



Patel & another v Kishan Construction Company Limited (Miscellaneous Civil Application 264 of 2021) [2024] KEHC 10328 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEHC 10328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 264 OF 2021**

**F WANGARI, J
APRIL 22, 2024**

BETWEEN

KANJI KUNVERJI PATEL 1ST APPLICANT

DEEPAK KANJI PATEL 2ND APPLICANT

AND

KISHAN CONSTRUCTION COMPANY LIMITED RESPONDENT

RULING

1. The application subject of this ruling is dated 11th July, 2023. It is brought under the provisions of sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Orders 45 Rule 1 and 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It seeks the following orders: -
 - a. That this Honourable Court be pleased to certify the instant application as urgent and the same be heard ex-parte in the first instance for purposes of prayer 2;
 - b. That pending hearing and determination of this application, the Honourable Court be pleased to stay the enforcement of the arbitral award dated 22nd November, 2021;
 - c. That the Honourable Court be pleased to vary, review and set aside entirely the orders issued pursuant to its consolidated ruling dated 5th March, 2023 enforcing the arbitral award dated 22nd November, 2021;
 - d. That this Honourable Court be pleased to issue any other order in the interests of justice be certified urgent and service thereof in the first instance;
 - e. That costs of the application be provided for.
2. The grounds in support of the application are that on 5th March, 2023, the court issued a consolidated ruling to the Respondent's application to enforce the arbitral award dated 29th December, 2021 and



the Applicants' application to set aside the arbitral award dated 24th January, 2022. In the ruling, the court adopted the arbitral award dated 22nd November, 2021 as a judgement of the court and granted leave to the Respondent to enforce the arbitral award.

3. However, the court in its determination erred in failing to consider whether key elements of the arbitral award were within the scope of reference to arbitration as per section 35 (2) (iv) of the *Arbitration Act*. On one hand, the judge considered whether the conduct of the arbitrator was right or wrong. However, the issue for determination before the judge was whether the dispute was as per the terms of reference to arbitration. In making the said determination the presence of the arbitrator in the proceedings is not mandatory as the issue for consideration is whether the arbitrator went beyond the terms of reference thereby warranting the setting aside of the award.
4. Additionally, the court in making its findings at paragraph 42 of the ruling also erred in its findings that the parties did not annex proceedings before the arbitrator. The proceedings were in fact part of the pleadings before the court annexed and marked as PK-4 in the Respondent's further affidavit sworn by Pravin K. Patel on 15th March, 2022.
5. The foregoing proceedings reveal the issues raised by the Applicants in the application to set aside the arbitral award where the arbitrator admitted the evidence in the witness statement of the Respondent's witness but failed to consider the same evidence in the final award. The effect of the omission was that the case against the Respondent was uncontroverted despite there being evidence on record in clear contravention of section 35 (2) (v) as the arbitral procedure was not in line with the agreement of the parties. It is thus fair and just to stay the implementation of the arbitral award to enable the court review its ruling to prevent an injustice to the Respondents.
6. The application has been made timeously without any unreasonable delay. The court has the requisite jurisdiction to stay the enforcement of the arbitral award, review its ruling and orders as well as give such orders as serves the interest of justice thus the application ought to be allowed. The application is further supported by the affidavit of one Deepak Kanji Patel, one of the Applicants. The affidavit restated the grounds in support of the application and set out the factual background which I do not wish to rehash.
7. The application is opposed. The Respondent through one Pravin K. Patel, its director swore a replying affidavit dated 27th July, 2023. At paragraph 5 of the response, the Respondent contends that the Applicants are being economical with the truth. The salient issues identified are among others are that the appointment of the sole Arbitrator Mr. Julius Muthui F. Mutunga was agreed by both parties following previous opposition by the Applicant on every arbitrator appointed and that the arbitrator's decision did not contemplate matters that were not referred to arbitration as the agreed dispute that formed the basis of the arbitral award pertained to variation of works.
8. On whether the judge should not have considered whether the arbitrators conduct was right or wrong, the Respondent counters the same by making reference to the Applicants' Notice of Motion Application dated 24th January, 2022 for the proposition that the Applicants had relied on the sole arbitrator's misconduct as a ground in the said application. Therefore, the judge did not go on a frolic of its own.
9. The Respondent further contends that in the event the judge did not consider the arbitration proceedings annexed to the further affidavit sworn by Pravin K. Patel dated 15th March, 2022, it does not take away the fact that the Arbitrator was not served with the application dated 24th January, 2022 which alleged the Arbitrator's misconduct and thus they cannot purport to beseech the court to review its ruling when it was their own fault.



10. It is equally the Respondent's position that the arbitrator in making the award allowed the Respondents' witness statements as evidence despite their witness not being present and cannot therefore claim that the evidence was disregarded. On the allegations that the arbitrator failed to consider the Respondents' expert evidence, it is the Respondent's position that a perusal of the arbitral award reveal that the Applicant's expert witness evidence was considered but found not persuasive and independent and that is why the same was dismissed.
11. Directions were taken to have the application canvassed by way of written submissions. Both parties duly complied with the directions. The Applicants' submissions are dated 8th April, 2024 while those of the Respondent are dated 26th February, 2024. The court commends both parties for their industry in taking their time to prepare the detailed submissions the various authorities they have cited. They go a long way in helping the court arrive at a suitable ruling either way. In an adversarial system such as ours, a decision satisfies one party while it aggrieves the other but it is the beauty of litigation.

Analysis and Determination

12. I have carefully considered the application, the response, the submissions for and against, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the prayers sought in the application are merited;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs?
13. The application dated 11th July, 2023 has two (2) principal prayers, these are, prayer 2 seeking to stay the enforcement of the arbitral award and prayer 3 seeking to vary, review and set aside in their entirety the orders issued pursuant to a ruling dated 5th March, 2023. At the onset, having perused the file, I note that the only ruling that allowed the Respondent to enforce the arbitral award as a decree of the court was delivered on 5th May, 2023.
14. Since none of the parties raised any issue as relates the date of the ruling, the court would presume that the date indicated at prayer 3 of the application is but a clerical error. It does not preclude the court from delving on the merits of the application. The primary duty of the court is to do justice and that duty cannot be fettered by procedural technicalities.
15. The Constitution under Article 159 on judicial authority has urged courts to do justice without undue regard to procedural technicalities. Article 159 (2) (d) states: -

“Justice shall be administered without undue regard to procedural technicalities.”
16. I now turn to the merits of the application. The application was filed under certificate of urgency. No orders were granted and as it were, the court has not been appraised on whether the decree has been executed or not considering that the ruling in the matter was delivered in May, 2023 a period of over eleven (11) months ago. It is trite that courts do not act in vain. Notwithstanding the above sentiments, this court has a duty to render itself on what is before it.
17. In Kenya, the general approach on the role and intervention of the court in arbitration is provided in section 10 of the Arbitration Act, 1995. The section provides: -

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



18. The role of the court in matters arbitration is thus circumscribed by the *Act*. The application is brought under the provisions of the *Civil Procedure Act* and the *Rules* thereunder. Is this tenable in matters arbitration? The answer to this question lies with the Court of Appeal decision in *Ann Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR where the court held as follows: -

“... A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and rule 11 of the *Arbitration Rules* cannot override Section 10 of the *Arbitration Act* which states:

“Except as provided in this Act no court shall intervene in matters governed by this *Act*”.

In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the *Arbitration Act*. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the *Arbitration Act* the award has not yet been enforced for a period close to 10 years now. The provisions of the *Arbitration Act* make it clear that it is a complete code except as regards the enforcement of the award/decree where *Arbitration Rules* 1997 apply the *Civil Procedure Rules* where appropriate.” (Emphasis added)

19. Prayer 2 of the application ought to have been brought under section 37 of the *Arbitration Act* which provides for grounds for refusal of recognition or enforcement of an arbitral award. Still, a party is required to meet any of the enumerated grounds for the High Court to exercise the powers under section 37 (2) of the *Act*. A party ought to adduce evidence to bring himself or herself within the parameters set out under section 37 (1).
20. Can the court vary, review or set aside the orders issued on 5th May, 2023? The grounds in support of the application including the issue of the arbitrator’s misconduct were issues dealt with conclusively in the ruling sought to be reviewed. Grounds 3 to 7 in support of the application clearly impugns the court’s substantial findings and in no way meet the threshold for review. This is an appeal disguised as a review.
21. In *National Bank of Kenya v Ndungu Njau* [1997] eKLR, the Court of Appeal had the following to say: -

“... A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is



not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it...” (Emphasis added)

22. Enforcement of arbitral awards is provided for under section 36 of the *Act*. There are certain prerequisites that a party desiring to enforce an arbitral award must meet. These are set out under section 36 (3) of the *Act*. In its ruling of 5th May, 2023, the court was satisfied that the Respondent had met those prerequisites and went ahead to grant leave to the Respondent to enforce the arbitral award as a decree of the court. This court cannot impeach the ruling of 5th May, 2023. I think I have said enough to show that the application dated 11th July, 2023 is devoid of merit.

23. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

24. Any departure from this trite position can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others v Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

25. The Claimant/Respondent has been vexed twice and as such, I see no reason to deprive it of costs which I so award.

26. Having found as above, the following orders flow therefrom: -

- a. The application dated 11th July, 2023 is devoid of merit and the same is hereby dismissed;
- b. Costs to the Claimant/Respondent; and
- c. File closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF APRIL, 2024.

F. WANGARI



JUDGE

In the presence of:-

Mr. Maina Advocate for the Respondent/Applicant

Mr. Oloo Advocate for the Claimant/Respondent

Mr. Barille, Court Assistant

