



**Oiko Credit, Ecumenical Development Society U.A (Oiko Credit) v
Vehicle and Equipment Leasing Limited (Arbitration Cause 131 of 2020)
[2023] KEHC 17583 (KLR) (Commercial and Tax) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE 131 OF 2020**

PN GICHOHI, J

MAY 18, 2023

BETWEEN

**OIKO CREDIT, ECUMENICAL DEVELOPMENT SOCIETY U.A (OIKO
CREDIT) APPLICANT**

AND

VEHICLE AND EQUIPMENT LEASING LIMITED RESPONDENT

RULING

1. The subject of this ruling is a Notice of Motion dated May 15, 2020 filed by the Applicant herein through the firm of Muriithi Kireria & Associates Advocates brought under Art. 159 (2) of *the Constitution* of Kenya, Section 36 (1) and (2) of the *Arbitration Act*, Section 1A, 1B, 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*. The Applicant seeks orders that:-
 1. The Arbitral Award filed be recognised as binding upon the Respondent.
 2. Judgment be entered for the Applicant as against the Respondent in terms of the Arbitral Award file herein.
 3. The Arbitral Award be adopted against the Respondent as judgment of this court.
 4. The Respondent bears the costs these proceedings.
2. The grounds are that the matter was referred to arbitration pursuant to a binding agreement between the parties and that the same was concluded and Award issued on March 2, 2020, hence the decree should be issued to make it executable. In support is an affidavit sworn by Betty Ntinyari Kirai on May 15, 2020. She states that the Final Award was clarified and published on April 3, 2020 and therefore,



a decree should issue in accordance with the Arbitration Act. She annexed the copy of the Agreement, the Copy of the Award dated March 2, 2020 and a copy of the Clarification of the Final Award.

3. The Respondent filed his replying affidavit sworn by Wang'ombe Gathondu on July 27, 2022 and opposed this application. He admits that there was a loan agreement between the Plaintiff and the Defendant and that when a dispute arose, it was referred to arbitration in accordance with the agreement between the parties. The dispute was heard and an Award published on March 2, 2020 and a clarification of the Award done on April 3, 2020 by the Sole Arbitrator MS Jacqueline Oyuyo Githinji.
4. He however states that the Arbitrator erred in law as the Award went beyond the scope of the agreement in adjudicating issues that were not contemplated in the contract forming the subject of the arbitral proceedings.
5. He further states that the Arbitrator failed to consider the evidence tendered by the Respondent against the claim and that the claim is premature in particular, as they did not exercise the option to realise their security by attaching / repossessing Respondent's agricultural Equipment bought by the Respondent herein before recalling the loan.
6. Further, the Respondent states the loan agreement provided that the loan facility was repayable in 20 instalments quarterly for a period of 6 years and therefore, by calling in the entire loan, the Respondent was not acting in good faith and therefore, the Arbitrator re- rewrote the contract between the parties which cannot be done.
7. Further, states that the Arbitrator erred in law by not strictly interpreting the contract between the parties and allowing the Respondent to terminate the contract before a period of six (6) years thereby imposing new terms upon the Applicant which were not agreed upon by parties as at the time of entering into the contract.

Submissions

8. The Applicant filed its submissions dated October 4, 2022. While urging the court to recognise the award as binding, counsel relies on section 32A of the Arbitration Act and submits that the arbitration Award is final and binding upon parties except otherwise agreed by the parties and the court has power to recognise and enforce the Award under Section 36 of the Arbitration Act.
9. While submitting that the Arbitrator was within the confines of her legal merit and was not in any way ultravires to her duty as per the loan agreement and the Arbitration Act, counsel terms the application as primitive, frivolous and vexatious and in doing so, counsel relies on the case of Mahican Investment Limited & 3 others v Giovanni Gaida & 80 others [2005] eKLR where it was held that in order to succeed that matters objected to were outside the scope of the reference to arbitration, one has to prove beyond doubt that the Arbitrator went on a frolic on his own to deal with matters not related to the subject matter of the dispute.
10. While restating that the award was issued two years ago, counsel submits that the Respondent has remained in breach of the contract that was entered between the parties in year 2015 and the Applicant is still waiting to reap the benefits of the success of arbitration. Counsel further submits that it is now Seven (7) years since the Respondent was advanced the loan and that being an institution that is mainly dependent payments made by money borrowers, the Applicant is now exposed to financial constraint due to the default and non-payment of the loan advanced to the Respondent. Counsel therefore submits that without adoption of the Arbitral Award, the Applicant will not manage to proceed with the enforcement and execution of the same and it will suffer substantial loss.



11. On their part, the Claimant/ Respondent filed submissions dated November 1, 2022 through the firm of Nyaanga & Mugisha Advocates and while maintaining the contents of the replying affidavit, counsel submits that the Arbitrator went beyond the scope of the Agreement in adjudicating issues that were not contemplated in the contract contrary to the provisions of the *Arbitration Act*.
12. Maintaining that the Arbitrator's duty is to construe and enforce the contract and any terms implied in it, reliance is placed on the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another* [2001]eKLR , the court of Appeal decision in *Kenya Bureau of Standards v Geo Chem Middle East* [2019] eKLR and the case of *Kenya Sugar Research Foundation v Kenchuran Architects Limited* [2013]eKLR and counsel submits that by allowing the Applicant to shorten the loan agreement period and demand for immediate payment repayment of the loan together with interest, the Arbitrator in effect rewrote the contract voluntarily entered into between the parties and this was contrary to the law.
13. In conclusion, counsel urges the court to set aside the entire Arbitral Award dated March 2, 2020 and the subsequent clarification of the Award dated April 3, 2020 delivered and published by the Sole Arbitrator therein.

Determination

14. Having looked at the application, affidavits, submissions by parties, the loan agreement, the Arbitrators Award, and the court record, the issue for determination by this court is simply whether the Award by the Sole Arbitrator Ms. Jacqueline Oyuyo Githinji should be recognised and adopted as prayed.
15. It is noted from the court record that after this application was filed, the Claimant/Respondent (Vehicle and Equipment Leasing Limited) had filed an application dated June 19, 2020 under Section 35 (2) (a) (iv) of the *Arbitration Act* and Rule 7 of the *Arbitration Rules*. It sought that the Award dated March 2, 2020 and subsequent clarification of the Award dated April 3, 2020 delivered by the Sole Arbitrator Ms Jacqueline Oyuyo Githinji be set aside. The grounds therein were that the Arbitrator misapprehended the contract between the parties and therefore went beyond the scope of the Arbitrator. That application was opposed by Oiko Credit , Ecumenical Development Society U. A (Oiko Credit) who was the Respondent.
16. That application was heard and determined by A. Mabeya , FCI Arb J vide ruling dated February 25, 2022. It is clear from that ruling that the sole issue for determination was whether the Award should be set aside. The Court found that the Claimant had partially complied with the Award and had intended to settle the Award and even paid Ksh. 36, 870, 500/= by the time it brought the application for setting aside and therefore the application was an afterthought.
17. While considering the grounds under which an Arbitral Award should be set aside , the Court had this to say while dismissing the application with costs;

“ A close consideration of the application will reveal that none of those grounds were relied on. Instead , he Applicant set out grounds as to why the arbitrator ought not have found in the respondent's favour. In a nutshell , the application was a complaint or challenge against the award. It amounted to an appeal against the arbitral award. The law is trite that the Court is not to interfere with arbitral process , unless the parties mutually agree to an appeal. There was no such an agreement to this case...Further Section 39 of the *Arbitration Act* provides that the courts are only permitted to intervene against the arbitral award through an appeal



process where parties have agreed to appeal and the appeal is restricted to determining any question of the law arising in the course of arbitration or out of the award.”

18. It is clear that the Claimant/ Respondent herein is raising the same issues that it raised in the application dated June 19, 2020 and the submissions herein are more or less a copy and paste of that application. Be that as it may, Section 36 of the *Arbitration Act* provides: -

- (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) An international arbitration award shall be recognised 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.
- (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]

19. The Respondent/Applicant has complied with Section 36 of the *Arbitration Act* by providing the copy of the agreement and the Award. Having complied with that limb of Section 36, then the Court has to consider the provision of Section 37 and find if there is any hindrance to the enforcement of that Award. The said Section provides;

- (1) 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 to the High Court proof that—
 - (i) 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, 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 decisions 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 recognised 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 award 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.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.” [Emphasis added]

20. There is no dispute that the parties herein freely entered into the loan Agreement on 8th October 2015 and freely signed the same to bind themselves to the terms and conditions therein. It was their agreement that the loan advanced was for Ksh. 180,000,000/= repayable in Six (6) years, in Twenty (20) instalments the first capital payment being Ksh. 9,000,000/= due in Fifteen (15) months after the first disbursements and thereafter Nineteen (19) equal instalments of Ksh, 9,000,000/= due every quarter.

21. There is also no dispute that this loan was advanced in two equal tranches of Ksh. 90,000,000/= as agreed but the Claimant breached the terms of the loan Agreement. There was a default clause in the Agreement to which the parties bound themselves and therefore, the Claimant/Respondent’s complaint that the Arbitrator shortened the period for repayment is not supported. Further, its complains that the Arbitrator failed to consider evidence tendered by the Claimant/Respondent. This is not an appeal against the decision of the Arbitrator to call for this court to re-evaluate the evidence tendered by parties in the arbitral proceedings. This Court is persuaded by the finding in *Mahican Investment Limited* that ;

“A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.”

22. Further, the Claimant/Respondent argues that the Respondent/Applicant ought to have exercised the option of realising security but again, that is a matter of evidence and besides, that remains one of the options that open to the Respondent/Applicant as per the agreement. Where one is given a choice, then he cannot be faulted for choosing one and not the other.

23. The Claimant/Respondent correctly argues that the Arbitrator cannot rewrite the contract between parties. Indeed, even this Court cannot do so as held by the Court of Appeal in the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another* [2001]eKLR thus;

“Having directed himself so far quite properly, the learned judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the appellant bank the learned



judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”

24. I agree with the holding in *Mahican Investment Limited* (*supra*) that while opposing this enforcement, it is the Claimant/ Respondent’s burden to prove its allegations that the Arbitrator went beyond the issues the subject of the dispute. In this case, there is nothing in Arbitral Award to show that the Sole Arbitrator went outside the Loan Agreement and the scope thereof.
25. The effect of that Award is that it is binding as spelt out in Section 32 A of the *Arbitrator Act* which provides that;

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this *Act*.”
26. This Court finds that the Sole Arbitrator properly construed and considered the dispute as per the agreement entered into between the parties exercised her jurisdiction within the terms of reference in arriving at the decision the subject of the Arbitral Award dated March 2, 2020 and the subsequent clarification of the Award dated April 3, 2020. There is no reason whatsoever for this Court to intervene with that Award. The opposition by the Claimant/Respondent fails in totality.
27. This litigation must come to an end. It has been a very long time when the parties entered into this agreement and decided to have any dispute arising thereof be referred to arbitration. The Arbitrator did her job as per the agreement and her decision should be respected by both parties in the circumstances. It is not conscionable or economically sound for parties to engage in prolonged dispute in this matter. It is the high time that the Respondent/Applicant was allowed to enjoy what he is entitled to.
28. The application dated May 15, 2020 is therefore merited and allowed in the following terms:-
 1. The Final Arbitral Award issued on March 2, 2020 clarified and published on April 3, 2020 by the Sole Arbitrator Ms. Jacqueline Oyuyo Githinji FCI Arb be and is hereby recognized and adopted as a Judgement of this Court.
 2. The Respondent/ Applicant granted leave to enforce the Award as a Decree of this Court.
 3. Costs are awarded to the Respondent/Applicant.

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

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Dachi for Applicant

N/Afor Respondent

Isindu, Court Assistant

