REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION NO. 1312 OF 2000

AIR EAST AFRICA…….APPLICANT

V E R S U S

KENYA AIRPORTS AUTHORITY……RESPONDENT

R U L I N G

In this application, the claimant, Air East Africa seeks the following orders:

"A. Time be extended for the filing of the Reconsidered final award dated 9th February, 2001, made by the Arbitrator Lee G. Muthoga Esquire in this matter, to such time as this Honourable Court deems just and proper.

B. The Reconsidered Final Award dated 9th February, 2001, be adopted and be enforceable as a judgment of this Court.

C. The Reconsidered Final Award dated 9th February, 2001 be set aside to the extent of its considerations and or findings and or awards in respect of the following matters:

1. The period of the notice that the Respondent was bound to give to the claimant (Issue No. 3.)

2. The period of loss of profit (Part of Issue No. 3.)

3. The appropriate rate of interest on the sums Awarded (Part of Issue No. 8)

4. The award of costs.

D. The costs of this application and all thrown away costs be provided for."

Although in its grounds of opposition and in the Replying Affidavit sworn by Janet Ong'era the Respondent raised issue with the whole of the Claimant's application, its Counsel at the hearing, Mr. Keriako Tobiko, limited himself to prayer C only. I, therefore, take it that the other matters in the application have been conceded and I will deal only with prayer C which I believe represents the real issues in dispute.

The matters leading to this application can be summarized as follows. Pursuant to the provisions of the Kenya Airport Authority Act (Cap. 395) the Claimant and the Respondent agreed to refer a dispute that had arisen between them to an arbitrator. An arbitrator was duly appointed by the Honourable the Chief Justice by an instrument dated 25th May, 2000 as provided for by section 33 (1) of Cap. 395. The arbitrator made the award on 17th November, 2000, and published it to the parties on 21st November, 2000. The Claimant then applied to have the arbitral award adopted and enforced as a judgment of this Court. The Respondent, on the other hand, applied to set aside that award. The parties consented to have

the award set aside and the same was remitted to the same arbitrator for reconsideration. The arbitrator made his reconsidered award on 9th February, 2001. The Claimant is aggrieved by this later award (hereinafter referred to as "the Award") and seeks that it be set aside in limited part as outlined earlier.

Before I consider the arguments by Counsel, I would like to set out briefly the findings of the arbitrator on the three issues in dispute in this application. These issues, as stayed in prayer C, relate to (1) the notice period; (2) lost of profit; and (3) interest.

At page 13 of the Award, the arbitrator said as follows in relation to the question as to whether the Respondent was bound to give the Claimant any notice in terminating the Agreement between them, and if so, the period of the notice (this was issue No. 3 before the arbitrator):

> ***"On issue No. 2, I have examined the Agreement and find that it does not have a break clause. The letter of 16 th November, 1993, (page 38 - 39) does not provide a period for notice of termination. It can, therefore, only be terminated by a reasonable notice. Upon consideration of all the relevant issues in this relationship, I consider that a reasonable notice, taking into account the extent of the investment and the cond uct of the parties, would be at least six calendar months. This goes to answer issue No. 3 also."***

At page 28 of the Award, the arbitrator said as follows in his consideration of the period of loss of profit:-

> ***"The Claimant has claimed loss of antici pated profit, at the average rate of 2.1 million U.S. Dollars per year, for a period of 5 years. This translates to K.shs. 168,000,000/= per year using a conversion rate of K.shs. 80 per U.S. Dollar which works out at K.shs. 840,000,000/= for 5 years. The Claimant argued that it would be entitled to this sum on the basis that, if the relationship had not been wrongfully terminated, it would have traded and earned this sum. I can not agree. The relationship could, as I have found above, be terminated on giving a reasonable notice. The Claimant's entitlement to loss of profits must, therefore, be restricted to profits it might have made during the notice period. I find that a six month's notice would have been sufficient to terminate the relationship between the parties. It would have provided the Claimant sufficient time to reorganize its operations and to remove such facility as could be removed from the demised premises. The sudden termination deprived the Claimant of the opportunity to earn profits during that notice period and disrupted its operations. It is, in my Judgment entitled to compensation in respect of this."***

As to the issue of interest on the sums awarded, the arbitrator said as follows at page 29 of the Award:-

