Apa Insurance Limited v Tarus & 2 others (Miscellaneous Application 244 & E231 of 2023 (Consolidated)) [2024] KEHC 4683 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4683 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS APPLICATION 244 & E231 OF 2023 (CONSOLIDATED)

RN NYAKUNDI, J

APRIL 16, 2024

BETWEEN

APA INSURANCE LIMITED ..... APPLICANT

AND

DAVID KIPKEMEI TARUS ..... 1ST RESPONDENT

CO-OPERATIVE CONSULTANCY & INSURANCE AGENCY LIMITED ..... 2ND RESPONDENT

COOPERATIVE BANK OF KENYA LTD ..... 3RD RESPONDENT

RULING

1. There are two pending applications before this court. The first application is an application dated 16/11/2023 seeking to set aside an arbitrator's award and a second application dated 23/10/2023 seeking to effect the arbitrator's award issued on 3/10/2023 via email.

2. The application dated 23rd October 2023 was premised on the grounds set out therein and the affidavit sworn by the 1st respondent. He avers that a dispute arose between the Respondents and him concerning a breach of an Insurance Premium Finance (IPF) loan agreement signed on 7th June, 2019. He filed a suit against the Respondent *vide* Eldoret CMCC NO 701 OF 2020 and the dispute referred to arbitration, which prayer was granted by the court vide an Order made on 17th December, 2021. On 19th July, 2022, the Chairman, Chartered institute of Arbitrators, Kenya appointed Ms. Doreen Kibia to arbitrate on the dispute. She heard the parties and delivered her award on the 14th day of July, 2023.

3. He deposed the propriety of the award has never been challenged or otherwise disputed since its delivery neither is there a pending application before court concerning the dispute or the arbitral award. Further, that the arbitral award is therefore ripe for recognition and adoption and the Applicant is desirous of enforcing the same.

Replying Affidavit

4. In response to the application, the 2nd respondent's legal manager, Judith Onyango, swore an affidavit filed on 18th December 2023. She deposed that the application dated seeks to commence the execution process in respect to the arbitral award issued on 3/10/2023 against the 2nd respondent to wit; Kshs 2,450,000/= and costs of Kshs.248,970/=. Further, that the draft arbitral award was issued on 14/7/2023 whereby the arbitrator indicated that no action would be undertaken with the draft award until the final award is issued. This is because the arbitrator's fees had not been settled. Once the arbitrator's fees were fully settled, the arbitrator issued a final award to the parties via email on 3/10/2023.

   He stated that the final award was duly certified and understandably, parties were now at liberty to move the court.

5. Additionally, that the 2nd respondent has actually moved the court through an application dated 16/11/2023 seeking to set aside the arbitrator's award. She averred that it is factually incorrect and misleading for the applicant to indicate that the arbitrator's award was delivered on 14/7/2023 knowing very well that what was delivered on 14/7/2023 was the draft award. Additionally, that it is well known to the applicant that the final certified award was delivered on 3/10/2023 via email.

6. She stated that the arbitrator actually wrote an email to the parties indicating that what she delivered on 14/7/2023 was only a draft award which the parties could not use to move the court. The arbitrator expressly advised the parties to await the final, certified and signed award which she would issue once her fees were fully paid. True to this, once the arbitrator's fees had been fully paid, she proceeded to deliver the final, certified and signed award on 3/10/2023 via email. She reiterated that there is an application to set aside the arbitral award issued on 3/10/2023 and as such, the proceedings herein have not come to a close. She deposed that the 2nd respondent is amenable to depositing the entire decretal sum in court to facilitate the hearing of the appeal.

7. She stated that the application dated 16/11/2023 for stay and setting aside the arbitral awards is made timely and without unreasonable delay. Further, that the 2nd respondent herein stands to suffer substantial loss if these enforcement proceedings are not stayed pending the outcome of the appeal. The applicant's financial ability is unknown and the applicant is unlikely to refund the decretal sum hence exposing the second respondent to substantial loss. She maintained that this application is therefore brought before the court in bad faith, and is only meant to deny the 2nd respondent he right to be heard. She urged the court to dismiss the application.

Respondent's Further Affidavit

8. In response to the replying affidavit by Judith Onyango, the applicant filed a further affidavit dated 10th January 2024. He deposed that that the arbitral award was delivered on 14/7/2023.

9. The certified copy of the award was st respondent's assertion that the award was made on 3/10/2023 is therefore misleading. The arbitrator's fees could not fall due if the award had not been delivered as claimed by the 1st respondent.

   only withheld by the arbitrator due to non-payment of the arbitrator's fees by the respondents who were condemned to bear the costs of the arbitration. The 1

10. I note that the 2nd and 3rd Respondent filed an affidavit in response to the application dated 16th November 2023. However, I note that the deponent at the beginning of the application is Jackson

Oire and the jurat indicates that the affidavit was sworn by one Lucy Muthama. It is my considered view that the affidavit is fatally defective and therefore I shall not consider the same.

11. The parties were directed to prosecute the applications *vide* written submissions.

Applicant's submissions

12. The applicant was represented by the firm of Onyinkwa & Co Advocates. Learned counsel for the applicant submitted that the application dated 16/11/2023 was filed pursuant to section 35 of the *Arbitration Act* which provides for setting aside of an arbitral award. Therefore, this honourable court is mandated and has the powers to interfere with an arbitral award where it is shown that the arbitral award has no basis in law and that there was a wrong understanding or interpretation of the law. He cited the case of *Rashid Moledince & Co. (Mombasa) Ltd & anor vs Herma Ginners Ltd* (1976) EA 645 in support of this submission.

13. Counsel urged that the applicant has faulted the arbitral awards for being inconsistent with the law of contract and the law of insurance hence ultimately against public policy. He cited the case of *Christ for All Nations vs. Apollo Insurance Co. Ltd* (2002) 2EA366, on the definition of public policy.

14. Counsel urged that the arbitral award was against public policy for the following reasons;The arbitrator failed to acknowledge the fact that the 1st respondent appointed an insurance intermediary who acted as an agent of the 1st respondent.The arbitrator failed to recognize the effect of the letter dated 2/6/2017 from the 1st respondent appointing the 2nd respondent as the 1st respondent's insurance intermediary/agent.There existed no valid policy at the time of the alleged theft thus the applicant had no contractual obligations towards the 1st respondent.The arbitrator erred in law and fact by failing to hold the 2nd and 3rd respondents liable to compensate the 1st respondent for the loss allegedly incurred.The premium having been cancelled by the applicants at the instruction of the 2nd and 3rd respondents, and the premium refunded there was no contract capable of being enforced.

15. It is the applicant's case that the 1st respondent appointed an insurance intermediary/agent to represent him in all matters concerning the insurance of his subject motor vehicle. In this case, the insurance intermediary was the 2nd respondent. As per the instruction letter marked as "JOl", it can be seen that the 1st respondent expressly instructed the 2nd respondent to represent him in all matters concerning his insurance policy including renewals. He submitted that during the arbitration, the 1st respondent claimed that he did not understand the nature of the letter marked as "JOl" when he was signing the same.

16. However, the 1st respondent failed to demonstrate undue influence or coercion while signing the said document and in fact admitted that he appended his signature himself. He also later admitted that he was aware that the 2nd respondent was his agent. The 1st respondent cannot therefore turn back around and claim that he did not know what he was signing. He maintained that it is not in dispute that the 1st respondent appointed the 2nd respondent as an insurance intermediary/agent and therefore the 2nd respondent was mandated to act on behalf of the 1st respondent.

17. It is the applicant's case that the arbitrator totally dismissed the letter dated 2/6/2017 and further failed to recognize its effect on the policy. Initially, the first duty by the applicant herein was owed to the 1st respondent by dint of the policy agreement. However, the 1st respondent's move to appoint the 2nd respondent as his insurance intermediary/agent automatically meant that any communication concerning the policy was now as between the applicant and the 2nd respondent as the 1st respondent's intermediary/agent. The 2nd respondent was mandated to send notices/reminders to the 1st respondent.

The 2nd respondent used to send notices/emails to the 1st respondent reminding him to renew his policy.

