimant expressly stipulated that interest would be calculable at *“a rate of 3 percentage points above the Central Bank of Kenya’s average rate for base lending prevailing as at the first day when payment became overdue,”* the Arbitrator was enjoined to award interest within that range. The reason for so saying was that the claim for interest was provided for in the contract document, in the very terms as the claimant set out in paragraph 10 (vi) of the Statement of Claim.

52. If the Arbitrator was to act within the scope of the terms of the contract, he was obliged to give effect to that contractual term.

53. By awarding a rate of interest which was not in tandem with the terms of the contract, the Arbitrator acted in excess of his jurisdiction.

54. I so find because the Arbitrator;

“expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the realm of the contract....”

In so finding, I have borrowed the words of Kimondo J. in **AIRTEL NETWORKS KENYA LIMITED (Formerly known as CELTEL KENYA LIMITED) VS NYUTU AGROVET LIMITED, Misc Cause No. 400 of 2011**, at paragraph 39.

55. In conclusion I hold that the Arbitrator acted beyond his jurisdiction, when he failed to keep himself within the confines of the contract, as was expected of him when adjudicating the dispute. He flouted Section 29 (5) of the Arbitration Act.

56. Secondly, the Arbitrator acted against public policy by applying double-standards on the issue as to which party had the onus to tender evidence to prove his claim. He had, correctly, stated that it is the person who made a claim who was under a legal duty to prove his claim. Thereafter, he rejected the Applicant’s counter-claim, on the grounds that the Applicant did not prove its said counter-claim. But in relation to the Respondent, the Arbitrator held that the failure by the Respondent to tender evidence was deemed to be proof of the claimant’s claim.

57. If that reasoning was permitted to stand, it would be inconsistent with Public Policy in Kenya. That is not because the decision was wrong, of itself. It is because the Arbitrator had expressly stated the legal position, as he understood it, but thereafter applied it differently as between the 2 parties.

58. To my mind, such a position was wholly offensive to the ordinary, reasonable and fully informed member of the public.

59. For those reasons, the Arbitrator's award cannot be sustained. I therefore order that the Final Arbitral Award published on 31st August 2012, and delivered on 19th August 2014 be set aside.

60. The costs of the application are awarded to the Applicant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of April 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Bundi for Milimo for the Applicant

Thuita for the Respondent.

Collins Odhiambo – Court clerk.