Hadar Limited v Housing Finance Company Limited (Arbitration Cause E040 of 2023) [2024] KEHC 12787 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12787 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E040 OF 2023

WA OKWANY, J

OCTOBER 17, 2024

BETWEEN

HADAR LIMITED .... APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED .... RESPONDENT

RULING

1. The Applicant herein, Hadar Ltd, obtained a loan facility from the Respondent (the Bank) to enable it construct houses on its property known as L.R. No. Kikuyu/Kikuyu/Block 1/1253, Kiambu County (hereinafter referred to as the "suit property").
2. By letter of offer dated 19th August 2013, the Respondent approved a loan facility of KES. 113,000,000.00 to the Applicant for the construction of apartments on the suit property.
3. The Bank later issued statutory notices to the Applicant on the basis that there was a default in the loan repayments thus prompting the Applicant to file a suit in the in the Environment and Land Court at Thika being ELC Case No. 845 of 2017. The parties however thereafter entered into a consent on 18th September, 2019 wherein they agreed to refer the dispute to arbitration.
4. QS Walter Aggrey Odundo was, on 19th July 2019, appointed as the Sole Arbitrator to determine the dispute between the parties.
5. The Claimant's/Applicant's case was that the Respondent mismanaged the Claimant's accounts through irregular and unauthorized payments, wrongful entries in the statement of accounts; requiring unnecessary works to be executed under the contract and generally usurping the role of the professionals engaged to supervise the construction and completion of the works thereby leading to not only longer period for loan repayment but also the large amount of the loan through claims for

additional loss and expenses; deducting the withholding tax but failing to remit the deductions to the Kenya Revenue Authority (hereinafter "KRA") thus exposing the Claimant to sanctions by the KRA.

6. The Claimant further alleged that the Respondent breached the provisions of the *Banking Act*, The Prudential guidelines of the Central Bank of Kenya, and other laws; failed to furnish the Claimant with Statements of Accounts for over 4 years; delayed in transferring the deposits that had been made by prospective buyers from the Escrow Account where they had been deposited in compliance the letter of offer to the Loan Account leading to the skyrocketing of the loan amount; misrepresented facts about the Claimant to Equity Bank to which the Claimant had intended to migrate the loan after mistreatment by the Respondent; culminating in the Respondent referring the Claimant to the Credit Reference Bureau for listing.

7. A summary of the Applicant's prayers before the arbitrator were that: -

   a) The Respondent, Housing Finance Company Limited, to pay to the Claimant,

      Hadar Limited KES. 44,780,536.34 in Loan Overpayment dues plus interest at 14% per annum compound up to 1st October, 2020, in the amount of KES. 53,368,846.47, and further interest until payment in full.

   b) The Respondent to refund to the Claimant unauthorized payments from Hadar Accounts amounting to KES. 25,328,404.18 plus interest at 14% per annum compound up to 1st October, 2020, in the amount of KES. 35,447,396.94, and further interest until payment in full.

   c) The Respondent to pay to the Claimant the value lost due to withdrawn bookings for sale amounting to KES. 20,216,666.75 plus interest at 14% per annum compound from 1st October, 2020 until payment in full.

   d) The Respondent to pay to the Claimant the Unremitted Withholding Tax amounting to KES. 6,742,811.20 inclusive of penalties and interest up to 1 October, 2020. Plus, further penalties and interest till payment in full.

   e) The Respondent to pay to the Claimant disputed fees charged on the Claimant amounting to KES. 2,698,999.46 plus interest at 14% per annum compound up to 1 October, 2020, in the amount of KES. 4,990,200.88 and further interest until payment in full.

   f) Cost of the arbitration.

   g) Discharge and release of the tile deed for parcel L.R. No. Kikuyu/Kikuyu/Block 1/1253 which arose from the consolidation of land parcels L. R. No. Kikuyu/Kikuyu/Block 1/51 and Kikuyu/Kikuyu/Block 1/52 that are still held by the Respondent.