18. It is the applicant's case that the subject policy was cancelled on 24/10/2019 by the applicant upon express mandatory instructions from the 2nd and 3rd respondents. The reasoning of the 2nd and 3rd respondents is that the 1st respondent had defaulted in paying the IFF loan instalments. The claimant admitted during the arbitration hearing that he was aware that if he defaulted the IFF loan repayment his policy would be cancelled. This bit of testimony is contained in the 5th paragraph of page 150 of the record. These submissions were not countered by the 1st respondent. The cancelation was done by the applicant pursuant to the IFF loan agreement which entitled the 2nd & 3rd respondents to cancel the policy in the event of non-payment of the agreed loan instalments by the 1st respondent

19. It is the applicant's submission that by having a closer look at the loan statements filed by the 1st respondent, it is clear that he failed to pay the loan instalments as they fell due. If at all the same were ever fully repaid, then it was on later dates and not as scheduled. To that effect, the 1st respondent is estopped from alleging that he was not aware of the fact of the cancellation especially having entered into the IFF loan agreement. It is quite clear that that the 1st respondent approached the court with unclean hands. According to the 1st respondent, the IFF loan agreement was executed between the 1st respondent and the 2nd respondent. The 1st respondent being aware that his policy would be cancelled upon default of the IFF loan repayments coupled with his agency agreement. It goes without saying that the applicant herein was not contractually obligated to notify the 1st respondent of the cancellation since the said cancellation was instructed by the agent of the 1st respondent.

20. Counsel urged that the arbitrator's failure to find that the 2nd and 3rd respondents were liable to compensate the 1st respondent was in itself illegal and misguided.

    Further, that the 2nd and 3rd respondents issued express instructions to the applicant to cancel the policy due to no payment of the IFF loan instalments. The witness who testified on behalf of the 2nd and 3rd respondents admitted that pursuant to the letter dated 2/6/2017 it was the 2nd respondent's obligation to notify the 1st respondent of any issues regarding the policy including cancellation. Further, that the 2nd respondent used to send notices/emails to the 1st respondent on issues regarding the policy as his agent as was mandated pursuant to the agency agreement between the 1st respondent and the 2nd respondent. Additionally, that the 2nd and 3rd respondent's witness (Jackson Oire) actually admitted that the 3rd respondent continued to receive loan repayments from the 1st respondent even after having cancelled the policy which fact was not countered in the submissions.

21. The applicant herein acted on the instructions of cancellation from the duly appointed intermediary/ agent and the 3rd respondent. If the instructions were illegal, unlawful and/or breached the agency agreement between the 1st respondent and the 2nd respondent, then any loss suffered by the 1st respondent should be shouldered by the 2nd respondent. The 3rd respondent also ought to shoulder the loss for continuing to receive loan repayments from the 1st respondent despite having issued instructions to cancel the policy. He maintained that the arbitrator failed to consider these issues blatantly.

    Counsel submitted that after the 2nd and 3rd respondents issued instructions twice to the applicant to cancel the policy, the applicants went ahead to do the same and further refunded the premium that had been paid by the 3rd respondent. After the said acts, the policy was in effect non-existent and therefore there was no longer a contract between the applicant and the 1st respondent that was capable of being enforced.

22. As per Section 3 (3) of the *law of Contract Act*, there shall be no specific performance based on a non-existent contract. In the absence of a contract, the section is clear that no suit shall be brought for specific performance. Counsel cited the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR

23. Counsel submitted that the final certified award was issued on 3/10/2023 via email. What was delivered on 14/7/2023 was only a draft award which the arbitrator expressly indicated to the parties could not be used to move this honourable court as it was uncertified. He argued that the 1st respondent is blatantly trying to mislead the court by purporting that the final award was delivered on 14/7/2023. Counsel submitted that the application dated 16/11/2023 for setting aside the arbitral award was filed on 17/11/2023 which was well within the 3 months provided for in section 35 of the *Arbitration Act* of Kenya.

24. Counsel submitted that the replying affidavit dated 30/11/2023 does not at all oppose the applicant's claim that the arbitral award was made contrary to public policy and therefore agrees with the applicant. He urged the court to dismiss the application dated 23/10/2023 with costs as it has been shown that it lacks merit. Further, he urged that the application dated 16/11/2023 be allowed with costs.

1st Respondent's submissions

25. The 1st Respondent's was represented by the firm of Omondi & Company Advocates. Learned counsel for the 1st respondent submitted that the 1st Respondent's application dated 23rd October, 2023 rests on the applicant's application dated 16th November, 2023. With the striking out of the applicant's application dated 16th November, 2023

26. the 1st respondent's application effectively matures for determination.

27. Counsel submitted that over 3 months have lapsed and the award has not been varied or set aside. The arbitral award has not been paid to the 1st respondent either. Further, that pursuant to section 36(3) of the *Arbitration Act* the 1st respondent has furnished the court with the certified award and a copy of the arbitration agreement. He urged that the 1st respondent has met the threshold for grant of the orders sought. He urged the court to allow the application dated 23rd October 2023 be allowed with costs.

Analysis and determination

28. Let me start by highlighting that as a general rule, courts have acted to uphold the autonomy of the Arbitral process. Arbitration as a form of Alternative Dispute Resolution is promoted by Article 159(2) of the*Constitution*. The *Arbitration Act* is a complete code. Section 10 of the *Act* provides that except as provided by the *Arbitration Act*; no Court shall intervene in matters governed by this *Act.*

29. Section 35 of *Arbitration Act* on the other hand sets out grounds for setting aside the Arbitral award and a party is legally bound to bring itself within the ground(s) of Section 35 of the *Act*. The said section sets out the grounds for setting aside of an award as follows: -

> " (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 or contains decisions on matters beyond the scope of the reference to arbitration, provided that it 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 provisions 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.

30. The applicant argued that this honorable court is mandated and has powers to interfere with an arbitral award where it is shown that the arbitral award has no basis in law and that there was a wrong understanding or interpretation of the law. The 1st respondent on the other hand argued that none of the grounds proffered by the applicant fall within the grounds prescribed under section 35(2) of the *Arbitration Act*. That the court cannot set aside the arbitral award on the grounds not contemplated by the *Act*, and which grounds have not been proved.

31. I have to mention that the *Arbitration Act* is self-sufficient. The Limitation on the jurisdiction of this Court on matters arbitration is based on the fact that arbitration is simply consensual between parties. When parties agree that their dispute is to be settled by an arbitrator, and not by the formal court system, they also consent to abide by the arbitrator's perspective of the facts and the interpretation of the contract between them. For this reason, unlike in normal cases filed in court where one has the liberty to appeal when aggrieved by a court's decision, the court will not hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing lower court decisions. The doctrine of party autonomy to this end is deeply embedded in the *Arbitration Act*.

32. The court of appeal captured the above position in *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2020] eKLR in the following terms:

> "One of the significant features of the *Arbitration Act* (the Act) is the principle of party autonomy, which entitles parties to have their disputes resolved by the forum and in the manner of their choice. For that very reason, the instances when the court may intervene

in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act"

33. Further, in *Geo Chem Middle East v. Kenya Bureau of Standards* [2020] eKLR, the Supreme Court of Kenya quoted with approval Ochieng J's holding in the High Court that: -

> " It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal".

34. In *Kenya Oil Co. Ltd & Anor vs Kenya Pipeline Co* [2014] eKLR the Court of Appeal referred to *Geogas S.A. vs Trammo Gas Ltd* (The Baleares) which the Court L.J Steyn observed;

> " The Arbitrators are masters of 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 findings of fact of the Arbitrators. It is irrelevant whether the Court considers those findings of act to be right or wrong. It does not matter how obvious the mistake by the Arbitrators on issues of fact might be, or what scale of financial consequences of the mistake of fact might be. That is of course an unsurprising position. Afterall, the very reason why parties conclude an Arbitration Agreement is because they do not wish to litigate in Courts. Parties who submit their disputes to Arbitration bind themselves by agreement to honor the Arbitrator's award on the facts. The principle of party autonomy decrees that a Court ought to never question the Arbitrator's findings of fact."

35. Are the grounds raised in support of the application to set aside the awards sufficient? The applicant raised the following grounds:

i. That the arbitral awards are contrary to the provisions of law and particularly to the mandatory provisions of the *Arbitration Act* (No. 4 of 1995 and the rules and regulations made thereunder.

ii. That the arbitral awards are inconsistent with the law of contract on the well laid principles of agency relationships.

iii. That the arbitral awards on the whole are inconsistent with public policy and contain errors on the interpretation and the application of the law as it is.

iv. That the arbitrator failed to discharge her duty by failing to recognize the fact that the 1st respondent appointed an insurance intermediary thereby introducing a new party to the agreement and as such the action automatically altered the policy agreement.

v. That further to the above paragraph, the arbitrator failed to discharge her duty by failing to hold that the 2nd respondent herein was under duty to disclose to the 1st Respondent that the policy had been cancelled.

vi. That the arbitrator failed further in her duty by failing to find the 3rd Respondent liable for its actions and specifically by issuing instructions to the applicant to cancel the policy while still receiving loan repayments from the 1st Respondent.

vii. That the arbitrator delayed and/or caused the arbitral award to be delivered after a considerable and inordinate delay thus making the award unfair and oppressive.

