SJB Great Services Co. Ltd (South Sudan) v Foremost Limited (Commercial Arbitration Cause E003 of 2023) [2024] KEHC 1440 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1440 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL ARBITRATION CAUSE E003 OF 2023

DKN MAGARE, J

FEBRUARY 5, 2024

BETWEEN

SJB GREAT SERVICES CO. LTD (SOUTH SUDAN) ..... CLAIMANT

AND

FOREMOST LIMITED ..... RESPONDENT

RULING

1. This is a ruling in respect of the application dated 2/10/2023. The application sought the following prayers:-

    a. This Honourable Court be pleased to adopt the Arbitration Award dated and filed on 28th February, 2023 in the mater herein as Judgment of this court.

    b. In pursuant to the said award Judgment be entered for the applicant against the Respondent as follows;

    The respondent shall pay within 90 days from the date of the Arbitral Award;

    a. Special damages the sum of US $ 224,577.78 (inclusive of VAT) inclusive of ample interest of 8% p.a. from the date of filing of the claim until payment in full.

    b. General damages of the sum of US $ 10,000 (inclusive of VAT) at simple interest of 4 % p.a. from the date of the award until payment in full.

    c. Late payment of the above sums shall attract a further simple interest of 1% p.a. on the outstanding amounts until payment in full.

    d. That the Respondent shall within 90 days from the date of this award pay the costs of this arbitration ass taxed by the Registrar of the East African Court of Justice.

c. This Honourable Court be pleased to direct that the costs of this application be borne by the Respondent.

2. This is grounded by the affidavit of Ssajjabi Stanley Mukasa. The applicant filed a further affidavit dated 3/11/2023. It deals with the issue that the Replying Affidavit was not commissioned and should be struck out. They stated that there was no additional award made pursuant to Rules 35(2) and (3) of the EA and Arbitrator Rules.

3. The Respond responded to the chamber summons through Application dated 2/10/2023, through: -

   a. Grounds of opposition

   b. Further affidavit

   c. Un-commissioned Replying Affidavit.

4. I have not understood the import of the document titled Replying Affidavit to the Chamber Summons. There is absolutely nothing useful to address in terms of the Arbitration Rules.

5. It is not an affidavit within the meaning of the *Oaths and Statutory Declarations Act*, Laws of Kenya. Even if it were, it does not address the issues raised, that is there is a final award that has not been reviewed or set aside.

6. On the other hand the Applicant's further affidavit is 31 pages long. It does not answer any issues raised by the Respondent, since the Respondent does not have a valid affidavit on record.

7. The grounds of opposition state that Rule 55 sub rules 1 provide for review off the award made on 28/2/2023. The review if to be done within 48 days of the request. They state that the award has not attained finally. There is no explanation given on what drains away finality.

8. The Applicant filed submission. They stated that the claim was lodged on 9/12/2020 for a claim arising from breach and frustration of as subcontract No. UNMISS/CON/17/014.

9. They rely on the case of Fili Shipping CO. Ltd v Premium Nafta Products & Others [2007] UKHL 40, Lord Hoiffman stated as follows:

> "[13] In my opinion the construction of an arbitration clause should start form the assumption that the parties, as rational businessmen are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

10. The court notes that the said judgment also dealt with the principle of separability of the arbitration clause. The said court stated as doth:

    14. This appears to be the approach adopted in Germany: see the Bundesgerichtshof's Decision of 27 February 1970 (1990) Arbitration International, vol 6, No 1, p 79:

        > "There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals."

17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

11. The applicant then addressed matters related to breach of contract. The same are irrelevant in view of the principle of competence – competence as set out in This matter was well articulated by Nyamu JA (as he then was) in Safaricom Limited Vs Ocean view Beach Hotel Limited [2010] eKLR thus:

> " In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the *Arbitration Act*. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. This point came up in the famous English arbitration case of Channel Tunnel Group Limited Vs Balfour Beatty Construction Ltd (1993) AC 334 where the English Court rendered itself as follows:-
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> > "There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail... If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide."
> >
> > Although the English *Arbitration Act* 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse the principles as outlined in the CHANNEL CASE (supra) because they are in line with the arbitral tribunal's jurisdiction as set out in section 17 of the *Arbitration Act* of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the *Arbitration Act* as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "Competence to decide

upon its competence" and as expressed elsewhere in this ruling in German it is "Kompetenz/Kompetenz" and in French it is "Competence de la Competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

12. The Respondents relied on Sections 36(2) of the *Arbitration Act* and Samura Engineering Limited vs Don- Wood Co. Ltd. [2014] eKLR it was held: -

> " Of course, Section 36(1) of the act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to *the Constitution*. Section 36(3) of the *Arbitration Act* makes it mandatory that the p arty applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed ..... "

13. On enforcement jurisdiction, they relied on the provisions of Section 37 of the *Arbitration Act* which provides as doth: -

> " The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, maybe refused only –
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> a. At the request of the party against whom it is invoked, if that party furnishes the High Court proof that;
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> i. A party to the arbitration agreement was under some in capacity; or
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> ii. The arbitration agreement is not valid under the law to which the parties have subject it or, failing any indication of that law, under the law of the state where the arbitral award was made;
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> iii. The party agonists whom the arbitral award is invoked 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
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> iv. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, it contains decision on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or
>
> v. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the la of the state where the arbitration took place; or
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> vi. The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or

vii. The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;

b. If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya."

14. It is their considered read that the Court cannot re-litigate on the said issues.

15. In Kenya Oil Company Limited & another vs Kenya Pipeline Company Limited NRB CA Civil appeal No. 102 of 2012 [2014] EKLR the Court of Appeal cited, with approval, the following dicta by Steyn LJ., in Geogas S.A. vs Trammo gas Ltd (The "bareares") 1 Lylods LR 215:

> " The arbitrators are the Masters of the facts. On an appeal, the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those financings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

16. Further, in Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR the Court held that: -

> " We therefore reiterate that there is no right for any court to intervene in the arbitral process, or in the award except in the situations specifically set out in the *Arbitration Act* or as previously agreed in advance by the parties and simultaneously there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the *Arbitration Act*."

17. They also dealt with whether there is an error in the arbitral award. I shall not deal with the same given that this is not an appellate court.

18. They also dealt with the issue whether the award was obtained though corruption. Reliance is placed on the case of Emfil Ltd. vs. Registrar of titles Mombasa and 2 Others (2014) eKLR the Court had this to say:-

> " Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without un due regard to technicalities, Articles 159 does not allow the respondents to lay ignore the rules of evidence."

19. It is their submission that Replying Affidavit is fatally defective.

20. The High Court in Draft and Develop Engineers Ltd. v. National Water Conservation and Pipeline Corporation, Civil case NO. 11 of 2011, wherein that Court stated that: -

> "An error apparent on the fact of the record cannot be defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction been a mere erroneous decisions and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the fact of the record would be made out. An error which has to be established by a long – drawn process of reasoning or on points where there may conceivably be two options can gladly be said to be an error agreement on the face of the record. Again, if a view adopted by the court in the original record is a possible one, cannot be an error apparent on the face of the record even though no other view was also possible. Mere error or wrong view is certainly no ground for a review although it may before an appeal."

21. We preface our conclusion by citing the case of Continental Homes Limited v Suncoast Investments Limited where the Court found as follows:

> "The arbitrator clearly identified each issue and sated the positions of the parties before anlysing the evidence and reaching a conclusion. He stated why he believed or did not believe the witnesses. The arbitrator did his job as was expected of him. He considered the issues placed before him by the parties. Were this courts to interfere with the award, the court would be acting contrary to public policy which not only encourages alternative dispute resolution like arbitration, but also requires that arbitration should be an end in itself. The parties who subject themselves to arbitration us live with the outcome of the process so long as the same has been conducted incompliance with the law and the award adheres to the law."

22. Finally, they conceded that the application is merited. They rely on the decisions of continental OMe limited v Suncoast Investments Limited where the court found as follows: -

> "The arbitrator clearly identified each issue and stated the positions of the parties before anayizing the evidence and reaching a conclusion. He stated why he believed or did not believe the witnesses. The arbitrator did his job as was expected of him. He considered the issues placed before him by the parties. Were this court to interfere with the award, the court would be acting contrary to public policy which not only encourages alternative dispute resolution like arbitration, but also requires that arbitrator should be an end in itself. The parties who subject themselves to arbitration must live with the outcome of the process so long as the same has been conducted in compliance with the law and the award adheres to the law."

Respondents' submissions

23. The Respondents filed submission on 13/11/2023. It has been extremely difficult in following their line of thought.

24. The respondent stated that an award was made under Rule 35(1) of the East Arbitration Rules African Court of Justice 2012.

25. They state that they had sought review for Review under Rule 35 (1) e and 81, that is: -

a. an error apparent on the face of the record.

b. The award was obtained by fraud.

26. The submission basically discuss various Rules and proceedings in EACJ taxation cause No. 3 of 2023. They submitted that only after review of taxation costs can be award. He said to be complete. It is their view that the matter has not reached finality. They also refer to various emails, whose relevance to Section 36 of the *Arbitration Act*, has not been fathomed.

27. They deal with the ripeness principle:-

> " The principle of ripeness was aptly captured by Kriegler [J] [34] In Ferreira vs Levin NO. & others; Vryenhoek v Powell No & Others 1996 (1) SA 9844 (CC) at paragraph [1999] in the following words: - "The essential flaw in the applicants' cases is one of the timing or, as the Americans and, occasionally the Canadians call it, "ripeness" ..... suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones.
>
> 47. Ripeness rears to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. [38] Texas vs Unites States, 523 US 296 (1998). The final decision was yet to be made, hence there is no decision to be quashed. The global of ripens is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.
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> 48. The U. S supreme court fashioned a two –part test for assign ripeness challenges in about laboraties vs. Gardner [39] 387 US 136 [1967] as follows: -
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> > "Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of pre mature adjudication, from entangling themselves in abstract disagreements over administrative polices, and also to protect the agencies of judicial interference until an administrative decisions has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate the fitness of the issues for judicial decisions and the hardship to the parties of it holding court consideration." [40]

28. They state that the court has to await successful closure of the matter.

Analysis

29. Lest we forget the High Court in Kenya is over 126 years old. Parties opted for arbitration in the East African Court of justice appellants Division and Arusha. The court sitting a said arbitrational tribunal sat and gave an award on 28/2/2023.

30. The Respondent had upto 30/3/2023 to lodge review. The same was to be determined before 16/5/2023. There is and can be no review pending in the Application in view of the strict time lines. The respondent has power to extend the 30 days' period. I agree. However, there is no evidence

of extension of such. The humongous documents filed herein tell only one story. The matter was concluded on 28/2/2023. The Respondent has not made any application to set aside the award. Section 36 of the *Arbitration Act* provides as doth:-

36. Recognition and enforcement of awards

(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—

(a) the original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

(5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

31. The court's jurisdiction has not been invoked to set aside the award. No material has been placed before to show that the award is against Public Policy, Taxation of costs are a different proceedings. They cannot hold the adoption of the award. The court has jurisdiction to adopt even a partial award.

32. In the case of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, the Supreme Court stated as doth: -

> "(74) Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal.
>
> (75) With regard to the first proposal, the issue of 'substantially affecting one or more of the parties', we think that it is not a proposal that should stand on its own. Generally, a Court decision has the ultimate effect of affecting the parties and hence even though the 'substantial' element is important, it should be tied to something more-other than just 'affecting the parties'. In that context and going back to the submissions by the parties, we recall that the Interested Party had raised an important observation to the effect that arbitral awards are now being set aside because they allegedly do not comply with constitutional principles. As urged by the Interested Party, when that happens, the High

Court becomes the first and final Court of determining that issue. We are on our part persuaded by the argument that where an award is set aside on constitutional grounds, then that should be one of the exceptional grounds in which an appeal should be preferred against a decision made under Section 35 because Section 35 is clear as to the issues for which proof is required before setting aside of an arbitral award. That Section provides in the relevant part:

2.

> "...
>
> (a) the party making the application furnishes proof-
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> i. that a party to the arbitration agreement was under some incapacity; or
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> ii. the arbitration agreement is not valid under the law to which the parties have subjected it to or, failing any indication of that law, the laws of Kenya; or
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> 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
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> 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 decision 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
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> 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
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> 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."

33. The arbitration was done under International Arbitration Rules, in particular the Arbitration Rules of the east African Court of Justice. Under Rule 27 (3) of the said Rules, the Adoption is to be done through Rules governing national arbitration the country in which enforcement is to be carried out. The Rule 27 provides as doth: -

"(1) The arbitral award shall be final.

(2) By submitting the dispute to arbitration under article 32 of the Treaty, the parties shall be deemed to have undertaken to carry out the resulting award without delay.

(3) enforcement of arbitral shall be in accordance with the enforcement procedures of the country in which enforcement is ought."

34. In relation to Kenya, the Award which is final, under Rule 27(1) is to be enforced under the *Arbitration Act* 1995. The said Section provides as doth: -

1. The tribunal shall fix costs of arbitration in its award.

2. The term "costs" includes:

a. Filing fees;

b. The expenses incurred by the Tribunal to obtain expert advice and other assistance;

c. Travel and other expenses of witnesses.

d. The costs for legal representation.

3. The filing fees shall be calculated in accordance with the scales of fees prescribed in the Schedule.

4. A successful party shall be allowed only such costa s the Tribunal considers reasonable and which shall have been climbed during the arbitral proceedings.

35. I am satisfied that a final award has been made. Any issue of costs are incurable and shall be enforced accordingly. The application dated 2/10/23 is accordingly allowed.

36. Before I pen off, I wish to point out that I was invited to strike out the Replying affidavit filed by the Applicant.

37. I do not find the same necessary. It is not the court duty to deal with nullities. In United African Company - vs- Mc Foy Lord denning stated as doth:-

> " If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

38. In the circumstances I find no useful purpose in striking out an affidavit which is null and void.

Determination

39. I find as doth: -

    a. The chamber summons dated 2/10/2023 is allowed, that is the Arbitral award made by the east Africa Court of Justice sitting as the Arbitral tribunal is adopted as judgment of this court.

    b. A decree do issue accordingly in terms of the said award and is enforceable in terms of Rule 27(3) of the Arbitration Rules of East Africa court of Justice.

    c. Costs of USD 750 for this application.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 5TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian

M.D. KIZITO, J.