



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CIVIL CASE NO 71 OF 2014

IN THE MATTER OF THE ARBITRATION ACT 1995 AND THE ARBITRATION RULES 1997

AND

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD

BETWEEN

NAROK COUNTY GOVERNMENT

(being the legal successor to the defunct

COUNTY COUNCIL OF NAROK).....APPLICANT

AND

SEC & M COMPANY LIMITED.....RESPONDENT

RULING

1. The Applicant's Chamber Summons application dated and filed on 27th February 2014 was brought pursuant to the provisions of Section 35 (1) and (2) (b) (ii) and Section 37 of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT there be interim orders of stay of execution of the arbitral award made and published by Mr Arthur K Igeria, Arbitrator on 29th November 2013 pending the hearing and determination of this application *inter partes*.

3. THAT pending the hearing and determination of this application, the recognition or enforcement of the arbitral award be refused and declined by this honourable court.

4. THAT this honourable court be pleased to set aside the arbitral award in its entirety made and published by Mr Arthur K Igeria, Arbitrator on 29th November 2013.

5. THAT the costs of this application be provided for.

THE APPLICANT'S CASE

2. Following the General Elections held on 4th March 2013 and the establishment of the Narok County Government, on 14th August 2008, the then County Council of Narok contracted the Respondent to conduct a valuation of its movable and immovable assets and raised a fee note for the sum of Kshs 89,101,215/=.

3. On 15th October 2009, the Applicant and the Respondent entered into an agreement in which the Respondent agreed to discount its fees of Kshs 89,101,215/= by fifty percent (50%) to Kshs 44,550,608/=. This was to be paid within a period of two (2) years with a ten (10%) penalty in the event of default. On the same date, Joseph Mutua Malinda, who was the then Clerk of County Council of Narok wrote a "letter of comfort" to the Respondent indicating that the Respondent was at liberty to revert to its original claim in the sum of Kshs 89,101,215/= in the event the said County Council of Narok defaulted in payment of its fees within the stipulated period. As at 30th August 2012, the Applicant had paid the Respondent a total sum of Kshs 46,426,316/= being the agreed fees pursuant to the compromise between it and the Respondent and as such it did not owe the Respondent any monies.

4. It contended that the said letter was not approved or authorised by the council and that it unilaterally varied the terms of the compromise agreement entered by the parties on 15th October 2009.

5. The Applicant's case was that the Final Arbitral Award was made on the strength "letter of comfort" dated 15th October 2009 which it alleged was fraudulent and illegal and being in conflict with the public policy of Kenya, the said Final Arbitral Award ought not to be recognised and enforced by the court as the Arbitrator unlawfully and impermissibly re-wrote the compromise agreement dated 15th October 2009, thereby reverting the claim to Kshs 89,101,215.

6. The said application was supported by the Affidavit and Supplementary Affidavit of Lenku Kanar Seki, the Interim County Secretary of Narok County Government, that were sworn on 27th February 2014 and 21st March 2014 respectively. Its written submissions were dated 2nd May 2014 and filed on 6th May 2014.

THE RESPONDENT'S CASE

7. In opposing the application, the Respondent filed its Grounds of Opposition dated 4th April 2014 on 9th April 2014. It contended that the application lacked merit, it was an abuse of the process of the court and that the grounds adduced in the application herein did not meet the threshold for setting aside an arbitral award. It also filed a Replying Affidavit that was sworn by Humphrey Kaburu Michael, its director, on 9th April 2014

8. Contrary to what the Applicant stated, it averred that there was a compromise agreement between the parties in which the Respondent had agreed to discount its fees of Kshs 89,101,215/= by fifty percent (50%) to Kshs 44,550,608/= which was to be paid within a period of two (2) years with a ten (10%) penalty in the event of default. It was emphatic that in the "letter of comfort" dated 15th October 2009, it was agreed that the compromise agreement was to stand subject to the Applicant honouring its part by ensuring payment within the two (2) years as stipulated in the aforementioned letter.

LEGAL ANALYSIS

9. The Applicant cast doubt on the integrity of the said Joseph Mutua Malinda, the Applicant. It argued that he had to act in its best interests and that testifying on behalf of the Respondent herein presented an obvious conflict of interests in terms of Section 12 of the Public Officers Act.

10. It also submitted that under the repealed Local Government Act Cap 265 (Laws of Kenya) and the Standing Orders made pursuant to Section 92 (6) of the said Act, Second Schedule, the said letter of

comfort did not flow from the authority of the Council or its Committee and could therefore not create any lawful rights that were capable of being enforced in favour of the Respondent and its illegality was therefore patently palpable.

11. It argued that the agreement of 15th October 2009 which crystallised in Kshs 44,550,608/= and Kshs 2,000,000/=, being the re-negotiated professional fees and disbursements respectively, that the Respondent was entitled to, constituted an **“accord and satisfaction.”**

12. It referred the court to the case of **Hart vs Hart (1881) Vol XVIII CD 670** in which the court held that “specific performance would not be refused for a mistake as to the legal effect of the contract” and Cheshire and Fiffot at pg 566 in which Scrutton L.J. defined “Accord and Satisfaction” in **British Russian Gazette & Trade Outlook Ltd vs Associated Newspapers Ltd [1933] 2KB 616** as follows:-

“Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself, the accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.”

13. On its part, the Respondent said that the Applicant’s argument that the letter dated 15th October 2009 was illegal or obtained fraudulently was an attempt at re-opening the arbitration proceedings to interrogate evidence that had been subjected to cross-examination and had been considered by the Arbitrator before he rendered his Final Award.

14. It was adamant that the letter of comfort was clear as to what would happen if the Applicant defaulted on the terms of payment that had been set out in the compromise agreement of the same date. The letter of comfort stated as follows:-**“As explained during our conversation, the council has no reason to exceed the payment period beyond the two (2) years stipulated in our above letter. However, should the period be exceeded, which we do not contemplate, you will be at liberty to enforce the full term of the contract signed on 4th August 2008. For the avoidance of doubts, your fees will be pegged on the value of the valued assets and as stipulated by the relevant statutes.”**

15. In his Arbitral Award, the Arbitrator had the following to say:-

“ The Respondent asserts that the letter of comfort should be disregarded as it was not backed by any minutes, and consequently, Mr Malinda had no legal authority to vary the agreement reached at the meeting held on 14th October 2009 as captured in the letter of 15th October 2009 which contains the renegotiated contract. However, the Respondent asserts that this letter is valid and reliable. If there are no minutes in respect of both the letter of 15th October 2009 and the letter of comfort, what makes one letter more credible than the other? It appears to me that the credibility is selected to suit the Respondent’s position which is to avoid having to revert to the original contract....I find the letter of comfort reliable and credible because it was authored and signed by Mr Malinda, the Respondent’s County Clerk, who had authority to do so and who also signed the letter dated 15th October 2009, and produced it personally and confirmed the reasons for the issuance of the letter of comfort...

I therefore find that the Claimant is entitled to revert to the original agreement as a basis for claiming its fees because the Respondent failed to pay this fee within the two year period agreed upon...”

16. The court found it prudent to set out in great detail what the Arbitrator’s findings were to show to what extent he considered the validity and legality of the letter of comfort and the circumstances under which the same was issued. He heard the *viva voce* evidence from all the witnesses that appeared before him and made a finding of fact.

17. The Respondent was emphatic that an application for setting aside an Arbitral Award was not an

appeal on the said Award. Appreciably, a court cannot sit on an appeal unless a question of law has been placed before it for determination as provided for in Section 39 of the Arbitration Act. If the Applicant had wished to have the issues under the Local Government Act (now repealed) and the Standing Orders thereof, whether the testifying by Joseph Mutua Malinda on behalf of the Respondent amounted to conflict of interest as stipulated in the Public Officers Act, whether the entitlement of the Respondent to half of the initial amount charged constituted accord and satisfaction or whether the court should allow specific performance on account of a mistake as to the legal effect of a contract, then it ought to have filed an appeal to enable the court determine those questions of law.