36. The grounds as crafted are similar to what is normally 'grounds of appeal' in our normal court procedure. Considering the application together with its grounds under the prism of section 35 of the *Act*, it is my considered view that the said application falls short of the threshold required therein. From the cited decisions, it is evident that it is not in this court's mandate to hear claims of factual or legal error by an arbitrator as an appellate court does. Like I have said, once parties have had a consensus to solve their disputes through arbitration, the court's intervention is limited and can only intervene in circumstances as set in section 45. The comparative jurisprudence in *Mum abo Mpete & 37 Others v Advocate Xolani Matyolo &another* JR 755/2019. Review and possible reversal are the constant objects of applications pursuant to arbitral proceedings and an award made by the arbitrator. On that basic jurisdiction the court herein remarked as follows: " That a court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties. That would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.

37. My appreciation of Section 35 of the *Arbitration Act* of Kenya that any such application filed as a front to review the merits of an arbitrators decision is limited to cases of clear violations of fundamental mandatory legal rules and principles. Meeting this standard, is difficult for not only every legal rule is a fundamental principle of the law. A mistake pertaining to principles of contract law involving private parties hardly seems like a clear violation of fundamental legal principles. It is not a parent to the court under these provisions that contesting an arbitral award based on an error of law is all but certain an uphill battle. Ideally therefore parties to arbitration proceedings should make every effort to ensure that mistakes do not become part of the arbitral award or immediately address them before the award is final. On that principle, once an award has been rendered by an arbitrator retroactively convincing the High Court to correct such a mistake would be an extremely a difficult task. A simple error by the arbitrator does not meet the manifest disregard standard to allow a court of this jurisdiction to a null an arbitral award unless the decision exceeds the arbitrator's authority, powers, or jurisdiction to exhibit a manifest disregard for the governing law of this country. The arbitral forum properly conducted under the *arbitration Act* and within the confines of Article 50 of the *Constitution* thereafter, followed by an award is final and binding upon the parties and the recourse against the award is permitted only within the prescriptive exceptions in the *Act*. However, notwithstanding those provisions, courts like the instant one with jurisdiction must act with a cautionary safeguard that interventions to set aside the award are limited scope. See Section 10 of the *Act*. The restrictions is modelled on the UNCITRAL Model Law which in terms of Article 2 (5) & (6) of the *constitution* is part of the source of law to applied in arbitration matters. It is clear to this court that the questions at the centre of the Application to set aside the award in addition to the analysis done elsewhere in this ruling is yet to satisfy the criteria in Section 35 of the *Arbitration Act* as construed with Section 10 of the same *Act*. I appreciate that

the superior courts in Kenya have pronounced themselves on this issue which is a matter of General Public Importance warranting revisiting the conflicting decisions to set right the applicable law with certainty. Similarly See also the *Principles in National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* (2014) eKLR. Thus if a party seeks to contest enforcement of the decision by an Arbitrator he or she may only advance arguments expressly covered by Section 10, & 35 of the *arbitration Act*. The arguments must be based on the laws of the seat of the arbitration. This is more so for our *arbitration Act* more often than not in annulling or setting aside the arbitral award closely mimics the language of UNCITRAL Model of Law on International Commercial Arbitration which is a near replica of Art. 5 of the New York convention. Applying the criteria set out above and in answering the questions in the application dated 16.11.2023 I am at pains to concur with the applicant that the arbitral proceedings and award should be interfered with by having it being set aside. I consider any such jurisdiction if so exercised by this court to be in contravention to the legislative intent both in the letter and the spirit of the whole *Arbitration Act*. There is no clash between the provisions of this Act and the terms of arbitral award.

38. Pursuant to the constitutional and statutory edict on alternative dispute resolution under Art. 159 (2) (C) of the *constitution* and pursuant to Section 35 of the *Arbitration Act* the application dated 16. 11. 2023 is dismissed for want of merit. Whereas on the other hand, the vital questions of law and evidence in the application dated 23.10.2023 carries the day at this moment in time to give effect to the arbitral award by the arbitrator with costs.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 16TH DAY OF APRIL 2024.

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R. NYAKUNDI

JUDGE