



RWAMA FARMERS CO-OPERATIVE SOCIETY LIMITED PLAINTIFF

VERSUS

THIKA COFFEE MILLS LIMITED.....DEFENDANT

RULING

1. By a consent order made on 7th January, 2009, the parties herein referred this suit to arbitration. The arbitration was conducted by Mr. Kamau Karori Esq who on 21st November, 2011 awarded the Plaintiff Kshs.15,097,783.99 together with interest thereon at the rate of 16% per annum compounded annually from 6th December, 2011 until payment in full. The Award was filed in this court on the 15th February, 2012.

2. On 13th February, 2012 the Plaintiff applied for the Arbitrator's Award to be adopted as a judgment of the court. On 8th March, 2012, the Defendant applied that the Award dated 12th September, 2011 and final Award dated 21st November, 2011, be set aside. The Defendant also sought that the order on costs be set aside. The application was grounded upon the grounds that the award was fundamentally flawed having been made on consideration of matters outside the scope and terms of reference to the Arbitrator, that refund of Kshs.15,422,160/25 was never pleaded and by awarding the same to the Plaintiff the Arbitrator acted without jurisdiction, that the Award was made contrary to public policy as it sought to wrongfully enrich the Plaintiff, and finally that the award was made in contravention of Article 50 of the constitution in that the Defendant was not accorded a fair hearing.

3. Mr. Macharia, learned Counsel for the Defendant summarized the issues for determination into three, that is, whether by awarding the Plaintiff Kshs.15,097,783.99, the Award was not falling within the terms of reference, whether in so acting, the award was in conflict with the public policy of Kenya and whether the Award violated the applicant's rights under Article 50 of the Constitution of Kenya. Counsel clarified that this was an application under Section 35 of the Arbitration Act and not an appeal. It was contended for the Defendant that the contemplated issues were the ones agreed upon by the parties and submitted to the tribunal, that the Plaintiff introduced new issues and additional relief at the stage of submissions that was not in the statement of claim, that the Defendant and its witnesses were not given an opportunity to respond to those issues, that the Arbitral tribunal dealt with the issue of a cheque for Kshs.7,500,000/- and entered an award for the same yet the same had been admitted in paragraph 12 of the Plaintiff, that the said cheque of Kshs.7,500,000/- did not constitute the disputed facts in terms of the order of the court made on 17th September, 2009. The cases of Kenya **Pipeline Company Limited –vs- Kenya Oil Company Limited & Anor CA No. 12 of 2010, Airtel Networks Kenya Limited –vs- Nyutu Agrovet Limited Misc 400 of 2011** were relied in support of those contentions.

4. Mr. Macharia further contended on behalf of the Defendants that the refund of Kshs.7,500,000/- was never an issue to be tried, that by a Further Affidavit filed in these proceedings, the Defendant had showed that the said sum had been paid to the Plaintiff and it will offend justice and will unjustly enrich the Plaintiff, that the Arbitrator acted contrary to Section 120 of the Evidence Act being statutory estoppels the Defendant also relied on the cases of **Christ for All Nations –vs- Apollo Insurance Company Ltd (2002) EA 366** and **Rural Housing Estates Ltd –vs- Eldoret Municipal Council** on the proposition that an Award made contrary to public policy cannot stand.

5. The Plaintiff opposed the application to set aside the award and urged that the Award be adopted as a judgment of this court. The Plaintiff contended that the Parties were equitably accorded a fair hearing in addressing all and any issue that required the Arbitrator's attention, equal opportunity was granted to all the parties to put forth their respective cases, that the issue of jurisdiction cannot be raised at this stage as doing so will be contrary to Section 17 of the Act, that the application was filed outside the 90 day period in contravention of Section 35(2) of the Act, that the Award was based on the statement of issues filed and agreed to by the parties and the documents before him.

6. I have considered the Affidavits on record, submissions of Counsel, oral hi-lights and authorities relied on. This is not an appeal against the decision of the Arbitrator Kamau Karori Esq – but rather an application to set aside the Award on the grounds set out in the body of the motion. The jurisdiction to do so is very restricted and has to be exercised in accordance with Section 35 of the Act. The court cannot go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act. The present application is on the basis that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference, or contains matters beyond the scope of the reference and that it is contrary to public policy.