8. The Respondent denied the Applicant's claim and Counterclaimed that the Applicant owed it a debt of KES. 146,341,341.00 with interest of 19. 75% per annum until full payment.

9. The Respondent sought orders for the dismissal of the Applicant's claim and for the entry of judgment in its favour for: -

   a) A sum of KES. 95,097,891.95 from 2nd, 3rd and 4th Respondents in the counterclaim.

   b) Costs of the main claim and the Counterclaim.

   c) Interest thereon at the rate of 12% from the date of the filing of this Reply to Amended Statement of Claim and Counterclaim until payment in full.

d) Any other relief the Tribunal deemed fit to grant.

10. In its decision rendered on, the arbitrator made a finding in the Respondent's favour thus triggering the filing of the instant application that is the subject of this ruling.

The Application

11. This Ruling is in respect to the Application dated 30th May 2023 wherein the Applicant seeks, inter alia, orders set aside the Arbitral Award Arbitral Award by Hon. Walter Aggrey Odundo dated 30th March 2023.

12. The Application is supported by the affidavit of Cecilia Wanjiku Kabugi and is premised on the grounds that: -

    a. The Respondent is likely to enforce an award it has acquired, dated 30th March 2023 and signed on 1st April 2023, to the detriment of the Applicant, who has raised serious grounds to set it aside.

    b. The award is obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration and affirm parties' rights is to set it aside. It is replete with illegalities, to wit:

        i. It is inconsistent with the *Constitution* and laws of Kenya,

        ii. It is inimical to the national interest of Kenya, and

        iii. It is contrary to justice and morality.

        iv. The arbitral award also deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration and contains decisions on matters beyond the scope of the reference to arbitration. For instance; HFC in their Counterclaim and submissions had asked for interest of 12% p.a. on the loans allegedly defaulted. The tribunal ignored both the pleadings and the contracts and gave interest at 14% p.a. from a specific date in 2020, 1st October 2020, while the loan accounts started running in 2013.

The Respondent's Case

13. The Respondent opposed the Application through the replying affidavit of its Legal Counsel Hedaya Malesi who averred that by dint of the provisions of Section 10 of the *Arbitration Act* (the Act), this court is precluded from granting the injunctive orders sought to stop the execution of the arbitral award. The Respondent's deponent further averred that the arbitral award did not deal with matters not contemplated by or falling within the terms of reference to arbitration and does not contain decisions on matters beyond the scope of reference to arbitration.

14. The Respondent urged this court to dismiss the application while arguing that it does not meet the threshold set for the setting aside of the arbitral awards.

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

The Applicant's Submissions

16. The Applicant highlighted, in detail, several issues for determination and grounds for the setting aside of Arbitral Award which I will endeavor to summarize in this ruling as follows: -

17. On the claim that the Arbitrator exhibited outright biasness when it denied the 2nd and 4th Respondents in the Counterclaim costs despite the fact that the suit against them in the said Counterclaim was dismissed. According to the Applicant, the Tribunal was biased as it loaded all the costs on the Applicant yet the Respondent also lost a sizeable portion of its claim.

18. The Applicant faulted the Arbitrator for issuing an award that was in conflict with the public policy and the law in Kenya. In this regard, the Applicant contended that the impugned award offends Articles 40 and 46 of the *Constitution* on the right to own property and consumer rights respectively to the extent that the Arbitrator found that Bank could pay out monies to third parties without consulting the account holder. In this regard, the Applicant contended that the Respondent did not exercise due care, diligence and good faith when it paid monies to a third party [Contractor] without informing the account holder. Reliance was placed on the decision in *National Bank of Kenya Ltd v Isaac A. Ogetta* [1999] e KLR, where it was held that: -

> "There must be contractual terms of lending backed up contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely".

19. The Applicant further contended that the Arbitrator decision was against the Doctrine of Privity of Contracts, Social values and legitimate expectation, the *Banking Act* and Prudential Guidelines. Reference was made to the decision in *Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank Limited* [2015] eKLR, where it was held that the CBK Prudential Guidelines are legally enforceable.

20. The Applicant submitted that the impugned award was in conflict with public interest as the Tribunal held that capitalization of interest was acceptable. It was the Applicant's case that while the *VAT Act* empowers the Kenya Revenue Authority (KRA) to appoint withholding VAT agents, such withheld money must be remitted to the Authority and that holding to the contrary, amounted to entertaining an illegality that is not in the interest of the Kenyans.

21. Still, on conflict with public policy, the Applicant submitted that the impugned award raises serious public policy issues, to wit, misrepresentation and undue influence in view of the bank induced it to enter into a contract by offering a lucrative financial plan that dominated its free will or judgment with a cogent hindsight that the project would cost a certain amount of money, only for the figure to rise exponentially midway. The Applicant also claimed that the Tribunal's finding was in conflict with public policy when it held that the bank would pay the certificates directly without consulting the Applicant yet the bank ought to have known, that the amounts remaining in the account were not sufficient for the subsequent certificates. On this issue, the Applicant maintained that the bank failed in its duty of care as a bank as well as contractual duty to pay and debit.

22. It was submitted that the enforcement of the award will contravene the rules of natural justice, is repugnant to justice and morality and flies in the face of public interest.

23. It was the Applicant's case that unless this Court intervenes and sets aside the arbitral award, a dangerous precedent shall be set that allows unscrupulous businesses to regard their business brands in higher priority to their duty to adhere to local laws which is inimical to the national interest of Kenya and highly detrimental to public interest.

24. The Applicant contended that it is reasonably apprehensive that if the Arbitral Award and is not set aside, the agreements in questions will be used to facilitate the enforcement of illegalities and

conduct that is inconsolably and indefensibly injurious to the citizenry of Kenya at very high cost to the Applicant.

The Respondent's Submissions

25. The Respondent highlighted the grounds upon which an arbitral award can be set aside and cited the provisions of Section 35 (2) (a and b) of the *Arbitration Act* (the Act) as read with Section 10 and 32A of the *Act*. It was the Respondent's case that save for the limited instances set out under the Act the Court is estopped from interfering with arbitral matters. Reference was made to the decision in *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2020] eKLR.

26. The Respondent submitted that a critical look at the Application reveals that it is an invitation to this court to sit on an appeal against the arbitral award and in particular to review the factual findings of the arbitrator and arrive at a different decision. The Respondent argued that it is against public policy for this court to sit on appeal against the decision of the arbitrator and that to pursue the Applicant's argument, as proposed, would result in an extension of the scope of section 35 to include perceived wrong inferences of fact made by the arbitrator. Reference was made to the Supreme Court's decision in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR in support of this position.

27. On the Applicant's argument that the award was replete with bias, the Respondent submitted that the said allegation does not meet the threshold set out in *Mistry Jadva Parbat & Co. Ltd v Grain Bulk Handlers Ltd* [2016] eKLR. The Respondent maintained that an award of costs is essentially at the discretion of the court and that the tribunal cannot be said to have been biased by awarding costs to the Respondent who was the ultimate successful party.

28. On the issue of the Tribunal's clarification dated 24th May 2023, the Respondent submitted that it was the Applicant who proposed that its claims, in the reference, be allowed with interest at the rate of 14% per annum from 1st October 2020 and further, that the award of the rate of interest was a factual finding of the tribunal that this court cannot sit on appeal over. The Respondent argued that the Applicant's submissions mainly challenged the factual findings of the tribunal that this court cannot sit on appeal over. Reliance was placed on the decision in *Mahican Investments Limited and 3 others v Giovanni Gaida & Others* NRB HC Misc. Civil Application No. 792 of 2004 [2005] eKLR.

29. It was submitted that bias is not a ground to set aside an arbitral award under Section 35 of the *Arbitration Act*. Reliance was placed on this court's decision in *Mall Developers Limited v Postal Corporation of Kenya* (2014] eKLR for the proposition that the court will only set aside a Final Award delivered by an Arbitrator is if it is satisfied that grounds under Section 35 of the *Arbitration Act* exist.

30. On the challenge on the Tribunal's interpretation of Clause 8 of Special Condition B of the Letter of Offer dated 19th August 2013, the Respondent submitted that even assuming that the said interpretation was wrong, the court cannot interfere with the finding of the tribunal. Reference was made to the decision in *Mahican Investments Limited and 3 others v Giovanni Gaida & Others* NRB HC Misc. Civil Application No. 792 of 2004 [2005] eKLR.

31. Regarding the alleged capitalization of interest, the Respondent submitted that the Applicant had not pointed out the portion of the award allowed the alleged capitalization or the section of the *Banking Act* alleged to have been breached by the finding.

32. On the issue of the rate of interest charged on the loans extended to the Applicant, the Respondent maintained that the interest rate never changed over the course of the various facilities advanced to the Applicant.

33. On the Applicant's challenge over the Tribunal's finding that theApplicant's claim for refund of Withholding Tax was not merited as there was no demand Notice, the Respondent submitted that allowing the claim would have amounted to a breach by the Respondent's duty, under the *Tax Procedures Act*, to withhold taxes and pay taxes on behalf of the Applicant for services rendered.

34. On the issue of the reliability of the Expert Report prepared by the Applicant's expert, the Respondent submitted that admissibility of a document into evidence does not automatically translate to its relevance to the issues in dispute and consequently its reliability.

Analysis and Determination.

35. I have carefully considered the pleadings filed herein, the impugned arbitral award and the parties' respective submissions. I find that the main issue for determination is whether the Applicant has made out a case for the granting of orders to set aside the arbitral award.

36. The court's jurisdiction to determine whether an award should be set aside is circumscribed by section 35 of the *Arbitration Act* which, at the parts material to the Applicant's case, provides as follows:

    35. Application for setting aside arbitral award

        (1) ....

        (2) An arbitral award may be set aside by the High Court only if—

            (a) the party making the application furnishes proof—.........................

            (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(b)the High Court finds that—

                (i) ....

                (ii) the award is in conflict with the public policy of Kenya.

37. Before delving into determining the merits of the application, I find it necessary to set out the jurisdiction of this Court in arbitral matters. The *Arbitration Act* and Rules provide for both the substantive and procedural manner in which arbitral matters are to be dealt with. The role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the Act. Section 10 of the *Act* provides that: -

> " Except as provided in this Act, no Court shall intervene in matters governed by this Act".

38. The above section reveals that the jurisdiction of the Court is restricted and may only be invoked in very clear circumstances specified under the Act. Section 32A of the *Act* further provides: -

> " Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act".

39. The restriction on the jurisdiction of this Court on arbitral matters is founded on the fact that arbitration arises purely as a matter of agreement between parties when parties agree, upfront, that their disputes will be settled by an arbitrator, and not by the national courts. The parties also agree to accept the arbitrator's view of the facts and the meaning of the contract between them. For this reason, courts will not sit to hear the claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. This is the party autonomy that is embedded in the *Arbitration Act*.

40. The above position has been reiterated by the courts in several cases. In *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2020] eKLR, the Court of Appeal rendered itself thus: -

> "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".

41. 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".

42. It is against the above backdrop that this Court will examine the instant application. I wish to begin with the main ground raised by the Applicant that the award was contrary to public policy.

43. The issue of public policy was extensively discussed in the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, where the court held: -

> "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 public policy of Kenya if it is shown that it was either (a) inconsistent with the *Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality".

44. In the above case, the court adopted the Indian position set out by the Supreme Court of India in the case of Renusagar Power Co. v General Electric Co. AIR [1994] S.C 860, wherein it was held that in order to succeed in an application for setting aside an arbitral award on the grounds of public policy, an applicant must establish that the award is contrary to fundamental policy of Indian Law, violation of India's laws and further that the enforcement of such an award would be contrary to justice and morality.

45. In the present case, the applicant contended that the award was contrary to public policy because of several grounds: the Applicant contended that the award is contrary to public policy as it contravenes Articles 40 and 46 of the *Constitution* on the right to own property and consumer rights. According

to the Applicant, the Arbitrator made findings that amounted to the ratification of the payments that the Respondent made to third parties who were not parties to their contract the Applicant's. The Applicant also faulted the Arbitrator for holding that capitalization of interest was acceptable.

46. The Applicant added that the award raises serious public policy issues such as misrepresentation and undue influence while arguing that the bank induced it to enter into a contract by offering a lucrative financial plan that dominated its free will or judgment with a cogent hindsight that the project would cost a certain amount of money, only for the figure to rise exponentially midway. The Applicant also claimed that the Tribunal's finding was in conflict with public policy when it held that the bank would pay the certificates directly without consulting the Applicant yet the bank ought to have known, that the amounts remaining in the account were not sufficient for the subsequent certificates.

47. The Applicant also faulted the Tribunal for biasness because it denied the 2nd and 4th Respondents in the Counterclaim costs despite the fact that the suit against them in the said Counterclaim was dismissed.

48. I have considered the grounds set out by the Applicant for assailing the Award which I have already highlighted in this ruling and I note that the said grounds read and sound like the ordinary grounds of appeal as they mainly speak to the merits of the Award. It is noteworthy that all the issues raised in the application deal with the appreciation of the evidence that was presented before the Tribunal. The gist of the case before the Tribunal was whether the Applicant had defaulted in the loan repayments, and to what extent, as it was not disputed that the Applicant had secured a loan from the Respondent to enable it construct houses.

49. It is trite an an arbitral tribunal has the authority and latitude to interpret an Agreement, the parties' arguments and evidence in a manner which makes the Agreement more effective, without re-writing the Agreement (see Equity Bank Limited vs. Adopt a Light Limited ML HC Misc. Application 435 of 2013 [2014] eKLR). This means that the Arbitrator in this case was entitled to review the evidence and come to his own conclusion and even if that conclusion was wrong as the Applicant suggests or even if this court may take a different view of his findings.

50. It is now settled that section 35 of the *Arbitration Act* was never meant to elevate the court to sit as an appellate court in arbitration matters. It is also trite that the arbitrator is the master of facts and the court must resist the temptation to become an appellate court. This is the position that was adopted in Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR where the Court of Appeal cited, with approval, the following dicta by Steyn LJ., in Geogas S.A v Trammo Gas Ltd (The "Baleares") 1 Lloyds LR 215:

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

51. As to whether the Award is contrary to public policy, reference is often made to the decision of Ringera J., (as he was then) in Christ for All Nations v Apollo Insurance Co Ltd ,(supra) where the learned

judge explained the scope of public policy as a ground for setting aside an arbitral award and recognized that not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. He added that:

> “ [I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the *Arbitration Act*.”

52. In Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR, the Court underscored the same principle and observed that:

> “ Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy. “[Emphasis mine]

53. In the instant case, I find that the Applicant liberally applied the term ‘contrary to public policy’ to challenge every single factual conclusion/finding by the Arbitrator that they did not agree with, which, to my mind, brings this application to the realm of an appeal. I find that the Arbitrator’s conclusions of fact cannot be elevated to matters of public policy because the Applicant or the court could have arrived at a different determination. It is my view that the Applicant’s argument that the Respondent’s actions had the effect of depriving it of its right property is a factual issue on which the Arbitrator held a different view. I find and hold that the Applicant has not demonstrated how the Award was inconsistent with the *Constitution* or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality.

54. Turning to the issue of alleged biasness by the Arbitrator on account of his failure to grant costs to the Respondents in the counterclaim, I find that it is trite that an award of costs is a matter that falls on the discretion of the court and therefore the mere fact that costs were not awarded to a party cannot be a ground for the setting aside of an award.

55. I find that the Arbitrator considered the issues raised by the parties, analysed their arguments, submissions and evidence and made a finding on the said issues based on his understanding and appreciation of the material before him.

Disposition

56. For the reasons that I have stated in this ruling, I find that the Application dated 30th May 2023 lacks merit and I therefore dismiss it with costs to the Respondent.

57. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE