Gama Limited v Kenya Ports Authority (Miscellaneous Civil Application E207 of 2021) [2024] KEHC 16940 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 16940 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION E207 OF 2021

F WANGARI, J

FEBRUARY 7, 2024

BETWEEN

GAMA LIMITED .... APPLICANT

AND

KENYA PORTS AUTHORITY .... RESPONDENT

RULING

1. The application subject of this ruling is the one dated 21st July, 2022 preferred by the Applicant. It was brought under the provisions of Order 43 Rule 3, Order 40 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B, 3A, 66, 75 and 95 of the *Civil Procedure Act*, Section 7 of the *Appellate Jurisdiction Act*, Article 48 of *the Constitution* of Kenya, 2010 and all other enabling provisions of law. It sought the following orders: -

   a. That this Honourable Court be pleased to enlarge the time for the making of this application and upon said enlargement of time, this application be deemed as properly filed;

   b. That this Honourable Court be pleased to grant the Applicant herein leave to appeal against the ruling and orders made on 25th May, 2022;

   c. That the orders granted herein to apply mutatis mutandis to MSA HC Misc. Civil Suit No. E234 of 2021; Kenya Ports Authority v Gamma Villa Limited & Eunice Lumallas;

   d. That the costs of this application be provided for.

2. The grounds in support of the application were among others that on 25th May, 2022, the court delivered its ruling by which the Applicant's application dated 29th September, 2021 was struck out while the Respondent's application dated 28th October, 2021 was allowed and the final arbitral award published on 31st July, 2021 was set aside. Being aggrieved by the said ruling, the Applicant contends

that it has notified the court and the counterparty of its intention to appeal the same to the Court of Appeal and filing and serving its notice of appeal as well as in the setting aside application.

3. Making reference to the Supreme Court's decision in Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Chartered Institute of Arbitrators Kenya which was delivered on 6th December, 2019, the Applicant opined that the Supreme Court of Kenya in the cited decision had found that an appeal can lie from the High Court on a determination of an application to set aside an arbitral award, with the leave of court, where the High Court in setting aside the award has stepped out of the grounds set out in section 35 of the *Arbitration Act* and thereby made a decision so grave, so manifestly wrong and which has closed the door of justice to either of the parties.

4. The Applicant stated that the court set aside the arbitral award on the grounds that the arbitrator lacked jurisdiction to handle the Applicant's claim. In arriving at the said conclusion, the Honourable Court correctly found that the Respondent never challenged the jurisdiction of the arbitrator in accordance with the provisions of section 17 of the *Arbitration Act* but according to the court's interpretation of the provisions of section 17 (2) of the *Arbitration Act*, the challenge to jurisdiction can be made even at the setting aside stage.

5. Accordingly, the Applicant believes that the court's interpretation of section 17 (2) of the *Arbitration Act* was erroneous as the section simply preserves the right to challenge the jurisdiction of an arbitrator in arbitral proceedings, even if the party who raises such challenge in arbitral proceedings participated in the appointment of the arbitrator.

6. The Applicant thus stated that the court in so doing usurped the powers of the tribunal in a manner that affronts the principle of Kompetenz Kompetenz and by allowing the challenge to jurisdiction post – award, breached the Applicant's right to fair trial under Article 50 (1) of *the Constitution* by denying it the opportunity to argue the issue of jurisdiction which was never raised during the arbitral proceedings.

7. It was thus the Applicant's contention that it was deserving to have this ground of appeal heard and determined before the Court of Appeal. It was stated that the court having made its determination on the applicability of section 17 (2) of the *Arbitration Act*, went ahead to interpret sections 22 and 62 of the *Kenya Ports Authority Act* and arrived at the conclusion that disputes based on negligence do not fall under the ambit of section 62 of the *Kenya Ports Authority Act*.

8. On this second find, the Applicant stated that the court relied on the case of Kenya Ports Authority v Threeways Shipping Services Limited [2019] eKLR where the Court of Appeal had found that the jurisdiction of the High Court cannot be ousted under the provisions of section 62 of the KPA Act where the dispute related to negligence hence reference to the term 'negligence exception.' It was the Applicant's view that the court misconstrued the Threeways Shipping Services case and thus deserves an opportunity to have the Court of Appeal hear and determine this ground of appeal.

9. In the Applicant's view, the court contradicted itself by finding on one hand and correctly so that grounds not set forth in the setting aside application are to be ignored and yet turned around to create and apply grounds not pleaded, that is, the arbitrator's lack of jurisdiction on account of sections 22 and 62 of the KPA Act, in setting aside the arbitral award. Accordingly, the Applicant viewed the ruling as one containing decisions bearing errors so grave, so manifestly wrong and which had closed the door of justice to the Applicant.

10. On delay, the Applicant averred that though the decision was delivered on 25th May, 2022, the copy of the ruling was only availed to its Counsel on or about 11th June, 2022 and its board of directors required time to take legal advice and internalize extremely technical legal matters and issues dealing with the

arbitration law and appellate procedures as well as costs involved and for this reason, the Applicant could not bring the application within 14 days of the order as required by applicable procedure.

11. However, according to the Applicant, the slightly over five (5) weeks delay is not inordinate, the reasons are excusable and the enlargement of time will not cause any prejudice to the Respondent. Any prejudice, if at all, ought to be weighed against the Applicant's right of access to justice under the provisions of Article 48 of *the Constitution* and ought to be resolved in favour of promoting the said right in accordance with the guiding principles under Article 20 (3) (b) as well as Article 159 (2) (d) of *the Constitution*.

12. The Applicant further stated that since the ruling in this matter applied to setting aside application, for expeditious disposal and efficient administration of justice, it was only proper that any enlargement of time and/or leave granted be made to similarly apply to the setting aside application without filing a duplicate application. The Applicant thus concluded that it was just and equitable in the circumstances of the case that the orders sought be granted.

13. The application was further supported by the affidavit of one Dr. Francis P. Kiranga, the Applicant's Managing Director. The depositions in his affidavit mirrored the grounds in support of the application save for the annexed documents. This being the case, there is no need to rehash the same.

14. The application was opposed. The Respondent filed its grounds of opposition dated 15th December, 2022. The grounds were among others that the Applicant had failed to explain the reason (s) for the delay in making the application hence not entitled to the court's discretion for enlargement of time. Further, the grounds in the application did not meet the threshold for obtaining leave to appeal the ruling delivered on 25th May, 2022.

15. The Respondent urged that leave to appeal a ruling delivered under section 35 of the *Arbitration Act* can only be granted in the rarest and/or exceptional cases, where there is evidence of unfairness or judicial misconduct and where there are conflicting decisions on an issue, none of which have been demonstrated in the application. The application did not raise any matters of concern in respect of failure of any due process disregarded by the court.

16. The application was said to have failed to demonstrate unfairness or misconduct in the decision making process of the court in arriving at its finding in the ruling delivered on 25th May, 2022. Further, that the application did not exhibit any importance of the subject matter either of massive/enormous economic value or any legal principle at issue.

17. It was further stated that since the court did not anchor its ruling on a Constitutional ground and/or scope of section 35 of the *Arbitration Act*, no leave to appeal should be entertained and/or granted. Lastly, the Respondent's view was that the Applicant was seeking a shot at an opportunity which is not deserved and is negating the principle of finality in bringing litigation to an end.

18. Directions were taken to have the application heard by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities from this court to the apex court in support of their two diametrically opposed viewpoints. The Applicant's submissions are dated 27th March, 2023 and filed on 28th March, 2023 while those of the Respondent are dated 19th April, 2023 and lodged in the e-filing portal on 20th April, 2023.

19. The court is grateful to Counsel for their industry in putting up well – reasoned and researched submissions and citing key authorities which have illuminated this court's view in arriving at a decision either way.

Analysis and Determination

20. I have carefully considered the application, grounds of opposition, parties' rival submissions, authorities cited as well as the relevant law (s) and in my view, the following salient issues invite the court's determination: -

    a. Whether the court can grant leave to the Applicant to appeal to the Court of Appeal;

    b. If the answer in (a) above is positive, whether time can be enlarged; and

    c. Who bears the costs?

21. Before interrogating the first issue, it is important to put the Applicant's consternation into perspective. Having submitted its issues before the arbitrator, the Applicant got a final arbitral award in its favour which was published on 31st July, 2021. Through an application dated 29th September, 2021 and filed on 30th September, 2021, the Applicant moved the court to have the Final Arbitral Award dated 31st July, 2021 recognized and enforced as a judgement of the court and a decree be issued.

22. Upon service of this application upon the Respondent, it was opposed. The Respondent in addition to its responses, filed its own application on 28th October, 2021. Principally, the application sought to have the final award set aside for being contrary to public policy and provisions of several Acts of Parliament including the East African Community Customs Management Act, 2004, the *Kenya Ports Authority Act* amongst others.

23. The court considered the two (2) applications and decided to deal with the Respondent's first as it deemed its outcome to impact the Applicant's application. Having analyzed the Respondent's application in detail, the court found merit and in a ruling delivered on 25th May, 2022, the Final Arbitral Award published on 31st July, 2021 was set aside for having been made contrary to the public policy. This is what has precipitated the present application which is seeking two principal orders, enlargement of time to make the application and leave to appeal the ruling.

24. The court's ruling subject of the application was hinged on the provisions of section 10 and 35 of the Arbitration. Section 10 provides as follows: -

    " Except as provided in this Act, no court shall intervene in matters governed by this Act."

25. In Nyutu Agrovet Limited v Airtel Networks Kenya (above), the Supreme Court cited with approval the Singaporean Court of Appeal decision in L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd & Another Appeal [2012] SGCA 57 and went ahead to state as follows: -

    " …Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds…"

26. The Respondent's application to have the award set aside was well grounded on the provisions of section 35 of the *Arbitration Act* which provides as follows: -

    35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by 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) 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 laws 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

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(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 the public policy of Kenya.

27. In setting aside the award, the court found that the award was in conflict with the public policy of Kenya in terms of section 35 (2) (b) (ii). Having found as such, the court cannot be faulted for its finding for this is among the narrow strictures within which this court can set aside an award. Does leave to appeal the decision obtaining herein lie before this court? The answer to this question lie in the Supreme Court's decisions in Nyutu Agrovet (above), Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR and Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR.

28. In Synergy Industrial Credit Limited (above), the Supreme Court held as follows: -

> " ...Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law. Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on appeals arising from Section 35 should

be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act..." (Emphasis added)

29. It went further to illuminate this most litigated provision in the Act as follows: -

> "...For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the *Arbitration Act*, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award... In applying the above criteria, it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration under Article 159(3)(d) so that floodgates are not opened for all and sundry to access the appellate mechanism. Similarly, it would be expected that a leave mechanism would be introduced into our laws by the Legislature to sieve frivolous appeals and not create backlogs in the determination of appeals from setting aside of award decisions by the High Court...In making the above finding, we are affirming the position taken by some benches of the Court of Appeal that Article 164(3) is a jurisdiction that is tied to a party's right to appeal to that Court and to completely deny that right would be inimical to the spirit and tenor of *the Constitution*, 2010..."

30. Flowing from the foregoing, it leaves no doubt that the present application ought to have been lodged before the Court of Appeal as this court cannot sit to review its own decisions as to whether they fell within the ambits of section 35 or not. In Isaac Aluoch Polo Aluochier v Independent Electoral and Boundaries Commission & 17 Others [2022] eKLR, the court though addressing leave in respect to judicial review, held as follows: -

> "...Seeking of leave is meant to expedite the process and weed out any frivolous applications..."

31. This court finds succor in the above position and since the Court of Appeal's jurisdiction on this issue are circumscribed, this application suffered a false start. The court cannot impeach its own decision unless on review which is not the case herein. Though section 39 (3) of the *Arbitration Act* recognizes that a right of appeal shall lie from the High Court to the Court of Appeal on an application under section 39 (2), the same is subject to conditions set out under 39 (3) (a) and (b). None of those conditions have been met. Therefore, the court finds that it cannot grant leave to the Applicant to appeal the ruling of 25th May, 2022.

32. Having found as above, the second issue must fall by the way side since even if the court were to enlarge time, it would be an exercise in futility.

33. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. I see no wrongdoing by either party and as such, the only order that lends itself is for each party to bear own costs.

34. Following the foregone discourse, the upshot is that the following orders do hereby issue;

    a. The application dated July 21, 2022 lacks merit and is hereby dismissed.

    b. Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of;

Kings Advocate h/b for Karega Advocate for the Applicant

M/S Nzisa Advocate h/b for Akwana Advocate for the Respondent

Barile, Court Assistant