7. The position taken by the Defendant is that the issues determined by the Arbitrator and in respect of which the Award was based were never referred to him for determination. The first issue therefore that falls for determination by this court is whether the award of Kshs.15,097,783.99 arose out of issues not contemplated by the parties or was not part of the reference to the Arbitrator. At page 12 of the Exhibit "MM2" to the Supporting Affidavit is the consent order dated 7th January, 2009 that referred the dispute to arbitration. The said order partly directed that:-

"2. THAT the disputed issues raised in the pleadings filed by both parties be framed and referred to an arbitrator to be appointed by the Chairman of the Law Society of Kenya within 14 days of the filing of this order."

8. It would seem that the issues for determination were drawn by the Plaintiff only but were later on adopted by the Defendant. They are produced as "MM3" and are dated 9th March, 2010. I agree with the Defendant that once an arbitral tribunal delves into matters that are not subject to a reference, that Award, however well considered is a candidate for setting aside. The cases relied on by the Respondent are good authority and they have restated law on the subject. The Defendant has contended that since the Plaintiff had in paragraph 12 of the Plaint admitted payments of Kshs.7,500,000/- and Kshs.1,623,245/65 there was no dispute on the same and that no issue thereon had arisen that was capable of reference to the Arbitrator. As correctly put by the Defendant, issues for determination in any dispute arise from and/or are framed from pleadings. I thoroughly perused the entire record for the Defence filed against the claim but there was none. Although the same is referred to in the submissions and the Award itself, a copy thereof was not availed to the court. The court was therefore left to look at the records to ascertain as to the actual dispute referred to the arbitral tribunal. The only issues that the court found that were referred to arbitration were therefore the issues dated 9th March, 2010 which were 13 in number.

9. Having admitted in paragraph 12 of the Plaint that some of the payments received from the Defendant was Kshs.7,500,000/- and Kshs.1,623,245/65 could the issue of refund of the same to the Plaintiff be a proper issue for determination by the Arbitrator? I have noted that at paragraph 22 of the Award, the Arbitrator considered what was before him. He stated:-

"Preliminary Matters

22. In the course of the hearing and even in the written submissions, the parties raised a number of issues which they requested me to determine as preliminary matters or which by their very nature touch on the issue of this Tribunal's jurisdiction and which must therefore be determined at the very outset. I shall address those issues in the order in which they appear below:-

a) If PW1 could change his evidence on the issue of the claim for the coffee years 1996/1997 and 2000/2001

b) If the Tribunal is bound by the statement of issues agreed upon by the parties or if it can inquire into matters outside the agreed issues in the interest of justice.

c) Whether this Tribunal has jurisdiction to grant any relief outside those specifically sought in the statement of claim.

d) Whether this arbitration was pursuant to agreement of the parties or by order of the court and whether therefore the agreement by the parties on the issues for determination was circumscribed by or subject to the court order.”

10. The Arbitrator admitted the Plaintiff’s witnesses’ evidence for the period 1996/97 and 2000/2001, he held quite rightly that the statement of issues dated 9th March, 2010 constituted the reference and he would not deal with any issues not part of those issues, he further held that his award was to be limited to those issues referred to him for determination and not otherwise. As regards the reliefs sought, the Arbitrator found that the parties had tendered evidence both oral and documentary touching on reliefs that were not in the pleadings. Then at paragraphs 47, 49 and 50 of the Award, he held:-

“47. The procedure adopted by the parties in this case was a departure from the normal process. The parties agreed to file and exchange documents even in the middle of the oral hearing

49. Both parties expended a lot of time and energy addressing the issue of crop advances paid to the claimant. Although the issue of the specific crop advances is not specifically referred to in the pleadings, the claimant sought to demonstrate that several payments allegedly paid to it as crop advances was not actually paid. On its part, the Respondent produced Bank statements, copies of cheques, crop advance agreements and payment vouchers to prove that the crop advances were actually paid. It is clear to me that the issue of whether or not payments allegedly made by the Respondent to the claimant were received by the claimant was in the contemplation of the parties.....

