REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Civil Appli 719 of 2004

IN THE MATTER OF: THE ARBITRATION ACT NO. 5 OF 1995

AND

IN THE MATTER OF: AN APPLICATION TO SET ASIDE ARBITRAL

AWARD

BETWEEN

SIGINON MARITIME LTD ..... APPLICANT

AND

GITUTHO ASSOCIATES & OTHERS..... RESPONDENT

Coram: Before Hon. Justice Mwera

Mwakisha for applicant

Adhoch for Respondent

Court clerk – Kazungu

RULING

The applicant brought this chamber summons dated 25th October 2004 under Section 35 of the Arbitration Act No. 4 (not 5) of 1995, hereinafter the Act, and under Rules 4, 7 thereunder made in 1997. It also cited O3r. 9A, O21 rr 22, 25 and S. 3A Civil Procedure Act. As at the time of hearing this application, the only prayer that remained to be determined was:

> *(i) That the arbitration award made by one Ali A. Mandhry Qs on 4th February 2004 and notified to the applicant on 30th July 2004 be set aside.*

There were four grounds on which this application was based, but while incorporating the contents of the affidavit of one clement Mwambingu sworn on 27th October 2004 in support of this application, Mr. Mwakisha brought out the issue of the arbitrator Mr. Mandhary failing to keep and later avail a record of the arbitral award. The court was told that that amounted to a misconduct on the part of the arbitrator because such failure militated against the arbitration agreement reached by the disputants.

Mr. Adhoch relying on five (5) grounds of opposition plus a replying affidavit resisted the orders

sought. Both sides put forth authorities and expanded on the law applicable.

The applicants' case briefly put, was that it hired the 1st respondent to do some work connected with building construction sometime on or about 2nd November 1993.

The 1st respondent engaged other experts in the project but that did not seem to be the question before the arbitrator at all. What seemed to be the bone of contention was that during that engagement, the parties seemingly did not settle and agree on the two options that the 1st respondent suggested to the applicant, which one was to be executed in the project. That that was the position as at 9th August 1996 when the two parties last sought each others final stand. That the 1st respondent did not confirm which of the two options to execute on behalf of the applicant as at that time, and yet he proceeded to develop one of the options to tendering stage sometime into February 1997. Apparently the applicant was left with the view that the 1st respondent had gone over and above what he ought to have done, because before the building option had been agreed the 1st respondent had gone on to do more and so the issue of up to what time the applicant would pay arose. Then the 1st respondent's fees cropped up. This constituted a dispute which the parties sought to resolve by arbitration – whether the applicant would pay fees to the 1st respondent up to 9th August 1996 for work done or until February 1997 when according to the applicant the 1st respondent had gone on to do work that was not agreed upon.

So before commencing the serious part of the arbitral proceedings, there was the first preliminary meeting of 18th February 2002 when the parties before the arbitrator Mr. Mandhry agreed to the directions and course of the arbitral proceedings, inter alia, that:

> "2.0 (i) .....
>
> (ii) Arbitration (had) arisen under the Architects and Quantity Surveyors Act Chapter 525,"

and that arrangements for hearing included:

> "8.0 (i) ..... (iv) .....
>
> (v) Recording in writing by Arbitrator."

The other aspects of this arbitration agreement included witnesses, documentary evidence, fees, etc which are not in dispute here. The other point which should be taken up and settled here right away is that the award in question was dated 4th February 2004, while a certified copy of it was sent for from the arbitrator and received, according to Mr. Mwakisha, on 30th July 2004. The court settles this point here and now because Mr. Adhoch raised a point in opposition that this application was incompetent because it was brought long after 3 months expired since the award's date (not even when it was read) contrary to Section 35(3). The time of 3 months can only begin to run after a party has been notified or given the award, by either reading it to him or conveying a copy to him. If an award is notified to one party or read to one party the time of 3 months cannot begin to run against the other party who was not notified of the date of reading the award or was not given a copy thereof. For whatever took place here the 1st respondent did not show this court that either the applicant was notified of the date the award was to be delivered, and it absented itself, or that he himself, the 1st respondent or the arbitrator sent a copy to the applicant before it asked for and the arbitrator provided one on 30th July 2004. So when the applicant filed this application on 27th October 2004 in the view of this court, it was right on time and so is not barred by Section 35 of the Act.

Having said so even before the actual determination of this application is really under, way but there is no harm in that, it appears pertinent to set out the provisions of law under which this application was brought. Thereafter, the counsel's submissions will be woven into the decision of this court along with the authorities cited, if necessary.

Section 35 of the Act in its pertinent parts says this:-

"35. (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) (i) ..... (iv) .....

(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 the provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or;"

Mr. Mwakisha's position was mainly that the arbitrator acted outside the arbitration agreement of 18th February 2002 first by disregarding the evidence given by the 1st respondent, before him that he did not wish to be paid for the work he did after 9th August 1996 as he had laid it in his claim by way of fee note. But that the final award gave this figure. Secondly, that when the applicant asked for a copy of the proceedings to point out this anomaly, Mr. Mandhry responded that he was not obliged to avail the record of proceedings.

The final award refers to the fee note of June 1997 for Kshs. 1,359,208/- by the 1st respondent to be paid by the applicant (the copy of the final award exhibited here, pp. 48, was rather faint). The arbitrator found that that sum had been proved and the 1st respondent was entitled to it, less what had been paint on account. It was the applicant's position that by failing or declining to avail a copy of proceedings to ascertain that services rendered after 9th August 1996 were not to be paid, for the arbitrator derogated from the arbitration agreement.

Mr. Adhoch maintained that Mr. Mandhry was justified in declining to avail the proceedings as sought because any and all arbitrations in the building industry are governed by the rules of arbitration of the Chartered Institute of Arbitrators (Kenya) Branch. This aspect is to be adverted to presently. But this is what the arbitrator said in a letter of 4th August 2004 when the applicant's lawyer (then Y. A. Ali, Advocate) asked for typed certified copies of proceedings:

"As the arbitration was carried out under the Chartered Institute of Arbitrations (Kenya) Branch, Arbitration rules, I am under no obligation to hand over notes or make any statement on this matter after handing over the award."

Although Mr. Adhoch supported the arbitrator's, view this court is minded to find that it went contrary to the arbitration agreement of the parties. It has been reproduced above that the parties agreed that arbitral proceedings would be recorded in writing. Mr. Mwakisha said that Mr. Mandhry was actually writing as the proceedings went on. In his letter of 4th August 2004 (above), that arbitrator said that the notes he was taking down were for his own use. By the parties agreeing that proceedings be kept in writing, meant that they would refer to them if they wanted. Accordingly Mr. Mandhry was obliged as per agreement of 18th February 2002 to preserve the proceedings and permit parties to have or see them. By not doing so, the arbitrator did not act in accord with the arbitration agreement of the parties. The position became more grave when the applicant actually wanted to examine the proceedings to point out that the 1st respondent had said during examination at the arbitral proceedings that he had left out the part of the claim covering the time over and above 9th August 1996. So on this basis this court is satisfied that the award herein was arrived at by conducting proceedings contrary to the parties arbitration agreement. It ought to be and is hereby set aside.

That is not the end of the reasons as to why the award under review should be set aside.

It was extracted from the procedural directions the parties agreed on 18th February 2002 that their dispute, and so the arbitration, had arisen under the Architects and Quantity Surveyors Act (Cap 525) Mr. Mwakisha told the court that Mr. Mandhry was appointed by the Architectural Association of Kenya on 29th September 2001 pursuant to Rule A7 under that Act when the disputants seemingly could not agree

