Fawaki Fresh Pack International Limited v Wanjama (Arbitration Cause E072 of 2023) [2024] KEHC 12035 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E072 OF 2023

JWW MONG'ARE, J

OCTOBER 4, 2024

BETWEEN

FAWAKI FRESH PACK INTERNATIONAL LIMITED ..... APPLICANT

AND

JAMES KINYUA WANJAMA ..... RESPONDENT

RULING

Introduction and Background

1. On 29th August 2023, the Arbitral Tribunal ("the Arbitrator") published an award in which the Respondent was awarded Kshs. 1,850,000.00/= plus interest at a rate of 14% from the date of filing the claim together with costs of the arbitration proceedings ("the Award"). The Award was in respect of an investment agreement entered into between the parties for the financing and exportation of agricultural produce from Kenya to the Middle East wherein the Respondent, as the financer, was to invest Kshs. 2,000,000.00/=. and receive a return of this amount plus a minimum net profit of 60% of the overall profit obtained from the exportation of the produce, within 21 days. In his claim before the Arbitrator, the Respondent stated that the Applicant only paid him Kshs. 150,000.00/= but it had since refused and or declined to pay the balance despite various demands. The Respondent thus sought the sum of Kshs. 2,000,000.00/= plus the said minimum net profit of the overall profit obtained from the exportation of the produce and interest on these sums at a commercial rate.

2. In response, the Applicant stated that the investment was frustrated by the advent of the COVID-19 pandemic and the Governmental restrictions thereof that prohibited movement and restricted and/or banned access to the Port and clearing of any goods thereat. That the payment of Kshs. 150,000.00/= was made after the Respondent reported the matter at the Directorate of Criminal Investigations (DCI) Headquarters whereupon the Applicant's directors were arrested and the Applicant was coerced into paying him the said sum.

3. Having heard the parties viva voce and gone through their submissions, the Arbitrator found that the Applicant had offered to pay the Respondent the Kshs. 1,850,000.00/= in instalments which was clearly an admission of owing the Respondent the said amount. That from the evidence presented, the Respondent had been paid Kshs. 150,000.00/= of the principal but he did not produce or canvass or table any documents to show the profits made from the investment to enable the Arbitrator access what comprises of "60% of the interest". The Arbitrator held that other than pleading, the Respondent did not address him on the issue of interest hence the Award as aforementioned.

4. Both parties are aggrieved with the Award and they now seek to set it aside by way of their applications dated 19th September 2023 and 26th October 2023 respectively. The Applicant adds that the court should order that this dispute is not and cannot be referred to arbitration whereas the Respondent adds that the court should invoke its inherent powers and correct the errors of law committed by the Arbitrator. The applications have been canvassed by way of written submissions which are on record and which is will make relevant references to in my analysis and determination later on.

The Applicant's Application

5. The Applicant's case is that the Arbitrator acted and/or proceeded without jurisdiction owing to the fact that there existed and/or exists no valid arbitration agreement or written agreement between the parties herein. That the Arbitrator even went beyond the scope of the matter and parties' pleadings to award what was not pleaded for; that is the 14% interest. It adds that the Arbitrator, while acting without jurisdiction, having found and/or established that parties herein, on oral agreement, had agreed on sharing profits at 60% to 40%, he erred in not allocating losses at the same rate and awarding the Respondent 100% of its invested amount. Further, that the Arbitrator erred in solely using without prejudice communications between parties herein to arrive at the Award.

The Respondent's Application

6. On his part, the Respondent contends that the parties herein entered into an Agreement in which one of its terms at Clause 10 subjected them to Arbitration in the occurrence of disputes among them. He accuses the Arbitrator of making the Award without considering or making reference to the terms of contract more so in determination for liquidated damages hence making an error that ought to be corrected. He states that the Award went against public policy as the Arbitrator failed to consider the evidence before him in regards to what consisted of the 60% interest of the overall profit obtained from the exportation of the produce an error that had to be corrected. Additionally, that the Arbitrator stating that the Respondent did not address him on the issue of interest infringed the Respondent's right to a fair hearing under Article 50.

Analysis and Determination

7. From the parties' pleadings and submissions, the issues for the court's determination are whether the Arbitrator had jurisdiction to determine the dispute between the parties and if so, whether the Award ought to be set aside and the alleged errors of law corrected.

8. I propose to first deal with the issue of the Arbitrator's jurisdiction. It is common ground that the Applicant filed a preliminary objection challenging the Arbitrator's jurisdiction but he reserved the determination for the Award where he held that he had jurisdiction to determine the dispute, which is what the Applicant is now challenging and serves as one of the reasons for setting aside the Award. I find that this challenge is in line with the court's decision in *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), where the late Majanja J., held that if 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 *Arbitration Act* as in the present case.

9. The Applicant submits that that the subject of the dispute is not capable of being settled by way of arbitration for the reason that the alleged agreement between the parties was invalid and that an invalid agreement cannot confer the tribunal jurisdiction to arbitrate any dispute thereof. That it did not have a written agreement/contract with the Respondent herein and that this fact was proven by the Appellant's witness vide her witness statement and that in addition, the documents filed in support of the Respondent's case, initially, were an undated agreement that was not properly executed and whose author could not be proven.

10. In the Award, the Arbitrator found that though the Applicant opposed the filed agreement, its sole witness referred to the agreement and, in her statement, she confirmed that the parties got into an investment agreement whereby they were to share the profits at the rate of 60/40; She reiterated that the parties had gotten into an agreement and that the Applicant had done its part and she also quoted para. 6 of the agreement on Force Majeure. That both parties admitted part performance of the agreement during the hearing process and the Applicant cannot be allowed to approbate and reprobate the agreement though there were questions as to whether the same was signed, how it was signed, where it was signed or which was the latest copy.

11. Going through the record, I am inclined to agree with the Arbitrator that the Applicant was approbating and reprobating on the impugned agreement. It is correct that in her witness statement, the Applicant's witness kept referring to certain provisions of the agreement in a bid to avoid its performance but at the same time denied its validity when it came to the arbitration agreement. Whereas the Applicant relies on section 4(2) and (3) of the *Arbitration Act* to state that the impugned agreement was not signed and that there was no written contract, Section 4(4) thereof also provides that "The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract". The Applicant kept referring to the investment agreement which contains the arbitration clause. It cannot selectively choose the clauses in the said agreement to the exclusion of others. I find that the arbitration clause was contained in the agreement referred to by both parties and as such, the same wad valid and binding upon them. The Arbitrator thus had jurisdiction to determine the dispute as the arbitration clause provided that "Any dispute, controversy or claim arising out of or in connection with this including any question regarding its existence, validity or termination shall be solved by the parties within 30 days of the dispute. If not solved by parties, the dispute shall be referred to and finally resolved by arbitration.... The arbitral tribunal shall consist of a sole arbitrator appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch). This ground by the Applicant has no merit and is therefore dismissed.

12. The other ground relied on by the Applicant is that the Arbitrator went beyond the scope of the matter and parties' pleadings to award what was not pleaded for; that is the 14% interest. Under section 35(2)(iv) of the *Arbitration Act* the court can set aside an award if it ".... 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..."

13. In his statement of claim dated 28th May 2021, the Respondent sought interest at the commercial bank rate. However, the Arbitrator awarded interest at a rate of 14%. It should not be lost that interest is meant to compensate a party for having been kept out of its/his funds or property for some time and not meant to enrich such a party or punish the opposing party (See Ministry of Environment and

Forestry v Kiarigi Building Contractors & another ML Misc. Civil Application No. E320 of 2019 [2020] eKLR).

14. Under Rule 90(j) of the Arbitration Rules, an Arbitral Tribunal has jurisdiction, "To award simple and compound interest on any sum from and to any date, at such rates and with such rates as it decides to be appropriate." This provision grants the tribunal discretion to award interest at such a rate as it deems fit and there is no requirement that the same has to be pleaded for it to be awarded. In awarding interest at a rate of 14%, I am satisfied that the Tribunal exercised discretion properly and I find no reason to interfere or set aside the interest awarded as the same was on the principal sum and was not otherwise "compound"(see Kay Construction Limited v Kenya Rural Roads Authority [2022] KEHC 16508 (KLR).

15. I therefore find that the Arbitrator did not go beyond his scope when he awarded interest at a rate of 14% even though the same was never pleaded. The summation of this finding is that the Applicant's quest to set aside the Award collapses in its entirety at this point. Turning to the Respondent's application and as stated, he laments that the Award went against public policy as the Arbitrator failed to consider the evidence before him in regards to what consisted of the 60% interest of the overall profit obtained from the exportation of the produce an error that had to be corrected. Additionally, that the Arbitrator stating that the Applicant did not address the Tribunal on the issue of interest infringed his right to a fair hearing under Article 50 of *the Constitution*.

16. In the Award, the Arbitrator stated that the Respondent did not provide evidence to substantiate its claim for 60% of the interest and that he did not address him on the issue of interest. In short, the Arbitrator made a factual determination based on the evidence before him that he could not award the 60% of the interest sought by the Respondent for lack of evidence and now in essence the Respondent is inviting the court to review this finding. I decline this entreaty as to accede would result in this court exercising appellate jurisdiction. In Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR) the Supreme Court of Kenya quoted with approval the holding of Ochieng J.,(as he was then) 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.

17. In the foregoing, I find that the Respondent's challenge does not raise any public policy issue as contemplated in section 35 of the *Arbitration Act* as this was a factual issue within the province of the arbitral tribunal to resolve. I therefore find and hold that the Respondent has also not met the threshold to warrant the setting aside of the Award.

Conclusion and Disposition

18. In the upshot, both parties' applications are not merited and ought to be dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Angwenyi for the Applicant.

2. Mr. Muhatia for the Respondent.

3. Amos - Court Assistant