REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 241 of 2005

APA INSURANCE CO. LTD. ……..... ……..…...APPLICANT

VERSUS

HON CHRYSANTHUS BARNABAS OKEMO ……RESPONDENT

RULING

This is an application pursuant to Section 35 of the Arbitration Act, 1995. It seeks the setting aside of the Arbitral Award dated 25th February 2005, and the dismissal of the Respondent's claim with costs. The application is founded on the following four grounds which were cited on the face of the application itself;

"(a) The award is contrary to public policy. (b) The award is founded on issues that were extraneous to the dispute and an alleged agreement reached on a without prejudice basis which was subject to certain conditions and between the Respondent and an officer of the Applicant company but not approved by the company.

(c) The Respondent offered no evidence on the quantum of his claim and the arbitrator went out of his way to find bits of evidence on behalf of the Respondent to sustain the Respondent's claim when there was indeed no evidence offered by the Respondent. (d) The Arbitrator disregarded the Applicant's evidence on the quantum of the claim and proceeded as in (c) herein-above."

When canvassing the application, Mr. Mutua, advocate for the applicant dealt with all the grounds together, on the basis that the arbitral award was contrary to public policy. He submitted that whilst the concept of public policy was a broad one, the courts have previously set out instances in which arbitral awards would be said to be in conflict with public policy. One such instance was said to have been tackled in the case of CHRIST FOR ALL NATIONS –VS- APOLLO INSURANCE COMPANY LIMITED, HCCC NO. 477 OF 1999.

That was a case which had been filed pursuant to Section 35 (b) (ii) of the Arbitration Act and rule 4 of the arbitration rules. The applicant therein had sought to set aside an arbitral award, on the grounds that it was in conflict with public policy in Kenya. Therefore, the court gave due consideration to the meaning and scope of the phrase "public policy". At page 6 of his Ruling, the Hon. Ringera J. (as he then was) expressed himself thus;

"I am persuaded by the logic of the Supreme Court of India and I accept the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it, you never know where

it will carry you, an award could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either:

(a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category, I would, without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals."

Bearing those illuminating words in mind, the applicant herein submitted that the award had been obtained in a manner that was inconsistent with the laws of Kenya. And, to illustrate that point, the applicant raised two issues, as follows: (i) The arbitration process is a mechanism for settling disputes, within the Kenyan Legal system, which is adversarial in nature. The arbitrator is therefore supposed to be neutral, so that each party appearing before him has to prove his case. Now, in this case, the question in dispute was clearly in relation to the quantum of the compensation payable by the applicant, to the respondent, pursuant to a policy for the insurance of a motor vehicle.

The applicant contends that in determining the question, the value of the motor vehicle had to be established. The exercise of determining the value of a motor vehicle was said to be a technical question, which could only be proved with expert evidence tendered by someone who was qualified to assess it. In this case, it was said that there were various motor vehicle assessment reports. However, the arbitrator finally concluded that all the said reports were conflicting and thus without probative value. He therefore did not rely on any of the valuation reports.

The applicant contends that as the issue was a technical one, the arbitrator had nothing else to rely on, having concluded that the valuation reports were of no probative value. As the tenets of the Kenyan legal system provide, inter alia, that "whoever asserts, proves", the applicant submitted that the respondent herein must be taken to have failed to prove his claim, as soon as the arbitrator found the valuation report which he had adduced in evidence, to be of no probative value. Therefore, for the arbitrator to proceed to make a finding in favour of the respondent, he must be deemed to have acted against the law and against public policy.

(ii) Secondly, the applicant contends that the arbitrator was wrong to have relied on the evidence of an alleged settlement which was arrived at after some without prejudice negotiations. As far as the applicant was concerned, the alleged settlement was no more than an offer, which was conditional. In fact, it is said that even the arbitrator did recognise the fact that the negotiations between the two parties had broken down. In the circumstances, the arbitrator is said to have erred by accepting as a settlement, the offer which had been made in the course of the negotiations, which ultimately collapsed. As the offer was made during the "without prejudice" negotiations, the applicant says that it was inadmissible, pursuant to Section 23 of the Evidence Act.

Therefore, as the arbitrator admitted the said offer in evidence, he is said to have acted in a manner that was inconsistent with public policy. Those submissions are definitely formidable. So, what did the respondent have to say, in response thereto? Mr. Gaita, advocate for the respondent, submitted that the applicant had failed to make out a case for the setting aside of the award, under Section 35 of the Arbitration Act. He contended that arbitral awards are final unless set aside under Section 35. And, as far as the respondent was concerned, the applicant had failed to meet the stringent terms of that statutory provision.

Section 35 of the Arbitration Act falls under Part VI of that statute, which part is headed as follows: "RECOURSE TO HIGH COURT AGAINST ARBITRAL AWARD." Subsection (2) of Section 35 provides as follows: "An arbitral award may be set aside by the High Court only if - (a) the party making the application furnishes proof – (i) 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 law 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 (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 in conflict with public policy of Kenya." From my reading of that statutory provision, I share the view expressed by Mr. Gaita, advocate for the respondent, to the effect that arbitral awards are final unless they are set aside pursuant to the provisions of Section 35 of the Arbitration Act. My said understanding of the law, in that regard, finds backing from my brother, the Hon. J. G. Nyamu, J., who held as follows, in TRANSWORLD SAFARIS LIMITED –VS- EAGLE AVIATION LIMITED & 3 OTHERS, H.C MISC. APPLICATION NO. 238 OF 2003 (Milimani), at page 21;

"An Applicant must strictly bring himself within S. 35 or fail. Awards have now gained considerable international recognition and courts, especially commercial ones, have a responsibility to ensure that the arbitral autonomy is safeguarded by the courts, as arbitral awards are surely and gradually acquiring the nature of a convertible currency due to their finality." In effect, the burden of proof is placed squarely upon the shoulders of the applicant. Did the applicant herein discharge that burden?

In the arbitrator's considered view, none of the valuation reports which were produced in evidence was helpful. This is what he had to say about them; "In effect none of these valuations was entirely satisfactory, apart from the first one whose probative value is diminished by the second conflicting valuation by the same valuer as pointed out." Having arrived at that conclusion, the applicant believes that the arbitrator was then obliged to hold that the respondent had failed to prove his claim, and that therefore the said claim should have been dismissed. The applicant's reasons for so saying are that the process of valuation is a technical exercise. Thus, if the valuations were disregarded, the arbitrator would have had nothing else upon which to peg his assessment of the respondent's claim.

In the circumstances, the arbitrator is faulted for having derived a valuation from evidence which was not backed by any expert. But, the respondent holds the view that an arbitrator was not obliged to accept expert opinions as evidence. The respondent emphasized that the court or any other tribunal was not bound by the opinion of any expert. Such opinion had to be evaluated alongside any other evidence, to enable the court or tribunal determine the weight, if any, to attach to the expert opinion. Section 48 of the Evidence Act stipulates as follows;

"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions. (2) Such persons are called experts. " In this case, the parties made available five valuation reports. And whereas the applicant asserts that the arbitrator should have been guided by the said valuation reports, on account of the fact that the authors thereof were qualified to assess the value of the respondent's motor vehicle, I am afraid that that proved to be impossible for the arbitrator. First, the arbitrator held that St. Austin's Garage was not a qualified assessor. Next, he held that the fifth valuation report was an internal exercise, carried out by the applicant, and therefore was entirely self-serving. Then, as regards the third report, by Mr. Bharat Patel, the

arbitrator found that it was "based on assumption." Having arrived at these conclusions, I am satisfied that the arbitrator was right to have declined to place reliance on them. That left the first and last valuation reports, which were both prepared by Prime Accident Assessors. In the first report dated 8th January 2004, the assessor valued the vehicle at Kshs.2.7 million. The same assessor made the fifth report on 30th March 2004, in which it placed the value of the vehicle at between Kshs.1.6 million and Kshs.1.8 million.

To my mind, there is little wonder that the arbitrator concluded, as he did, that the probative value of the first report was diminished by the other report, prepared by the same assessor, only two months later. Having arrived at that conclusion, should the arbitrator then have dismissed the respondent's claim, as contended by the applicant herein? I believe that if there had been no other evidence other than the valuation reports, the arbitrator would have been obliged to conclude that the respondent had failed to make out his claim. But, as the arbitral award shows, there was other evidence that was adduced by the parties. The said other evidence was in the form of discussions between the respondent and the applicant's Managing Director, a Mr. Ashok Shah.

The applicant faults the arbitrator for relying on the said evidence, on the grounds that the negotiations between the two persons were without prejudice. The applicant relied on the case of D. O SONGA & ANOTHER –VS- RELI COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED, HCCC NO. 109/2000, as authority for the proposition that the arbitrator erred in accepting, as evidence, that which transpired during without prejudice discussions. In that case, the Hon. Onyango- Otieno J. (as he then was) cited, with approval, the following passage from Phipson on Evidence, 12th Edition at page 552;

"Without Prejudice' protects subsequent, and even previous letters in the same correspondence; and an admission made during a bona fide attempt to settle a dispute has been excluded even when not expressly made without prejudice. The test is whether the communication was part of a genuine attempt to settle a dispute. If so, the whole course of the negotiations is protected. It is immaterial that it can be said from individual documents that they contain no offer. Equally, the mere fact that the heading of a document is "without prejudice" is not in the least decisive. If its protected status is challenged, then Courts must look at it and establish its true nature. Documents which came into being under an express or tacit agreement that they should not be used to the prejudice of either party will not be ordered to be produced on discovery."

The rationale for the foregoing rule was well expounded by the Hon. Waki J. (as he then was) in COOPERATIVE BANK OF KENYA LIMITED –VS- SHIRAZ SAYANI, MSA HCCC NO. 23 OF 1999, wherein he expressed himself as follows; "The issue raised by Mr. Gikandi on communication made "without prejudice" is not a novel one. The rubric "without prejudice" has been used over ages, particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of disputes. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties.

As I understand it, the rubric simply means "I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it, is to no effect at all." There is no dispute about the law relating to the usage of "without prejudice" negotiations. However, as the respondent did point out in his submissions before me, the applicant did not demonstrate how the said law was applicable to this case. And, I do hold that the respondent has a point. First, the applicant acknowledges that a tentative agreement was arrived at between Mr. Ashok Shah, its Managing Director, and the respondent. But it is then contended that the said tentative agreement was not approved by the applicant's Board.

Mr. Ashok Shah then complains that the arbitrator was being selective by holding that the agreement was binding on the applicant, yet the conditions were not binding on the respondent's company. On the other hand, the respondent emphasises that the discussions between him and Mr. Ashok Shah were not without prejudice. He deposed that the meeting was proposed by Mr. Shah, as the applicant's Chief Executive, with full authority to negotiate a binding settlement.

In looking at this issue, I must remind myself that it is not for me to re-evaluate the evidence, as if it were

an appeal. This is certainly not an appeal from the decision by the arbitrator. My role is to ascertain if the applicant had made out a case to warrant the setting aside of the arbitral award. I therefore need to ask myself if the award was contrary to public policy, as alleged by the applicant. In his award, the arbitrator set out the evidence of the respondent, about that which transpired between him and Mr. Ashok Shah. The meeting was held on 31st March 2004, and another one was held on 28th July 2004.

As the arbitration proceedings had commenced in March 2004, it is evident that the two meetings were held during the currency of the said arbitration proceedings. Therefore, it is within that context that one must understand the comment by the arbitrator, about negotiations having broken down. In other words, the arbitration process commenced after their negotiations had broken down, and therefore the negotiations being referred to by the arbitrator must be those that preceded the process of arbitration.

After the arbitration process had commenced, the respondent met with Mr. Ashok Shah and he (the respondent) asked for Kshs.2.5 million. The said offer was made at a meeting held in Mr. Shah's office, and which was held over a cup of coffee. The meeting itself had been initiated by Mr. Shah. In response to the respondent's request for Kshs.2.5 million, Mr. Shah is said to have given a counter-offer of Kshs.2.0 million. However, that sum was deemed too low, by the respondent, whereupon the parties settled on Kshs.2.2 million.

First, it must be emphasized that had the parties not arrived at any settlement, it would have been wrong for the arbitrator to have taken into account the negotiations, if they were indeed, "without prejudice". Now, in this instance, the arbitrator made the following finding regarding the respondent's evidence about his meeting with Mr. Ashok Shah "This testimony was neither challenged nor countered by other evidence." It is my considered view that as the applicant did not challenge the oral evidence of the respondent, which was tendered before the arbitrator, it is no longer available to him to start challenging that evidence at this stage. If the applicant had any objections to the admissibility of the respondent's testimony, on the grounds that the same was founded on "without prejudice" negotiations, that objection should have been raised before the arbitrator.

Had that been done, and the arbitrator erred by admitting evidence which should not have been admitted, the applicant would have become entitled to challenge the arbitral award, for being in conflict with the public policy of Kenya. It would be wrong of me to set aside the award on the basis of something which the applicant readily concedes to have failed to raise before the arbitrator, unless the issue went to jurisdiction. Indeed, to my mind, if the court were to act in the manner proposed by the applicant, the court itself may be deemed to be acting in a manner that was contrary to public policy, by finding fault with an arbitrator on the basis of issues which were not canvassed before him. I therefore decline to accept the applicant's invitation to go down that route. Accordingly, the Notice of Motion dated 3rd May 2005 is hereby dismissed with costs.

However, in the unlikely event that I might be wrong in this decision, I would still have not dismissed the respondent's claim in its totality. In my view, the very least that the respondent is entitled to is the sum of Kshs.1,381,000/= which the applicant had offered. To allow the applicant to benefit from the insurance premiums, whilst also retaining the money which it had expressly said the applicant would be entitled to, would be tantamount to aiding and abetting the applicant to unjustly enrich itself. It must be recalled that the issue in contention before the arbitrator was only in relation to "the quantum of compensation or indemnity". In effect, liability of insurer to pay compensation was never an issue, and cannot therefore become an issue now.

But, as I have already held, I find no merit in the applicant's application. It is therefore dismissed, with costs.

Dated and Delivered at Nairobi this 24th November 2005.

FRED A. OCHIENG

JUDGE