REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

WINDING UP CAUSE NUMBER 57 OF 2001

IN THE MATTER OF K & A SELF SELECTION STORES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF THE ARBITRATION ACT

AND IN THE MATTER OF AN ARBITRATION BETWEEN

DILSHAD SADRUDIN MOHAMED AS

THE LEGAL REPRESENTATIVE OF THE ESTATE OF

SADRUDIN H. MOHAMED (DECEASED) ……..…..…....CLAIMANT

AND

K & A SELF SELECTION STORES LIMITED ……....1ST RESPONENT

KHATUN SHAMSHUDIN MOHAMED AS

THE LEGAL REPRESENTATIVE OF THE ESTATE OF

SHAMSHUDIN H. MOHAMED ……..2ND RESPONDENT

GALIB MOHAMED …….3RD RESPPONDENT

KHATUN S. MOHAMED ……..4TH RESPONDENT

RULING

1. The respondents are seeking to set aside the arbitral award dated 27th May 2004. The history of the litigation is relevant. On 13th December 2001, the claimant presented a winding up petition against K & A Self Selection Stores Limited (hereinafter the company). The company was

incorporated on 28th November 1963. Its objects were to undertake the business of a department store, grocery, food outlet and a myriad of other functions spelt out in the memorandum of association. The original subscribers were Karmali Ahmed and Ahmedali Mohamed. The claimant is one of the executors of the estate of Sadrudin Mohamed (deceased), a minority shareholder in the company. The pith of the grievances in the petition was that the affairs of the company were being run in an opaque and oppressive manner by Shamshudin Mohamed, as the managing director, and other directors. There were allegations of mismanagement and diversion of the company's funds and assets. Accordingly, the claimant pleaded that it was just and equitable that the company be wound up.

2. The winding up petition was contested by the respondents. On 16th December 2002, the parties agreed to refer the dispute to arbitration. The parties executed a detailed arbitration agreement on 20th December 2002 and submitted it to court three days later. The agreement nominated Mahmood Manji and Azim Jamal Virjee as the joint arbitrators but with liberty to appoint an umpire. The parties agreed to refer *all their disputes to arbitration*. Fundamentally, the directors of the company, who were not parties to the petition, agreed to be enjoined into the arbitration.
3. It is material that under the reference agreement, the arbitrators (or their nominated umpire in such event) were to determine *four* matters-

a. *"The price at which the shares of K & A Self Selection Stores Limited are to be transferred by the Estate of Sadrudin H Mohamed to the intended purchaser (name the intended purchaser).*
b. *In arriving at such price, the arbitrator(s) shall have regard to the monies appropriated by the management of K & A Self Selection Stores Limited (if any) and not accounted for by them to the Estate and also of any loans that they may have been advanced to the Company.*
c. *Are the Directors liable to the shareholder for any wrong doing and if so what wrong doing?*
d. *At the time of the split of the Fish and Chips Shops, Mr. Aziz Mohamed represented to the Estate that the Estate should accept the split on his assurance that once the split was formalized (as it was), he would ensure that proper accounts and explanations would in due course be agreed on. Are the Directors further liable to the shareholder for any further sums in respect of this issue?"*

4. The parties filed pleadings before the arbitrator. The arbitration proceedings ended sometime in July 2003. An award was made on 27th May 2004 and presented to the parties on or about the 8th June 2004. On 28th August 2004, the claimant filed an application in Court to enforce the award. The respondents felt aggrieved by the award. They presented to Court a chamber summons dated 31st August 2004 to set aside the entire award.
5. It remains a serious indictment on the parties that the latter application has remained undetermined for over 9 years. The delay does not wholly lie with the parties. To be fair, the matter was heard by Leonard Njagi J between 26th May 2005 and 20th February 2007. In the meantime, the court file got either misplaced or lost. The file was reconstructed in the year 2009. The parties then appeared before the learned Judge who granted a date for ruling for the 10th November 2011. The ruling was not delivered. In the meantime the Judge left the bench following a determination by the Judges and Magistrates Vetting Board. On 8th November 2013 the parties appeared before me and consented that I determine the matter on the basis of their written submissions and the proceedings before my learned predecessor.
6. The applicant takes up cudgels on the award on three primary grounds: First, that the award went beyond the reference and dealt with *disputes* not contemplated by the parties; secondly, that the award contained *decisions* on matters outside the reference; and thirdly, that the award is *inimical* to the public policy of the Republic. The entire application is predicated upon the provisions of section 35 of the Arbitration Act 1995 (now amended) and Rules 4, 7 and 11 of the Arbitration Rules. In reply, the claimant has filed grounds of opposition dated 5th October 2004 and two depositions dated 19th January 2005 and 16th December 2004. There is also filed a preliminary objection dated 5th October 2004 as well as the written submissions dated 12th April 2007. The respondents had made oral submissions before my predecessor on 26th May 2005 and 12th July 2005. In addition, they filed a reply to the claimant's written submissions. That reply is dated 4th May 2007 and filed in court on 7th May 2007.

7. I have considered the award, pleadings, depositions and rival submissions. The key question for decision is simple: Whether the respondents have met the threshold for setting aside an arbitral award under section 35 of the Arbitration Act. The section provides in the material part 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 –*

a. *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 conflict with the public policy of Kenya.

8. The parties had at clause 9 of the reference to arbitration provided that the governing law and procedure shall be the law of Kenya. In particular the Arbitration Act, No 4 of 1995, as amended from time to time, was to apply. Section 10 of the Act provides-

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

9. That provision is a general caveat on judicial review. Recourse to the High court is thus limited: it is within very narrow confines. Again, section 32 A of the Act provides;

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

See *Mifra Construction Company Limited Vs Eldoret Municipal Council* [2000] KLR 404. See also *Tony Mark Tonui Vs Andrew Stuart & another* High Court, Nairobi Misc. App. 69 of 2012 [2012] e KLR, *Trans World Safaris Limited Vs Eagle Aviation Limited* High Court Nairobi, Misc.

App. 238 of 2003 (unreported).

10. Hand in hand with those principles is the concept of finality of an arbitral award. This was well captured in *Anne Mumbi Hinga Vs Victoria Njoki Gathara* Nairobi, Court of Appeal, Civil Appeal No 8 of 2009 [2009] e KLR where it was held:

"The concept of finality of arbitration awards and pro-arbitration policy is something shared worldwide by the states whose Arbitration Acts such as ours have been modeled on the UNICITRAL model law. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation".

11. There is a plethora of Kenyan cases reaffirming that position. See for example *Trans World Safaris Limited Vs Eagle Aviation* Nairobi High Court Misc. 238 of 2003 (unreported), *Nectel (K) Ltd Vs Development Bank (PTA Bank)* Nairobi High Court Misc. 859 of 2010 [2011] e KLR, *Century Oil Trading Company Limited Vs Kenya Shell Limited* Nairobi High Court Misc. App. 1561 of 2007 (unreported) and *Erad Suppliers & general contractors Limited Vs National Cereals and Produce Board* Nairobi High Court Civil Case 639 of 2009 (unreported), *Kenya Guards and Allied Workers Union v Security Guards Services 7 others* High Court, Nairobi, Misc. App. 1159 of 2003 (unreported),.
12. However, if the arbitrator exceeds his jurisdiction, the court will set aside the award. The same holds true where the award deals with disputes not contemplated by the parties. The decision in *Associated Engineering Company Vs Government of Andhra Pradesh & another* [1991] R.D.S.C 153 (1992 AIR 232 15th July 1991) has an enlightening passage that I find persuasive to the facts before me. It states;

"In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outwent the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provision of the contract to the contrary"

See also *National Housing Corporation Vs Intex Construction Limited* Nairobi, High Court Misc. App. 131 of 1996 (unreported), *Oltukai Mara Limited Vs Conservation Corporation (Kenya) Limited* Nairobi High Court case 666 of 2006 (unreported) and *Express Kenya Ltd Vs Peter Titus Kanyago* Nairobi High Court Misc. 963 of 2002 (unreported) and the decision I have already referred to of *Anne Mumbi Hinga Vs Victoria Njoki Gathara* (supra). See also *Airtel Networks Kenya Limited Vs Nyutu Agrovet* Nairobi, High Court Misc. Cause 400 of 2011 [2011] e KLR, *Kenya Pipeline Company Limited Vs Kenya Oil Company Limited* Nairobi, High Court Civil Appeal 13 of 2010 [2012] e KLR.