50. I accept as a correct statement of law the argument by the Respondent that a party is bound by its pleadings. It however is a trite principle of law that where parties, from their conduct and submissions have clearly left an issue for determination, a tribunal has an obligation to deal with and determine that issue, provided that the same does not fall outside the Statement of Issues prepared by the parties and identified by them as the issues referred to arbitration. In this case, by issue number 13 the parties have asked me to determine if there were any sums due to the claimant arising from the coffee deliveries in respect of the pre-1999 coffee year If it is proved that any of the crop advances allegedly paid to the claimant were not in fact paid, then the Respondent would have no right to retain any amount it deducted in repayment of such advances. In that case, the Respondent would be indebted to the claimant for coffee deliveries made before the year 1999 to the extent of the wrongly deducted amounts.”

11. I have quoted the Award extensively to show the basis on which the Arbitrator entertained the Plaintiff’s claim and the consequent award. It is clear from the foregoing that the parties themselves under Issue No. 13 of the statement of issues had asked the Arbitrator to determine whether there were any monies owed by the Defendant to the Plaintiff for the period of pre- 1999. That issue read:-

“13. Whether Thika Coffee Mills is indebted to Rwama Farmers Cooperative Society Limited for coffee deliveries made before period year 1999/2000 and 2000/2001?”

Can it therefore be said that by inquiring into the coffee deliveries in the period pre-1999 and ordering any refunds of the amounts found to have been wrongly deducted the arbitral tribunal went outside the terms of reference? I think not. Once the parties submitted that issue for determination and had called evidence and tested each other’s evidence through cross examination, my view is that, that was an issue within the contemplation of the parties and within the terms of reference. The Arbitrator cannot be faulted.

12. One thing I should point here is that under Section 29(4) of the Act, Arbitral proceedings are not subject to the strict rigours of the rules of procedure unless the parties authorize the tribunal to do so. The reason for this is to make arbitral proceedings user friendly. That is why parties in arbitral proceedings have a lot of latitude in presenting their cases before Arbitral tribunals. It will be noted that in this case, due to the wide latitude given in arbitral proceedings, the parties were producing evidence liberally. For this reason, I am not in agreement with the Respondent that the Award is contrary to Section 120 of the Evidence Act. From the record, it would seem that the issue of payments of Kshs.7,500,000/- and Kshs.1,623,245/65 was raised both in the evidence as well as submissions. The evidence presented by the Plaintiff's witnesses giving evidence in respect thereof were greatly cross-examined and the Defendant presented evidence to contradict the same. For these reasons, I am of the view that the Award does not fall for setting aside under Section 35(2)(iv) as urged by the Defendant on this ground.

13. The other issue raised by the Defendant is that the Award is contrary to public policy in that it will lead to wrongful enrichment of the Plaintiff and that the Defendant was not accorded a fair hearing contrary to Article 50 of the Constitution of Kenya. The Defendant contends that the Plaintiff's claim was introduced at the submission level thereby giving the Defendant no opportunity to defend that claim. The Plaintiff have contended otherwise.

In **Renusagar Power Company Ltd –vs- General Electric Company (1994) AIR 860**, the Supreme Court of India observed thus:-

“While observing that “from the very nature of things the expressions ‘public policy’, ‘opposed to public policy’ or ‘contrary to public policy’ are incapable of precise definition”, this court has laid down:

Public Policy is some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time.” (Emphasis added)

In the case of **National Oil Company (1987) 2 All ER 769 at page 779** Sir Johnson Donaldson M.R observed:-

“Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in Richardson –vs- Mellish ‘it is never argued at all but when other points fail, it has to be shown that there is an element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised . ’(Emphasis supplied.)

