Africare Limited v Sitafalwalla & another (Commercial Arbitration Cause E084 of 2023) [2024] KEHC 7268 (KLR) (Commercial & Admiralty) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND ADMIRALTY

COMMERCIAL ARBITRATION CAUSE E084 OF 2023

DKN MAGARE, J

JUNE 13, 2024

BETWEEN

AFRICARE LIMITED ..... APPLICANT

AND

ARIF AHMEDALI SITAFALWALLA ..... 1ST RESPONDENT

NAZIRA ARIF AHMEDALI ..... 2ND RESPONDENT

RULING

1. The matter is for disposal of 2 diametrically opposite Notices of Motion. They all arise from an award given by Peter M. Waiyaki, Arbitrator who gave an award dated 13/6/2022.

2. The award was to the effect that:-

    a. That the Respondent shall pay to the Claimants the amount of Kenya Shillings Ten Million Seven Hundred and Ninety-Seven Thousand Five Hundred and Twenty-One and Four Cents (Kshs 10,797,521.04) being the computed revenue share income for the period from December, 2017 to 2nd May 2019, inclusive of simple interest at rate of 14% per annum computed to the date of this award.

    b. That the Respondent shall pay simple interest at the rate of 14% per annum on any amount set out in (a) above which is not paid by 13th July, 2023 until payment in full. Such interest to accrue from 13th July, 2023.

    c. That the Respondent shall pay the costs of this arbitration including the arbitrator's fees.

    d. The parties are at liberty to agree the costs of this Arbitration, excluding arbitrator's fees. If parties do not agree on the quantum, they may file a bill of costs for taxation.

e. The Arbitrator's fees, as set out in the invoice of even date delivered to the parties, shall be paid by the Respondent. Any amount paid by the Claimants so far as deposit or to take up the Award, or any part thereof outstanding from the Respondent shall accrue simple interest at the rate of 14% per annum w.e.f. 13th July, 2023 until it is paid in full.

3. By an application dated 20/11/2023 the Applicant stated that the Respondent have threatened to enforce the award from 3/11/2023. The threats must have ceased on 17/11/2023.

4. The Respondent sought to set aside the award by Hon. Peter Waiyaki. They also sought stay enforcement. The main ground was that:

a. The award was made in absence of jurisdiction hence contravening both written and unwritten laws of Kenya.

b. The sole arbitrator exceeded jurisdiction and failed to find that the same was res judicata. The tribunal was biased and failed to have the Applicant to be heard.

5. He stated that the tribunal did not have requisite jurisdiction. It was their case that the award was res judicata. However no evidence of this was annexed.

6. The award holders filed a Chamber Summons dated 21/12/2023 for enforcement of the award pursuant to section 36(1) of the *Arbitration Act*. The main reason being that the award arose pursuant to a framework laws, public policy and promoted unjust conduct and was res judicata. They stated that the Corporations lacked capacity to bring arbitration.

7. A supplementary affidavit was filed by Allan K. Kaparo agreement of 5/11/2013. They stated that the award is fair and thus the same be enforced.

Analysis

8. There is no dispute that the award was published on 13/7/2023 though the Africare Ltd posits that they collected the award on 12/10/2023. The award was published on 12/7/2023. Three months lapsed on 13/10/2023. A challenge to the *Arbitration Act* must be filed as per Section 35(3) of the *Arbitration Act*.

9. In the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling), which deals with defective arbitration clauses as follows: -

> " An arbitration agreement was null and void if it did not have a legal effect due to the absence of consent. A lack of capacity, such as when a party did not have the authority or permission to enter into an arbitration agreement, could invalidate the clause. An arbitration agreement could also be null, where the clause's language was so vague or ambiguous, that the parties' intention could not be decided. However, defective arbitration clauses may nonetheless be interpreted by a court to give meaning to them, to save the parties' intention to arbitrate, as courts tended to interpret the clauses narrowly, to avoid giving a back door, for a party wishing to escape the arbitration agreement. The null and void language had to be read narrowly given a presumption of enforceability of agreements to arbitrate."

10. The Application dated 20/11/2023 is filed out of time. This then seals the fate of the application dated 20/11/2023. In any case there are no questions raised in terms of Section 35 of the *Arbitration Act* 1995.

11. Section 35 of the *Arbitration Act* 1995 provides that: -

(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.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

12. A question of bias, must be first raised with the arbitrator. It can't be a new ground without the arbitrator being given a chance to rebut the allegation. Section 13(3) of the *Arbitration Act* provides for challenge to an arbitrator. It must however be in circumstances that give rise to justifiable doubts

as to his impartiality and independence. Secondly the challenge must accord the procedure as set out in Section 14 of the said Act. The said sections provide as follows: -

> "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. (2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him. (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so. (4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.

13. Section 14 of the *Arbitration Act* provides for the procedure as follows: -

    1. Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

    2. Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

    3. If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

    4. On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

    5. The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

    6. The decision of the High Court on such an application shall be final and shall not be subject to appeal.

    7. Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

    8. While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

14. In absence of a challenge before the arbitrator, this court has no jurisdiction to handle issues of bias. A challenge to an arbitrator cannot be a ground unless, it is as regards corruption in giving final award

as provided for under section 36(2) (vi), where "the making of the award was induced or affected by fraud, bribery, undue influence or corruption";

15. The ground touches the opposing party. No such allegations have been made.

16. On res judicata, Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

17. In the dicta in *In the Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows:

> The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> "(a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

18. In the case of *Attorney General & another ET vs (2012) eKLR* where it was held that;

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".
>
> In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

19. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been

determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R 378, observed thus:

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

20. Res judicata applies to applications just like suits. In the case o*f Julia Muthoni Githinji v African Banking Corporation Limited* [2020]eKLR the court stated thus:

> 14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was res judicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

21. In *Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021)* [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

22. The *Black's law Dictionary, 11th Edition*, page 1567 defines "res judicata" as: -

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

23. There are no materials before the court to show that this claim was dealt with. A contract can be dealt with a various levels. In such a case, the issue of res judicata has to be raised as a jurisdictional issue before the Arbitrator. This was not done. The court cannot go into the merit of the Award.

24. In any case there can be no application to set aside an award after 3 months. Further there was no application made under section 34, meaning there was no ground for time running from any other date other than the date of publication of the award.

25. The date of collection of the award is irrelevant. The date the arbitrator informs parties that the award is ready for collection, is the date of publication.

26. Being a contract, whether there was continuous breach, it is a question of merit that the parties ought to raise at the tribunal as a first instance. Issues of jurisdiction are dealt with in the manner provided under section 17 of the act. The said section provides as hereunder: -

> " (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
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> (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.
>
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.
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> (5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitration award on the merits.
>
> (6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.
>
> (7) The decision of the High Court shall be final and shall not be subject to appeal.
>
> (8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful."

27. In the case of *University of Nairobi v Nyoro Construction Company Limited & another (Arbitration Cause E011 of 2021)* [2021] KEHC 380 (KLR) (Commercial and Tax) (22 December 2021) (Ruling), Justice Majanja posited as follows: -

> " 18. Once the arbitral tribunal has ruled on its jurisdiction, section 17(6) of the Act provides for recourse by the aggrieved party to the High Court. I therefore reject the Applicants submission that section 17 of the Act is inapplicable in the circumstances of this case. Therefore, in as much as the applicant seeks to set aside the ruling under section 35 of the Act, it cannot run away from the

ambit of section 17 which provides that it ought to have filed its application within thirty days after the notice of the ruling.

19. Whether the decision of January 22, 2021 is referred to as an Award is immaterial since the substance of the impugned decision is on the question of jurisdiction and falls within the ambit of section 17 of the Act. It is important to recall that this court's jurisdiction to interfere in arbitral proceeding is circumscribed by section 10 of the Act which provides that, "Except as provided in this Act, no court shall intervene in matters governed by this Act". Thus the mode of intervention by the court in a ruling on jurisdiction is the by way of an application to the High Court within 30 days as provided by section 17(6) of the Act. Had the issue of jurisdiction been reserved for and dealt with in the Award on merits, then the party aggrieved would be entitled to apply to set aside the Award under section 35 of the Act. I therefore find and hold that section 35 of the Act is not applicable to the facts and circumstances of this case."

28. Jurisdiction is everything. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> "With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
>
> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

28. The court cannot rail load the law and assign itself jurisdiction. The court has no jurisdiction to hear and determine an application filed out of time. It is not even important to determine whether time can be extended as it is a settled point and none is before the court.

29. In the circumstances and for reason given, there is no merit in the application dated 20/11/2023. It is accordingly dismissed with costs of Kshs. 35,000/= to the Respondents in this application. Further, regarding the application for enforcement, I do not see any impediment. Section 36(1) provides as follows: -

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.

30. There is no public policy impediment to the award. Questions raised in paragraph *4* relate to the same questions I have dealt with and dismissed in respect of the Application dated 20/11/2023.

31. In the circumstances the application dated 21/12/2023 is merited and accordingly allowed with costs of Kshs. 40,000/=.

Determination

a. The application dated 20/11/2023 is dismissed with costs of Kshs. 35,000/=.

b. The application dated 21/12/2023 is allowed. The award given on 13/6/2023 by Mr. Peter M. Waiyaki between the parties herein is recognized as an order of this court and orders shall issue accordingly.

c. The award holder is entitled to costs of Kshs.40,000/= for the application dated 21/12/2023.

d. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF JUNE 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Bhulla for the Appellant

Ms. Munyiva Mbevi for the Respondent

Court Assistant - Jedidah