



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS
MISC. 250 OF 2004

UNISPAN LIMITEDPLAINTIFF

V E R S U S

THE PROJECT MANAGER

ELNINO EMERGENCY PROJECTDEFENDANT

R U L I N G

The applicant has brought an application under Section 35 (2) (a) iii and iv of the Arbitration Act No.5 of 1995 and Rules 2 and 7 of the Arbitration Rules 1997.

The applicant is seeking from the court the setting aside of the arbitrators award and that the award be remitted to the Tribunal to be varied accordingly.

The contractual relationship between the applicant, (herein after called the contractor) and the respondent (herein after called the employer) related to a contract for the rehabilitation of water supply and sanitation facilities at Amagoro and Malaba - Kocholia water supply project.

Counsel for the contractor submitted that the arbitrator failed to adjudicate the dispute in terms of the contract between the parties and he exceeded his terms in making the award.

Counsel further argued that the Arbitration Act is clear that when he arbitrator makes an award he ought to do so within the terms of contract and if he fails to so decide he would be said to be exceeding the terms of his reference. In this regard counsel relied on Section 35 (2) iv of the Arbitration Act.

Counsel referred to exhibit 'RS3' which is the agreement for the appointment of the arbitrator and therein, he said were the terms of appointment of the arbitrator.

The part of the terms he said was to "**determine the liabilities or otherwise of the parties relating to the dispute of difference in question under the contract.**"

The contractor is seeking the setting aside of specific parts of the award and the court will deal with each one separately.

A) The respondent's, failure to grant access to part of the site from September 2000 to June 2001 is not a compensation event.

Contractor's counsel said that the contract required the contractor to construct a water pump at the river then to construct infracture and lay pipes of considerable distance so that the water from the river would

be distributed to areas about 40 kilometers.

Accordingly counsel said that the site of work was not in one locality but it included the area where infrastructure and pipe were to be installed and laid.

Counsel said that the arbitrator made a finding that possession of the site was given to the contractor on signing of the contract.

Counsel said, that after the signature of the said contract, dispute arose between the various land owners, where the pipe was to be laid, about compensation which the government, should have negotiated with them before the signing of the contract.

The contractor contended that as consequence of that dispute he was not able to carry out the work from August 2000 to June 2001.

Counsel said that the contractual completion date was due on 3rd April 2001 but because of the aforesaid dispute the contractor did not have access to lay the pipe until 3 months after completion date.

Ravinder Singh the deponent of the affidavit in support of the present application stated in his affidavit that the arbitrator held that there was no compensation event in regard to access and this, he said was an error of the terms of reference falling under Section 35 (2) (a) (iv) of the Arbitration Act.

Counsel for the employer in response to this argument said that clause 44 (1) of the contract showed what is a compensation event.

He said that the arbitrator held that possession was granted to the contractor on 20th July 2000 when the parties signed the contract. He emphasised that work had commenced by the time it was stopped by a court injunction.

Because the contractor had obtained possession counsel said that no compensation event had occurred.

Counsel therefore was in agreement with the finding of the arbitrator.

The court in consideration of the arguments hereof is of the view that no compensation event had occurred because the contractor had possession of the site as at the date of signing of the contract.

Clause 44.1(a) provides that a compensation event occurs where an employer does not give access to a part of the site by the site possession date.

Since possession was given on 20th July 2000 the contractor had possession and access thereof.

The arbitrator therefore cannot be faulted for finding that the contractor had possession as aforesaid and although he was prevented from proceeding, due to the court injunctions, that was not a compensation event.

B) The applicant is liable to pay to the respondent liquidated damages from 12th December 2001 to 28th December 2001.

Ravinder Singh in his affidavit deponed the employer caused variation to the project by adding extra work or by changing the nature of work but failed to give the contractor extended completion date.

The arbitrator found that after the contractor requested an extension of 150 days it resulted in the completion date being extended to 17th November, 2001.

He further found that the employer's request for additional work brought contract completion date to 12th December 2001.

He therefore found that since there was no dispute of the completion date being 28th December 2001 the liquidated damages payable by the contractor to the employer was for the period 13th December 2001 to 28th December 2001.

It ought to be appreciated that the court is finding itself extremely hampered by the applicant's failure to place the documents that were laid before the arbitrator before this court.

The court finds that the pleading filed before the arbitrator and the letter dated 27th November 2001 by the employer are not before the court.

The court, having in mind that it was only provided with the contract and the award finds no reason placed before it by the applicant why the award of the arbitrator in respect of liquidated damages should be set aside.

C) The respondent is not liable to compensate the applicant for V. A. T. refund.

The contractor was relying on clause 45.1 of the contract which provides as follows:-

"This contract is exempted from the Custom Duty Excise and the V. A. T.it is the responsibility of the contractor to obtain tax exemption through the employer who will provide the necessary certification and recommendation to the Treasury."

Counsel for the contractor submitted that the above clause meant that the contractor was to make its application for refund of V. A. T through the employer.

In response counsel for the employer submitted that the law applicable to the contract was the law of the Republic of Kenya.

Referring to exhibit "EJM4" counsel said that the law changed in regard to refund of V. A. T in that the contractor was obligated to claim the V. A. T. through its monthly returns.

In view of the aforesaid the court cannot fault the finding of the arbitrator in regard the V. A. T. refund, the court finds that the contract provided that it is the responsibility of the contractor to obtain the refund and even though that clause says that the same, that is refund, is obtainable through the employer, clearly the law has changed and it is not now possible to so do.

D) The applicant can only recover extended costs for the period of 78 days.

The affidavit of Ravinder Singh states that the arbitrator breached the terms of his reference when he failed to adjudicate or determine the claimant's financial claims on the basis of the evidence adduced at the hearing before him.

The deponent further said that the arbitrator had erred when he held that the claimant had failed to adduce evidence to prove the claim for extended costs in the face of the evidence before him.

Now, the court has said this before the applicant failed to place material before this court with regard to the proceedings before the arbitrator other than the award and the contract.

How then does the court find that the contractor presented evidence before the arbitrator which he did not take regard of.

The court considering the submission by counsel and evidence in affidavit does not accept that his aspect of the arbitrator's award ought to be set aside.

E) The applicant has failed to prove the claim for extended costs.

The arbitrator in his award stated that this claim was hypothetical. He came to this conclusion after considering the evidence presented before him.

The contractor in seeking to set aside this aspect of the award failed to specifically show where he erred. The court having considered the submission is unable to hold that this head of the award should be set aside.

In conclusion the court has found the contractor's application to set aside the arbitrator's award unmerited and the application dated 14th April 2004 is dismissed with costs to the respondent.

Dated and delivered this 8th day of July 2004

MARY KASANGO

AG. JUDGE