REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Civ Appli 1212 of 2006

SEYANI BROTHERS & CO. LIMITED……..…….APPLICANT

VERSUS

ZAKHEM CONSTRUCTION (K) LIMITED……...……RESPONDENT

RULING

Following the filing of an arbitration award under section 36 and 37 of the Arbitration Act and Rule 9(2) of the Arbitration Rules, Seyani Brothers & Co. Limited(hereinafter referred to as the Applicant) has come to this court under section 35 of the Arbitration Act, 1995 and Rules 4(2) and 7 of the Arbitration Rules 1997 seeking to have clause (b) of the arbitral award dated 6th September, 2006 set aside and the costs of this application borne by Zakhem Construction (K) Limited the Respondent herein.

It is alleged that the arbitral award which results from arbitration proceedings that were concluded through a consent between the parties herein, derogates in very material respect from the consent entered by the parties before the arbitrator, and contains a decision in a matter beyond the scope of the consent entered into by the parties and therefore deals with a matter outside the terms of the reference to arbitration. Finally it is contended that the arbitral award is otherwise against the law to the extent that it imposes upon the parties to the arbitration, rights and obligations not conferred or assumed under the consent, and is therefore in conflict with the public policy of Kenya.

In his supporting affidavit Adnan Annous, a director of the Applicant reiterates that clause (b) of the arbitral award filed on 1st November, 2006 materially derogates from the consent entered into by the parties to the extent that it directs that the amount stated ‘‘be released immediately to the Respondent’’ contrary to the consent entered into by the parties whose terms were that the payment of that sum was subject to discussions between the Applicant and the employer in respect of the main contract and therefore set no time limit for payment.

Relying on the case of ***Nyangau vs Nyakwara (1986) KLR 712*** and the case of ***Christ for all Nations vs Appollo Insurance Company Limited (2002) 2EA 366***, Mr. Mutua who appeared for the applicant urged the court to grant the application.

The Respondent opposed the application on the following grounds; First it was contended that the application does not fall within the armpit of section 35(2) of the Arbitration Act 1995 as the section does not concern itself with errors made by an arbitrator, but concerns itself to the entire dispute and that the applicant not having annexed the proceedings it was not possible for the court to appreciate the alleged error.

Secondly it was submitted that the court lacks jurisdiction to set aside the award on the grounds alleged

by the applicant. It was maintained that an error of fact or law or mixed fact and law, of construction of a statute or contract on the part of an arbitrator is not necessarily inconsistent with public policy and that it has not been demonstrated that the award is against public policy. Finally it was submitted that under section 35(3) an application for setting aside an award cannot be made after 3 months from the date of receipt of the award and that since the Applicant has not revealed when he received the award, it must be construed that he received the award on the date of the award, and therefore the application filed on 5th December 2006, was incurably defective having been filed after the limitation period

It is evident from the arbitration award filed on 1st November 2006, that the same was a consent award based on the consent agreement entered into by the parties on the 25th August, 2005. That consent which was annexure ''AAI'' to the Affidavit of Adnan Annous was in the following terms. ''By consent

1) Kshs.1,542,424.00 owing from the contractor to sub-contractor being sums on certificate number 8 of which cheque for $20,000(Twenty thousand US Dollars) dated 13th August, 2005 has been remitted.

2) Kshs.4,854,981.80 owing from the contractor to the sub- contractor as agreed, being sums on executed works and variations by the sub- contractor, subject of discussions between the contractor and the employer (Kenya Power and Lighting Company Limited).

3) Kshs.1,617,114.00 owing from the contractor to the sub- contractor, being sums on retention under the terms of the contract.

Upon execution of this consent, the arbitration shall stand suspended"

The Arbitrator has given no reason for the award but purports to confine the award to the consent entered into by the parties. That is to say that the intention was for the arbitrator to give effect to this consent. The contentious part of the award is clause (b) which purports to incorporate clause 2 of the consent. In respect of that clause the award read as follows;

''Payment of Kenya shillings four million eight hundred and fifty four thousand nine hundred and eighty one cents eighty (Kshs.4,854,981.80) on account of executed works and variation which is subject of discussion between the respondent and the employer to be released immediately by the Respondent to the Claimant"

(Underlining added)

The underlined part is the point of departure between the consent entered into by the parties and the award, and this is what the applicant claims is a derogation from the consent and a matter outside the scope of the reference. It is not clear what the terms of reference given to the Arbitrator were, as this is neither contained in the award nor has it been availed to the Court.

The Court cannot therefore be able to tell whether that part of the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration or contains decision on matters beyond the scope of the reference to arbitration. Moreover, the consent appears to merely identify the amounts owing from the contractor to the sub-contractor. Without the terms of reference the court is unable to tell whether that is what constituted the dispute between the parties i.e identification of the amounts owed. It was for the Applicant to satisfy this court that there is good grounds to set aside the arbitral award or part of the arbitral award under section 35 of the arbitration Act. The parties having agreed on the amount owed to the Respondent by the Applicant and not having said anything on the mode or time of payment the addition by the arbitrator for payment to be made with immediate effect is certainly not derogation from that consent nor is it contrary to any public policy. The Arbitrator simply exercised his discretion to conclude the arbitration proceedings and this cannot be subject of an application under Section 35 of the Arbitration Act.

As was submitted by the advocate for the Respondent an application for setting aside an arbitral award under Section 35(3) of the Arbitration Act cannot be made after three months from the date on which the party making this application has received the arbitral award. It is for that party to satisfy the Court that his application has been brought within the required time. In this case the Applicant has not revealed to the court when he received the award and since the award was dated 6th September, 2006 the assumption is that he received it on that date. I do concur with the Respondent that on this ground the application for setting aside the award under section 35 was filed out of time without any leave and is therefore defective. For these reasons I find that this application must fail and is accordingly dismissed with costs to the Respondent.

Dated signed and delivered this 29th day of March 2007.

H. M. OKWENGU

JUDGE