



THE REPUBLIC OF KENYA
THE HIGH COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC CIVIL APPL NO 507 OF 2014

DHL EXEL SUPPLY CHAIN KENYA LIMITED.....APPLICANT

VERSUS

TILTON INVESTMENTS LIMITED.....RESPONDENT

RULING

1. The Applicant's Chamber Summons application dated and filed on 22nd October 2014 was brought under the provisions of 35 (2)(a)(iv) and 35 (2)(b)(ii) of the Arbitration Act 1995 and Rule 7 of the Arbitration Rules, 1997. Prayer Nos 1, 3 and 4 were spent. It sought the following remaining orders:-
 1. **Spent.**
 2. **THAT the Final Award dated 13th October, 2014 of SAMMY O. ONYANGO, Sole Arbitrator, be set aside.**
 3. **Spent.**
 4. **Spent.**
 5. **THAT FURTHER AND IN THE ALTERNATIVE this Honourable Court may be pleased to give appropriate directions and or (sic) the said award be reviewed and the dispute be decided by this Honourable Court.**
 6. **THAT costs of this Application be provided for.**
2. For ease of reference, the court referred to the parties in the names the proceedings had been brought under and not Tilton Investments Limited and DHL Exel Supply Chain Kenya Limited as the Claimant and the Respondent in the Arbitral Proceedings respectively.

THE APPLICANT'S CASE

3. The said application was supported by the Affidavit of Benedict Clay that was sworn on 21st October 2014. His Supplementary (sic) Affidavit was sworn on 23rd March 2015 and filed on 24th March 2015. The Applicant's Written Submissions dated 17th April 2015 and together with authorities were filed on 21st April 2015. It filed two (2) Supplementary (sic) Lists of Authorities dated 18th May 2015 and 21st June 2015 on 19th May 2015 and 2nd July 2015 respectively.
4. The Applicant stated that on 11th April 2011, it entered into a Transport Contract (hereinafter referred to as "the Contract") with the Respondent for the supply of trucks for transportation of the Applicant's goods. However, the Respondent was unable to service the said Contract effectively

- and breached the confidentiality clause leading to the suspension of the said Contract.
5. The Applicant contended that the Respondent relied on a Clause in the Addendum of the said Contract demanding payment for trucks that were not in its service whereupon the Arbitrator made the following findings which it said, lacked basis:-

“....

1. **Specific damages of Kenya Shillings Forty Nine Two Million, Two Hundred and Twenty Eight Thousand Six Hundred and Fifty Six, Fifty Five Cents. (Kshs. 49,228,656.55) worked as per the addendum attached herewith. The amount takes into account the 15% tolerance level and therefore gives the respondent the benefit of doubt on possible business downtime.**
2. **Payment of damages for loss of business following termination/suspension of the contract.**

The Claimant pleaded for damages for loss of business for the remainder of the contract period being 14 months from the date of the wrongful termination of the Agreement.

In the end the arbitrator assesses damages at Kshs. Thirty Six Million (Kshs. 36,000,000/=) for the months of March 2012 (Kshs. 13,000,000/= each). The Arbitrator has taken into cognizance of the fact that as at the time of termination of the Contract, the Claimant had made available 13 trucks for utilization by the Respondent. Refer to the Attached addendum on the workings.”

6. The Applicant pointed out that the failure or omission to serve the Arbitrator with its present application was as a result of the urgency of the matter which omission it said ought not to prejudice the hearing of the case herein. It denied that it was attacking the said Final Award on merits and contended that it had challenged the same on grounds that it was in contravention of the Laws of Kenya and hence a nullity, that it failed to follow and/or disregarded the terms of the aforesaid Contract between the parties and the Addendum thereto, that it exceeded the scope and mandate of the said Arbitrator and dealt with a dispute that was not contemplated by or falling within the terms of the reference and that it failed to determine all the issues that were placed before the Arbitrator.
7. The Applicant was categorical that the said Contract did not provide for any compensation as had been contended by the Respondent and emphasised that the double benefit of the Final Award for the sum of Kshs 1,000,000/= per month per truck as claimed by the Respondent would only apply if the truck worked for the whole month as per the evidence that was adduced before the Arbitrator.
8. It therefore urged the court to find that its application was meritorious and that the same should be granted as it had been sought.

