



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. CIVIL APPLICATION NO. 9 OF 2021

IN THE MATTER OF: THE ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF: THE ARBITRATION FOR SETTING ASIDE AN ARBITRATION AWARD

DARTSTAR LIMITED.....APPLICANT

VERSUS

KILIFI BOATYARD LIMITED.....RESPONDENT

RULING

This ruling is in respect of the Respondent's Preliminary objection dated 14th April 2021 and applicant's Chamber Summons dated 31st March 2021 seeking the following orders:

a) Spent

b) That pending the hearing and determination of the application inter-partes a temporary stay of execution/ implementation of the award of the Arbitrator Klaus Von Mitzlaff dated 2/03/2021 and delivered 2/3/2021.

c) That the award of the Arbitrator Klaus Von Mitzlaff dated 2/03/2021 and delivered 2/3/2021 be set aside to the extent of that award,

i. Arbitrarily alienates registered and beneficial ownership of the Applicant's suit property being the beach bordered by Kilifi creek between Kilifi group V429 and Kilifi Creek bordered by the markers CW1, CW2, CW3, PH-9, BH1 and BH2 and confers the same on the 2nd Respondent without consent of the Applicant who was not a party to the arbitration agreement of 1/11/2001

ii. Illegally confers to the 1st Respondent a lease of 10 years over the Applicant's suit property being the beach bordered by Kilifi Creek between Kilifi group V429 and Kilifi Creek bordered by the markers CW1, CW2, CW3, PH9, BH1 and BH2 without the consent of the Applicant and without hearing the Applicant who was not a party to the Arbitration agreement of 1/11/2001.

iii. It purports to impose rights and obligations to the Applicant despite the Applicant not being a party to the lease agreement or the Arbitration agreement of 1/11/2001.

d) A declaration that the Applicant is fully discharged from the rights and obligations present or future arising from the award of the Arbitrator Klaus Von Mitzlaff dated 2/03/2021.

The Respondent filed a Replying Affidavit and a Notice of Preliminary Objection on the following grounds:

a) That this Honourable Court does not have the jurisdiction to hear and determine the subject application and the proceedings thereof in accordance with the Arbitration Act.

b) That this Court not having been established under Article 165 of the Constitution of Kenya, which would be the proper court to hear and determine the application in accordance with the Arbitration Act.

The court will therefore dispose deal with the Preliminary Objection first.

RESPONDENT'S SUBMISSIONS

Counsel submitted that this court does not have jurisdiction to hear and determine the application as the Environment and Land Court being a court of Equal Status is not envisaged in the Interpretation and General Provisions Act and in the Arbitration Act.

Counsel submitted that the jurisdiction of the High Court is established under Article 165 (1) of the Constitution, while that of the Environment and Land Court is established under Section 4 of the Environment and Land Court Act. In the same manner, the jurisdiction to exercise the remedies under Section 35 of the Arbitration Act is vested in the High Court, which is established under Article 165 (1) of the Constitution and not this Honourable Court which is established under Section 4 of the Environment and Land Court Act.

Counsel relied on the cases of **S. K Macharia & Another V. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR** and **Tanzania National Roads Agency V Kunder Singh Construction Co Ltd [2014] eKLR** on the issue of jurisdiction of a court and urged the court to find that it does not have the requisite jurisdiction.

On the Applicant's application, counsel filed grounds of opposition and a Replying Affidavit sworn by Peter Bateman, the Respondent's director, who deposed that the relationship between the Applicant and the 2nd Respondent is very intertwined as shown in the CR 12 of both companies and more particularly that the Applicant is the majority shareholder in the 2nd Respondent company.

The Respondent's director deposed that one Christopher Wilson who is a shareholder in the Applicant company and a co-director of the 2nd Respondent has been carrying out his duties under the cover of the two companies and whenever convenient, benefiting from his position in the two companies to frustrate the 1st Respondent.

He further deposes that Mr. Wilson acting as a shareholder of both the Applicant and the 2nd Respondent in accordance with the arbitration clause agreed to request the arbitrator to resolve the issue of non-renewal of the long term lease in favour of the 1st Respondent in respect of the suit property. That during the pendency of the arbitration proceeding, the Applicant was well aware but chose not to participate in the proceedings and has thus not approached the court with clean hands.

The Respondent's director deposed that the 1st Respondent's continued use of the suit property is not based on the outcome of the arbitration proceedings but rather by a court order dated 1st April 2021 which was obtained in favour of the 1st Respondent against the parties on 31st March 2021 in **ELC No 23 of 2021** thus the instant application has no basis and ought to be dismissed.

Counsel relied on Rule 7 of the Arbitration Rules which provides for setting aside remedy under Section 35 of the Arbitration Act and further provides that the arbitrator must be a party to the proceedings and must be served with the subject application. Counsel cited the case of **Scope Telematics International Sales Limited v Stoic Company and Another [2017] eKLR** and submitted that failure to serve the arbitrator deems the application fatal and the court should not entertain it.

Counsel also submitted that the Applicant cannot claim that the award is in conflict with public policy and yet it was never raised with the arbitrator during the arbitration proceedings and relied on the case of **Castle Investments Company Limited V Board of Governors Our Lady of Mercy Girls Secondary School [2019] eKLR**.

APPLICANT'S SUBMISSIONS

Counsel for the Applicant did not address the Preliminary Objection but submitted on the application by relying of the Supporting Affidavit of Betty Bundotich who deposed that an Award was made by the arbitrator in favour of the 1st Respondent arising from a purported lease agreement entered into between the 1st and 2nd Respondents over a beach property which lease was for twenty years commencing on 1st April 2001 terminating on 1st April 2021.

According to her, Clause 3 of the Agreement provided that all disputes between the parties be referred to arbitration and on 5th January 2021. The parties referred the matter to an arbitrator who delivered the award on 2nd March 2021. She further stated that the Applicant was not a party to the agreement of 1st November 2001 and being aggrieved by the award the same should be set aside.

Counsel for the Applicant listed three issues for determination as follows:

- a) *What portion of land was leased to the 1st Respondent in the lease dated 1/11/2001?***
- b) *Which portion of the land does the Respondent occupy and who owns it?***
- c) *Whether in the circumstances, the award should be set aside.***

On the first two issue, counsel submitted that as per clause C of the lease agreement, the land that was leased to the Respondent was Kilifi Group V429 owned by the Applicant and that the Respondent occupies the suit property which property belongs to the Applicant. That the Respondent failed to prove its allegations that the Applicant entered into the lease agreement as an agent of KPL.

On whether the award should be set aside, counsel submitted that the award should be set aside as the arbitrator failed to consider material

and relevant factors as were outlined in the Chamber Summons and Supporting Affidavit. Further that the award violates Article 40 of the Constitution and Section 26 of the Land Act that protect the rights of a registered owner of property and sanctity of title.

It was counsel's further submission that the award also violates Article 50 of the Constitution and section 35 (2) (a) (iii) of the Arbitration Act which guarantee the right to a fair hearing and that in this case the Applicant was not part of the arbitration proceedings.

Counsel relied on the case of **Savings & Loan {K} Limited v Kanyenje Karangaita Gakombe & another, [2015] eKLR** where the court held a contract binds only the parties to such contract.

It was counsel's submission that the award confers the 1st Respondent a lease of 10 years over the Applicant's suit property yet the Applicant is not a party to the lease the subject of extension. That such extension of lease is without valid instrument or compensation to the Applicant who is the registered owner.

ANALYSIS AND DETERMINATION

The first issue for determination is whether the court has jurisdiction to hear this application as was raised in the Preliminary Objection. When an issue of jurisdiction of a court is raised, then the same has to be disposed of as jurisdiction is everything.

The Respondent raised a Preliminary Objection on the jurisdiction of this court to hear and determine the Chamber Summons.

Section 35 (1) of the Arbitration Act, provides 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).

It was counsel's submission that the power to set aside an arbitral award is strictly to the High Court and the Environment and Land Court being a court of equal status did not have such jurisdiction.

In the case of **Godfrey Mwampembwa v Nation Media Group Limited [2021] eKLR Nduma J** while citing the cases below addressed this issues as follows:

"In Miscellaneous Application No 559 of 2016, CMC Aviation Limited, Trident Enterprises Limited –vs- Anastacio D Thomas Fred Ochieng J. observed that: -

'There is no doubt that the Employment and Labour Relations Court was established by Parliament, pursuant to the Constitutional imperative that a court, with the status of the High Court be established to hear and determine disputes relating to employment and labour relations.....I am also alive to the fact that the Arbitration Act in Kenya was enacted in 1995. At that time, the Courts with the status of the High Court did not exist. Therefore, it cannot be argued that by specifying the High Court as the court to which parties could have recourse against arbitral awards, the Arbitration Act intended to, inter alia, exclude the courts with the status of the High Court.' In my considered view, the fact that the dispute was first registered at the Industrial Court, as a claim by an employee who believed that his employers had dismissed him unfairly or had unfairly terminated his services, is significant. ...

In United States International University –vs- Attorney General Nairobi Petition No. 170 of 2012(eKLR), Majanja J in the High Court stated that: -

"The Industrial Court contemplated under Article 162(2) was intended to be independent of the High Court. It is for this reason that it was bestowed the status of the High Court. Indeed, the Final Report of the COE affirms that giving Parliament power to establish the Industrial Court with the status of the High Court was aimed at addressing the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. It was the intention of the drafters of the Constitution to give the Industrial Court, though a specialized court in nature, full independence from the High Court.... The Constitution does not define what "status" means but in my view it implies that the court so created must have the same juridical incidents as the High Court. The jurisdiction bestowed upon the High Court under Article 165(3) is not absolute but 'subject to clause (5)' whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized court established under Article 162(2). This status is to be determined from a textual consideration of the provisions governing the judiciary. First, under Article 162, the courts of status of the High Court are considered superior courts save that their functions are to be defined by Parliament rather than the Constitution itself. Second, Part 2 of Chapter Ten titled "Superior Courts" sets out the jurisdiction of the Superior courts, that is, the Supreme Court, the Court of Appeal and the High Court. Though the Courts of status of the High Court are not defined their jurisdiction is dealt with in negative terms under Article 165. The High Court shall not exercise jurisdiction in matters reserved for status courts contemplated under Article 162(2). This implies that the High Court cannot deal with matters set out in section 12 of the Industrial Court Act, 2011. Third, the High Court does not have supervisory jurisdiction of superior courts, which includes courts with the status of the High Court."

23. The Court in answer to issue (a) agrees with the Applicant that the issue of jurisdiction of the ELRC Court in relation to the setting aside of an award under section 35 of the Act is well settled, and returns that the Court in light of Article 162(2) of the Constitution, Section 12 of the Employment & Labour Relations Act, 2012 as well as the authorities foreshadowed, the Court has the jurisdiction to handle applications from an arbitral award."

Similarly, the Environment and Land Court is established under Article 162 (2) of the Constitution of Kenya, 2010 and section 4 and 13 of the Environment and Land Court Act, 2011, provides as follows:

Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

The dispute before the arbitration tribunal was in relation to a lease agreement between the parties herein. I therefore find that this court has jurisdiction to hear and determine applications from arbitral awards involving matters listed under Section 13 of the Environment and Land Act.

The issue of jurisdiction between the High Court and courts of Equal Status has always been a thorny issue in matters that are crosscutting and have a thin line. Many decisions have been rendered including by the Supreme Court in the *Karissa Chengo case* but the same has not yet come to rest. Many applications are still being made on the issue of jurisdiction between the two courts and courts have dealt with them on case to case basis.

On the issue of the substantive application, the issue for determination is whether the application is within the reasons as provided for under section 35(2) and (3) of the Arbitration Act which provide as follows:

(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;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

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

The Applicant's case is that the subject matter of the dispute was not capable of settlement by arbitration under the Kenyan Law and that the award was in conflict with public policy. Further that the lease was void as the Applicant had no authority from KPL to enter into it; and that the award failed to appreciate that a TOL can only be issued by the government.

It is on record that it was not disputed that the TOL to the suit property was in the name of KPL and it was the Respondent's argument that the director of KPL was one and the same person as the Applicant's Director; and the same person that negotiated the terms of the lease.

The correspondence between the parties herein attached to the Replying Affidavit, states that Mr. Christopher Wilson identified himself as the director of KPL during and after the lease negotiations which fact was not disputed by the Applicant. The Applicant did not dispute this fact. The dispute is on renewal of a lease and I do not find that this is a matter that cannot be settled by arbitration which was a mode of Alternative Dispute Resolution provided for in the lease agreement.

On the second issue as to whether the award violates public policy, the Applicant's argument was that the award was made against KPL when the said KPL was not a party to the arbitration proceedings thus violating KPL's rights to a fair hearing under Article 50 (1) of the Constitution.

In the case of **Castle Investments Company Limited v Board of Governors Our Lady of Mercy Girls Secondary School**, [supra] the court adopted with approval the definition given by Ringera J (as he then was) in the case of **Christ for All Nations v Apollo Insurance Company Limited**, NRB HCC No. 477 of 1999 where he expressed himself as follows:

"... 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..."

Black's Law Dictionary Tenth Edition defines Public Policy as follows: -

"The collective rules, Principles or approaches to problems that affect the commonwealth or (esp.) promote the general good; principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the state and the whole of society."

It is trite that for an arbitral award to be against the public policy of Kenya, it must be shown that it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or value in the Kenyan society as was held in the case of **Glencore Grain Limited -vs- TSS Grain Millers [2002] 1 KLR 606**, the Applicant did not prove that the award fitted that description of being immoral/illegal and against public policy. The Applicant was all along aware of the fact that KPL is indeed the owner of the TOL to the suit property. Why was the issue not raised during the arbitration proceedings?

Arbitration is a form of Alternative Dispute Resolution which is meant to fast track determination of disputes without recourse to the court processes. Section 39 of the Arbitration Act allows for Appeals on questions of law where the parties have agreed. The application before the court was brought under Section 35 hence not an Appeal. Litigation must also come to an end at some point.

I find that the application lacks merit and is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.