> ***"Lastly I have to deal with the issue of interest. I received learned submissions on this issue from the Advocates representing the parties. I have carefully considered them as I am duty bound to do. I remain, however, conscious of the fact that I am not assessing damages for breach of contract or tort. I have not, therefore, applied the rules on application of interest on judgment sums as would apply in case of an award in damages. [I] have considered the factors that would make the compensation payable, just and fair. I am of the view that in order that the compensation be just and fair, it is necessary to apply interest on the sums ordered. With regards to the manner of applying interest, the rates of interest that might be ap propriate and the duration of the payment of that interest, are all issues that I have had to consider in coming to the decision on interest that I have come to. I have considered vulgarities (sic – read 'vagaries') of business, the fluctuation in t he interest rates during this time. Having considered all these matters, I have decided that the appropriate rate of interest should be 10% p.a. I have also found that the appropriate date for applying the interest, both on the replacement value o f the facility and on the loss of profits, should be the 2 nd February, 1997, which is the date next following the date on which a proper notice might have expired."***

As to cost, the arbitrator ordered each party to bear its own costs.

Mr. Nowrojee who led Mr. Kihara for the Claimant challenged the Arbitrator's findings on these matters. He argued that the finding on the notice period was uncertain, and therefore defective. It was "uncertain" because, in his view, the arbitrator had ruled that the notice period should be "at least six months." He argued that once the arbitrator had made such a finding on the notice period in the manner already alluded to earlier, he could not do so again when he determined that the notice period was 6 months in dealing with the issue of loss of profit. This means the arbitrator made two findings on the issue of notice period – these being "at least six months" and "six months". According to Mr. Nowrojee, this second finding on the issue of the notice period was not within the reference to him. He submitted that a reasonable notice period in the circumstances of this case, and which would be consistent with practice in the industry, would be 1½ years.

As to the issue of interest, Mr. Nowrojee argued that the arbitrator's finding was contrary to recognised principles. The arbitrator had failed to take into account normal commercial rates of interest.

Finally, regarding the issue of costs, Mr. Nowrojee argued that although the arbitrator had discretion in the matter, it was well established that costs follow the event and if there is a departure from that, reasons for doing so must be given. He argued that the arbitrator did not follow any principles of law in determining the issue of costs when he ordered each party to bear its own costs.

Mr. Tobiko for the Respondent, on the other hand, started by challenging the Claimant's application on the ground that it did not comply with rule 7 of the Arbitration Rules in that the application and the Affidavit accompanying it did not show uncertainty as a ground relied upon in this application. I do not agree with that proposition. It is clear from ground number 6 of the application that it was based on uncertainty as argued by the Claimant's Advocate. He also argued that since grounds 4 and 5 of the application stated that the arbitrator had omitted to determine the issue of the notice period, this application could not be maintained on the ground of "uncertainty." This argument is quite attractive because if that issue had not been determined, it cannot be challenged on the ground of uncertainty. But again this is a side issue which should not distract the Court from looking at the substance of the application as a whole. The issue relating to uncertainty is more important and requires the Court's meritorious consideration. So, going to the merit of that point, Mr. Tobiko argued that there was no uncertainty in the arbitrator's finding on the issue of the relevant notice period. He argued that the Court cannot rely on a simple word in determining whether the arbitrator's finding was certain or not. In his view, the Court must look at the entire award including documents referred to by the arbitrator to form an opinion on the issue. In his view, the arbitrator did not make a "second finding" on the notice period when he said a six months notice would have been sufficient notice to terminate the relationship between the parties, but only removed any uncertainty that may have been created by his earlier finding that a reasonable notice would have been "at least six calendar months." He argued that the arbitrator was justified in using that period in assessing the loss of profits.

As to the question of interest, Mr. Tobiko argued that this was a matter entirely within the arbitrator's discretion and that he took into consideration all the relevant factors in making his finding on the issue. In his view, the fact that the Court might have reached a different conclusion is not sufficient ground to warrant it to interfere with the arbitrator's award.

Finally, as to the issue of costs, Mr. Tobiko agreed that generally costs must follow the event except with good reason but argued that there was no point for the arbitrator to give reasons in this case since that matter had been agreed between the parties.

Having looked at the application in this matter, the grounds of opposition and the affidavits in support of and in opposition to the application and having heard Counsel for the parties, I consider the following issues to have been raised for determination:-

(a)Whether the arbitrator's finding on the issue of the applicable notice period is uncertain;

(b) Whether the arbitrator was justified in applying the period of notice as the period for loss of profit;

(c) Whether the arbitrator applied sound principles in determining the rate of interest applicable to the sums awarded; and

(d) Whether the arbitrator was justified in making the order of costs as he did.

Before I attempt to answer these questions, I would like to discuss the principles to be applied in an application to set aside an arbitral award.

The power of this Court to set aside an arbitral award is provided for by section 35 of the Arbitration Act (Act No. 4 of 1995). Section 35(2) of that Act provides as follows:-

"35(2) 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 agreem ent 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 arbitrati on 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 no so referred, only that part of the arbit ral 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;

(ii) the award is in conflict with the public policy of Kenya."

For an arbitral award to be worth its name, it must be certain. It must be in a form that it can be enforced as a judgment of this Court. If it was otherwise it would, in my view, be outside what is contemplated by the reference to arbitration: It would be outside the terms of the reference and it would be contrary to public policy. The Learned Author of RUSSEL ON ARBITRATION (16th Edition) has tried to discuss the need for an arbitral award being certain and said as follows at page 232:-

"An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and e xtent of the duties imposed by it on the parties. If the arbitrator directs one party to pay money, or to execute a release to the other, the award is sufficiently certain, though it mentions no time; for if a request to do the act is necessary, it mu st be done in convenient time after the request; if no request is necessary, it must be performed in a reasonable time. [I]f it is doubtful whether the award has decided the question referred to it will be set aside for uncertainty. [T]he award will be equally invalid if it is uncertain how it has decided the matters referred."

Although Act No. 4 of 1995 specifically deals with situations in which this Court may set aside an award, I have no doubt whatsoever in my mind that an award that is uncertain falls outside the reference and is contrary to public policy and will be set aside. The Learned Authors of A PRACTICAL APPROACH TO ARBITRATION LAW (Andrew Tweeddale and Karen Tweeddale, BLACKSTONE PRESS LTD, 1999) on their part said as follows at paragraph 12.2.6:

> ***"The requirement that the award be certain and free from ambiguity derives from common law. At common law an award which was uncertain was invalid: Re Arbitration between Marshall and Dresser (1843) 3 QB 878, Margulies Bros Ltd v. Dafnis Thomaides & Co (U.K.) Ltd [1958] I Lloyds Rep 250; River Plate Products Netherlands BV v. Etablissement Coarglain [1982] I Lyod's Rep. 628. The test of whether an award is uncertain is whether the award is uncertain to the parties. The award may be uncertain to a third party but clear to the parties. In Plummer v. Lee (1837) 2 M & W 495 an award which stated that interest should run from 'the date of the last settlement' was held to be valid as the parties were not in disagreement about that d ate. Equally, in Wohlenberg v. Lageman (1815) 6 Taunt 251, an award that the parties should pay a debt in proportion to the percentage of shares that they held in a ship was held to be certain as there was no dispute about the percentages held by th e parties. [A]n award that is ambiguous renders the award uncertain: Duke of Beaufort v. Welch (1839) 10 Ad & El 527. Where only part of the award is uncertain the Courts may enforce part of the award and remit the remainder if this is possible: Miller v. De Burgh (1850) 4 Ex 809; S. 68(3)(b) of the AA 1996. In addition to challenging the award under S. 68 of the AA 1996 a party may also seek to challenge the enforcement of any award under S. 66 of the AA 1996 for uncertainty and ambiguity."***

In Margulies case supra DIPLOCK, J. held that the Court was not limited by authority to the four grounds in the Act for remitting awards. In the Learned Judge's view, it was an implied term of an arbitration agreement that an award for the payment of money should be in a form which was capable of being enforced in the same manner as a judgment. Failure by the arbitrator to comply with the express or implied terms of the arbitration agreement would amount to misconduct on his part a matter that does not fall within his reference.

Now, can it be said that the award in this case is uncertain? As has already been seen, an award will only be considered uncertain if it is not clear to the parties. An award will not be uncertain only because one of the parties says so. The Court must apply its mind to the question and determine whether there is some reasonable doubt as to what the arbitrator meant and what a reasonable person would understand by the award if he was one of the parties to the arbitration. In this regard, I agree with Mr. Tobiko that in determining whether the award is certain or not, the Court has to look at the whole award and not a single word or sentence. This includes documents referred to in arbitration. In **Fabrica Lombarda Di Acido Tartarico v. Fuerst Bros Ltd** [1921] Lloyds L.R. 57 LUSH, J. said as follows:-

> "W***ith regard to the second point, Mr. Schwabe has said that the arbitrators have left the amount at large, because they said the applicants must pay the necessary expenses incurred in insurance, & C. and because to say 'expenses, &C.' is not an award at all. I do not think that is the necessary construction or the true construction. It is impossible for the arbitrators to fix a sum that would cover all these amounts. These are the w arehousing charges going on, and one or two other expenses which the arbitrators could not ascertain, but there was evidence and other things giving all the necessary material to enable the applicants to find out what they have to pay and I think it is because they do not want to pay that there is any difficulty in the matter. In these circumstances I think the award is good on the face of it and the motion must be dismissed with costs."***

In my view, an award will not be uncertain if its meaning can be ascertained from the award read as a whole. Assuming for a moment that the arbitrator's finding that a reasonable notice in the circumstances "would be at least six calendar months" was uncertain, this was obviously cleared when he later said that "a six month's notice would have been sufficient to terminate the relationship between the parties." To argue that this was a second finding on the same issue is to stretch the point in a manner that is not only pedantic but also unhelpful. For my part, I do not understand what Mr. Nowrojee meant by a second

finding on the same issue. There really is no second finding – only a clarification of the finding.

Now, coming to the issue of the period to be applied in calculating the loss of profit, I agree with Mr. Tobiko that the period of notice was the one to be applied in the matter. There should have been no argument on this. This is quite clear and the arbitrator cannot be faulted on this account.

As to Mr. Nowrojee's argument that if the arbitrator had determined the notice period correctly, he would have found it to be one and a half years, simply does not hold water. The fact that this Court would have reached a different conclusion is not sufficient to warrant an interference with the arbitrator's finding. It has not been shown at all that the arbitrator erred in law or that he arrived at that conclusion on wrong principles and that he in any event, reached a wrong conclusion in law. In **Pioneer Shipping Co. Ltd & Others v. B.T.O. Tioxide Ltd** [1982] A.C. 724 LORD ROSKILL said as follow at p. 752:-

> ***"My Lords, in Edwards v. Bairsow [1956] A.C.14, 36, Lord Radcliffe made it plain that the Court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the Court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thi nks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the Court to usurp what is the sole function of the tribunal of fact. My Lords, there have been suggestions in some of the decided cases that because questions of frustration are ultimately questions of law, it is always open to the Court to impose its own view rather than adopt that of the arbitral tribunal. My Lords, I think, with respect, that this is what Kerr J. did in Trade and Transport Inc. v. Lino Kaiun Kaisha Ltd (The Angelia) [1973] 1 W.L.R. 210, and what Robert Goff J. has done in the present case, and I think they were each wrong to do so. I respectfully question whether the Angelia was rig htly decided in the light of the findings of fact by the very experienced arbitrators there concerned. For the future I think that in those cases which are otherwise suitable for appeal the Court should only interfere with the conclusion on issues such a s those which arise in cases of frustration expressed by arbitrators in reasoned awards, either if they are shown to have gone wrong in law and not to have applied the right legal test, or if, whilst purporting to apply the right legal test, they have re ached a conclusion which no reasonable person could, on the facts which they have found, have reached. On this matter too I find myself in entire agreement with what was said by Templeman L.J. [1980] Q.B. 547,572F. The learned Lord Justice pointed out that the arbitrator had correctly directed himself in accordance with Davis Contractors Ltd v. Fareham Urban District Council [1956] A.C. 696, had made a large number of findings of fact and had reached the conclusion that the 1979 adventure had been f rustrated. The learned Lord Justice went on to say that in those circumstances he was not prepared to substitute the decision of the Court for that of the arbitrator. I respectfully and entirely agree with him".***

In my judgment, the arbitrator reached a logical conclusion based on the material before him and this Court has no quarrel with his finding on the matter.

Going to the issue of the rate of interest to be applied to the sums awarded, Mr. Nowrojee argued that the arbitrator's award of interest at 10% p.a. was contrary to known principles. He was of the view that the arbitrator should have taken into account commercial rates as it was the appropriate law. In this contention, he relied on the decision of DONALDSON, J. in **Myron (Owners) v. Tradax Export S.A. Panama City R.P.** [1969] 2 All E.R. 1263 in which the Learned Judge said as follows at p. 1268:

> ***"All matters of costs in the arbitration and interest on any moneys found due are for the arbitrators or umpire. However, it may assist if I expre ssed my views on the principles which are applicable. It is of paramount importance to the speedy settlement of disputes that a respondent***

who is found to be under a liability to a claimant should gain no advantage and that the claimant should suff er no corresponding detriment as a result of delay in reaching a decision. Accordingly, awards should in general include an order that the respondent pay interest on the sum due from the date when the money should have been paid. The rate of interes t is entirely in the discretion of the arbitrators, but I personally take the view that in an era of high and fluctuating interest rates the principles which I have expressed is best implemented by an award of interest "at a rate one cent, in excess of the Bank of England discount rate for the time being in force". When interest is awarded, arbitrators commonly award it for a period ending with the date of the award. Section 20 of the Arbitration Act 1950 provides that:

