China National Aero-Technology International Engineering Corporation v Dazzler Properties Limited (Arbitration Cause E041 of 2022) [2023] KEHC 17833 (KLR) (Commercial and Tax) (18 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17833 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E041 OF 2022

PN GICHOHI, J

MAY 18, 2023

BETWEEN

CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION ..... CLAIMANT

AND

DAZZLER PROPERTIES LIMITED ..... RESPONDENT

RULING

1. Through the firm of Nyaanga & Mugisha Advocates , the Claimant herein filed a Chamber Summons dated 2nd March 2022 under Section 36 of the *Arbitration Act*, 1995 and Rule 3,4 and 9 of the *Arbitration Rules* 1997, and seeks orders that;

    1. The Final Arbitral Award dated 15th October 2021 and the Award on taxation of costs dated 15th February 2022 published by Ms. Sylvia Mweni Kasanga MCIArb be recognised and adopted as judgment of this Court.

    2. Judgment be and is hereby entered in favour of the Claimant/Applicant as against the Respondent in terms of the Final Award published on 15th October 2021 and the Award of Taxation of Costs dated 15th February 2022 Ms. Sylvia Mweni Kasanga MCIArb

    3. The Applicant be granted leave to execute/ enforce the resultant decree against the Respondent.

    4. The costs of the application be provided for.

2. The grounds thereof are that vide the Final Arbitral Award dated 15th October 2021, the Claimant was awarded Kshs. 153,616,0982 .00 plus interest until payment in full. Further, the Claimant was awarded

costs of Kshs. 4,266,573.00 vide another Award dated 15th February 2022 but the Respondent has not settled the said amounts and has not made any efforts to settle the same hence this application. He states that no application has been filed to challenge the award and, in any event, time to do so has lapsed.

3. In support of that application is the affidavit sworn by Wang Jin on 2nd March 2022 in his capacity as the Deputy Director of the Applicant Company and duly authorised by the Board of Directors to do so. He states that on 24th June 2013, the parties entered into a Construction Contract for the construction of a commercial office block comprising Blocks A, B, C, D and E with two -levels basement each with ancillary building and associated site works otherwise referred to as Spring Valley Business Park on plot LR. No. 7158/76 off lower Kabete Road Nairobi estimated at Ksh. 785, 000,000/=.

4. The contract contained an arbitration clause that in event a dispute arose between the parties, the would refer same to arbitration. A dispute eventually arose between the parties regrading the Respondent's failure to settle the sum owed to the Applicant in certificates No. 22, 23 and 24 , the release of the retention fund and finalisation and the settlement of the final account.

5. The matter went for hearing before the Sole Arbitrator Ms Sylvia Mweni Kasanga on 23rd and 24th February 2021. The Arbitrator issued a Final Award in favour of the Applicant in the sum of Ksh. 153, 616,082. which the Respondent was to part to the Applicant within 60 days of the collection of the Award .

6. The arbitral Tribunal further ordered the Respondent to pay to the Applicant the costs of the claim which costs the Arbitrator taxed at Kshs. 4,266, 573.00 but the Respondent did not settle the same.

7. As a consequence, the Applicant seeks to have the Final Award recognised and adopted as a decree of this court. He further states that no application has been filed to challenge the Award and in any event the time for doing so has lapsed.

8. In response and through the firm of Gichumbi Gachaga & Achoki Advocates, the Respondent filed a replying affidavit sworn by Daniel N. Kimoro on 14th September 2022 where he recounts at length the calculations done by the Arbitrator. He recalculates the figures to show what the Arbitrator should not have been awarded.

9. He faults the Arbitrator on how she did the calculations , applied interest and arrived at the figures in the Award. He therefore objects to adoption of the Award as published for the reasons that the same is contrary to public policy since it will lead to unjust enrichment. That in arriving at the Award, the Arbitrator rewrote the contract between the parties.

10. He further depones that even where there is no application for setting aside has been filed, the Court has powers to refuse to recognise to and enforce the Award.

Submissions

11. In submissions dated 30th November 2022, the Applicant submits that in their replying affidavit, the Respondent is inviting the Court to review the facts of the dispute before the Arbitrator which informed the decision to award the amounts claimed under interim certificates 22, 23 and 24 and this amounts to asking the Court to interfere with factual findings of the Arbitrator yet the Court has no powers or jurisdiction to do so. On this issue, counsel relies on the case of *Kenya Oil Co. Ltd & another v Kenya Pipeline Co.* [2014] eKLR and *Tcat Limited v Joseph Arthur Kibutu* [2015]eKLR.

12. Counsel further submits that the invitation by the Respondent to re-open the final Award to interrogate the factual findings by the Arbitrator amounts to inviting this Court to sit in an appellate capacity on a decision arrived at by the Arbitrator which this Court cannot do. On this issue, counsel

relies on the case of *International Construction Ltd v Quality Inspectors Ltd* [2019]eKLR and *Samuel Kamau Muhindi v Blue Shield Insurance Company Ltd* [2010]eKLR and further submits that request by the Respondent offend the principle of finality as set out under Section 10 of the *Arbitration Act*.

13. Counsel further relies of the Supreme Court decision in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party)* [2019]eKLR on limitation of Court intervention in arbitral proceedings.

14. On the issue by the Respondent that the Award should not be recognised and adopted as the interests awarded amount to unjust enrichment , counsel submits that Section 32 C of the *Arbitration Act* expressly gives power to the Arbitrator award interest . While relying on the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 EA 366, counsel submits that the Award is not contrary to public policy and therefore the same should be recognised and to frustrate the recognition of the Final Award. adopted as prayed.

15. On the issue that the Arbitrator re-wrote the contract between parties to arrive at her decision, counsel relies on Clause 34. 12 and 34.16 and submits that having found that the Respondent was in breach of the contract, the Arbitrator rightly found that to damages and reimbursement of the retention sum. Lastly counsel submits that the Respondent is abusing the public policy principle frustrate the recognition and adoption of the Final Award . He therefore urges the court to allow the application and adopt the Final Award as prayed.

16. In their submissions dated 14th January 2023, Counsel for the Respondent still reiterates the contents of the replying affidavit and lists the issues for determination by this Court as flows;

    1. Whether in awarding retention money amounting to Ksh. 23,101,376 the Arbitrator acted outside her jurisdiction by attempting to re-write the contract for parties.

    2. Whether an award on interest to amounts which had interest included amounted to an award on interest thus making a compound interest award which was contrary to the Contract.

    3. Whether there is double award by the Arbitrator and whether such awards lead to unjust enrichment.

    4. Whether an award that leads to unjust enrichment is contrary to public policy.

17. On the first issue , counsel submits that there is no dispute that the parties had agreed on retention of 5% on the contract sum and at the time of the Dispute, the retention money was Kshs.23,101,376; that the retention was payable upon issuance of the Certificate of Making Good the defects; that it is common ground that the Applicant was never issued with the said Certificate.

18. Counsel therefore submits that in absence of said Certificate, the money was not payable. That the said sum was pleaded in the claim but nowhere did the in the claim did the Applicant plead that the Respondent had refused to issue it with the certificate. Arguing that parties are bound by their pleadings, counsel submits that by ordering payment of Kshs.23,101,376/= where no certificate of making good the defects has been issued, the Arbitrator rewrote the terms of the contract between the parties and therefore acted outside the jurisdiction.

19. On the second issue, counsel refers to Certificate 22, 23 and 24 annexed to the replying affidavit and submits that contract did not provide for compound interest and therefore, awarding the interest on Ksh. 7,808,486.00 which was part of the three certificates previously accumulated amounted to allowing compound interest. That in the circumstances, the Arbitrator went outside the matter contemplated in the contract as parties had agreed that interest be on be simple and that no interest was to be awarded on accumulated interest.

20. While restating the contents of the arbitral Award, Counsel submits that there were instances of double awards and therefore this amounts to unjust enrichment. On issue of unjust enrichment, counsel relies on the case of *Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others* (2003) e KLR that "the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining the money or benefit derived from another which it is against conscience that he should keep it, and he should in justice, restore it to the plaintiff." Counsel submits that the Applicant did not deny that there were double awards and therefore the court need not evaluate the facts.

21. On the issue that the Award is contrary to public policy, counsel reiterates his submissions on the compound interest and while referring to Sect 32 C of the *Arbitration Act*, he submits that there is no authority cited to show that an Arbitrator can award compounded interest even where parties have agreed on simple interest. While citing the case of Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 EA 366 on grounds of setting aside an Arbitral Award, counsel submits that the Award gave the Applicant compound interest which amount to unjust enrichment and therefore the Award is contrary to public policy.

22. Lastly, counsel prays that the application be disallowed and the Award be remitted to the Arbitrator for re- calculation.

Determination

23. From the material presented by parties before this Court, this Court notes that there is no dispute that parties did voluntarily enter into a Construction Contract containing the arbitral clause and that the parties did subject themselves to the jurisdiction of the Arbitrator. They both participated in the Arbitral proceedings. u There the issues for determination are :

    1. Whether the issues raised by the Respondent amount to an appeal

    2. Whether the recognition and enforcement of the Award is contrary to public policy of Kenya.

    3. Whether the Court should recognise, adopt and enforce of the Arbitral Award.

    4. Who should bear the costs of this application.

24. This Court takes note of the last statement made by counsel for the Respondent in his submissions thus; "We therefore pray you disallow the Application for adoption and recognition of the award as published and remit the same to Arbitrator for re- calculation."

25. That line of submissions is a conclusion of clearly weaved through contention as to the facts that led the Arbitrator to reach her decision and make the Award the subject of this application. The contents of the replying affidavit show that the Respondent was dissatisfied by the finding of the Arbitrator particularly in the manner that she calculated the interest. He is also aggrieved that the Arbitrator considered issues not pleaded yet parties are bound by their pleadings.

26. Indeed, counsel argues that "since the Applicant did not deny that there were double awards and therefore the court need not evaluate the facts." This argument coupled with the contention in the relying affidavit show that the Respondent is trying to litigate issues in the arbitral proceedings and which were dealt with and determined by the Arbitrator. In effect, the Respondent treating asking the Court to re- open , re- evaluate and interfere with factual findings of the Arbitrator as though this is an appellate Court. What is before this court is not an appeal.

27. Be that as it may, the Respondent who is aggrieved by the said Award had a right to apply for its setting aside under Section 35 (3) of the *Arbitration Act* which provides that: "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 36 from the date on which that request had been disposed of by the arbitral award."

28. The Respondent acknowledges that they did not file any application for setting aside but nevertheless urges this Court not to recognise and adopt this Award for it is contrary to public policy. It is true that High Court may decline to recognise and enforce the Award. Section 37 of the *Arbitration Act* provides as follows;

> " 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 the High Court proof that;
>
> (i) a party to the arbitration agreement was under some in capacity; 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, under the law of the state where the arbitral award was made;
>
> (iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision 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 recognized and enforced; or
>
> (v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
>
> (vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or
>
> (vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;
>
> (b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya." [Emphasis added]

29. The Respondent's contention is that there were instances of double awards that will obviously unjustly enrich the Applicant. The term "public policy" has been subject of various court decisions. In the case *Christ for all Nations v Apollo Insurance Company limited* [2002] EA 366, relied on by both parties, Ringera J (as he then was) held:-

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

30. Around the issue of double awards is the alleged contravention of Section 32C where the Respondent says that the Arbitrator allowed interest which had been calculated in accumulated interest. The power of the Arbitrator to award interest is provided for under Section 32 C of the *Arbitration Act* that "Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award."

31. The Respondent confirms that indeed parties had agreed that interest was applicable. In order to ascertain that double award, this Court is again being asked to go to the evidence, the Award and do calculations to confirm if indeed there were double awards as claimed hence leading unjust enrichment. That would be inviting this court to make a decision on a question of fact delt with by the Arbitrator and see if the calculations were erroneous or not but this is an exercise this court would engage in.

32. Indeed, courts have declined to engage on issues of facts as opposed to law in such circumstances. This Court is in agreement with the finding in *Tcat Limited v Joseph Arthur Kibutu* [2015]eKLR the Court had this to say;

> " If the court would look into the issue of whether there was enrichment as invited to do, it is my finding that the same would be tantamount to the court trying to render itself on a question of fact. The Arbitrator used the facts before him in determining whether or not there was breach of any of the terms of the subject Agreement. And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case *Kenya Oil Company Limited & Another v Kenya Pipeline Company* [2014] Eklr, *Moran v LLoyds* (1983) 2 ALL ER 200 and DB SHAPRIYA & CO. v BISHINT (2003) 3 EA 404, where there is judicial consensus that;
>
> "All questions of fact are and always have been within the sole domain of the Arbitrator.....the general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator."

33. This Court must emphasise that once a Final Arbitral Award is made, the decision should be final and the Award binding on parties as was the intention of the *Arbitration Act*. If any intervention is to be made then it has to be only as provided in the *Arbitration Act*. That principle is set out under section 10 of the *Arbitration Act* that "Except as provided in this Act, no court shall intervene in matters governed by this Act."

34. In this case, there is nothing here to show that the Final Arbitration Award is against public policy or that the Arbitrator went outside the matter contemplated in the contract. There is no justification whatsoever to intervene and interfere with this Award.

35. Lastly, the basis for the recognition and adoption of the Arbitral Award is laid down in Section 36 of the Arbitration which provides that: -

    (1) A domestic arbitral award, shall be recognised as binding and, upon application in writing to the High Court, shall be enforced subject to this Section and Section 37.

    (2) ...

    (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish-

        (a) the original arbitral award or a duly certified copy of it; and

        (b) the original arbitration agreement or a duly certified copy of it.

    (4) ....

    (5) ....” [Emphasis added]

36. This Cout is satisfied that the Applicant herein has fully complied with the said provisions of the law. From the foregoing, it is clear that the Respondent's opposition to the application herein lacks merit. The costs of this application follow the event. The Application dated 2nd March 2022 is therefore allowed in the following terms;

    1. The Final Arbitral Award dated 15th October 2021 and the Award on taxation of costs dated 15th February 2022 published by Ms. Sylvia Mweni Kasanga MCIArb be and is hereby recognised and adopted as judgment of this Court.

    2. Judgment be and is hereby entered in favour of the Claimant/Applicant as against the Respondent in terms of the Final Award published on 15th October 2021 and the Award of Taxation of Costs dated 15th February 2022 Ms. Sylvia Mweni Kasanga MCIArb.

    3. Leave is hereby granted to the Applicant to execute/ enforce the resultant decree against the Respondent.

    4. The costs of the application are hereby awarded to the Claimant/Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 18TH DAY OF MAY , 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Dachi for Applicant

Gachaga for the Respondent

Kevin, Court Assistant