18. It is, however, important to note that under Section 39 of the Arbitration Act, the court can only consider questions of law arising in the course of the arbitral proceedings only if the parties have consented to lodging of appeals or the Court of Appeal is of the opinion that a point of law is of general importance. The stringent wording of the Arbitration Act is due to the final and binding nature of arbitrations.

19. In this regard, the court wholly concurs with the Respondent's submissions that the said Arbitrator's findings of illegality or otherwise of the said letter of comfort were well considered. The court has no jurisdiction or power to determine the legality or otherwise of the Arbitrator's finding on that issue as entertaining arguments on the circumstances of how the said letter of comfort letter came to be issued to the Respondent herein would be tantamount to re-opening the challenge that ought to have been canvassed before the Arbitral tribunal.

20. The Applicant also referred the court to the cases of **Holman v Johnson (1775) 1 Cowp. 341 at 343** and **Collins v Blantern (1767) 2 Wilson 341 at 350** where the common thread was that no court would aid a man who founds his cause upon an immoral or illegal act. It further placed reliance on the cases of **National Oil Company (1987) 2 All ER 769** and **Glencorn Grain Ltd v TSS Grain Millers Ltd (2002) 1 KLR 606** in which it was reiterated that the even though public policy can never be exhaustively defined and that it should be approached with caution, an award ought not to be enforced if it had an element of illegality as it would be clearly injurious or offensive to the public good.

21. On the other hand, the Respondent was categorical that the fact that the Applicant was a public body or that it deals with public money did not bring the present application within the ambit of Section 35 (2) (b)(ii) of the Arbitration Act.

22. In the local celebrated case of **Christ for All Nations v Apollo Insurance Co. Ltd (2003) 2 EA 366**, Ringera J (as he then was) addressed this question of public policy. He stated as follows:-

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten or (b) inimical to the national interest of Kenya and (c) contrary to justice and morality.”

23. The meaning of **“in conflict to public policy”** does not in any way seem to suggest that any award that is made against public bodies to pay huge or colossal sums of money which it does not agree with is contrary to public policy. As was correctly pointed out by the Respondent, if that was the meaning ascribed to public policy, this would mean that no award could be made against such a public body.

24. As was aptly put by Ringera J in the case of **Christ for All Nations v Apollo Insurance Co. Ltd**(Supra):-

“On the contrary, the public policy of Kenya leads towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act.”

25. As has been seen above, courts have from time to time reiterated that the term “public policy” is a

term that may not be exhaustive. However, its parameters may nonetheless be narrowed down to include what violates basic legal and moral principles and tenets.

26. Parties are and must be bound by their contracts. They are obligated to meet their respective obligation irrespective of whether or not they are public bodies. Once they chose arbitration as a mode of settlement of their disputes, they must be prepared to accept the final and binding nature of arbitral awards as is clearly set out in Section 32A of the Arbitration Act that stipulates as follows:-

“Except as otherwise agreed by the parties, an arbitral award is finding and binding (emphasis court) and no recourse is available against the award otherwise than in the manner provided in this Act.”

27. Indeed, no negligent public officer should hide behind the cloak that the public would stand to lose colossal amounts of money which would be coming from public coffers if an arbitral award was not set aside. Public officers who act negligently and occasion monumental loss of public funds must be held accountable for failing to protect the very public they have been charged with a legal duty to protect.

28. Accordingly, from the pleadings, affidavit evidence, written submissions and case law that was placed before the court by the parties, the court found that the Applicant did not demonstrate that the Final Arbitral Award herein 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 or that the Respondent’s cause was premised upon an immoral or illegal act. The Applicant cast a wide net in trying to set aside the arbitral award which was not established to the required standards of the law. In this respect, the Applicant’s application must fail in its entirety.

DISPOSITION

29. For the foregoing reasons, the upshot of this court’s ruling is that the Applicant’s Notice of Motion application dated and filed on 27th February 2014 was not merited and is hereby dismissed with costs to the Respondent.

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 9TH day of DECEMBER, 2014

J. KAMAU

JUDGE