



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO.69 OF 2012

TONY MARK TONU I APPLICANT

VERSUS

ANDREW STUART.....1ST RESPONDENT

DOROTHY SEYANOI MOSCHION2ND RESPONDENT

RULING

1. This notice of motion dated 6th February 2012 is taken out by Tony Mark Tonui. The applicant prays that the arbitral award made by Steven Gatembu Kairu on 1st September 2011 be set aside. The application is expressed to be brought under section 35 (1) (2) of the Arbitration Act 1995 and section 3A of the Civil Procedure Act. The applicant has sworn a deposition of even date setting out the principal grounds for the motion.

2. Those grounds are three pronged: that the award particularly the part marked “H” went beyond the scope of the reference to arbitration; that the award is inimical to the public policy of Kenya; and that it is in the interests of justice to set aside the award. At the award numbered “H” the arbitrator had ordered the 2nd respondent to complete the sale transaction in favour of the 1st respondent. The applicant says this was beyond the scope of the arbitrator. On the matter of public policy the applicant’s case is that, first, the arbitrator erred in holding that the sale agreement between the 1st respondent and 2nd respondent was first in time. He secondly erred, it is submitted, in ordering a refund of Kshs 2,800,000 to the applicant without a further award for interest at commercial rates.

3. The motion is contested by the respondents. There is a replying affidavit of Andrew Stuart sworn on 29th February 2012. In a synopsis, the respondents say that the applicant has brought a disguised appeal which does not lie. The respondents contend that the arbitral award does not exceed the jurisdiction of the arbitrator and it is not impeachable. The respondents submitted that the present motion is prejudicial and the matter should be brought to a quick rest. It was also contended that the award does not in any manner offend public policy.

4. I have heard the rival arguments. It is common ground that the parties entered into a written arbitration agreement dated 24th March 2009. To answer the question whether the arbitrator exceeded his mandate it is instructive to cite *in extenso* the relevant part of the arbitration agreement;

“The Claimants and the Respondent (hereinafter referred to as the “Parties”) are bound by separate sale agreements dated the 23rd of June 2007 between the 1st claimant and the Respondent, a second sale agreement between the 2nd Claimant and the Respondent dated the 24th of April 2008 and a third sale agreement dated the 23rd of July 2008 between the 1st Claimant and the Respondent. All sale agreements relate to the same property being Land Reference Number 5892/11. A dispute has arisen as to who is the rightfully (sic) entitled to conclude the sale transaction the said piece of land (sic) and the parties have agreed to refer the dispute and matters arising out of the sale agreements to arbitration and final determination by a single arbitrator.

NOW IT IS AGREED as follows:

1. Appointment of the Arbitrator.

All disputes and differences between the parties relating to the above matters shall be referred to the final determination of Mr. Steven Gatembu Kairu.

The Arbitration will be in accordance with the Arbitration Act No 4 of 1995 or any statutory amendment to it and the decision of the Arbitrator shall be final and binding on all parties.

2. Terms of Reference.

The Arbitrator shall determine:

a) All disputes and differences between the parties concerning the matters recited above; and

b) All other questions arising out of the matters recited above”.

The parties had also agreed on procedures, language and powers of the arbitrator. The powers of the arbitrator were set out at clause 6(d) which stated;

“The Arbitrator may:

a) Order the execution of any documents by the parties to the reference for the purposes of giving effect to the award of the Arbitrator;

b) Direct by whom and at whose expense such documents shall be prepared and executed”

5. It seems clear to me that there were competing interests over ownership of LR No 5892/11. The parties expressly mandated the arbitrator to determine who was entitled to conclude the sale. The applicant takes up cudgels on the arbitrators finding at the holding numbered “H”. There the arbitrator ordered as follows;

“The 2nd Respondent do within thirty (30) days from the date of delivery of this Award conclude the sale of the property Land Reference Number 5892/11 in favour of the 1st Respondent pursuant to the Agreement for Sale dated 24th April 2008 between the 2nd Respondent and the 1st Respondent”.

Arbitral proceedings are consensual and party driven. The parties had two sets of competing sale agreements over the same property. They expressly provided in clause 2 of the agreement power to the arbitrator to determine the dispute and specifically to find out which party was rightfully entitled to complete the transaction and any other matter arising out of the recital in the arbitration agreement. That in my view is what the arbitrator has done. I have tried to wrack my mind and scratch my head and I am unable to say that by that holding, the arbitrator exceeded his jurisdiction.

6. The parties had also 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 Arbitration Act provides;

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

There is a general principle captured therein to reduce intervention by the court in the arbitral process. 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”.

At clause 1 of the arbitration agreement, the parties agreed that the award would be final and binding.

The court will obviously disturb an award if an arbitrator is guided by wrong principles. See Mifra Construction Company Limited Vs Eldoret Municipal Council [2000] KLR 404. The applicant here has elected to proceed under section 35 of the Act. This is thus not an appeal as contemplated by section 39 of the Act.

7. Section 35 of the Arbitration Act 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 applicant has not alleged misconduct on the part of the arbitrator. I have already held that from the evidence before me, the arbitrator's findings, particularly at the impugned paragraph "H" were well within the terms of reference of clause 2 of the arbitration agreement. That ground of the application under section 35 collapses. By ordering the 2nd respondent to complete the sale, the arbitrator was well within matters arising out of or in relation to the recitals in the arbitration agreement. See Anne Mumbi Hinga Vs Victoria Njoki Gathara Civil Appeal No 8 of 2009 [2009 eKLR] 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".

See also on that point Transworld Safaris Limited Vs Eagle Aviation Nairobi HCCC Misc. 238 of 2003 (unreported), Nectel (K) Ltd Vs Development Bank (PTA Bank) Nairobi HCCC Misc. 859 of 2010 [2011] eKLR, Century Oil Trading Company Limited Vs Kenya Shell Limited Nairobi Miscellaneous Civil Application No 1561 of 2007 (unreported) and Erad Suppliers & general contractors Limited Vs National Cereals and Produce Board Nairobi High Court Civil Case No 639 of 2009 (unreported).

9. That would leave the matter of public policy. The award is attacked for, first, holding that the agreement between the 1st and 2nd respondent was first in time; and secondly, for not granting interest on the sum of Kshs 2,800,000 that the arbitrator ordered to be refunded to the applicant. It was well within the evidential purview of the arbitrator to determine which of the competing sale agreements was valid or first in time. As this is not an appeal, I cannot substitute my opinion for that of the arbitrator. The applicant's case is that this was at variance with public policy. 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 the Honourable Justice Ringera, 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".

I would agree entirely. I find nothing immoral or illegal in the award that violates the values of Kenyan society in the materials placed before me in this application. 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.

10. Earlier, I said that the parties had provided that the law and procedures would be governed by the law of Kenya. In Kenya, and as provided at section 26 of the Civil Procedure Act, the award of interest is at the discretion of the court. I would venture to think that in arbitral proceedings, it was well within the discretion of the arbitrator to award interest on the sum of Kshs 2,800,000 refunded to the applicant. I do not have any evidence that that would be a violation of sound international practices.

11. I also agree with decision of the Court of Appeal in New Tyres Enterprises Limited Vs Kenya Alliance Insurance Company Limited [1987] KLR 380 on the court's discretion. At page 384, the court stated;

"The award of interest for any period prior to the filing of the suit is a matter of substantive law. See Gulsmhuddrin Vs French Somali-land Shipping Company Limited [1959] E.A 25. Where a party has been deprived of land or movable property and receives a monetary award in compensation of the loss, the usual practice is to award interest from the date of such deprivation; (see Kimani Vs Attorney General [1969] E.A 502). In the present case the liability of the respondent to pay for the appellant's loss

was not determined until the date of judgment and that is the date from which interest should be payable. I am satisfied that the judge's order is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion".

12. The arbitrator may thus have exercised his discretion to award

Interest in a different manner than I would. But this is not an appeal under section 39 of the Act. And even then, this court cannot substitute its discretion for that of the arbitrator unless the arbitrator misapprehended the law or evidence as to cause an injustice. See generally *Bashir Ahmed Butt Vs Uwais Ahmed Khan* [1982 – 88] 1 KAR 1 at page 5.

13. In the result, I find that the applicant has not met the threshold

for setting aside an award under section 35 of the Arbitration Act. The notice of motion dated 6th February 2012 thus lacks merit. I order that the application be and is hereby dismissed with costs to the respondents.

It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of April 2012

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Oluga for the Applicant.

Ms Wangui Shaw for the Respondents.