



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Case 1253 of 2004

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

INSURANCE COMPANY OF EAST AFRICA LIMITED.....A PPLICANT

AND

EZRA ODONDI OPAR..... RESPONDENT

RULING

By notice of motion dated 03.09.04 and filed on 21.09.04 brought under section 35 of the Arbitration Act, No.4 of 1995 and rule 7 of the Arbitration Rules, 1997, the applicant applied for the following orders:-

- a) That service of the application be dispensed with in the first instance.
- b) That there be interim orders of stay of any further proceedings before the sole arbitrator or before the Chief Magistrates Court at Kisumu in Civil Case No.339 of 2003 pursuant to the arbitral award delivered by Mr. John Olago – Aluoch on 13.08.04, pending the hearing and determination of this application *inter – partes*.
- c) That this honourable court be pleased to set aside the arbitral award dated and delivered by Mr John Olago – Aluoch, sole arbitration between EZRA ODONDI OPAR and INSURANCE COMPANY OF EAST AFRICA LIMITED.
- d) That costs of the application be provided for.

The grounds upon which the application is based are:-

- i) That the dispute between the parties was referred to arbitration pursuant to an application under the provisions of section 6 of the Arbitration Act, 1995 and rule 2 of the Arbitration Rules, 1997.

- ii) That the arbitral award delivered by Mr John Olago – Aluoch on 13.08.04 deals with a dispute not contemplated by or not falling within the terms of reference to arbitration and contains decisions on matters beyond the scope of reference to arbitration.
- iii) The arbitral award aforesaid contains awards which are expressly excluded under the contract of insurance.
- iv) That the arbitral award amounts to re-writing a contract between the parties.
- v) That the Chief Magistrates Court lacks the pecuniary jurisdiction to enter judgment in terms of the arbitral award.
- vi) That the arbitral award is in conflict with the public policy of Kenya.
- vii) That the failure of the arbitrator to consider the fact and authorities amounts to misconduct.

The application is supported by the affidavit of Mrs L.M. Muriithi, Deputy Manager, Legal Affairs and Recoveries Section of the applicant company sworn on 03.09.04.

Initially the parties were represented as follows: Applicant was represented by learned counsel, Mr S. Shivaji while the respondent was represented by learned counsel, Mr F. E. Wasuna.

The firm of Wasuna & Co. Advocates filed grounds of opposition on 09.11.04 on behalf of the respondent. The said grounds are as under:-

1. That the application is misconceived, bad in law and is an abuse of the process of the court.
2. That no specific terms of reference have been set out and no issues having been framed for determination by the arbitrator, the arbitrator had no alternative but to determine the dispute on the basis of the issues that the parties either expressly or impliedly urged and/ventilated before him.
3. That in the circumstances the award delivered by the arbitrator dealt with the dispute (s) contemplated and which fell within the terms of reference to arbitration and the decisions contained therein are on matters within the scope of the reference to arbitration.
4. That the applicant allowed evidence to be led on issues that it now claims are expressly excluded under the contract of insurance and/or not pleaded in the statement claimed. The applicant is now estopped from arguing against admissibility of such evidence or decisions thereon in the manner the arbitrator did.
5. That the award need and should not be filed in the Chief Magistrates Court. The award having been made pursuant to the Arbitration Act must be filed in the High Court. The award did not purport that it should be filed in the Magistrates Court.
6. That the award can be modified or amended in accordance with the Arbitration Act and/or powers of the court and therefore need not be set aside if indeed the court finds fault with some portion thereof.
7. That what is referred to by the applicant as misconduct is not in law misconduct.
8. That nothing in the award is in conflict with the public policy of Kenya.

Subsequently the respondent fell out with the firm of Wasuma & Co. Advocates, which firm withdrew from acting for him and the firm of Kanyangi & Co. Advocates took over as counsel for the respondent. Learned counsel, Mr C.O. Kanyangi thereafter represented the respondent in these proceedings while Mr Shivaji continued to represent the applicant company.

During the hearing of the notice of motion application, the parties, through their respective advocates, made their submissions and counter submissions and referred this court to various decided cases in support of their opposing points of view.

I have given due consideration to the application before me and come to the conclusion that the said application can be disposed of briefly as follows.

The court record shows that the arbitral award apparently being contested by the applicant herein was delivered by the sole arbitrator on 13.08.04 after the case was referred to the said arbitrator by consent of the parties, pursuant to an arbitration clause. The actual award appears in the penultimate paragraph of the award in the following terms:

'I therefore do hereby award and determine that the respondent pay the claimant the sum of Kshs.484,500/= being the contract value of the car KAK 317 H; Kshs.2,095,000/= damages for loss of user; Kshs.902,835/= being interest to date of this award; Kshs.55,680/= being the claimant's counsel's (sic). The aggregate of this award is therefore Kshs.3,538,015/=. The sum shall attract further interest at 14% p.a. from today till payment in full. Counsel's for the parties to either agree on claimant's counsel's costs or the same to be filed before me for assessment at the convenience of the parties.'

Attention is drawn to the direction given to the advocates for the parties that they were either to agree on claimant's counsel's costs or, failing such agreement, claimant's counsel was to file his costs for assessment by the arbitrator.

This court was informed by counsel for the respondent herein that it is the respondent herein who had filed Kisumu Chief Magistrate's Court Civil Case No.339 of 2003 as plaintiff while the applicant herein was the defendant. That case was referred to arbitration by consent of the parties as already recorded.

The issue of costs was the last event which would have concluded the arbitration proceedings. There is no evidence before me that the arbitrator's direction for the parties to the arbitration proceedings to agree on claimant's counsel's costs or for such costs to be filed with the arbitrator for assessment was complied with. As the record now before me stands, the arbitration proceedings have not been completed.

It is instructive, and it bears repeating, that the arbitration proceedings were engaged in by consent of the parties, pursuant to an arbitration clause in this matter. That being so, it was incumbent upon the parties to facilitate conclusion of the arbitral process by complying with the arbitrator's direction on finalisation of the issue of the claimant's counsel's costs, which would then lead to filing of the arbitral award in court. In my respectful view, it is after the arbitral process has been finalized and the arbitral award duly filed in court that any party aggrieved by the arbitral award can legitimately challenge the arbitral award – in its totality. The hurried measures apparently embarked upon by the applicant herein constitutes jumping the gun. In the premise, I find the present notice of motion application dated 03.09.04, on the evidence before me, premature and the same is hereby dismissed with costs.

Orders accordingly.

Delivered at Nairobi this 18th day of October, 2006.

B.P. KUBO

JUDGE