



REPUBLIC OF KENYA



KENYA LAW
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**Directpay Limited v Tum (Civil Case E351 of 2021)
[2024] KEHC 2114 (KLR) (Civ) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E351 OF 2021**

AN ONGERI, J

MARCH 5, 2024

BETWEEN

DIRECTPAY LIMITED APPLICANT

AND

SHARON TUM RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 21/7/2021 seeking the following prayers;
 - i. That this court be pleased to set aside the final award save as to assessment of costs issued by the sole Arbitrator Mr. Mwaniki Gachoka on 21/4/2021 in the Arbitration proceedings between the applicant and the respondent.
 - ii. That the costs of the application to be borne by the respondent.
2. The application is supported by the affidavit of Agnes Mwathi in which she deposed that the respondent herein was employed by the applicant as a sales representative vide an employment contract dated 16.6.17.
3. That the said employment contract provided at paragraph 14 that any dispute arising between the parties and all claims or matters in such dispute not otherwise mutually settled between the parties was to be referred to arbitration by a sole arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of the dispute by either party to the other, by the chairman or the Chartered Institute of Arbitrators (Kenya Chapter) upon application by either party.
4. That on 13.3.18 the parties executed an addendum to the said employment contract.



5. That the said addendum introduced a clause 7.4 B on non-competition.
6. That clause 7.4 B(b) required the respondent, during the continuance of the employment contract and for a period of 1 year thereafter, not to engage directly or indirectly in any activity that would directly compete with the applicant's business.
7. That in default of the said clause, the respondent was to pay liquidated damages to the applicant equivalent to 1 year's salary.
8. That the respondent left the applicant's employ on 31.12.18 and took up employment with Pesa Pal, a direct competitor of the applicant, in January 2019.
9. That the applicant then initiated arbitration proceedings against the respondent on 16.8.19 seeking the enforcement of the liquidated damages clause.
10. That the Chartered Institute of Arbitrators (Kenya Chapter) then appointed Mr. Mwaniki Gachokas the sole arbitrator.
11. That Mr. Gachoka then heard the dispute and delivered the final award save as to Assessment of costs on 21.4.21.
12. That Mr. Gachoka failed to disclose that the respondent's counsel, Mr. Momba participated in the arbitration proceedings as his assistant when he was in his employ.
13. That Mr. Gachoka failed to disclose that he was in continued contact with Mr. Momba during the pendency of the arbitration proceedings.
14. That Mr. Gachoka's failure to disclose the said particulars was a violation of his statutory duty of disclosure and raised an imputation of bias in the respondent's favour.
15. That the final award save as to assessment of costs contains decision matters beyond the scope of the reference to arbitration as it purports to make findings on the provisions of clause 7.4 A of the addendum to the employment contract on proprietary information which was not the subject matter of the dispute referred to arbitration.
16. That further, the said award is in conflict with the public policy of Kenya as the arbitrator failed to consider the customary usages of trade applicable to the employment contract between the parties despite being required by Section 29(5) of the Arbitration Act to take the same into account.
17. That the said award is in conflict with the public policy of Kenya as it arbitrarily derogated from the applicant's right to property (including intellectual property) enshrined in Article 40 of the Constitution.
18. That the said award is in conflict with the public policy of Kenya as it purported to make a finding on whether the restrictive covenant between the parties was void, a matter that is the exclusive preserve of the High Court pursuant to the provisions of the Contracts in Restraint of Trade act, Chapter 24 of the Laws of Kenya.
19. That further, that the said award is contrary to justice and morality as it failed to make a finding on the relevance and materiality of the evidence tendered by the respondent despite manifest contradictions therein, thus violating the applicant's right to a fair hearing under Article 50 of the Constitution.
20. That the said award is contrary to justice and morality as it purported to interfere with a contract voluntarily entered into by both parties, thus derogating from the principle of freedom of contract.



21. That the said award is inimical to the national interest of Kenya as it purports to derogate from an employer's right to the protection bestowed by restrictive covenants in employment contracts, which would have far reaching consequences on employer-employee relations in the country.
22. That it is therefore in the interests of justice that the award dated 21.4.21 be set aside in its entirety.
23. The respondents filed a replying affidavit by Sharon Tum dated 26/7/2023 in which she deposed that she was employed by the applicant and it was a term of the said contract that any disputes arising between the parties was to be referred to arbitration by a sole arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of dispute by either party to the other, by the chairman of the Chartered Institute of Arbitrators (Kenya) Branch upon application by either party.
24. She deponed that on 13/3/2018 at the applicants request an addendum to the employment contract was presented and executed by the applicant and herself. On 31/12/2018 she left employment with the applicant and took up employment with Pesa Pel Limited in January 2019. This triggered the applicant to initiate arbitration proceedings against her seeking enforcement of the addendum to the employment contract.
25. Arbitration commenced on 2/12/2019 and proceeded to its logical conclusion. The final Arbitral Award was delivered on 21/4/2021 whereby the arbitrator found in her favour. Contrary to what has been indicated by the applicant Mr. Sunday Memba's participation in the arbitration proceedings was disclosed to the parties, specifically to the applicant herein.
26. She deponed that the applicant's claim that the arbitrator's failure to disclose the relationship with Mr. Memba violated his statutory duty of disclosure and raised an imputation of bias in her favour was misguided. The decisions contained in the Arbitral Award delivered were squarely within the scope of the reference to arbitration as stipulated in Clause 14 of the Employment contract. the Arbitral Award is not at all in conflict with public policy as claimed by the applicant in the allegations made by the applicant.
27. The parties filed written submissions as follows; the applicant submitted that the Arbitrator was under a duty to disclose all and any circumstances that would give rise to justifiable doubts as to his independence. It has not been controverted that a partial disclosure was made by the Arbitrator on 26/11/2020.
28. The applicant argued that the Arbitrator was aware of the need to disclose matters that may give rise to justifiable doubts about the Arbitrator's impartiality or independence. He however failed in his duty of disclosure.
29. The applicant argued that the courts have held that the effect of an arbitrator's failure to disclose issues that may raise justifiable doubts about the Arbitrator's impartiality and independence, such as his relationship, engagements and interactions with a party or their representatives, is to vitiate the award and render it ripe for setting aside. Once an imputation of bias has been raised and has not been dislodged or controverted, the court is left with no recourse but to set aside the arbitral award in its entirety.
30. The applicant submitted that the application herein is brought in pursuant to section 35 of the [Arbitration Act](#) that provides;
 35. Application for setting aside arbitral award



- (1) Recourse to the High Court against an arbitral award may be made only by an 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.
31. The applicant argued that the award is in conflict with public policy due to the arbitrator’s failure to discharge his duty of disclosure, thus raising justifiable doubts about his impartiality and independence and raising an imputation of apparent bias in the respondent’s favour.
 32. The applicant submitted that arbitrator further violated the applicant’s right to a fair hearing, right to property and his contravention of the provisions of the *Contracts in Restraint of Trade Act*. The arbitrator exceeded his legal mandate in purporting to make a finding that the non-compete clause between the parties was void which was in excess of his jurisdiction.
 33. The applicant argued that by stripping the applicant of the protection of the non-compete clause contained in its contract with the respondent, the arbitrator effectively deprived the applicant of the right to protect their intellectual property from being divulged to third parties by its employees upon the cessation of their employment. It also exposed the applicant to a potential flood of recruitment of its key employees by its competitors with the concomitant risk of the applicant being exposed to unfair competition.



34. The respondent alternatively submitted that section 13 (2) of the *Arbitration Act*, 1995 (hereinafter the "Act"), states that an arbitrator shall, from the time of his appointment and throughout the arbitral proceedings, without delay, disclose to the parties any such circumstances likely to give rise to justifiable doubts as to his impartiality or independence unless the parties have already been informed of them by him.
35. Section 13 (3) then goes on to state that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence.
36. The evidence on record clearly demonstrates that the Arbitrator was fully aware of his duty of disclosure under section 13 of the Act, and duly complied with the same.
37. That from the record, the Arbitrator immediately disclosed his relationship with Mr. Memba immediately upon Mr. Memba's appearance on behalf of the Respondent. The applicant also did not raise any objection was the disclosure was made and the respondent contended that the applicant is therefore estopped from claiming violations on the basis of Mr. Memba's participation.
38. The respondent further submitted that based on the evidence before this court, it is clear beyond peradventure that the Applicant has not sufficiently established that a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible.
39. The respondent submitted that the decisions contained in the Arbitral Award delivered by the Arbitrator were squarely within the scope of the reference to arbitration as stipulated in Clause 14 of the Employment Contract.
40. That there is thus no iota of a doubt that the issue of whether the Respondent, in the course of her employment had access to and gained knowledge of certain proprietary business information belonging to the Applicant, was one that was squarely within the ambit of the reference to arbitration, as it was an issue that the Applicant sought a determination on.
41. The Arbitrator derived authority to adjudicate on this issue from the arbitration clause of the Employment Contract, further, the Applicant itself set out the issue of proprietary information as an issue for determination in the arbitration proceedings and duly canvassed the same in its submissions.
42. The respondent submitted that the Applicant did not, at any time in its pleadings filed before the arbitral tribunal, plead the existence of any "customary usage of trade". The Applicant has also failed to plead, in the instant Application, precisely which practice or method of dealing that was not taken into consideration by the Arbitrator.
43. Further, that no evidence has been adduced nor has it been sufficiently demonstrated that any particular "customary usage of trade" or any at all - was not actually considered by the arbitral tribunal.
44. On the allegation that the award is contrary to public policy, the respondent argued that the Arbitrator did not make any finding as to the ownership of the property. The question the arbitrator was called to determine was whether the respondent in the course of her employment had access to and gained knowledge of certain proprietary business information belonging to the applicant.
45. The respondent further argued that when parties agree to refer a matter to arbitration, they must take the consequences of that award and be bound by the fact that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. That if a question of law is specifically referred and it becomes evident that the parties desired to have a decision on that question from the arbitrator, the court ought not to interfere with the award of the arbitrator



on that question on that ground that there is an error of law apparent on the face of the record, even if the view taken by the arbitrator does not accord with the view of the court.

46. The respondent further contended that the right to work is a constitutional right by virtue of the International Labour Organization Treaty, to which Kenya is a party. As such, the Applicant's actions in seeking to restrict the Respondent's engagement to employment are not only unconstitutional, but also unreasonable and unenforceable.
47. Finally, that advancing only an employer centric position in interpretations of restrain-of-trade contracts as showcased by the Applicant, amounted to denying the Respondent the possibility of earning a livelihood.
48. The sole issue is whether the Arbitral award should be set aside.
49. The jurisdiction of the Court under section 35 of the *Arbitration Act* in setting aside an arbitral award is a strict one. Section 35 (2) (a) and (b) of the Act reads as follows;

“(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;
 - 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 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 conflict with the public policy of Kenya”

50. I find the Arbitrator submitted that from the record, he disclosed his relationship with Mr. Memba immediately upon Mr. Memba's appearance on behalf of the Respondent.
51. Further, that the applicant did not raise any objection when the disclosure was made and the respondent contended that the applicant is estopped from claiming violations on the basis of Mr. Memba's participation.
52. I find that it is not clear when the Applicant discovered that Mr. Gachoka failed to disclose that Mr. Memba had participated in the arbitration proceedings as his assistant when he was in his employment and further that he was in continued contact with Mr. Memba during the pendency of the arbitration proceedings.
53. There is no indication that the Applicant raised any objection when he discovered the relationship and the encounters.
54. The Applicant also submitted that the final award save as to assessment of costs contains decision matters beyond the scope of the reference to arbitration as it purports to make findings on the provisions of clause 7.4 A of the addendum to the employment contract on proprietary information which was not the subject matter of the dispute referred to arbitration.
55. That further, the said award is in conflict with the public policy of Kenya as the arbitrator failed to consider the customary usages of trade applicable to the employment contract between the parties despite being required by Section 29(5) of the Arbitration Act to take the same into account.
56. The Appellant further submitted that the said award is in conflict with the public policy of Kenya as it arbitrarily derogated from the applicant's right to property (including intellectual property) enshrined in Article 40 of the Constitution .
57. That the said award is in conflict with the public policy of Kenya as it purported to make a finding on whether the restrictive covenant between the parties was void, a matter that is the exclusive preserve of the High Court pursuant to the provisions of the Contracts in Restraint of Trade act, Chapter 24 of the Laws of Kenya.
58. That further, that the said award is contrary to justice and morality as it failed to make a finding on the relevance and materiality of the evidence tendered by the respondent despite manifest contradictions therein, thus violating the applicant's right to a fair hearing under Article 50 of the Constitution
59. That the said award is contrary to justice and morality as it purported to interfere with a contract voluntarily entered into by both parties, thus derogating from the principle of freedom of contract.
60. Finally, that the said award is inimical to the national interest of Kenya as it purports to derogate from an employer's right to the protection bestowed by restrictive covenants in employment contracts, which would have far reaching consequences on employer-employee relations in the country.
61. I have perused the award and I find that the allegations are far-fetched since the question the arbitrator was called to determine was whether the respondent in the course of her employment had access to and gained knowledge of certain proprietary business information belonging to the applicant.



- 62. The Arbitrator found that the right to work is a constitutional right by virtue of the International Labour Organization Treaty, to which Kenya is a party. As such, the Applicant's actions in seeking to restrict the Respondent's engagement to employment are not only unconstitutional, but also unreasonable and unenforceable.
- 63. Further, that advancing only an employer centric position in interpretations of restrain-of-trade contracts as showcased by the Applicant, amounted to denying the Respondent the possibility of earning a livelihood.
- 64. I find that the Arbitral Award delivered by the Arbitrator was within the scope of the reference to arbitration as stipulated in Clause 14 of the Employment Contract.
- 65. The interpretation is in line with the Constitutional mandate to promote the spirit, purport and objects of the Bill of Rights in terms of Article 259 of the Constitution .
- 66. Article 50(1) of the Constitution provides that;
 - “ every person has the right to have any dispute resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”
- 67. I find that there is no cogent evidence of bias and the parties are accordingly bound by the Arbitral Award and the same is upheld.
- 68. The Application dated 21/7/2021 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... **for the Applicant**

..... **for the Respondent**

