



Associated Motors Limited v Sekura International Limited (Commercial Arbitration Cause E045 of 2022) [2023] KEHC 3125 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E045 OF 2022**

DAS MAJANJA, J

APRIL 6, 2023

BETWEEN

ASSOCIATED MOTORS LIMITED APPLICANT

AND

SEKURA INTERNATIONAL LIMITED RESPONDENT

RULING

1. In its Chamber Summons dated 14th July 2022, the Applicant seeks to set aside the arbitral award published on 14th April 2022 by Sanjeev Khagram (“the Arbitrator”) under the provisions of section 35 of the *Arbitration Act*, 1995.
2. The Award ordered the Applicant to pay the Respondent inter alia Kshs 3,690,849.84 with interest thereon being the amount due and owing by the Applicant to the Respondent as at 10th April 2017 for the security services rendered by it to the Applicant. The Applicant was also ordered to pay the Respondent all the costs of the arbitration proceedings and other legal expenses reasonably incurred by the Respondent in pursuing its claim and defending the Applicant’s counterclaim to be agreed by the parties failing such agreement, either party was at liberty refer the dispute to the Arbitrator immediately thereafter for him to make an additional award on costs under section 34(5) of the *Arbitration Act* and that the additional award would, where necessary, deal with interest on costs (“the Award”).
3. The Applicant’s application is supported by the affidavits of its officer, Dorothy Dolo, sworn on 14th July 2022 and 4th August 2022. It is opposed by the Respondent through the Preliminary Objection dated 28th July 2022 and the replying affidavit sworn on the same date by its General Manager, Reuel Kariuki. Both sides filed written submissions to supplement their arguments which, together with the parties’ pleadings, I have considered in my analysis and determination below.



Analysis and Determination

4. The Applicant raises three grounds for impugning the Award. First, that the Award is contrary to the public policy of Kenya and is designed to unjustly enrich the Respondent from its own transgression. Second, the Arbitrator exceeded the scope of his jurisdiction that the Arbitrator grounded the Award on irrelevant and immaterial facts while ignoring all the relevant and material facts. Lastly, that the Award demonstrates evident bias and a lack of consideration by the Arbitrator of the Applicant's evidence and submission of facts and law and that the same is contrary to established principles of law and justice.
5. The Applicant maintains that the Arbitrator failed to decide the substance of the dispute, in particular, the Counterclaim in accordance with the considerations of justice and fairness to its detriment. That the Award is arbitrary, capricious, unjust and failed to do justice to the Applicant. It therefore urges the court to set aside the Award.
6. The Respondent opposes the application on the ground that it is time barred having been filed beyond the 3-month statutory timeline stipulated in section 35(3) of the *Arbitration Act*. This is because the Respondent states that the Award was issued on 14th April 2022 whereas the application was filed on 15th July 2022.
7. On the substance, the Respondent states that Applicant has failed to establish that the Award, in part or at all, is in conflict with the public policy of Kenya. Further, that the Applicant has failed to demonstrate that the Arbitrator was biased, failed to act impartially and independently and/or went beyond the scope of his jurisdiction.
8. The Respondent contends that the application is a disguised attempt by the Applicant to appeal by inviting the Court to consider the facts and evidence of the matter, contrary to the cardinal principle of finality of arbitration. The Respondent submits that the Applicant has made baseless and allegations impugning the character of the Arbitrator. It avers that throughout the course of the proceedings, the Applicant never raised any issue regarding the impartiality and independence of the Arbitrator and that the accusation of perceived bias against the Arbitrator made towards the end of the proceedings was made without any shred of evidence to support such allegations. The Respondent urges that from the commencement to the conclusion of the arbitral proceedings, the Arbitrator was professional, fair, impartial, respectful, considerate and accommodative of both parties.
9. For these reasons, the Respondent urges the Court to dismiss the application on the grounds that it is unprocedural and premature.
10. In response to the Respondent's objection and deposition above, the Applicant states that the Arbitrator sent an email to the parties on 15th April 2022 at 2:27 pm attaching a letter of Notification of Publishing the Award. That it is common knowledge that 15th April 2022 was a Public Holiday (Good Friday) with the next working day being 19th April 2022. That the actual Award was dated 14th April 2022 but was in fact dispatched to the parties on Friday 17th June 2022 and received by the Applicant on Monday 20th June 2022.
11. The Applicant avers that the above notwithstanding, it filed the application on 15th July 2022 which is within 3 months from the date of Notification of Publishing the Award. The Applicant urges the court to take judicial notice that the following Public Holidays were celebrated within the subject period; 15th April 2022 - Good Friday, 18th April 2022 Easter Monday, 29th April 2022 President Kibaki's State Funeral, 2nd May 2022 Labour Day (in lieu), 3rd May 2022 - Eid-UI-Fitr, 1st June 2022 Madaraka Day and 11th July 2022 Eid-al-Adha.



12. The Respondent urges that pursuant to Order 50 Rule 2 of the *Civil Procedure Rules*, the law provides that the time appointed for doing an act falls on a day when offices are closed so that the act cannot be done, the time stands extended until the day when the offices are next open. Thus, the Applicant asserts that its application is not time barred.
13. The Applicant maintains that the Arbitrator was aware that he was actively involved in another heavily contested arbitration proceeding (Arbitration between Unispan Limited (Unispan) v China Zhongxing Construction Company Limited (China Zhongxing) and Norkan Investment Limited (Norkan), wherein he was acting for the claimant therein while two Advocates from the firm of O&M Law LLP who are not involved in these proceedings were acting for the respondent in the said arbitration. That the Arbitrator completely failed to disclose this pertinent fact, which had it been in the Applicant's knowledge, then the Applicant would have either not agreed to the appointment of the Arbitrator or instructed another law firm to act for them in place of O&M Law LLP. The Applicant thus maintains that the Arbitrator was conflicted in the arbitration and this raised doubts about his impartiality and independence.
14. The Applicant thus reiterated and restated that the Award was contrary to public policy of Kenya as the Arbitrator breached the rules of natural justice by not recusing himself from the matter when he was clearly aware that he was engaged in an active arbitration battle with one of the firms representing the parties before him. The Applicant thus maintained that it would be in the interests of justice that the prayers sought in the application be granted.
15. I propose to first deal with the Respondent's objection that the application is time barred having been filed past the 3-month statutory time period provided by section 35(3) of the *Arbitration Act* which states that:

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- (3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award. [Emphasis mine]

16. The meaning of "received" has been expounded by the court in a plethora of decisions that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection (See *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR and *Mercantile Life and General Assurance Company Limited and Another v Dilip M. Shah and 3 Others* [2020] eKLR). The Applicant does not deny this position and averred that the application was filed on 15th July 2022 which is within 3 months from the date of Notification of Publishing the Award, which was on 15th April 2022. It also urged the court to consider the number of public holidays within the subject period in counting the days, in line with Order 50 Rule 2 of the *Civil Procedure Rules* which provides that:

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.

17. The Court of Appeal in *Longinus Oroni Murunga v David Masika Mafumbo* ELD CA Civil Appeal No. 319 of 2013 [2017] eKLR explained the aforementioned provision by stating that Sundays and public holidays are only excluded when the period for doing an act is less than six days. In this case, the



period required for filing the application was obviously more than six days meaning that those Public Holidays cited by the Applicant could not be excluded from the computation of time. In any event, I agree with the Applicant that from the record, the Arbitrator notified the parties of the Award on 15th April 2022. The Applicant, having filed its application on 15th July 2022, was within the statutory timeline as this was the last date within which it ought to have made its application. I therefore find that the Respondent's Preliminary Objection is not merited and is therefore dismissed.

18. Turning to the substance of the Applicant's application, the Applicant first opposes the Award by invoking section 35(1)(2)(b)(ii) of the *Arbitration Act* which provides that the court may set aside an award, if it finds that, "the award is in conflict with the public policy of Kenya". It states that the Arbitrator was conflicted and failed to disclose his involvement in another arbitration between *Unispan Limited (Unispan) vs China Zhongxing Construction Company Limited (China Zhongxing) and Norkan Investment Limited (Norkan)* where the arbitrator was acting for the claimant therein and the Applicant's advocates in the arbitration were acting for the respondents therein.
19. It is firmly established that parties to an arbitration are entitled to a fair hearing. If the Applicant is able to prove conflict, bias and lack of independence by the Arbitrator, I agree it would be against the public policy of Kenya embedded in Articles 48 and 50 of *the Constitution* that guarantee access to justice and a fair hearing. In determining whether an arbitral tribunal is biased, the accepted test has been recited and applied in various cases. In *Philip K. Tunoi & another v Judicial Service Commission & Another* CA Civil Application NAI No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in *Porter v Magill* [2002] 1 All ER 465, where it stated that, "The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased." The Court of Appeal held that in order to found claim of bias, the facts alleged must be specifically alleged and established and that those facts must lead to a conclusion by the public at large of reasonable doubt of fair administration of justice. In short, the test is objective and not subjective (see also *Jan Bonde Nielson v Herman Philipus Steyn & Others* HC COMM No. 332 of 2010 [2014] eKLR, *West Park Limited v Villa Care Limited* [2020] eKLR).
20. Considering the facts laid before the court by the Applicant, I am constrained to agree with the Respondent that there is no nexus between these two cases. There is no indication that the parties or the subject matter in the two cases were the same or that they related to each other in any way. The Arbitrator was also not the tribunal in that matter and was therefore incapable of issuing any decision in favour of any party therein. Further, the fact that the Arbitrator was the opposing advocate in the matter is not sufficient to suggest any bias against the Applicant and none has been proven anyway. This ground is far-fetched and is obviously an afterthought by the Applicant, who admittedly failed to disclose the same during the parties' preliminary meeting in the arbitration, which failure is attributable to the Applicant's Advocate's own lack of diligence on the activities of its firm.
21. The duty to disclose depends on whether the circumstances sought to be disclosed give rise to justifiable doubts about the arbitrator's impartiality and independence (see *West Park Properties Ltd v Villa Care Limited and Another* HCOMM Misc. Civil Appl No, E671 of 2020 [2021] eKLR). In this case I do not find any obligation on the Arbitrator to disclose that he was acting in a matter against the Applicant's advocates when the said matter had no relevance or connection to the present proceedings to which he was the tribunal. Further, since the Applicant's advocates knew or had constructive knowledge that they were involved with the Arbitrator in an unrelated matter, it was upon them to disclose their involvement with the Arbitrator to their client, the Applicant or to the Arbitrator at the preliminary stage, if at all they had any reservation about his appointment. The Applicant's advocates' silence about the Arbitrator during the arbitration meant that they had acquiesced and accepted his



involvement in the matter and they are estopped from now claiming conflict in a matter over a matter they had knowledge, constructive of otherwise. In the end, a reasonable person with knowledge of the facts would not come to the conclusion that the Arbitrator would be incapable of rendering a fair decision. This ground by the Applicant therefore fails.

22. Under section 35(2)(a)(iv) of the *Arbitration Act*, the court may set aside an award if the applicant furnishes proof that, “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”. In this respect, the Applicant argues that the Arbitrator went beyond the scope of his jurisdiction and based the Award on irrelevant and immaterial facts while ignoring all the relevant and material facts evidenced before him. It also accused the Arbitrator of not considering its evidence and submissions and that he considered it counterclaim in a manner that was unjust and unfair.
23. The Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR observed that in determining whether an arbitral tribunal went beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical and that other relevant considerations included and were not limited to the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration (see also *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* ML HC Misc. Application No. 129 of 2014 [2015] eKLR). The scope of arbitration is determined by the arbitration agreement which, at Clause 3 of the Agreement, states as follows:

If at any time any question or dispute or difference whatsoever shall arise between the customer and the company upon in relation or in connection with this contract or anyway otherwise relating to or otherwise relating to or otherwise arising out of this contract such difference shall be referred to arbitration in accordance with the subject to the provisions of the *Arbitration Act* for the time being in force in Kenya. The arbitrator shall be appointed by the parties and failing agreement on this within fourteen days (14) after commencement of the dispute by the chairman for the time being of the Chartered Institute of Arbitrators (Kenya Chapter). [Emphasis mine]

24. It is evident the arbitration agreement above is broad, general and elastic as to the type of questions or disputes that could be determined by arbitration. In the Award, the Arbitrator stated although he directed the parties to file agreed issues or separate Issues in the absence of agreement. Only the Respondent filed its statement of issue. Nevertheless, the Applicant in its written submissions framed three issues for determination. The Arbitrator held that taking into account the issues framed separately by the parties and noting that the parties had empowered him to reorganize or consolidate or frame issues where necessary provided all issues raised are addressed in their entirety, framed the following 11 issues for resolution:
 - a. Did the Claimant render to the Respondent security services under the Agreement and if so, what amounts was it entitled to for such services?
 - b. Did the Respondent discharge its payment obligations to the Claimant as provided in the Agreement? Was it entitled, for whatever reason, to withhold any payments due to the Claimant?



- c. Was the Respondent in repudiatory breach of the Agreement and was the Claimant justified in terminating the Agreement as it did?
 - d. What amount, if any, remains due and owing to the Claimant?
 - e. Is the Claimant entitled to interest and, if so, at what rate and on what basis? What sum, if any, is the Claimant entitled to as interest?
 - f. Is the Respondent entitled to the value of one months' invoice in lieu of Notice?
 - g. Did the Claimant discharge its contractual obligations in rendering the services contracted with due skill and care and in a diligent, competent and professional manner or was the Claimant negligent or in breach of contract in the discharge of its contracted obligations?
 - h. What losses, if any, has the Respondent suffered as a result of the Claimant's actions and is it entitled to recover these?
 - i. Is the Respondent entitled to compensation for loss of customer goodwill?
 - j. Is the Respondent entitled to Interest on the amounts claimed, and if so, at what rate?
 - k. Costs award and allocation.
25. The Arbitrator made a determination on each of the issues and the Applicant has not pointed out which of these aforementioned issues was beyond the Arbitrator's scope of jurisdiction. My reading of its deposition in support of the application leads me to conclude that the Applicant is attempting to re-litigate its case or appeal the same with the hope that the court can come to a different factual conclusion to that of the Arbitrator. However, this is not an appeal and the Arbitrator is the master of facts and sitting as a tribunal, had the authority to interpret the parties' Agreement and the law and that since the Agreement gave him enough latitude to interpret it together with the evidence adduced by the parties in a manner which makes it more effective, without re-writing the Agreement, then the court will accept a genuine attempt by Arbitrator to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties (See *Equity Bank Limited v Adopt a Light Limited* ML HC Misc. Application 435 of 2013 [2014] eKLR and In *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited* NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR).
26. In short, the court cannot make any pronouncement in respect of the factual issues between the parties as that is within the province of the Arbitrator. It is for these reasons that I find that the Arbitrator did not exceed the scope of his jurisdiction as advanced by the Applicant.

Disposition

27. It must now be clear that the application dated 14th July 2022 lacks merit. It is dismissed with costs to the Respondent. The costs are assessed at Kshs. 120,000.00.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Andiwo instructed by O & M Law LLP Advocates for the Applicant.

Mr Titoo instructed by Tito and Associates Advocates for the Respondent.

