Attorney General & another v MA Consulting Group Limited (Miscellaneous Civil Application E551 of 2021) [2023] KEHC 1988 (KLR) (Civil) (2 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1988 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION E551 OF 2021

JN MULWA, J

MARCH 2, 2023

BETWEEN

ATTORNEY GENERAL ..... 1ST APPLICANT

MINISTRY OF AGRICULTURE LIVESTOCK & FISHERIES .... 2ND APPLICANT

AND

MA CONSULTING GROUP LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect of the Attorney General's Notice of Motion dated 21st July 2022; whereof the Applicants seek orders that: -

    1. Spent.

    2. That this court be pleased to review its order/ruling dated 23rd June 2022

    3. That this Honourable Court be pleased to set aside/vary the decree issued on the 18th of July 2022.

    4. That costs of the application be provided for.

2. The application is based on provisions of Order 45 Rule 1 and Order 21 Rule 8 of the *Civil Procedure Rules*, Sections 80 (a), 1A, 1B, and 3A of the *Civil Procedure Act* other enabling provisions of law; and further upon grounds appearing at the face of the application that: -

    a. The said order/ruling dated 23rd June 2022 has a mistake apparent on its face in that the application before court was for enforcement of the award and the prayers granted thereto are contrary to the orders granted in the adopted award.

b. The decree issued on 18th July 2022 was never granted to the Applicant herein for review and the same contains errors apparent on the record in that the terms thereto do not tally with the Orders in the award being recognized and also erroneously indicate that the Ruling was delivered on 10th February 2022 as opposed to 23rd June 2022.

c. The said errors import ambiguity into the Order/Ruling and Decree with the result that the Respondent/Applicant herein may be forced to satisfy a decree that is erroneous.

d. In the circumstances, it is only fair just and equitable that this court does allow the application.

3. In addition, it is further supported by an affidavit sworn on the 21st July 2022 by Mary Murugi, an Advocate/State Counsel having conduct of the subject matter on behalf of the Applicants.

4. In response to the motion, the Respondent M. A. Consulting Group filed a replying Affidavit sworn on the 22nd of July 2022 by Ngure Mwaniki its Managing Director. Parties tendered oral arguments to buttress their respective rival positions.

Ms Murungi appeared for the Applicants while Mr Otiende appeared for the Respondent.

5. The court has carefully considered the grievances raised by the Applicants and the responses by the Respondent in respect to the recognition and adoption of the Arbitration award dated 28th July 2020. The only issues arising therefrom in my considered view are two fold:

i. Whether the court can interfere with an Arbitration Award that has been recognized and adopted as a judgment of the court by way of a review order under Order 45 of the Civil Procedure Rules, 2010.

ii. Whether the decree as drawn has errors and if so, whether the cited errors are sufficient to pursuant the court to interfere with the Arbitration award by setting it aside.

Analysis and Determination

6. It is the Applicants' argument that the Arbitral Award did not award costs for the arbitration and thus, by this application seeks a review to vary the award and costs to the Applicants, in terms of prayer 3 (d) of the application dated 20th September 2021 whereupon a ruling was delivered on the 23rd June 2022.

7. For ease of reference, prayer 3 (d) was crafted as follows:

" That the Respondents to pay the Applicant the awarded costs of the Arbitration as follows:

i. Costs of hire of the venue, Kshs 20,000/-

ii. Appointment fee of an Arbitrator; Ksh 15,000/-

iii. Arbitrator's fees: Kshs 355,000/- plus interest at prevailing court rates from 28th July 2020 until payment in full.

iv. Costs of writing the award – Kshs. 120,000/- plus interest at the prevailing court rates from 28/7/2020 until payment in full.

8. In the impugned ruling of 23rd June 2022, paragraph 5, the court captured the final award made by the sole arbitrator on the 28th July 2020; and specifically in the matter of costs of the arbitration and apportionment to each of the parties to the arbitration.

That is the Order that the Applicants seek an order of review, to vary and/or set aside.

9. The Applicants state that the said order had an apparent mistake on its face in that the application before the court was for enforcement of the award and therefore the prayers granted were contrary to the award that was adopted by the court – see paragraph (9) of the prayers in the present application.

10. At paragraph 6 of the supporting affidavit to the application, the deponent, Mary Murugi, an Advocate and State Counsel deponed clearly that she did not oppose or object to the recognition of the Arbitral Award as there was no application filed to set it aside; but later discovered an error that she pointed out to the Respondent's Counsel; (and not to the court) before the hearing of the application dated 20th September 2021.

    She further deponed at paragraph 9 that the court was only bound to recognize the award as it did not tally any orders thereto and the decree should have been in conformity with the award.

11. It is to be noted here that the Applicants withdrew their Preliminary Objection dated 21st February 2022 upon the Respondent filing a complete award which she read, considered and did not object – paragraph 5 and 6 of the supporting affidavit.

    Further, the Applicant's Advocate argued that the arbitration award did not provide for costs, and citing prayer 3(d) cited in full above, that the arbitrator did not award costs, and therefore the court ought to award costs; and further that the decree as drawn awarded costs that were not awarded by the court.

12. For the Respondent, three issues were put forth both in the replying affidavit and in the oral arguments: -

    i. That an arbitral award is final unless set aside by the court upon application.

    ii. That this court lacks jurisdiction to review or vary the award under provisions of Order 45 of the Civil Procedure Rules; and

    iii. That the court is functus officio.

13. Reliance who placed under Sections 10,32(9) and 36 of the *Arbitration Act* to the extent that unless by consent of the parties, the court's hands are tied and cannot interfere with an arbitration award. The Respondent submitted that the court lacks review powers as they are not provided under the Act.

14. In rejoinder, the Applicants submitted that what is sought to be reviewed and varied was not the award, but the court's ruling dated 26/6/2022.

    Several decisions were cited by the Respondents. I have considered them.

15. The Decree and Certificate of Costs arising from the recognition and adoption of the award was drawn and issued on the 18th July 2022. The Applicants complaint over the Decree is that it contains orders that contradict the recognized award at paragraph 3 (c) - in that the Respondents were not awarded costs of the arbitration as the Applicant paid the said fees, evidenced by a discharge voucher attached thereto and marked "MM3" – see paragraph 11 of the supporting affidavit.

16. For the Respondents, it is averred that the Applicants seek to set aside the Decree through the backdoor; that they have not satisfied the legal criteria to vary or set aside the Decree in line with Section 10 of the *Arbitration Act* that bars a court from interfering with matters provided under the Act, citing Sections 32A on the finality of an arbitration award.

17. The Respondents submit that the Applicants having failed to challenge the award before it was recognized, they are barred and estopped from seeking reliefs stated in the application.

18. On the Decree, the Respondents submitted that it is in conformity with the award and the costs thereto relate to costs awarded by the arbitrator and well captured in the award, and further that if there is any discrepancy in the Decree, Rule 7 (3) of Order 21 of the Civil Procedure Rules provides a cure and remedy

19. Section 10 of the *Arbitration Act* provides for the extent of court's intervention in arbitration matters governed by the Act. This is one such matter. It provides:

> That except as provided in this Act, no court shall intervene in matters governed by the Act.

20. By the application before the court, the Applicants invite the court to review and vary or correct errors they claim to be on the face of the arbitration award. That in itself is a contradiction as the court is precluded to intervene; for reasons that at Section 32A, 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.

21. Recourse to the High Court against an arbitral award is provided for under Section 35 of the Act – by application for setting aside for various reasons stated at Section 35 (1) (2) and (3).

The above may be done before the award is recognized and adopted by the court as a judgment. Upon application, the court under Section 37(2) may refuse recognition and/or enforcement of the award. To that extent then, under Section 36 (1) the arbitral award shall be recognized as binding and enforceable subject to provisions of Section 37 above. It is on record by the Applicant, and repeated in court in oral arguments by the Applicants' Advocate that; at paragraph 9 of the supporting affidavit:

> " ...the court was only bound to recognize the award as it is and not vary any orders thereto and the decree should have been in conformity with the award."

22. The Applicants have not shown in any manner how the court failed to recognize and enforce the award as it is – see paragraph 7 above – where the orders by the sole arbitrator are repeated, as well as the court's ruling dated 23rd June 2022 at paragraph 5.

In any event, if such errors existed, the Applicants ought to have approached the court by application for setting aside of the award under Section 35 prior to its recognition by the court vide the impugned ruling. I must state here that during the oral arguments before the court on the 27th of July 2022, Ms Murungi for the Applicants told the court that she had no problem or objection with the arbitration award being recognized, and in-fact withdraw her earlier preliminary objection dated 21st February 2022 filed in opposition to the application for recognition and enforcement of the award; on the 23rd June 2022; leading to the court's ruling whereof the award was recognized and enforced as it is.

23. In the case *Acorn Properties Limited Vs Eng. Isaac Gathungu Wanjohi & 2 others* (2021) eKLR, in similar circumstances, the court held that:

> " Thus, our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award and the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration....."

24. Application of Order 45 of the Civil Procedure Rule and Section 80 of the Act are not permitted in Arbitration proceedings as the *arbitration Act* is a self-contained statute.

Section 35 cures errors and mistakes that may be found in the final arbitration award; and a party is permitted to invoke Section 35 to cure such errors; but before the said award is adopted as a judgment of the court. Power of review under Order 45 Civil Procedure Rules is therefore not applicable in arbitration matters.

25. The court in *Goodison Sixty-One School Limited Vs Symbion Kenya Limited* (2017) eKLR held that:

> "…….all provisions including *Civil Procedure Act* and the Rules do not apply to arbitral proceedings because Section 10 of the Act makes the *Arbitration Act* a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act*".

It is therefore clear that under Section 10 of the Act, the High Court has no Jurisdiction to intervene and confer upon itself the powers to review its decision. That also applies to provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*.

26. The same holding was earlier held in the case *Nyutu Agrovet Limited Vs Airtel Networks Limited* (2015) eKLR, and the Supreme Court of Kenya on the same matter: *Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited & 2 others* (2019) eKLR where it reiterated that:

> "By agreeing to submit disputes to arbitration, a party relinquishes its courtroom rights….. (including the appellate process) in favour of arbitration with all of its well- known advantages and drawbacks"
>
> and further that Section 32A captures in principle that:
>
> "except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it…."

27. On the matter of the Decree issued on the 18th of July 2022, the court makes observations that the Decree is not part of the Arbitral award as it was drawn after recognition of the award. A careful perusal of the orders on costs at paragraph 5 of the award shows that the Arbitrator provided costs payable to each of the parties thereto and by which party, and the amounts so payable.

If there are errors on the decree as drawn and issued by Deputy Registrar of the court, that is a matter to be taken up by any of the parties for correction in line with provisions of Section 99 of the *Civil Procedure Act*.

28. However, this must not touch on the arbitral award on costs as captured at paragraph 5 of the impugned ruling and at the tail end of the Arbitral Award. In *Republic vs Advocates Disciplinary Tribunal Exparte Apollo Mboya* (2019) eKLR; and *Republic vs Exparte Josphat Sirma & 2 Others* (2019) eKLR, the courts held, and is the law that,

> Corrections e.g. year, month, date is but an error of omission and must be self-evident; that clerical or arithmetical mistakes in judgments, decrees or orders are corrections that do not have any effect on the judgment.

29. Parties are advised accordingly.

Consequently, I find no merit in the Applicants' application dated 21/7/2022. It is dismissed in its entirety with costs to the Respondent.

Orders accordingly.

DELIVERED, DATED, AND SIGNED AT NAIROBI THIS 2ND DAY OF MARCH 2023

J. N. MULWA

JUDGE