Kaysap Builders Limited v Briant (Miscellaneous Application E190 of 2022) [2023] KEHC 18544 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 18544 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION E190 OF 2022

DKN MAGARE, J

APRIL 18, 2023

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN APPLICATION TO SET ASIDE THE ARBITRAL AWARD

BETWEEN

KAYSAP BUILDERS LIMITED ..... APPLICANT

AND

REGINA MUTIE NGIII BRIANT ..... RESPONDENT

RULING

1. Alternative dispute resolution mechanism is enshrined under article 159(2) (c) which states as doth: -

> " Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traction dispute resolution mechanism should be promoted, subject to clause (3). Clause (3) of article 159 provides limitation to the traditional dispute resolution mechanisms."

2. In undertaking these dispute resolution mechanism, the parties are following a constitutional imperative. This is the background to the two applications I have been tasked to rule on. Parties agreed that I rule on both separately but bear in mind that the two have the Russian Laurete Matitra.

3. It is a zero sum game. I may dismiss both but cannot allow both. Allowing one, ipso facto results in the dismissal of the other. Judicial precedent has settled this issues, so I thought. In the case of the *University of Nairobi v Nyoro Construction & another* Arbitration Cause No E011 of 2021 – (2021) KEHC 380 (KLR) Commercial and Tax December 22, 2021 Justice Majanja, DS was faced with an application requiring interpretation of section 35 of the *Arbitration Act*.

4. I shall revert on the same.

Background and Brief facts

5. The parties undertook arbitration before a sole arbitrator Mr Kimran A.G FCI Arb who gave a final award on September 6, 2022. The applicant made an application to enforce the award pursuant to section 36 of the *Arbitration Act*. The said section reads: -

> "(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
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> (2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.
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> (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—
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> (a) the original arbitral award or a duly certified copy of it; and
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> (b) the original arbitration agreement or a duly certified copy of it.
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> (4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.
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> (5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the June 10, 1958, and acceded to by Kenya on the February 10, 1989, with a reciprocity reservation."

6. Effectively the arbitral award is binding unless set aside by this court.

7. The applicant made an application with two grounds that is the award is in conflict with public policy and the arbitration agreed is not valid under the Laws of Kenya.

8. The invalidity arises from the signatures in that 2 directors ought to sign.

9. On the issue of public policy, it is based on lack of award of damages for breach of contract. This was twisted to that extent that it was produced as evidence of bias of the arbitrator.

10. The respondent replied through her replying affidavit sworn November 18, 2020.

Analysis

11. In the applicants response dated March 25, 2021 the applicant pleaded as follows: -

> "a. On or about February 28, 2018 the respondent entered into a contract with the claimant for construction of 16 apartments units (Phase 1 – Block B) on LR No 6667 in Nyali at contractual sum of Kshs 88,000,000 for a period of 43 calendar weeks."

12. In paragraph 5 of the counter claim the applicant stated:-

> " On or about February 28, 2018 the respondent entered into a contract with the claimant for construction of 16 apartments units (phase 1 – Block B) on LR No 6667 I Nyali at contractual sum of Kshs 88,000,000 for a period of 43 calendar weeks."

13. There is an admission that there is a contractual in situ between the parties. There is no law requiring signing by 2 directors. Indeed, pursuant to the section 128 of the *Companies Act*, 2015, a private company can have a single director.

14. Secondly, the issue of the Jurisdiction of the arbitrator is within the purview of competencies - competence. It is an issue to be taken before the arbitrator. The parties confirmed it was so taken and as such, there was no application to set the same aside.

15. Section7(1) of the *Arbitration Act* treats finding of the arbitrator at the preliminary, law as established facts. The section provides: -

> " Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

16. In *Uber Technologies Inc v Heller* [2020] 2 SCR, the Supreme Court of Canada, on appeal from the court of appeal for Ontario had this to say: -

> " Courts are generally directed to stay proceedings in favour of arbitration and arbitrators are given the competence to rule on their own jurisdiction (s. 17(1)). It follows that, on this court's jurisprudence, the competence- competence principle also applies ..., this court has repeatedly recognized, most recently in Wellman, that courts should generally take a "hands off" approach to arbitration (para 56). The compétence compétence principle described in Dell accords with that direct
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> This court accepted the latter aspect in *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801, by defi ning "a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator" (para 84). An exception applies where the challenge is based solely on a question of law or requires only a superficial review of the record (paras 84-8".

17. In any case, parties have their own arrangement on how they sign. Sometime and most of the time it is not the directors who sign but some other persons.

18. In the case of *Geoffrey Kipkirui Cheruiyot & others v Toplis & Harding International Limited* [2015] eKLR, the court, Hon Lady Justice Hellen Wasilwa, stated: -

> " I have considered the submissions of both parties. In the case of *East African Safari Air Limited v Anthony Ambaka Kegode & another* (2011) eKLR civil appeal No 42/2007 cited by the respondent herein, the learned JJA Tunoi, Waki and Visram in discussing a similar application, cited the case of *Royal British Bank v Turquand* (1856) 6 E & B 327 and rendered themselves as follows:
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> "while persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent,

therewith, they are not required to do more; they need not inquire into the regularity of the internal proceeding- what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agent of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a leader who relies on this power need to inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide, he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained".

19. No one has business to know whether, an agreement followed internal mechanisms. It is even words in a case where, the applicant has already derived benefit. To that extent the agreement is valid and this court has no power to disturb the same.

20. I find the issue of signing to be a red herring. In *Fulchand Manek & another v Bullion Bank Limited* [1996] eKLR, Justice Aaron Ringera stated as doth: -

> "There being no denial by the defendant/respondent that the cheques on which the applicant's account was debited did not belong to the plaintiff/applicant as deposed in paragraphs 5 – 9 of the affidavit in support of the application for summary judgment, I am of the view that the defence filed a hallow Sham in the nature of a red herring. Besides words and words, it discloses no bona fide triable issues."

21. In *Fidelity Commercial Bank Limited v Greenwoods Limited & 2 others* [2015] eKLR, the court stated as doth: -

> "Refer also to other cases such as *Mohammed HassimPondor& another v Summit Travel Services Limited & 4 others* (2011) eKLR, where the court made a finding that;
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> "The defence set up by the 1st defendant is not a genuine or bona fide defence. It is a red herring and a sham. It can only delay justice. It is for all the above reasons a scandalous, frivolous and vexatious defence "per Justice G.K. Kimondo in the cited case, authority No 4 in the plaintiff's list of authorities."

22. In *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR, the court had this to say: -

> "Lord Denning seems to have gone a little further than this statement of the law in the celebrated case of *Central London Property Trust Ltd v High Trees House Ltd* [1947] K-B. 130 (1946) (the "High Trees Case"). In the High Trees case, the plaintiff was a lessor of a block of flats. The lessor represented to the lessee, that the lessee could pay reduced rent due to the economic conditions during the second War. The lessee proceeded to pay the reduced rent for four years. By the fourth year, all the flats in the block were fully let and the lessor demanded for payment of rent in full-including the arrears for the period when the lessee had paid reduced rent. The lessor instituted proceedings seeking a declaration that the rent payable was that which was stated in the lease agreement on the ground that the subsequent arrangement for reduced rent was not supported by consideration. Lord Denning held that the lessor could not recover the arrears that had accrued reasoning as follows:

The law has not been standing still since *Jorden v Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said the promise must be honored .... The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it

The applicant is seeking benefits from the agreement at the same time seeking to invalidate the agreement. He swore such an agreement exists earlier and he is entitled to payment and to collect materials and at the same time, they state that they were not competent to sign the agreement. This kind of pleading cannot be countenanced.

Public policy on damages

23. There is no public on the issue of damages. The legal requirement regarding damages arising, from a contract, if that they are in the nature of special damages that ought to be specifically pleaded and proved. In the case of *David Bagine v Martin Bqndi* (1996) eKLR the Court of Appeal stated as doth: -

> " It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store*, civil appeal No 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
>
> Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" We also refer to the cases of *Ouma v Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services v Mayende* (1991) 2 KAR 232 at page 235."

24. In any case, if the plaintiff was seeking general damages they are not payable in a claim for breach of contract. This is well held in *Pwani Telecomms Limited v Taita Taveta County Government* [2021] eKLR by Hon Lady Justice A. Ong'injo.

> " 33. The court in in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co Ltd* [2015] eKLR explained why general damages cannot be awarded in cases of breach of a contract as hereunder: -
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> "The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9 Exch 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach

itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & others* Nrb CA civil appeal No 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, Nrb CA civil appeal No 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, Nrb CA civil appeal No 154 of 1992 (UR))".

25. The issue of damages raised are as such not serious but meant to hoodwink the court trying to see which allegation stands. The arbitrator specifically dismissed all the other claims. He also stated that he had no jurisdiction to deal with claims over 8 units after termination of contract. The part of damages did not remain undetermined but was determined by way of dismissal. The arbitrator had jurisdiction competence to make the heard by way of dismissal.

26. Consequently, the application to set aside is dismissed in limine with costs of Kshs 40,000/= to the respondent.

27. The second application seeks to refer the matter to court annexed mediation. The application has two fundamental flaws. The first one is that the court is not ceased of this matter except the limited extent provided under section 35 of the *Arbitration Act*. Secondly, there is already a final award in respect of this cause. The court is therefore *funtus officio*.

28. The application for mediation is bereft of merit as is therefore dismissed in *limine*. Costs of Kshs 20,000/= to the respondent.

Determination

29. The application dated December 27, 2022 for setting aside the award given on September 6, 2022 is dismissed with costs of 40.000/=.

30. The application dated March 8, 2023 is dismissed in *limine* with costs of 20,000/= to the respondent.

31. This file is closed.

DELIVERED, DATED and **SIGNED** at **MOMBASA** on this **18th** day of **April, 2023.** Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Mohamud for the Respondent

No appearance for the Applicant

Court Assistant - Firdaus

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