



Dodhia & 2 others v Azdah Enterprises (K) Ltd & 2 others (Commercial Case 429 of 2018) [2023] KEHC 2443 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 429 OF 2018
DAS MAJANJA, J
MARCH 17, 2023**

BETWEEN

**MANSUKHLAL PREMCHAND DODHIA 1ST PLAINTIFF
PARIT MANSUKHLAL DODHIA 2ND PLAINTIFF
PIRTIBALA MANSUKHLAL DHODIA 3RD PLAINTIFF**

AND

**AZDAH ENTERPRISES (K) LTD 1ST DEFENDANT
TAUSI INDUSTRIES (K) LTD 2ND DEFENDANT
OSHWAL ALUMINIUM INDUSTRIES LTD 3RD DEFENDANT**

RULING

Introduction and Background

1. What is before the court for determination is the plaintiffs' chamber summons dated June 24, 2022 made under section 36 of the *Arbitration Act*, 1995. It seeks to enforce an award published on December 7, 2021 ("the Award") by Dr Kairiuki Muigua ("the Arbitrator") where the plaintiffs were awarded *inter alia* Kshs 86,660,100.00 with interest at 12% per annum from the date of publishing the Award until payment in full, Kshs 2,184,897.50 being legal costs for the arbitration proceedings with interest at 12 % per annum from the date of publishing the Award until payment in full and the Arbitrator's fees.
2. The application is supported by the affidavit and supplementary affidavit of Enock Otieno, the advocate on record for the Plaintiffs, sworn on June 24, 2022 and September 12, 2022 respectively. It is opposed by the Defendants through the replying affidavit sworn by their Director, Shantalal Gunasekra on July 18, 2022. To further supplement their arguments, the parties have also filed written



submissions which together with the pleadings, I have considered in my analysis and determination below.

Analysis and determination

1. The recognition and enforcement of arbitral awards is governed by sections 36 and 37 of the Arbitration Act. Section 36 confirms the binding nature of a domestic arbitral award and requires a party seeking enforcement to furnish to the court either the original arbitral award and the original arbitration agreement or their certified copies thereof. Section 37 of the Arbitration Act sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award and provides, in the part relevant to this determination, as follows:

37. Grounds for refusal of recognition or enforcement

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

.....

(ii)

(iii)

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

(v)

(vi)

(b)

(2)

4. The Defendants oppose the Award and pray that the application for its recognition and enforcement be dismissed on the sole ground that the Arbitrator made reference and indeed relied on agreements dated October 6, 2013 and January 12, 2014 in writing the Award which said agreements did not bear any arbitral clause and were not adopted as part of the agreement dated March 17, 2014 which bears the arbitral clause. They contend that of the other agreements did not fall within the dispute



contemplated in the arbitral clause. The Defendants complain that the Award also contains decisions on matters beyond the scope of the reference to arbitration as the dispute to be referred to arbitration as per the arbitral clause was only with respect to the payment of the balance of the purchase price yet the Arbitrator went ahead to pronounce itself on the entire purchase price agreed upon by parties notwithstanding that the claimant therein had acknowledged receiving the deposit of the purchase price and that the acknowledgment was indeed a term of the Agreement.

5. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No 71 of 2016 [2020] eKLR observed as follows:

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

6. The primacy of the arbitration clause was also underlined by the court in *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* ML HC Misc Application No 129 of 2014 [2015]eKLR where the court held that the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law (see also *Joma Investments Limited v NK Brothers Limited* [2018] eKLR). The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether the issues raised by an opponent are contemplated by the agreement or fall within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in an arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract.
7. It is not in dispute that by an agreement dated March 17, 2014 (“the Agreement”), the Plaintiffs agreed to sell their shares in the 3rd Defendant company to the 1st and 2nd Defendants at the agreed price of Kshs 190,000,000.00. Kshs 42,500,000.00 and Usd 700,000 was to be paid on signing the Agreement while the balance of the purchase price, Kshs 50,000,000.00 and Usd 500,000 was to be paid within fourteen (14) days of successful registration of a Charge in favour of Bank of Baroda Kenya Limited. It is also not in dispute that Clause 9(a) of the Agreement provided as follows:

All disputes and questions whatsoever which shall arise between the parties hereto touching this agreement or relating to the rights and liabilities of either part hereto shall be referred to the decision of a single Arbitrator who shall be an Advocate of not less than 20 years standing to be appointed by the Chairman for the time being of the Law Society of Kenya in accordance with the provisions of the *Arbitration Act* or any Act amending or replacing the same.

8. Following consent order recorded in court on March 13, 2019, the court referred the dispute to arbitration. Pursuant to the arbitration clause, the Arbitrator was appointed as the sole arbitrator by the President of the Law Society of Kenya to determine the parties' dispute.



9. In the Award, the Arbitrator observed that the Plaintiffs claimed that during negotiations, the parties agreed that they would prepare two separate agreements which were to be executed by the advocates for purposes of formalities to obtain credit facilities from the bank. That they signed the Agreement in good faith acknowledging receipt, in advance, of payment of the 1st instalment to enable the 1st and 2nd Defendants process the facility from the Bank of Baroda Ltd which the Plaintiffs believed would, if successful, settle the whole purchase price. The Plaintiffs further contended that they executed and released to the 1st and 2nd Defendants completion documents in relation to the suit property and the shares to be purchased to enable the 1st and 2nd Defendants' Bank process the financial facility from Baroda Kenya Limited. That they in good faith, resigned from their positions in the 3rd Defendant upon executing the Agreement and handed over the suit property, plant and machinery together with stock to the 1st and 2nd Defendants. The Plaintiffs thus claimed that out of the cumulative contractual amount of Kshs 197,650,000.00 there was due an outstanding amount of Kshs 88,060,300.00 yet to be paid to them by the 1st and 2nd Defendants. The Plaintiffs contended that the Agreement was predicated on lies, misrepresentation and fraud and that the 1st and 2nd Defendants had no intention of fulfilling their duties and obligations under the Agreement and they further contended that the Defendants failed to honour a payment schedule that they had proposed through their advocates.
10. In their response, the Defendants stated that they were strangers to any preliminary agreements namely one dated October 6, 2013 and a memorandum of understanding dated January 12, 2014 and that there was only one agreement, that is, the Agreement for the transfer of shares. Since the issue of the preliminary agreement and memorandum of understanding was disputed, the Arbitrator listed it as one of the issues for determination and also determined its import, if any, on the Agreement. Both parties submitted on this issue in their final written submissions before the Arbitrator.
11. Considering the issues raised by the parties before the arbitral tribunal against the arbitration clause, I cannot fault the Arbitrator for making a determination on the validity and import of the other agreements to the Agreement. I note that the arbitration clause is elastic and accommodates ancillary matters that tend to touch on the Agreement.
12. According to the pleadings and evidence, the agreements, which were part of the Plaintiffs' case, touched on the Agreement and were relevant to the determination by the Arbitrator. Before proceeding for trial both sides framed issues for determination. The Plaintiffs issue was, "Whether the agreements dated October 6, 2013 and the Memorandum of Understanding dated January 13, 2014 are valid agreements." On the same subject the Defendants framed several issues, "Whether there was a contract(s) between the Claimants and the 1st and 2nd Respondents; How many contracts if at all were entered as between the Claimants and the 1st and 2nd Respondents; Whether there was breach of any of the terms of the contract(s)." Having consolidated the disparate issues, the Tribunal framed four issues for determination. First, whether there was a valid contract(s) between the Claimants and the 1st and 2nd Respondents. Second, whether there was breach of the contract(s) by either party. Third, are the parties entitled to the reliefs sought in the Statement of Claim and memorandum of Response and last, who bears the costs of these proceedings.
13. The Defendants, having acquiesced to the determination on the nature, extent and effect of the agreements by making submissions thereon, cannot now claim that the Arbitrator made a determination on an issue not falling within the scope of reference or that he made a determination not contemplated by the parties. From the arbitration clause in the Agreement, the parties indeed contemplated that issues touching the Agreement would be subject to the arbitration and thus, the preliminary agreement and memorandum of understanding, having a connection to the Agreement, were rightly within the scope of the Arbitrator's mandate and reference by the parties.



14. The subject of the agreements was raised by both sides and the Arbitrator proceeded to determine the case based on the subject agreements. The Arbitrator had the authority to interpret the Agreement and the law, together with the other agreement and all the ancillary documents. The Arbitrator in making the determination was entitled to make findings of fact and law as that was within his province and this court cannot intervene merely because it would have reached a different conclusion or because the arbitrator made an error of law as this is not an appeal on the merits of the Award. As the court observed in *Mabican Investments Limited & 3 Others v Giovanni Gaida & 80 Others* [2005] eKLR, ‘A court will not interfere with the decision of an Arbitration even if it is apparently a misrepresentation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the [Arbitration] Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.’
15. Having considered the Award, I cannot say that he ventured on a frolic of his own to determine issues outside the Agreement and his scope as the issues raised and determined fell within the four corners of the arbitration clause. As a result of the findings I have made, I do not find any other valid reason for the court to refuse to recognize and enforce the Award. The Award and the arbitration agreement are common to the parties and have been furnished to the court in accordance with section 36(1) of the *Arbitration Act*.

Disposition

16. For the foregoing reasons, I allow the Chamber Summons dated June 24, 2022 on the following terms:
 - a. The Award dated December 7, 2022 and made by Dr Kariuki Muigua (Sole Arbitrator) be and is hereby recognized and entered as a judgment of this court and that leave be granted to the Applicant to enforce the Award jointly and severally against the Defendants.
 - b. The Defendants shall bear the costs of the application assessed at Kshs 100,000.00.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Otieno instructed by Enock Otieno and Company Advocates for the Plaintiffs.

Mr Nyantika instructed by Mogaka Nyantika and Company Advocates for the Defendants.

