



REPUBLIC OF KENYA



**Granes Construction Company Ltd v World Vision Kenya (Commercial Arbitration Cause E040 of 2022) [2024] KEHC 3501 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3501 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E040 OF 2022  
DO CHEPKWONY, J  
MARCH 1, 2024**

**BETWEEN  
GRANES CONSTRUCTION COMPANY LTD ..... APPLICANT  
AND  
WORLD VISION KENYA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 25<sup>th</sup> May, 2022 seeking the following orders:-
  - a. Spent;
  - b. THAT this Honourable Court be pleased to stay the Arbitral award issued on the 2<sup>nd</sup> March, 2022 by a sole Arbitrator Arch Silvia Mueni Kasanga pending the hearing and determination of this application.
  - c. THAT this Honourable court be pleased to set aside, vacate and/or dissolve the Arbitral award issued on the 2<sup>nd</sup> March, 2022 by a sole Arbitrator Arch Silvia Mueni Kasanga on account of mistake of law on the face of the award that made  
the award bad and therefore for vacation from the record.
  - d. THAT in the meantime the Honourable Court be pleased to suspend the proceedings to set aside the arbitral award for such period of time determined by the court in order to give the single Arbitrator Arch Silvia Mueni Kasanga an opportunity to resume the arbitral proceedings or to take such other action



as in the opinion of the single arbitrator will eliminate the grounds for setting aside the arbitral award.

- e. THAT the Order on costs made by the single Arbitrator Arch Silvia Mueni Kasanga be varied and substituted with an order that the costs of the arbitration be paid for the Respondent.
- f. THAT the costs of this application be provided for.

2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Kimeli Tanui Kirwa sworn on 25<sup>th</sup> May, 2022.
3. It has been opposed through Replying Affidavit of Cicily M. Muiruri sworn on 17<sup>th</sup> June, 2022.
4. The Applicant holds that it filed a claim against the Respondent which was heard and determined by a single Arbitrator Arch Silvia Mueni Kasanga hereinafter “ the Arbitrator” who dismissed the Claim in the Arbitral award of 2<sup>nd</sup> March, 2022. The Applicant goes on to state that the dispute arose from a contract for the rehabilitation of three water pans being Fudumulo, Charamonje and Mapotea for a period of eight (8) weeks. The Applicant then holds that the site handover was not done immediately but was done after 5 weeks. The Applicant contends that it was required to submit a performance bond which it did and the handover was done afterwards.
5. The Applicant then states that the issues before the Arbitrator did not deal with performance bond which amounts to an error of law and as such the High court has jurisdiction to interfere with the award. It is the Applicant’s case that the Respondent terminated the contract through effluxion of time pursuant to Clause 13.2 of the Contract. The Applicant holds that the Arbitrator dealt with issues which were beyond the scope of reference so that if an award has a mistake in law it ought to be set aside or varied.
6. The Applicant has averred that the issue of performance bond being availed late resulting into the effluxion of time was only raised at the submissions stage which it believes is not an avenue to bring new evidence. The Applicant states that the issue which had been raised by the Arbitrator was not an issue raised by the parties and that it was beyond her scope of reference of the arbitration and the award should be set aside. The Applicant has also urged the court to stay execution of the costs which the Arbitrator awarded pending the hearing and determination of this Application.
7. In response, the Respondent opposed the application vive a Replying Affidavit sworn by Cicily M. Muiruri sworn on 17<sup>th</sup> June, 2022, wherein it holds that the application is vexatious and bad in law, thus ought to be dismissed. The Respondent then states that the arbitral award did not deal with issues beyond its scope of reference since the issue of performance bond which was the cause of the delay was raised even during hearing of the case. The Respondent holds that the scope of reference of the arbitration was founded on Clause 15.2 of the Contract which states that:-  
  
‘Unless otherwise agreed by the parties hereto any controversy or claim arising out of or relating to this agreement which remains unresolved after negotiations shall be settled by binding arbitration before a single arbitrator to be agreed upon by both parties.’
8. The Respondent further holds that the issues addressed by the arbitrator were well within the scope and the parties are bound to accept the Arbitrator’s view of facts which award is final and should not be interfered with by the courts. It has therefore urged the court to dismiss the application with costs.
9. In response thereto, the Applicant filed a Supplementary Affidavit sworn by the same Kimeli Tanui Kirwa on 25<sup>th</sup> July, 2022 in which it maintained that the issue of performance bond was not raised



in any of the pleadings. According to the Applicant, the Respondent did not terminate the contract for the reason that the performance bond was not submitted but by the failure of the Applicant to complete the contract within the required eight (8) weeks.

10. The Applicant holds that the Respondent introduced a non- issue of performance bond at submission stage and the Arbitrator made it a central issue which is beyond the scope of reference and therefore it maintains that the application should be allowed.
11. By directions of this court, the Application was canvassed by way of written submissions by way of submissions which the Applicant filed its dated 25<sup>th</sup> July, 2022, while the Respondent filed theirs dated 5<sup>th</sup> August, 2022. In response, the Applicant filed Supplementary Submissions dated 7<sup>th</sup> November, 2022 which have all been considered by this court in its determination of the application dated 25<sup>th</sup> May, 2022.

### **Analysis and Determination.**

12. Having read through the grounds upon which the application is based on and the grounds upon which the same is opposed, I have also read through the written submissions filed by either party and considered the statute and case law cited by either party. The issue for determination is whether the application is meritable in terms of the prayers being sought.
13. It is trite law that under Section 32A of the Arbitration Act, an arbitral award is final and binding. It states;-  

‘Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.’
14. The purpose of the limiting the court’s intervention is in the event of an arbitral award, so as to protect the autonomy of the arbitration process and to promote it as a means of quicker dispute settlement. In The Supreme Court’s decision in the case of Nyutu Agrovat Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, the court enunciated the purpose of Section 32 A of Arbitration Act.
15. Under the Arbitration Act, the general position under Section 10 thereof is that courts should not intervene with matters governed by the Act except where it is provided to the contrary by the said Act. Under the Act, the court has only two available recourses when it comes to an award which is either setting it aside under Section 35 of the Act or lodging an appeal under Section 39 of the Act.
16. In this case, the Applicant has opted for the means of setting aside the Award and has invoked the provision of Section 35 of the Arbitration Act which gives this court jurisdiction to hear the matter in so far as setting aside the arbitral award is concerned. Section 35 of the Act states as follows:-

35 (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.

17. In relying on Section 35 2 (a) (iv) of the Act, the Applicant has argued that the dispute addressed issues that were beyond the scope of reference. However, having read through and considered the proceedings in this case alongside the arbitral proceedings the court agree with the Respondent that the Arbitral clause of the Contract being Clause 15.2 of the Contract which states that;

‘Unless otherwise agreed by the parties hereto any controversy or claim arising out of or relating to this agreement which remains unresolved after negotiations shall be settled by binding arbitration before a single arbitrator to be agreed upon by both parties.’

18. In the circumstances of this case, the court finds that the main issue in question was the termination of the contract which according to the Applicant, was due to effluxion of time whereas according to the Respondent, the delay was caused with the delay in submitting the performance bond. It cannot be said that the issue of performance bond was not part of the issues to be addressed and yet it was one of the reasons which caused the delay in the completion of the contract. In view of this, it is the court’s finding that the issue of performance bond was not beyond the scope of reference by the Arbitrator to warrant the Arbitral award to be set aside.

19. In the resultant, the court finds that Notice of Motion dated 25<sup>th</sup> May, 2022 lacks merits and the same is hereby dismissed with costs to the Respondent.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF .....FEBRUARY....., 2024.



**D. O. CHEPKWONY**

**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF  
MARCH, 2024.**

**ALFRED MABEYA**

**JUDGE**

10

