Ramji Karman Holdings Limited v D. Manji Construction Limited (Arbitration Cause E085 of 2023) [2024] KEHC 8986 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E085 OF 2023

WA OKWANY, J

JULY 11, 2024

BETWEEN

RAMJI KARMAN HOLDINGS LIMITED ..... APPLICANT

AND

D. MANJI CONSTRUCTION LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect to the Application dated 16th November, 2023 wherein the Applicant seeks orders to set aside and/or stay further proceedings arising out of the arbitral proceedings in HCCOMMRB/E078/2023 seeking the recognition and adoption, by this court, of the arbitral award delivered on 25th September 2023.

2. The Application is supported by the Applicants' affidavit and is premised on the grounds that: -

    1. The arbitral award dealt with a dispute that was not contemplated and/or not falling within the terms of reference of the arbitration contained under clause 45.0 (Settlement of Disputes) of the contract signed on 25th April 2009.

    2. The arbitral award contains decisions on matters beyond the scope of the reference to arbitration, to wit; awarding sums for additional works that were not contemplated in the contract.

    3. The making of the Arbitral Award was affected by undue influence exerted by the Arbitrator's unjustified agreeableness with the Respondent's position on uncertified Bills of Quantities (BQs) and disregarding the Quantity Surveyor's evidence, certified BQs and draft Final Account That the intended execution will totally paralyze the Respondents' business occasioning great loss and damage.

4. The Arbitral Award is otherwise in conflict with the public policy of the Republic of Kenya for the reasons that the Arbitrator failed to logically decide on the Applicant's Counter claim for damages for delaying completion period at the rate of Kshs.80,000/= per week from 25th June 2010 to 1st November, 2012 as stipulated in the JBC Contract.

5. The Applicant will suffer great injustice, prejudice and losses unless this Honourable Court intervenes and issue the Orders sought herein as it is only just and fair.

6. No prejudice will be occasioned to the Respondent if the orders sought herein are issued.

3. The Application is supported by the Affidavit of the Applicant's member, Neha Sumaria, who states the Applicant entered into an agreement with the Respondent under the joint Building Council of Kenya, Agreement and Conditions of the Contract for Building Works, April 1999 Edition ("the BC Contract") to construct five (5) residential houses.

4. She avers that during and after the construction period, disputes arose between the parties some of which were amicably resolved, but that some of the disputes culminated in the Arbitral Proceedings that is the subject of this application.

5. She states that the arbitrator dealt with a dispute that was not contemplated and/or not falling within the terms of reference of the arbitration contained under clause 45.0 (Settlement of Disputes) of the contract signed on 25th April, 2009 between the parties. She adds that the arbitral award contains decisions on matters beyond the scope of the reference to arbitration such as awarding sums for additional works that were not contemplated in the contract.

6. She avers that the Arbitral Award was affected by undue influence exerted by the Arbitrator's agreeableness with the Respondent's position on uncertified Bills of Quantities (BQs) which were allowed on record during the hearing on 15th December 2023.

7. She faults the arbitrator for disregarding the Quantity Surveyor's evidence to the effect that the said Bills of Quantities (BQs) prepared by the Claimant separately did not emanate from the scope of the work/ project, and that the Tribunal should have been guided by the certified BQs and draft Final Account prepared by the project Quantity Surveyor (QS).

8. She states that the Arbitral Award is in conflict with the public policy of the Republic of Kenya because the Arbitrator did not logically decide on the Applicant's Counter Claim for damages for delaying completion period at the rate of Kshs.80, 000/= per week from 25th June, 2010 to 1st November 2012, as stipulated in the JBC Contract.

9. She states that the argument that the claim for delaying completion only surfaced during the pleadings before the Tribunal is absurd since the parties were dealing in good faith and agreed to settle some disputes beforehand save that the delay in completion was not one of the settled disputes.

10. She states that damages for delay in completion are explicitly provided for under the JBC Contract and that there is unimpeached evidence to show that the completion date of 25th June, 2010 was not met by the Respondent herein and that no extension was ever sought, allowed and/or agreed between the parties. She adds that the Certificate of Practical Completion was issued by the project Architect on 1st November, 2012.

11. She further states that the Arbitrator contradicted himself by partially allowing the prayer for defects to a tune of Kshs.891,210.50/= based on the defect's liability period between 1st November, 2012 to 1st May 2013 while dismissing the claim for delaying completion prior to 1St November 2012.

12. She avers that as a result of the delay in the Completion, by the Contractor, and subsequent failure to make good the defects on the snag list, the Applicant herein, at its own cost, sought services elsewhere to make good the defects.

13. She states that the Arbitrator further violated public policy and exerted undue influence by anchoring the sum payable on the figure of Kshs.63,390,883.00/= which was arbitrarily arrived at by the Claimant while disregarding the figure of Kshs.56,368,745.00/= in the draft final account prepared by the project QS.

14. She also faults the Tribunal for disregarding the project's QS evidence to the effect that the delay in issuing the Final Account was also occasioned by the Contractor's inclusion of unrelated matters to the scope of the project. She maintained that the QS was ready and willing to reconcile the BQs so as to finalize the Final Account.

15. She states that the award should be set aside as incongruent figures have been used to reach the final sum of Kshs. 21,949, 393.00/= as the amount payable to the Claimant yet it was admitted that all the payable certificates No.1 to 8 were duly paid to foot the project sum of Kshs.39,792,879.00/=.

16. The Respondent opposed the application through their Replying Affidavit dated 11th December 2023 wherein it is averred that the Applicant has totally failed to show how the Arbitral award exceeded the scope of the mandate of the Arbitrator and that the sole aim of the current application was not only to waste time but to enable the Applicant withhold money due to the Claimant/Respondent.

17. It was averred that the Applicant has not shown how the award is against the public policy and that the issues raised by the Applicant are issues that were dealt with by the Arbitral Tribunal and cannot be reopened before this court.

18. The Application was canvassed by way of written submissions which I have considered.

19. The gist of the Application is the prayer for an order to set aside the Arbitral Award dated 30th June, 2023.

Applicant's Submissions

20. On whether the Arbitral award was contrary to public policy, the Applicant cited the decision in *Teejay Estates Limited vs. Vihar Construction Limited* (2022) (at para. 34) where it was held that: -

> " An arbitrator must conduct himself in a manner that does not destroy the confidence of the parties or either of them. None of the parties should leave the arbitration with a feeling that they have not had a fair hearing"

21. It was submitted that the instant case is a perfect specimen of a party (the Applicant) who has left the seat of Arbitration with a deep feeling that the process and the result, predominantly, breached the principle of equality of arms, rules of natural justice and led to an unlawful enrichment on the part of the Respondent to the detriment of the Applicant.

22. The Applicant noted that while the interim report on Public Policy as a Bar to Enforcement of International Arbitral Awards recognised that "it is notoriously difficult to provide a precise definition of public policy " (in contest of enforcement of arbitral awards)", the report noted that violation of public policy in respect to arbitral awards entails derogation from the basic notions of morality and justice. What therefore the Applicant needs to show is the enforcement of the award would be clearly injurious to the public good or, possibly, the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public.

23. Reference was also made to the case of *Kenya Tea Development Agency Ltd & 7 other vs. Savings Tea Brokers Ltd* [2014] eKLR where the Court reiterated the High Court's celebrated decision in *Christ for All Nations vs. Apollo Insurance Co. Ltd* [2002] 2 E.A 366 where it was stated that;-

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the *constitution* of Kenya or any other law of Kenya whether written or unwritten or
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> (b) inimical to the national interest of Kenya or
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> (c) contrary to justice and morality."

24. The Applicant submitted that the arbitrator rendered himself to matters strikingly outside his jurisdiction and openly out stepped the confines of the contract and wandered far outside the designated area. The Applicant maintained that an error occurred not from misunderstanding the contract but by acting in excess of what was agreed.

Respondent's Submissions

25. The Respondent referred to *Mustill & Boyd's Commercial Arbitration*, Second Edition, at p.64 and submitted that an arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract.

26. The Respondent submitted that it was not true that the additional works were not contemplated in the contract and added that the issue of whether or not additional works were conducted was not in dispute. According to the Respondent, parties were in agreement that additional works were carried out which was a matter that was confirmed by the Applicant's witness Dipak Patel and QS Daniel Kimoro.

Analysis and Determination

27. I have considered the pleadings filed herein and the parties' respective submissions. I find that the main issue for determination is whether the applicant has made out a case for the setting aside of the arbitral award. Underlying the main issue for determination are the issues of whether the award conflicts with the public policy in Kenya and whether the arbitrator dealt with issues that were outside the scope of the reference.

Public Policy

28. Section 32(A) of the *Arbitration Act* (*the Act*) stipulates that an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by *the Act*. Section 36 of *the Act*, on the other hand, provides that the High Court has the power to recognise and enforce domestic arbitral award. The section states as follows: -

> 36
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> (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
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> (2) ...
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> (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.

(4) .....

(5) .....

29. The term 'contrary to Public Policy' has been the subject of interpretation in several cases. In *Christ For All Nations vs Apollo Insurance Company Limited* [2002] 2 E.A 366, Ringera J., observed as follows: -

> "I am persuaded by the logic of the Supreme Court of India and I accept the view that although public policy is a most broad concept Incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get a stride of it, you never know where it will carry you, an award could be set aside under Section 35(2)(b)(ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it was shown that it was either:(a) inconsistent with the *constitution* or other laws of Kenya, whether written or unwritten; (b)inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category, I would, without claiming to be exhaustive, include the interest of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive, include considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals."

30. In *National Oil Company* (1987) 2 All ER 769, Sir Johnson Danaldson M. R. observed;

> "consideration of public policy can never be exhaustively be defined, but they should be approached with extreme caution. As Burrough J. remarked in Richardson vs Mellish 'it is an element of illegality or that the enforcement of the award would be clearly injurious to the public good or possible that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the power of state is exercised."

31. In *Glencore Grain Ltd v TSS Grain Millers Ltd* [2002] 1 KLR 606, Onyancha J., held that:

> "A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan Society. It has been held that the ward "illegal" here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive."

32. In *Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd* [2012] eKLR Mabeya J. held: -

> [T]hese terms ("contrary to public policy", "against public policy", "opposed to public policy") do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

33. My understanding of the above interpretations is that for an award to be contrary to public policy, it must be harmful, injurious to the public, offensive, illegal, unacceptable and contrary to the basic societal norms.

34. In the present case, the applicant argued that the award was contrary to public policy of the Republic of Kenya because the Arbitrator did not logically decide on the Applicant's Counter Claim for damages for delaying completion period at the rate of Kshs.80, 000/= per week from 25th June, 2010 to 1st November 2012.

35. The Applicant further stated that the Arbitrator violated public policy and exerted undue influence by anchoring the sum payable on the figure of Kshs.63,390,883.00/= which was arbitrarily arrived at by the Claimant who disregarded the figure of Kshs.56,368,745.00/= in the draft final account prepared by the project QS.

36. My finding is that the mere fact that the Arbitrator arrived at a verdict that the Applicant does not agree with does not necessarily connote that such an award is illegal or contrary to public policy. A perusal of clause 45.10 of the arbitral clause shows that the parties agreed that " the award of the arbitrator shall be final and binding upon the parties."

37. Courts have taken the position that they must be cautious not to wade into the arena of an appellate court by reviewing the award and correcting errors of law and fact when the parties have agreed that a determination by the Arbitrator is final. This is the position that was stated by the Court of Appeal in *Kenya Shell Ltd vs Kobil Petroleum Limited*, Civil Appeal No. 57 of 2006 [2006] eKLR where the it was held as follows: -

> " We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the *Arbitration Act* under which the proceedings in this matter were conducted underscores that policy.... At all events the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under section 10 of the Act unless either party can satisfy that court that it ought to be lawfully set aside."

38. My finding is that the instant case does not fall into the category of an award that is contrary to public policy. My take is that the mere fact that the Applicant was not happy with the arbitral award does not mean that the award was against public policy.

39. Turning to the arbitrator's jurisdiction, the Applicant argued that the arbitrator dealt with matters strikingly outside his jurisdiction and openly out stepped the confines of the contract and ventured far outside the designated area. The Respondent was however of the contrary opinion and submitted that the arbitrator did not go beyond the jurisdiction granted to him in the parties' contract.

40. Clause 45.2 of the BC contract stipulated as follows: -

> " The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the architect, or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of the contract."

41. When advancing the argument that the arbitrator went beyond the scope of the reference, the Applicant stated that the sums for additional works were not contemplated in the contract. The Applicant also faulted the arbitrator for disregarding the Quantity Surveyor's evidence.

42. Section 17 (3) of the *Arbitration Act* provides;

> " 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."

43. In *Joma Investments Limited vs N. K. Brothers Limited* [2018]eKLR, the court dealt with the effect of section 17 (3) of the *Act* and what happens when a party fails to raise an objection at the first instance and held that: -

> " Given the foregoing, my take is that since the arbitrator did not deal with any substantive aspect of whatever dispute that was before him, instead of filing the instant summons, the applicant ought to have followed the procedure stipulated under section 17 of the *Arbitration Act* and challenged the arbitrator's jurisdiction to determine those claims it felt went beyond the scope of his authority once the arbitral proceedings began as had been directed by the arbitrator in his ruling.'
>
> "32. The arbitral tribunal should have been given an opportunity to rule on its own jurisdiction as provided for in section 17 (1) of the *Arbitration Act*. Had this been done, the parties would have been heard on the allegation that some of the claims made by the respondent exceeded the arbitrator's jurisdiction and a decision would have been made on the merits. The applicant would then have been at liberty to apply to this court if it was aggrieved by the arbitrator's decision."

44. In the present case, it is clear that the Applicant did not raise the issue of the arbitrator's jurisdiction before the tribunal as this is a matter that came up as one of the grounds for the application to set aside the award. I note that the said ground amounts to a challenge on the tribunal's factual findings.

45. It is trite that the Court cannot interfere with the factual findings of the Arbitrator. This is the position that was taken in *Tcat Limited vs Joseph Arthur Kibutu* [2015] eKLR, where the court stated as follows;

> " if the court would look into the issue of whether there was enrichment as invited to do, it is my finding that the same would be tantamount to the court trying to render itself on a question of fact. The Arbitrator used the facts before him in determining whether or not there was breach of any of the terms of the subject Agreement. And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case Kenya Oil Company Limited & Another vs Kenya Pipeline Company [2014] eKLR, Moran vs Lloyds (1983) 2 ALL ER 200 and DB Shapriya & Co. vs Bishint (2003) 3 EA 404, where there is judicial consensus that;
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> > "all questions of fact are and always have been within the sole domain of the Arbitrator.... The general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator.
> >
> > The arbitral tribunal was therefore seized of relevant material and facts which were placed before it by the Applicant. It considered all relevant material. It

inquired into the existence of the facts in the case and decided on the extent of the Respondent indebtedness. The court cannot thus be called to disturb the award on that front.

46. In *Mahican Investments Limited & 3 Others vs. Giovanni Gaida & 80 Others* [2005] eKLR the court observed as follows:

> "In order to succeed (in showing that the matters objected are outside the scope of the reference to arbitration) the application must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."

47. I have considered the reasons advanced by the Applicant to support the argument that the arbitrator went outside the scope of the reference alongside the provisions of Clause 45.10 of the parties' agreement and I am unable to find that the arbitrator dealt with matters not specified or related to the contract. Indeed, it is clear that the arbitral clause granted the arbitrator a wide latitude to handle the construction of the contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the architect. I note that the Applicant did not specify the dispute or issue that the tribunal dealt with that was not contemplated by the terms of the contract. My finding is that the arbitrator's decision was purely on issues that fell within the scope of the terms of the contract.

Disposition

48. For the reasons that I have stated in this ruling, I find and hold that the Applicant has not demonstrated that the award is contrary to public policy or that the Arbitral Tribunal dealt with matters beyond the scope of the reference to arbitration.

49. I therefore find that the application dated 16th November 2023 is not merited and I therefore dismiss it with costs to the Respondent.

50. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE