



**Loxea Limited (Formerly Tsusho Capital Kenya Ltd) v Vehicle
Equipment and Leasing Ltd (Arbitration Cause E026 of 2022)
[2023] KEHC 2888 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E026 OF 2022
DO CHEPKWONY, J
MARCH 17, 2023**

BETWEEN

LOXEA LIMITED (FORMERLY TSUSHO CAPITAL KENYA LTD) APPLICANT

AND

VEHICLE EQUIPMENT AND LEASING LTD RESPONDENT

RULING

1. There are two applications pending determination in this arbitration cause. The first one is a Notice of Motion application dated March 15, 2022 by Loxea Ltd (for purposes of discussion to be referred to as “the Applicant’s application”) seeking essentially to set aside the arbitral award dated September 30, 2021. The second application which is a Chamber Summons application dated May 20, 2022, is filed by Vehicle Equipment and Leasing Ltd (hereinafter referred to as “ the Respondent’s application) seeks the adoption of the award as the Judgment of this court and for leave to enforce the same.
2. The background upon which the two applications are premised is not controverted by the parties. The two parties entered into a lease agreement dated November 15, 2013 pursuant to which the Respondent leased the Applicant its 480 motor vehicles and the Applicant proceeded to lease them to the Government of Kenya for use by the National Police Service. Subsequently, a dispute arose between the parties as to extension of the lease and return of the motor vehicles upon expiry of the lease term. According to the Respondent, the Applicant had breached the terms on the return of the motor vehicles and the condition in which the vehicles were to be returned. Consequently, the dispute was referred for arbitration and upon considering the evidence by both parties, the tribunal decided in favour of the Respondent.
3. The Applicant was unhappy with the award and hence filed the Notice of Motion application dated March 15, 2022 under Sections 35(2)(a)(iii),(iv) and Sections 35(2)(b)(ii) of the *Arbitration Act, 1995*,



Rule 7 of the [Arbitration Rules, 1997](#) and Articles 50 (1) of the [Constitution of Kenya, 2010](#). The application seeks the following orders: -

- a. The following parts of the Final Arbitral Award dated September 30, 2021 published by Mr John Ohaga, SC sitting as sole Arbitrator in the arbitration proceedings between the Applicant and Respondent be set aside, namely;
 - i. The holding at paragraph 301 of the Award that the principle of law regarding award of damages applied in the case of [Strand Electric Engineering Co Limited -vs- Brisford Entertainment Limited](#) was applicable to the dispute between the parties.
 - ii. The findings at paragraphs 303 and 304 of the Award that the re-computed sum of Kshs 507,096,445.34 was due to the Respondent as damages for breach of contract on account of the Applicant's failure to return the vehicles within a reasonable period after expiry of the agreement.
 - iii. The finding at paragraph 349 of the Award that the Respondent shall be entitled to 75% of the costs of the Reference as well as the costs of the Award.
 - b. In the alternative, the part of the Final Arbitral Award dated September 30, 2021 published by the Hon Arbitrator, Mr John Ohaga, SC in the arbitration proceedings between the Applicant and Respondent which at paragraphs 303 and 304 of the Award contains the findings that the re-computed sum of Kshs 507,096,445.34 was due to the Respondent for breach of contract on account of the Applicant's failure to return the vehicles within a reasonable period after expiry of the agreement as well as that award of 75% of the costs in favour of the Respondent be set aside;
 - c. The issues of the amount of damages, if any, the Respondent, is entitled to consequent upon the finding of breach of contract by the Applicant as well as the appropriate award of costs be remitted to Mr John Ohaga, SC for re-determination after receiving submissions form the parties in light of the findings in the award;
 - d. Such other relief as this Honourable Court may deem fit and just to grant;
 - e. The costs of and occasioned by this application be provided for. The Respondent shall bear the costs of this application.
4. The Applicant's case as depicted in the grounds adduced in support thereof which are further explicated in the affidavit of Erwan Catto, the Applicant's Managing Director. According to the Applicant the Chartered Institute of Arbitrators appointed Mr John Ohaga, SC as the sole arbitrator to determine the sole dispute between the parties after they had failed to agree on the Arbitral tribunal. Thereafter, the Respondent filed the respective claim vide an amended statement of claim dated September 12, 2019 whereas the Applicant opposed the claim in its response dated February 26, 2020 but subsequently amended the same on November 4, 2020. Each side called its witnesses. Upon close of the parties' cases, the tribunal communicated the issues for determination on April 20, 2021 and parties filed submissions on the same.



5. Upon delivery of the final award, the Applicant avers that it was perplexed by the finding at Paragraph 303 of the award in which the tribunal had adopted a schedule referred at Paragraph 299 of the final award to compute the dates for purposes of awarding the Respondent damages in the sum of Kshs 507,096,445.34 notwithstanding that the tribunal had rejected the same schedule in Paragraph 286 of the final award. Then vide a letter dated November 22, 2021, the Applicant applied for correction and clarification on computation of the damages in view of the glaring error in the mentioned paragraphs of the award. The tribunal responded to the request on January 24, 2022 vide a decision dated January 14, 2022 declining the request to correct the award but explained that in arriving at the award, the tribunal adjusted the date difference and did the re-computation.
6. The Applicant has averred that by such response in the decision dated January 14, 2022, the tribunal denied it a chance to present its case and be heard on the finding at Paragraph 303 of the Final Award. According to the Applicant, the tribunal ought to have granted it a chance to be heard on the its concerns in the letter dated November 2, 2021 just as it did when it granted the parties an opportunity to submit on the proper contractual approach to contractual interpretation in light of the decision in [Strand Electric Engineering Co Ltd -vs- Brisford Entertainment Ltd](#) and the nature of special damages way after the delivery of the final award.
7. It is the Applicant's contention that had it been granted opportunity to submit on Paragraph 303 of the award, it would have argued that the Respondent's claim was only restricted to damages for conversion, breach of contract and continued use of the motor vehicles but not damages for detinue; that the reliance of the decision in [Strand Electric Engineering Co Ltd -vs- Brisford Entertainment Ltd](#) which informed the award of damages was not a matter before the tribunal, that the schedule which the Honourable Arbitrator relied on in calculation of the damages was not restricted to the market rate for hire of the motor vehicles as it contained two other additional heads for insurance and maintenance which were not within the lease agreement and not within the dispute referred to arbitration, that having rejected the date upon which the Respondent had charged breached of contract on the Applicant, the tribunal was under no obligation to determine a different return date other than the one asserted by the claimant; thus in determining a different return date, the tribunal had addressed a dispute not before it. Also, it was the deponent's averment that although under Paragraph 286 of the award, the Arbitrator held that the special damages claim had to be specifically pleaded and specifically proven, it was against public policy for the Arbitrator to adopt the principle of restitution in integrum at Paragraph 302 while determining the special damages awardable. All in all, the Applicant avers that the failure to be accorded a chance to be heard further denied it a right to a reasoned award.
8. The Respondent opposed the application for setting aside the award vide the affidavit of Wang'ombe Gathendu, its Finance Manager sworn on May 19, 2022. Her case is that parties were adequately represented by counsel in the arbitration, starting from filing of the necessary pleading all through to the final highlighting of submissions on August 4, 2021 before the Arbitral Tribunal. She added that under Paragraph 295 of the final award, the Tribunal reiterated an interim award it had made on the June 18, 2019 in favour of the Respondent directing the Applicant to refurbish the vehicles and return them to the Applicant. Further, that under Paragraph 297 of the Final award, the tribunal was clear that the basis for the award of Kshs 507,096,445.34 as damages was breach of contract and the award was compensatory for the loss and or injury suffered. She clarified that the basis for acceptance and reliance on the case of [Strand Electric Engineering Co Ltd -vs- Brisford Entertainment Ltd](#) was limited to acceptance of the principle that damages on breach of contract in the present dispute were the market rate of hire regardless of whether the Defendant made a profit from the use of the goods.
9. The Deponent added that the Tribunal had granted the parties numerous opportunities to comment on the award of damages and the schedules to be adopted in calculation of damages. More specifically



during the highlighting of submissions on August 4, 2021, the parties made applications vide their letters dated November 22, 2021 wherein they sought clarification on computation of the Final award pursuant to Sections 34(1)(2) of the *Arbitration Act*. Following the request, the tribunal vide a letter dated November 23, 2021 invited the parties to submit their respective comments on the request for clarification within fourteen (14) days. That although the Respondent communicated through its letter dated December 6, 2021 that it would not be making any comments, the Applicant canvassed its comments and submissions vide a letter dated December 10, 2021 and it would be ingenuine for the Applicant to assert that it was not heard on the issue.

10. Further, among other things, the deponent averred that the Respondent's claim was for determination on whether the Applicant had wrongfully detained the vehicles and prayer for wrongful detention was tantamount to detinue. That the tribunal was at liberty to rely on any material evidence introduced by the parties including the judicial cases relied on. More specifically, that the Applicant challenged the reliance on the case of *Strand Electric Engineering Co Ltd -vs- Brisford Entertainment Ltd* case on August 4, 2021 although the same was not a barrier on the tribunal to rely on the said case.
11. The Respondent thus believes that the issues raised by the Applicant in its application were addressed by the tribunal in its decision and final award dated January 14, 2022. Thus, in the Respondent's view, application is a disguised appeal against the decision of the tribunal which is not permitted under Section 35 of the *Arbitration Act*. That in any event, the Applicant has not established any of the grounds listed under Section 35 of the *Arbitration Act* pursuant to which the award can be set aside. The Respondent therefore craves for the application to be dismissed.
12. As earlier mentioned, there are two applications subject of this ruling and having addressed the parties' respective perspectives on the first application, I now turn to the second application. The same is a Chamber Summons application dated May 20, 2022 filed by the Respondent pursuant to Provisions of Section 36(1) of the *Arbitration Act* and Rules (4) and (9) of the *Arbitration Rules*. It seeks for the following Orders: -
 - a. That the Honourable Court be pleased to recognize and adopt the Final Award dated September 30, 2021 and the award on Taxation of costs dated March 28, 2022 published by Mr John Ohaga SC, CARb as a Judgment of this Honourable Court.
 - b. That Judgment be and is hereby entered in favour of the Applicant as against the Respondent in terms of the Final Award published on the September 30, 2021 and the Award on Taxation of costs published on March 28, 2021 by Mr John Ohaga SC, CARb.
 - c. That the Honourable Court be pleased to grant leave to the Applicant to execute/enforce the resultant decree as against the Respondent.
 - d. That costs of this application be provided for.
13. The application is premised on the grounds set out on its face and the affidavit of Wang'ombe Gathondu sworn in support of the application on May 19, 2022. The Applicant's case is that the Arbitrator made a final award on the dispute between the parties on September 30, 2021 and subsequently made assessment on costs in a decision dated March 28, 2022. That the Applicant is indebted to the Respondent in the sums made in those awards and the only way to enforce them is by this court adopting the award as its Judgment. It then sought the court to adopt the award as its Judgment in interest of justice so as to allow it the enjoyment of fruits of a successful litigation.



14. The Applicant opposed the Respondent's application vide its Grounds of Oppositions dated the June 8, 2022 adducing the following two grounds: -
- a. The Chamber Summons dated May 20, 2022 offends the provisions of Section 37(2) of the *Arbitration Act*.
 - b. The application for enforcement and recognition is premature. There is an application seeking to set aside the portion of the Arbitral Award to which enforcement application is made.
15. Directions were issued that the two applications be canvassed together by way of written submissions and as the record bears witness. Both parties complied with the Applicant filing submissions dated June 30, 2022 whilst the Respondent's submissions are dated August 23, 2022. I have thoroughly read through the submissions and established they reiterate the summary of the respective affidavits by the parties tendered above and buttressed with cited judicial authorities. I will not reproduce the same here but will certainly consider the same in the analysis and determination of the applications.

Analysis and Determination

16. Having carefully considered the two applications, the affidavits on record and the submissions made on behalf of the parties as well as the authorities relied on, I find that the issues which have come up for determination are:-
- a. Whether the Applicant has made a case for setting aside the Final Arbitral Award dated September 30, 2021 or any part thereof;
 - b. Whether the Final Arbitral award dated September 30, 2021 and the award on taxation dated March 28, 2022 should be adopted as a Judgment of this court

a. Whether the applicant has made a case for setting aside the arbitral award or any part thereof.

17. Section 35(2) of the *Arbitration Act* No 4 of 1995 sets out the conditions under which an arbitral award can be set aside. The section states as follows:-

“An arbitral award may be set aside by the High Court only

if—

- (a) the party making the application furnishes proof—
 - (i) that a party to the arbitration agreement was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (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

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
 - (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
- (b) the High Court finds that—
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
 - (ii) the award is in conflict with the public policy of Kenya.”

18. A plain reading of the provisions under Section 35 (2) above, leaves no room for doubt that an arbitral award can only be set aside if the conditions specified therein are established. However, in considering the application for setting aside an Arbitral award, the court should at all material times have in its mind that an arbitration is matter of agreement or contract between parties and the court’s mandate does not extend to hearing the claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. Such was the position reiterated with approval by the Supreme Court of Kenya in the case of *Geo Chem Middle East -vs- Kenya Bureau of Standards* [2020] eKLR. In this case, the court observed thus: -

“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”.

19. In the instant case, the Applicant premises its request in seeking the setting aside of the arbitral tribunal majorly on the ground under Section 35(2)(a)(iii) of the *Arbitration Act* by alleging that it was not accorded an opportunity to be heard in its request to present its case on the finding at Paragraph 303 of the award, hence it was unable to present its case. The Applicant has added that it had all the right to seek clarification as it did vide its letter dated November 22, 2021 and the Arbitrator was well enjoined under the Arbitral Rule to render a reasoned decision instead of declining the request by the Applicant. Further, I have understood the Applicant’s contention to be that the Arbitrator ought to have granted parties an opportunity to adduce submissions on their perspective with regard to Paragraph 303 of the Judgment. The Applicant has gone ahead to highlight a line of submissions it would have tendered before the arbitrator had it been granted such opportunity.

20. The parties have submitted on whether indeed the Applicant was granted a chance to be heard and present its request for clarification and be heard with appreciation at length. I have considered those submission as well as considered the Applicant’s letter dated November 22, 2021 seeking clarification.



I find that the letter specifically sought particulars of how the re-computation was actually undertaken resulting to the sum of Kshs 507,096,445.34 for the late return of the motor vehicles. The tribunal responded and made a determination to the application vide a decision dated January 14, 2022. Under Paragraph 50 of the said decision, the tribunal awarded the damages based on breach of contract and the amount was arrived at by adjusting the date difference for return of the motor vehicle as was explained under Paragraph 42 thereof.

21. Under Paragraph 51 of the same decision, the tribunal stated that it invited parties to clarify their positions and set out in detail the particular issues warranting clarification but no response was given by the Applicant. I therefore do not find the basis of the Applicant's allegation that it was not granted an opportunity to tender the submissions it highlighted under ground (2) on face of the application dated March 15, 2022 and Paragraph 16 of the Supporting Affidavit.
22. Since Arbitration proceedings are not confined to and or governed by a strict procedure on how they are conducted, it is my view that the Applicant had a chance to make the submissions and advance its case when the tribunal invited the parties to clarify their positions and set out in detail the particular issues warranting clarification but it chose not to do so. The Applicant can therefore not turn around to cast aspersions on the tribunal while alleging the failure to be granted a chance to be heard.
23. In any event, I have considered the submissions that the Applicant intended to tender before the tribunal. I find it intends to fault the tribunal for adopting a schedule not reflecting the market rate as the same contained schedules for insurance and maintenance. Further, the Applicant has purported that assessing damages for detinue was a matter outside the scope of the arbitration. In my view, detinue connotes a scenario where one wrongfully detains goods of another and the tribunal interpreted the same as a basis for an award of damages for breach of contract. The Applicant does not dispute having breached the lease agreement as the tribunal had found. Thus, in my view, restitution is among the equitable remedies for breach of contract and the Tribunal was therefore justified to order restitution as it did.
24. Having observed earlier that this court's jurisdiction is limited and restricted under the Arbitration Act, I am of the view that the Applicant's application is an invite to re-evaluate the decision of the arbitral tribunal of which the court is under no mandate to undertake. On the same wavelength, it is my conclusion that the allegation by the Applicant that it was not granted a chance to be heard with respect to clarification of Paragraph 303 of the Final Award is untrue. There being no other ground to warrant the setting aside of the Arbitral award in line with Section 35(2) of the Arbitration Act, I proceed to dismiss the Applicant's Application.

b. Whether the final arbitral award dated September 30, 2021 and the award on taxation dated March 28, 2022 should be adopted as judgment of this court.

25. I now proceed to the Respondent's application for adoption of the Arbitral award. I find that the affidavit sworn in support of the application has annexed the final arbitral award and the certified copy of the award on costs. Section 37 of the Act sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award. These grounds are similar to those that warrant the setting aside of an Arbitral award as provided for under Section 35 (2) of the Arbitration Act. Section 36 of the Arbitration Act further states that a domestic arbitral award is to be recognized as binding and, on application to court in writing, it shall be enforced unless the grounds set out in Section 37 are shown.
26. In the present case, I have already found that the Applicant vide its application dated March 15, 2022 failed to establish the existence of any of the grounds that would justify the setting aside of the final arbitral award dated September 30, 2021



27. The arbitral award dated September 30, 2021 and Award on costs dated March 28, 2022 are hereby recognized and adopted as a Judgment of the court and the Respondent is likewise granted leave for purposes of enforcement. Each party shall bear its own costs with respect to the two applications.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF MARCH , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gachuhi counsel for Applicant

Mr. Dachi counsel for Respondent

Court Assistant - Sakina