"A sum directed to be pa id by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt." The consequence is that the award carries interest at the rate of four per cent per annum from the date of th e award until payment (see Judgments Act 1838, s. 17). With bank rate at its present level, this is a positive disincentive to payment. In Pagnan v. Tradax Export S.A. (5), I expressed the hope that those concerned with law reform might give considera tion to amending the Judgments Act 1838 to provide that judgments and, by the operation of s. 20 of the Arbitration Act 1950, awards should bear interest at such a rate as may from time to time be specified by subordinate legislation. Whether such subordi nate legislation would specify a rate or involve a formula such as I have indicated would be a matter for those charged with the duty of legislating, but I would hope that the result would be to provide judgment debtors with a positive incentive to settl e their obligations with dispatch. [I[t would seem from the terms of s. 20 of the Arbitration Act 1950 that arbitrators, unlike a judge, can in addition to awarding interest, direct that the award itself carry interest at a specified rate in excess of t hat prescribed for judgments and this is a power which, if it exists, might well be used generally."

On this matter, Mr. Nowrojee made impressive arguments that a proper rate was "one that would not be detrimental to the party." In his award, the arbitrator said as follows on this point at pages 29 and 30 of the award:-

"Lastly I have to deal with the issue of the interest. I received learned submissions on this issue from the advocates representing the parties. I have carefully considered them as I am duty bound to do. I remain, however, conscious of the fact that I am not assessing damages for breach of contract or tort. I have not, therefore, applied the rules on application of interest on judgment sums as would apply in case of an award in damages. I have considered the factors that would make the compensation payable, just and fair. I am of the view that in order that the compensation be just and fair, it is necessary to apply interest on the sums ordered. With regard to the manne r of applying the interest, the rates of interests that might be appropriate and the duration of payment of that interest, are all issues that I have had to consider in coming to the decision on interest that I have come to. I have considered the vul garities (sic – read vagaries) of business, the fluctuation in the interest rates during the period and the return on investment on monies during this time. Having considered all these matters, I have decided that the appropriate rate of interest sh ould be 10% p.a.."

In view of the fact that the arbitrator agrees that the application of interest on the sums awarded is necessary to make the compensation just and fair and in view of the fact this interest ought to be determined by commercial factors which he alluded to, it is difficult to reconcile these facts with the conclusion he reached on the point as the interest he applied is totally out of touch with the present day realities of commercial life. Whereas I agree that excessive interest would discourage settlement, applying interest without regard to commercial realities would be unfair and avail advantage to a respondent found liable and yet leave the applicant to suffer as a result of the delay in reaching a decision. Mr. Tobiko relied on the decision of LORD ROSKILL in Pioneer Shipping supra as quoted above to argue that the fact that this court would arrive at a different conclusion was not sufficient to warrant an interference with the arbitrator's funding. In my judgment, that decision also says that a finding which has no foundation in law and which is arrived at on wrong principles may be called to question by this court. The case of Rashid Moleduria & Co (Mombasa) Ltd & Others v. Hoima Ginners Ltd [1967] E.A 645 cited by Mr.

Tobiko is also distinguishable on that point. For me, the arbitrator has not applied his mind to any sound principles known in law in determining the relevant interest rate to be applied on the sums awarded. Although it is agreed that this matter falls within the arbitrator's discretion, he was enjoined in law to exercise that discretion on sound principles and not arbitrarily. In my view, therefore, I do not understand why the arbitrator found it difficult to apply commercial rates on his award. Ordinarily, I would have remitted this matter to the arbitrator for re-determination. However, both Counsels have asked that in the interest of saving time and expense, this matter should be determined by this Court. I am willing to do so, and would invite submissions from both parties on a date to be mutually agreed.

As to the issue of costs, Mr. Tobiko said, and Mr. Nowrojee did not controvert this, that this matter had been agreed between the parties and I do not see the necessity of the arbitrator giving reasons for this. In any event, the order made by him is based on sound principles considering that the matter was remitted to the arbitrator by consent.

In the whole, this application is partially allowed as stated in the body of this Ruling. I do not propose to make any orders as to costs.

Before I sign off, I would like to express my gratitude to both counsels for their excellent preparation, research and submissions.

DATED and DELIVERED at NAIROBI this 18th day of June, 2001.

ALNASHIR VISRAM

JUDGE.