THE RESPONDENT’S CASE

9. In opposition to the said Application, John Muguviyi, the Respondent’s Managing Director swore a Replying Affidavit on 21st November 2014. The same was filed on 26th November 2014. The Respondent’s Written Submissions and List and Bundle of Authorities both dated 4th May 2015 were filed on 11th May 2015.
10. The Respondent stated that the Applicant’s application was an appeal in disguise and for which, this court had no jurisdiction to entertain. It was its averment that it in its Statement of Defence, it had sought an alternative prayer for an order of damages at the rate of Kshs 1,000,000/= per truck per month in respect of fifteen (15) trucks for fourteen (14) months. It also stated that the said Arbitrator had correctly interpreted the issue of expectation of work as the essence of the Contract in question.
11. All in all, it contended that the issues raised in the Applicant’s present application fell short of the grounds envisaged in Section 35 of the Arbitration Act and therefore urged the court to dismiss it with costs to it.

LEGAL ANALYSIS

12. In its Statement of Claim dated 4th February 2014 which was later amended on 8th April 2014, the Claimant therein (the Respondent herein) sought the following reliefs as against the Respondent therein (the Applicant herein):-

- a. **A declaration that the Respondent was in breach of the terms and conditions of the Agreement and Addendum.**
- b. **An order for specific performance to compel the Respondent, its agents, advocates or any other persons acting for or on its behalf, to pay the Claimant the amount of Kshs 67,695,494.02 due and outstanding to the Claimant together with further financial charges including interest at commercial bank rates from the respective payment obligations became due under the Agreement and Addendum until payment in full.**
- c. **In the alternative, an order as to damages or such other relief as may be just and fit to grant.**
- d. **For costs of the Arbitral Proceedings and interest thereon.**

13. On page 4 of the Final Award, the Arbitrator identified the following as the major issues for determination:-

- a. **Whether the Respondent was in breach of the Agreement and Addendum.**
- b. **Whether the Claimant was entitled to damages and to what extent.**

14. He dealt with the said two (2) issues, under what he referred to as sub-issues, shown herein below:-

- a. **Whether the Respondent guaranteed the Claimant work for its trucks that was expected to yield Kshs 1m per truck per month.**
- b. **Whether the Claimant ought to have been paid on the basis of the guarantee or on a pro-rata basis and trip basis.**
- c. **Whether the Claimant availed trucks as was expected by the Respondent.**
- d. **Whether the contract was lawfully suspended/terminated by the Respondent.**

15. In respect of the first sub-issue herein, the Arbitrator found as a fact, that the guaranteed work was a suretyship obligation on the part of the Applicant and that failure to allocate the guaranteed work to the Respondent herein was a breach of the material term of the Agreement and Addendum on the part of the Applicant herein.

16. In particular, the said Arbitrator relied on an email dated 7th December 2011 by one Albert Onyango, the then Applicant's Business Manager addressed to the Respondent's witness namely, Frank Muchiri in which it was stated as follows:-

“It is 1m per truck gross per month VAT exclusive. If the period is less than that it was to be pro-rated. The onus is on us to ensure work is available.”

17. On the second sub-issue, the said Arbitrator also found as a fact that unlike in the said Agreement where charges were to accrue upon provision of services by the Respondent herein which was to be proven by provision of deliveries, trip statement, statement of accounts and approved invoices, the Addendum modified this position and defined the expected fees as Kshs 1 million per truck per month with a fifteen (15%) per cent tolerance.

18. The said Arbitrator observed that the parties ought to have sought to have amended the Agreement and Addendum when they noticed that there was a divergence on the issue of payment. However, as neither the Applicant nor the Respondent herein sought to have the said amendments effected, they were now bound by the terms of their Agreement.

19. In this regard, he placed reliance on the aforesaid email of 7th December 2011 in which the Applicant was clear that the rate was Kshs 1,000,000/= per truck per month VAT exclusive. He relied on the doctrine of *contra preferentem* rule which was to construe an ambiguous contract terms against the drafter of the agreement so as to make a determination in respect of the ambiguous clause. There was no appeal that was raised on this issue. As a result, the court cannot disturb the said Arbitrator's finding on the same.

20. Turning to the third sub-issue, the Arbitrator found as a fact that the Respondent herein made the trucks available to the Applicant herein and that the five (5) vehicles original trucks were available from the date of the said Agreement while the additional trucks were made available from the date when they were first put into use under the said Agreement. It was his view that the Respondent's assertions that it was never provided with the trucks was an afterthought and that in any event, it did not adduce any evidence to prove this contention.
21. The Applicant averred that it terminated the Contract on 14th February 2012 on the ground that the Respondent herein was unable to service the contract. In its testimony before the Arbitrator, the Applicant stated that the Respondent herein was terminated for breaching the confidentiality clause of the said Agreement that touched on payment.
22. As regards this fourth sub-issue, the said Arbitrator found as a fact, that the Applicant wrongfully and unreasonably terminated the said Agreement for the reason that the Applicant did not notify the Respondent herein of the event of the default in reasonable detail and require a rectification of the alleged breach as was stipulated in the said Agreement.
23. In answer to the first major issue, it was therefore the Arbitrator's final finding that the Respondent breached the said Agreement and Addendum.
24. Turning to the second major issue, the Arbitrator contended that having found the Applicant to have been in breach of the Agreement and Addendum, the Respondent herein was thus entitled to compensation as shown in Paragraph (5) hereinabove.
25. He relied on the principle of law of contracts that a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss including loss of profit resulting from the breach. It was his finding that the Respondent ought to have sought alternative transportation arrangement for its trucks as opposed to continuing to reserve them for the Applicant which was no longer interested in the business relationship and in any event, within the stipulated contract termination notice period of three (3) months as was provided for in Clause 4.2 (a) of the said Agreement.
26. On that basis, the Arbitrator made a finding of fact as follows:-

“In the end the Arbitrator assessed damages at Kshs Thirty Six Million (Kshs 36,000,000.00 each). The Arbitrator has taken cognizance of the fact that as at the time of termination of the contract, the Claimant had made available 13 trucks for utilization by the Respondent. Refer to the attached addendum on working....”

27. The Arbitrator made no order as to costs. He did not also award any interest in respect of the specific damages. However, he awarded simple interest at the rate of eight (8%) per cent on the damages of wrongful termination of the said Agreement from the date of termination until payment in full.
28. The said Arbitrator framed the issues he was to determine in the reference from the facts that had been presented before him and as can be seen hereinabove, he made a finding on each and every issue. The Applicant did not object to the way the said issues were framed. When the court carefully considered the Applicant's arguments, it found itself in agreement with the Respondent's submissions that the issues raised by the Applicant were primarily issues of fact.
29. The court did not therefore find the case of **Kenya Pipeline Company Limited vs Kenya Oil Company Limited & Another [2012] eKLR** that was relied upon by the Applicant to have been relevant in the circumstances of this case as the court found that the said Arbitrator did not go outside the boundaries of the contract or that he had exceeded his jurisdiction and gone beyond the contemplation of both the Applicant and the Respondent in the reference that was before him.
30. There was also no evidence that was furnished by the Applicant to demonstrate that the said Final Award was in conflict with the law of contract and thus in conflict with public policy as contemplated by Section 35 (2)(b)(ii) of the Arbitration Act Cap 49 (Laws of Kenya) that stipulates as follows:-