In **Glencore Grain Ltd –vs- TSS Grain Millers Ltd (2002) I KLR 606** Hon. Onyancha J held at page 626 that:-

“A contract or arbitral award will be against the Public Policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word illegal here would hold a wider meaning than just “against the law”. It would include contracts or acts that are void. “Against Public Policy” would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive. (Emphasis supplied)

From the foregoing, it is quite clear that that term “conflict with the Public Policy” used in Section 35 (2) (b) of the Arbitration Act, is akin to **“contrary to Public Policy”, “against Public Policy” “opposed to Public Policy.”** These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society.

14. I have carefully perused the proceedings of the Arbitral tribunal produced as **“MM12”**. I have not

seen any part where the Defendant may have been denied an opportunity to present its case. Indeed the Plaintiff has contended which has not been denied, that the Defendant was given a lot of latitude in that it was even allowed to file its documents and defence out of time. On the issue of the claim for refunds, the Arbitrator found that both parties dealt with the issue substantively during the trial whereby evidence was fully adduced for and against the issue. I am unable to find that the Award was against public policy on the alleged ground that the Defendant was not given a fair hearing.

15. On the issue of unfair enrichment, the Defendant contends that the Plaintiff had admitted receiving the payments which the Award ordered a refund of. That there is evidence (by way of a Further Affidavit) that the sum of Kshs.7,500,000/- had been paid over to the Plaintiff. In my view, introduction of such evidence at this stage is not permitted. The same will be prejudicial as it was not before the arbitrator and the Plaintiff may not have been given an opportunity to test the same. Even if that is not the case, I am prepared to give the Defendant the benefit of doubt to see whether there is unfair enrichment. The Arbitrator found that there was no evidence of the payment of the sum of Kshs.7,500,000/- since there was only a copy of the cheque but no bank statement to show such payment. I have carefully considered the Bank statement produced as “**MM1**” in Michael Mwaniki’s Further Affidavit. There is an entry on 2nd May,1998 showing the payment of Kshs.7,500,000/- out of the Defendant’s Account No. 01040-144 286-01 with Standard Chartered Bank, Muthaiga Branch. It is the Defendant’s case that that entry represents the payment of Cheque No. 100100 dated 24th April, 1998 to the Plaintiff.

16. A close scrutiny of that entry will show that that was in respect of a Draft issued. That in my understanding is a Bankers Cheque. The entry reads “**02 MAY DRAFT ISSUED: 00216461 100100.**” If it is a draft that was issued for Kshs.7,500,000/-, that cheque must be by the Bank itself to the Plaintiff. But cheque No. 100100 dated 24th April, 1998 is by the Defendant directly to the Plaintiff. If what was encashed was the Defendant’s cheque I think the entry in the bank account would read “**inward clearing**” then the cheque number. Very good examples are to be found at pages 116 with 129 of R1. The payment of Kshs.9,180,800/- vide Cheque No. 100147 to the Plaintiff has been captured in the bank statement of the Defendant as “**30 MAR INW. CLEARING 100147**” then the amount is given. The other example is page 120 with 134 of R1 wherein the payment of Kshs.981,844/- to the Plaintiff vide cheque No. 100207 has been captured in the Defendant’s statement of Account as “**28 DEC INW. CLEARING 100207**” then the amount is given. That is not the case with cheque No. 100100 for Kshs.7,500,000/- allegedly issued to the Plaintiff on 24/4/98. It is still doubtful if that cheque was ever released to the Plaintiff and if so released, there is no evidence that it was paid through the Defendant’s account. My view is that there is no unfair enrichment. To my mind therefore I have not found anything that is injurious to the public, offensive, with an element of illegality, that which is unacceptable to the Kenya society with Award. I find that there is nothing in the Award that is contrary to public policy of Kenya. For the foregoing reasons, I am not satisfied that the Defendant’s application is meritorious and I accordingly dismiss the same with costs.

17. That leaves the Plaintiff’s application dated 10th February, 2012 for determination. I have noted that the Arbitral Award was filed in Court on 15th February, 2012 in accordance with the order of the court of 7th January, 2009. I find nothing to challenge the Plaintiff’s said application. Accordingly, I allow the said application and order that the said Arbitral Award be adopted as a judgment of this court. The costs of the suit and the application are awarded to the Plaintiff. A decree in these terms to issue accordingly.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE