



Nar Enterprises Limited v Africa Reit Limited (Commercial Arbitration Cause E048 of 2022) [2023] KEHC 17278 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E048 OF 2022**

DAS MAJANJA, J

MAY 12, 2023

BETWEEN

NAR ENTERPRISES LIMITED APPLICANT

AND

AFRICA REIT LIMITED RESPONDENT

RULING

1. The Applicant has filed the Chamber Summons dated 27th July 2022 made, inter alia, under sections 29(5), 35(1), (2)(a)(ii), 35(2)(b)(ii) of the *Arbitration Act*, 1995 seeking to set aside the award published on 23rd May 2022 following a ruling dated 6th April 2022 disposing of the preliminary objection on jurisdiction (“the Award”). It also seeks an order that the court direct that another arbitrator be appointed for purposes of determining the Applicant’s claim on merit.
2. The application is supported by the grounds on its face and the supporting affidavit of Malkit Singh Main, a director of the Applicant, sworn on 27th July 2022. The Respondent has opposed the application through the Grounds of Opposition dated 2nd November 2022 and the replying affidavit of its director, Joyce Wanjiru sworn on the same date. The parties’ advocates made oral submissions supplemented by written submissions in support of their respective positions.
3. The parties’ dispute arises from a building contract dated 26th March 2012 for the construction of 2 office blocks in Karen, Nairobi on the property LR No. 1159/385 for the contract sum of Kshs. 196,721,313.00 (“the Agreement”). The Applicant was the contractor while the Respondent was the employer/client. It was agreed that the date of possession would be 26th March 2012 and that of practical completion 28th February 2013. Following disputes over performance of the Agreement, the Respondent terminated it on 26th July 2013. The disputed was referred to arbitration.



4. In its Statement of Claim before the Arbitral Tribunal, the Applicant sought Kshs. 248,337,891.11 for work done and materials on site, outstanding certified payments plus interest, extended preliminaries, idle labour and supervision, idle construction machinery and tools, confiscated construction machinery and tools and loss of profit.
5. In its response to the claim, the Respondent raised a preliminary objection to the effect that the Arbitral Tribunal lacked jurisdiction on the ground that the claim was time barred, having been filed outside the statutory timeline of 6 years in respect of a claim for breach of contract. In any case, the Respondent lamented that it was the Applicant who caused the delay in completing the construction and failed to meet its contractual obligations with no meaningful explanation. That at the time of termination of the Agreement, none of the Applicant's alleged temporary buildings, plant, tools, machinery, goods or materials were left at the site as claimed by the Applicant and that this was only raised by the Applicant in its letter dated 9th June 2021, almost eight years after termination of the Agreement. The Respondent also stated that it was the duty of the Applicant to settle any claims made by the subcontractors as the contracts were between the Applicant and the subcontractors.
6. After considering the parties' pleadings and arguments, the Arbitrator published an award on 23rd May 2022("the Award") after disposing of the preliminary objection through its ruling dated 6th April 2022.

Analysis and Determination

7. The court's jurisdiction to set aside an arbitral award is demarcated and delimited by section 35(2) of the *Arbitration Act* which provides as follows:

35. Application for setting aside arbitral award

- (1)
- (2) 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.
 - (ii) the award is in conflict with the public policy of Kenya.
- 8. The Applicant’s application is grounded under the provisions I have highlighted above, that is, section 35(2)(a)(iii), (v) and (b)(ii) of the [Arbitration Act](#).
- 9. The Applicant contends that while its application for recusal of the Arbitrator was pending, the Arbitral Tribunal, in reaction to the said application proceeded to render the Award without according it an opportunity to present its case on the application. It complains that the Arbitral Tribunal totally did not acknowledge the application and proceeded to resolve the matter hence the Award should be set aside under section 35(2)(a)(iii) of the [Arbitration Act](#). It further contends that the procedure adopted in arriving at the Award was neither in accordance with the Agreement nor in accordance with the [Arbitration Act](#), or in tandem with the Arbitrator’s own directions. It was therefore flawed, unprecedented, mischievous and arbitrary hence the Award should therefore be set aside under section 35(2)(a) (v) of the [Arbitration Act](#).
- 10. Lastly, the Applicant states that Award is in conflict with the public policy of Kenya in that, it is inconsistent with Articles 47 of [the Constitution](#) which provides that there should be fair administrative action. That it violates Article 50 which provides that every person has a right to fair hearing and Article 159 which provides that in exercising judicial authority, courts and tribunals shall not use dispute resolution mechanisms in a way that is repugnant to justice or morality or inconsistent with [the constitution](#) or any written law.
- 11. The Respondent opposes the application on the ground that after the Arbitral Tribunal published the Award, it was served with a letter of intended recusal application pursuant to section 14(1) of the [Arbitration Act](#) and that the Arbitrator lacked jurisdiction to entertain the claim through an email dated 23rd May 2022. The Respondent avers that the Applicant did not file any such application and merely communicated its intention to do so. The Respondent submits that the application for recusal was bad in law ab initio as it was made when the Arbitral Tribunal has already delivered a ruling holding that it lacked jurisdiction over the matter.
- 12. The disposition of the Applicant’s application turns on the course of the arbitral proceedings which I have appraised and I find as follows. The Arbitrator was appointed by the consent of the parties and he confirmed his appointment on 23rd September 2021. Upon the Applicant’s filing of the statement



of claim and during the preliminary meeting, the Respondent raised a preliminary objection by way of a chamber summons application dated 9th November, 2021 seeking to strike out the claim on the grounds that it was time barred and therefore the Arbitrator lacked jurisdiction to hear and determine the same. The Applicant responded to the objection by filing a replying affidavit and the said objection was canvassed by way of written submissions. In a ruling dated 6th April 2022, the Arbitral Tribunal upheld the preliminary objection and allowed the prayer striking out the Applicant's claim. On 6th May 2022, the Applicant wrote to the Arbitral Tribunal seeking clarification on the import of the said ruling. The Arbitration Tribunal responded by the letter dated 12th May 2022 stating that section 17 of the Arbitration Act empowered him to rule on his own jurisdiction, whether as a preliminary question or in an award on merit. In this case, it dispensed with the issue of jurisdiction as a prelude to the case and thus, the said ruling could not be termed as an award since it sought to dispense with an interlocutory application hence the parties were at liberty to take steps to move the Arbitral Tribunal to adopt the ruling as a final award in this reference.

13. On 23rd May 2022, the Arbitral Tribunal adopted the ruling as a final award upon being moved by the Respondent on 16th May 2022. On the same day, the Applicant wrote to the Respondent giving it notice of the Applicant's application for recusal of the Arbitral Tribunal and to invite the Respondent in accordance with section 14(1) of the Arbitration Act to agree on the procedure for the challenge. In response, the Respondent, through its letter dated 24th May 2022 informed the Applicant that the tribunal was functus officio and could not hear its proposed application as it had held that it lacked jurisdiction to hear and determine the matter and thus, there was no claim in existence.
14. I agree with the Respondent that once the Arbitral Tribunal has ruled on its jurisdiction as a preliminary matter and found in the negative, there was nothing further it can do and the only recourse that the dissatisfied party has is to set aside the resulting award under section 35 of the Arbitration Act.
15. The Applicant could not expect the Arbitral Tribunal to rule on any further application including that of its recusal, once it concluded that it lacked jurisdiction. I do not find any fault by the Arbitral Tribunal in failing to deal with the Applicant's application for recusal, if at all the said application was filed, or any other application for that matter as it lacked the jurisdiction to do so. This ground by the Applicant therefore fails.
16. The aforesaid finding and from the record I have summarized above also disposes of the Applicant's complaint that the procedure adopted and applied in arriving at the Award was neither in accordance with the agreement between the parties, nor in accordance with the Arbitration Act, or in tandem with the Tribunal's own directions, and that it was therefore flawed, unprecedented, mischievous and arbitrary.
17. I reject the Applicant's argument for several reasons. The application to strike out the claim was based on an application to which the Respondent opposed by filing a replying affidavit and written submissions whereupon the Arbitral Tribunal made its finding that it lacked jurisdiction. At no time did the Applicant raise any objection to the composition or appointment of the Arbitral Tribunal, or the procedure adopted in dealing with the preliminary objection. These objections ought to have been raised at the earliest opportunity otherwise they are deemed to have been waived in accordance with section 5 of the Arbitration Act which provides as follows:

5. Waiver of the right to object

A party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without



undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

18. Once the Arbitral Tribunal delivered its ruling on 6th April 2022, it lacked jurisdiction from that point. The fact that it was necessary to adopt the ruling in the form of a formal award neither adds nor subtracts from the fact that the Arbitral Tribunal had determined that it lacked jurisdiction. Even if the ruling was never adopted as a final award, the lack of jurisdiction would still remain and it would not be in a position to entertain any the application for recusal. I hold that the Arbitral Tribunal cannot be accused of denying the Applicant a fair hearing of its claim when it had ruled that it had no jurisdiction to entertain the substance of the claim after hearing both parties.
19. Ultimately, the Applicant has not furnished proof and the court has not found any grounds to set aside the Award.

Disposition

20. The Applicant's Originating Summons dated 27th July 2022 lacks merit. It is dismissed with costs to the Respondent assessed at Kshs. 50,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Wanja instructed by N. K. Mugo and Company Advocates for the Applicant

Ms Ndirangu instructed by Igeria and Ngugi Advocates for the Respondent.