on an arbitrator. That accordingly Mr. Mandhry who was a member of the Institute of the Chartered Institute of Arbitrators (Kenya) Branch, was mandated by the agreement of the parties to conduct the arbitration under Cap. 525. And so having chosen to do the arbitration as per Rules of his Institute (see the letter of 4th August 2004 above), he deviated from the dictates of the arbitration agreement. This court agrees. The arbitration agreement stated clearly that the arbitration had arisen under Cap. 525. Their arbitrator had been appointed pursuant to the rules under that Act. At no point did the parties incorporate the Rules of Mr. Mandhry's Association to operate in the proceedings. Thus again the arbitrator did not proceed in the arbitral exercise in accordance with the agreement of the parties. This is again another reason why this award should be set aside. Mr. Adhoch's view here that the applicant should have objected to the manner in which the arbitrator was conducting the proceedings during those proceeding or it was deemed to have waived that right to object (Section 17 of the Act) cannot be applied here. The fact that he applied the Rules not agreed on to govern the proceedings, only came to the fore on 4th August 2004 long after the award when Mr. Mandhry was asked to avail a typed certified copy of the arbitral proceedings.

In such circumstances the applicant could not be expected to have objected during the proceedings. The same even as Section 5 of the Act mandates. When the arbitrator kept writing as arbitral proceedings progressed, the parties must have been satisfied that he was recording the proceedings in writing. It is only when asked to avail a written record of the proceedings, long after the award had been made, that he declined to do so claiming that he made the notes for his own use and thus nobody was entitled to them. None of the parties including the 1st respondent knew during the proceedings that the arbitrator was disregarding the arbitration agreement that the proceedings would be recorded in writing. So the plea by the 1st respondent that the applicant's prayers were barred by waiver did not commend itself to this court. Indeed Mr. Adhoch pressed the court to accept that the award of fees beyond 9th August 1996 was justified because he exhibited letters which when read together must be constined to mean that the applicant agreed to one of the options of the work intended. That when it was done beyond 9th August 1996, the applicant also agreed to pay the fee except that he sought that the 1st respondent should offer it some discount. All this may have been so. But the applicant did not accept that. To it, the work done beyond 9th August 1996 was to be excluded from the fee note and that the 1st respondent had admitted that during the arbitral proceedings, whose record the arbitrator, regrettably, did not furnish. So Mr. Adhoch's claim cannot be verified from any record. Neither can we verify that the respondent agreed to exclude payments for work done beyond 9th August 1996. It may as well be that accordingly the arbitrator fell in error to include payment for a period excluded by the 1st respondent while submitting on his claim in the proceedings – another point worth of note while considering to accept the award or set it aside.

Another point that engaged counsel here much concerned the supporting affidavit sworn by one Clement Mwambingu on 27th October 2004 when he was no longer in the employment of the applicant limited company. Mr. Adhoch submitted that the affidavit fell foul of Section 2 of the Companies Act (Cap 486) and O3 r. 2 (c) Civil Procedure Rules in that the said Mwambingu was not an officer of the applicant company authorized by seal or otherwise to do anything on its behalf.

The court took time to appreciate these provisions of law and any cases saying something about an authorized officer of a company when swearing affidavits (eg Microsoft Corporation Vs Mitsumi Computer Garage Ltd NRI HCCC (MIL.) 810/2001. This court's view on affidavits is that they contain evidence on facts but reduced in writing and sworn on oath. This evidence is no different from that of any person who comes to give it orally on oath. All it boils down to is whether the facts known and being presented are relevant to the dispute and to what extent:

"Affidavits relate to matters of fact. And if the facts relating to the issue at hand are known by a person other than the respondent, the respondent cannot be precluded from adducing that evidence in aid of his contentious."

(MBA HCCC 331/1996 – Shakira Ali Vs Nurunnissa Sulemanji & Others, page 2, Waki, J).

Mwambingu once worked with the applicant as a Manager during the time of these matters between

these parties. He knew the facts relating to them. He swore an affidavit to those facts with authority of the applicant. There is no reason to exclude them as the 1st respondent put it.

Lastly the 1st respondent urged this court to dismiss the application to set the award aside and instead, by his application dated 13th September 2004, recognize the award as binding and thus facilitate its execution. From the orders above that the award herein is set aside, this ex parte application to recognize it is dismissed.

The orders sought in the chamber summons dated 25th October 2004 are granted with costs.

Orders accordingly.

Delivered on 28th July 2005.

J.W. MWERA

JUDGE