13. I have studied the arbitral award. In its preamble, it correctly captures the *four* issues to be determined. On issue number 1, the arbitrators found as follows:

"We note that according to the audited accounts of the company the company has been making losses over the past few years such that it is now insolvent and the shares accordingly have no value. We direct that the shares held by the plaintiff in the company be transferred to the defendants in the proportion of their existing holding at a value of Kshs. 20/- per share, provided that the award herein in respect of issue No. 2 is duly complied with. We also wish to draw the attention of the defendants to the consequences of continuing to run a company knowing it is insolvent".

14. Under the agreement to arbitration, issue number 1 was to deal with *"the price at which the*

shares of K & A Self Selection Stores Limited to be transferred by the Estate of Sadrudin H. Mohamed to the intended purchaser (name the intended purchaser)". Clearly, the arbitrators determined the price of Kshs 20 per share. That was in order. However, four fundamental problems arise. First, and in contravention of the express provisions of the arbitration agreement, they made the price *conditional* upon compliance with issue number 2. As I will discuss shortly, the arbitrators at issue number 2 made an award of damages of Kshs 4,186,000 with interest payable to the claimant by the respondents. Secondly, by ordering that the shares be taken by *all* the defendants in the proportion of their shareholding, the award unwittingly exposed the company (being the 1st respondent) to the risk of purchasing its own shares against the Companies Act. See *Trevor Vs Whitworth and another*[1887] 12 AC 409. Although the parties had submitted *all* disputes to arbitration, issue number 1 was very specific: determine the price of transfer of shares of the company to the intended purchaser. The conditional price and stated proportions of transfer permeated the boundaries of number 1. Fundamentally it raised the real specter of conflict with the articles of association of the company. For example, there were restrictions on transfer in clauses 3,4,5,6 and 7 of the articles.

15. Thirdly, not *all* shareholders of the company were *parties* to the arbitration proceedings. The winding up petition was *against* the company. True, the directors of the company were enjoined into the arbitral proceedings. Paragraph 5 of the winding up petition listed 6 shareholders: Shamsudin Mohamed holding 17,250 shares, the estate of Sadrudin Mohamed 17, 250 shares, D.A. Mohamed 14,850 shares, estate of Ahmedali Mohamed 9,375 shares, Gurshan Mohamed 9,375 shares and Aziz Mohamed 6,900 shares all totaling to 75,000 shares issued by the company. The decision of the tribunal on issue number 1 clearly impacted non-parties to both the petition and the arbitral proceedings.
16. Fourthly, although the tribunal set the price of the shares at Kshs 20, there is no *reason* for that award. How was the value arrived at? The arbitrators had received professional reports from auditors. There was an express power to do so in the reference agreement. But it still behoved the arbitrators, as good umpires, to state, however briefly, the method of valuation of the shares. This is important because the arbitrators had prefaced their decision by saying the company was *insolvent* and that the shares had *no* value.
17. I am alive that at paragraph 10 of the reference to arbitration the parties had provided as follows:

"It is hereby expressly agreed and declared that the proceedings before the arbitrators shall not form part of the record of the arbitration proceedings and the same shall not be available either to the parties and or the High Court in any event".

That would not justify the failure to give reasons for the award on the price of shares. Section 32 (3) of the Arbitration Act provides as follows:-

"The arbitral award shall state the reasons upon which it is based, unless –

a. *The parties have agreed that no reasons are to be given; or*
b. *The award is an arbitral award on agreed terms under section 31"*.

18. Regarding issue number 1 and the decision of the arbitrators, I have reached the inescapable conclusion that wrong principles were applied. Fundamentally, the arbitrators meandered well beyond the boundaries in the reference on that issue. The decision of the arbitrators on issue number 1 is thus set aside.
19. On issue number 2, the award was as follows:

"It is alleged that the defendants did not fully account for the profits made by the company to the other shareholders, thereby resulting in non-payment of the rightful dues of the plaintiff. Both parties agreed that the audited accounts did not reflect the full and correct position of the company as certain sales and expenses were not fully accounted for. It was mutually agreed that Mr. Ismail Mawji, a practicing certified public accountant of Mawji Sennik to be appointed to review the financial statements, accounting and related records and submit an independent report of his findings. This report is attached as Annexture 1 of this award. The report was reviewed and

discussed and Mr. Mawji was invited to give the necessary explanations and clarifications on the report. Certain information which had previously not been provided to Mr. Mawji came to light during these discussions. As a result, we have relied on the report of Mr. Mawji and adjusted it based on additional information which came to light during the review/examination of the said report. Based on our review and analysis of the report and further information, we award that the following sums be paid by the defendants to the plaintiff.

For the year ending 28th February,	*1997*	*Kshs.1,955,000/-*
For the year ending 28th February	*1998*	*Kshs.2,070,000/-*
For the year ending 28th February	*1999*	*Kshs. 460,000/-*
For the year ending 28th February	*2000*	*Kshs. 207,000/-*
For the year ending 28th February	*2001*	*Kshs. (506,000/-) Negative*
		Kshs.4,186,000/-

The above sum shall earn interest at court rates as from the respective year end date stated hereabove, to be compounded annually. If payment is not made by 30th July, 2004 the amount then outstanding shall earn interest at the rated of 16% p.a. to be compounded monthly".

20. Two things can be said of the award on that issue. First, issue 2 as framed in the reference *only* required the tribunal in deciding on the price to consider any monies appropriated by the management and not accounted for and also of loans advanced to the company. The tribunal after reviewing the independent report of Ismail Mawji C.P.A and *"further information"* awarded the claimant Kshs. 4,186,000 together with compound interest. These damages were to be paid by the defendants. The audit report (annexture 1 to the award) was for the years 28th February 1997 and 28th February 1999. The award has dealt with additional years 1998, 2000 and 2001. Those damages were presumably based on discussions with Mr. Mawji. The tribunal stated certain information *"came to light during [those] discussions"*. The tribunal then *"adjusted" the* report and reviewed it. Like I stated earlier, there would be need for reasons of arriving at the damages in compliance with section 32 of the Arbitration Act. But I remain faithful to the notion that this is not an appeal.
21. Secondly, it is apparent that the award went *beyond the* price of the shares to grant *damages* to the claimant. Although the parties had agreed to refer *all* disputes to arbitration, the schedule to the reference *expressly* stated *four* matters for determination by the arbitrators. On that score, I am persuaded that the arbitrators dealt with disputes not contemplated or falling within the terms of the reference to arbitration. Accordingly, the award on issue number 2 was without jurisdiction.
22. If there was any doubt the arbitrators were assessing damages, it is completely removed by their decision on issue number 3. They found the directors had contravened the Companies Act by failing to hold regular board meetings, annual general meetings and failing to circulate *"annual directors report and audited accounts to shareholders"*. The tribunal then stated as follows:-

"We believe that the award made under issue No 2 adequately compensates for the wrong doing of the Directors. Accordingly, no further award is made in respect of this issue".

That fortifies my finding that the arbitrators exceeded their jurisdiction in the reference to arbitration. The arbitral award on issues number 2 and 3 is set aside.

23. On issue number 4, the tribunal delivered itself as follows:

"Having examined the evidence including the evidence adduced by the witnesses, we are inclined to conclude that all profits were not accounted for to the shareholders. The defendant did not

produce any witnesses or evidence to refute this fact, and in particular the fact that at the time of exchange of shares in 1994 the businesses were valued on 30 months profit basis. We therefore conclude that the actual profits based on this formula were as per the claim of the plaintiff based on valuation figures. This results in the estate's share of profit to be Kshs. 168,667/- per month. The estate was paid a sum of Kshs. 33,333/- per month, leaving a balance of Kshs. 135,333/- per month. The Estate has claimed its share of unaccounted profits for the period 1984 to 1994. We have reviewed the validity of the claim period and taking into account the evidence produced and the fact that the late Sadrudin Mohamed died in 1989, our award is restricted to the period representing the last thirty months of operation. Based on the figures stated here above, we award a sum of Kshs. 2,638,994/- (Kenya shillings two million, six hundred thirty eight thousand, nine hundred ninety four only) to the plaintiff being unaccounted profits, less tax thereon. The said sum shall earn interest at court rates from 1st January, 1995 to 31st March, 2004 compounded annually. If the payment is not made by 31st July, 2004 the amount then outstanding shall earn interest at the rate of 16% per annum to be compounded monthly".

24. The respondents have urged that the matter was time or statute barred. I do not agree. The memorandum of understanding was made on 7th November 1994. The fish and chips businesses were acquired on diverse dated between 1963 to 1990. All those dates are not the *effective* dates for purposes of limitation of action. The effective dates would be the *dates of the dispute.* Time would run from the date of dispute under the contract in the memorandum of understanding *not* the date the contract was made.
25. Fundamentally, the parties *expressly* referred the dispute to arbitration in the following terms:

"At the time of the split of the Fish and Chips Shops. Mr. Aziz Mohamed represented to the Estate that the Estate should accept the split on his assurance that once the split was formalized (as it was), he would ensure that proper accounts and explanations would in due course be agreed on. Are the Directors further liable to the shareholder for any further sums in respect of this issue"?

26. Granted those circumstances, it cannot fall from the lips of the respondents that the claim was time barred or was outside the purview of the tribunal. The respondents raised the issue of limitation before the tribunal and were overruled. What is before the Court is not an appeal under section 29 of the Arbitration Act but an application to set aside the award under section 35 of the Act. The considerations in both cases are quite different and fall far apart. I am thus unable to impeach the decision of the tribunal on issue number 4. The arbitrators have expressed their reasons for the decision and award of Kshs 2,638,994. Section 32 C of the Arbitration Act allows a tribunal to award simple or compounded interest calculated from the date specified in the award. This provision was not in operation at the time of the award. The interest awarded was at court rates. The rate of 16% seems to be a default rate if the amounts awarded were not paid in time. The arbitral tribunal had discretion to award the rate of interest that it did, to compound it and to specify the rates. See *Myron (owners) v Tradax Export S. A. Pananma City R.P.* [1969]2 All ER 1263, *New Tyres Enterprises Limited Vs Kenya Alliance Insurance Company Limited* [1987] KLR 380, *Bashir Ahmed Butt Vs Uwais Ahmed Khan* [1982 – 88] 1 KAR 1 at page 5.
27. I am also unable to say that the award on issue number 4 was against Kenyan public policy. As this is not an appeal, I cannot substitute my opinion for that of the arbitrator. My view is that public policy in Kenya leans towards finality of arbitral awards. In *Christ for all Nations Vs Apollo Insurance Co Ltd* [2002] 2 E.A. 366 Ringera J, as he then was, in equating that ground to an unruly horse, delivered himself thus at page 370;

"in my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act".

28. I agree entirely. I find nothing immoral or illegal in the award on issue number 4 that violates the values of Kenyan society in the materials placed before me in this application. I have stated that it was well within the tribunal's express jurisdiction to deal with issue number 4. I have disagreed with the respondents' views on limitation of the action. And I am fortified there by the general holding in *Glencore Grain Limited Vs T.S.S Grain Millers Limited* [2002] 1 KLR 606 as to when an award will be held to be offensive to public policy of Kenya.

29. Section 35 (2) (a) (iv) of the Arbitration Act that I set out earlier has the following proviso:

"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 …."

See also *Airtel Networks Kenya Limited Vs Nyutu Agrovet* Nairobi, High Court Misc Cause 400 of 2011 [2011] e KLR.

30. I have reached the conclusion that issue number 4 was expressly referred to arbitration. The decision of the tribunal related directly to a matter within the contemplation of the parties and falling well within the terms of reference. Under the proviso to section 35 (2) (a) (iv) of the Act, the decision of the tribunal on issue number 4 in the award dated 27th May 2004 is upheld. The award on issues numbers 1, 2 and 3 in the award are hereby set aside.

31. Costs follow the event and are at the discretion of the Court. The claimant has partly succeeded on issue number 4 in the impugned award. The respondents have succeeded in setting aside substantial parts of the award. In the interests of justice, the order that commends itself to me to grant is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 20th day of January 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. T. Wanjohi for the respondents instructed by Theuri Wanjohi & Company Advocates.

Ms. S. Wambui for the claimant instructed by Shiraz Magan Esq Advocate.

Mr. C. Odhiambo, Court clerk.