35(2) An arbitral award may be set aside by the High Court only

(b) The High Court finds that-

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

31. Indeed, the Applicant did not show that the said Final Award was inconsistent with the Constitution or other laws of Kenya, or inimical to the national interest of Kenya or contrary to justice and morality. Its arguments did not reveal that there was a violation of public policy herein and in this regard, its application would not succeed on this ground. The case of **Christ For All Nations vs Apollo Insurance Co Ltd [2002] 2 EA 366 (CCK)** that was relied by both the Applicant and the Respondent would therefore not come to the aid of the Applicant for the aforesaid reasons.
32. There was also no evidence that was presented by the Applicant to demonstrate that the said Final Award dealt with a dispute not falling within the terms of the reference to arbitration or that it contained decisions on matters that were beyond the scope of the reference or that the said Award contained decisions not referred to arbitration as envisaged under the provisions of Section 35 (2) (iv) of the Arbitration Act.
33. The said Arbitrator was well within his right, power and jurisdiction to have opted to award the alternative prayer in the Respondent's Statement of Claim. Indeed, a perusal of the said Final Award did not give any indication that the said Arbitrator also awarded Prayer Nos (a) and (b) of the said Statement of Claim shown hereinabove.
34. Notably, the court did not have any jurisdiction to consider if the Arbitrator went outside the contractual documents. If the Applicant was of the view that the Arbitrator had flouted the principles of the law of contract and was aggrieved by the said finding, it ought to have appealed against that point of law that would have arisen from the said Final Award as contemplated under Section 39 (b) of the Arbitration Act. Appreciably, the Applicant did not appeal against the said Final Award but instead opted to seek prayers for the setting aside of the said Final Award. The court must therefore confine itself to the application that is before it and not consider the merits or otherwise of points of law of the Final Award.
35. It is, however, important to note that under Section 39(a) and (b) of the Arbitration Act, the court can only consider questions of law arising in the course of the arbitral proceedings or those arising from the award and if the parties have consented to lodging of appeals or the Court of Appeal is of the opinion that a point of law of general importance due to the final and binding nature of arbitrations. This was not the position in the case herein.
36. While Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, it must be done within the parameters of Section 10 of the Arbitration Act which provides as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

37. Interrogating whether or not the said Arbitrator comprehended the agreement would be tantamount to re-opening and considering facts he had already determined, a power and jurisdiction this court was not seized of. As was held in the case of **DB Shapriya & Company Limited vs Bish International BV (2) [2003] 2 EA 404** that was relied upon by the Respondent, a mistake of fact is not a ground for setting aside an arbitral award.
38. The case of **Finelvet AG vs Vinava Shipping Co Ltd [1983] 2 All ER 658** that the Applicant referred the court to was thus distinguishable from the facts of this case as the same related to the basis on which an arbitral award may be appealed from. It was not applicable in the circumstance of this case.
39. Hence, the court was inclined to accept the Respondent's submissions that a court which finds it has no jurisdiction in a matter, must down its tools as was ably held in the case of **Owners of Motor Vessel “Lillian SS” vs Caltex (Kenya) Limited (1989) KLR.**
40. Accordingly, having considered the pleadings, the affidavits, the written submissions and the case law in support of the respective parties' cases, the court was more persuaded by the Respondent's arguments that the Applicant did not demonstrate that the ground set placed reliance on under Section 35 of the Arbitration Act with a view to setting aside the said Final Award did not exist in this case.
41. The court, in fact, found the grounds the Applicant relied upon not to have been relevant in the

circumstances of the case herein and that the said Arbitrator applied his mind to the issues that had been placed before him.

DISPOSITION

42. For the foregoing reasons, this court's ruling was that the Applicant's Chamber Summons application dated and filed on 22nd October 2014 was not merited and the same is hereby dismissed with costs to the Respondent herein.

43. It is so ordered.

DATED and DELIVERED at NAIROBI this 21ST day of JULY 2015

J. KAMAU

JUDGE