



Osonga v Diamond Trust Bank (K) Limited & 2 others (Miscellaneous Application E018 of 2021) [2023] KEHC 17735 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS APPLICATION E018 OF 2021**

JK SERGON, J

MAY 16, 2023

BETWEEN

FILEX MUHOMA OSONGA APPLICANT

AND

DIAMOND TRUST BANK (K) LIMITED 1ST RESPONDENT

CIC GENERAL INSURANCE LIMITED 2ND RESPONDENT

FAULU MICRO FINANCE BANK LIMITED 3RD RESPONDENT

RULING

1. The subject matter of this ruling is the Chambers Summons dated February 9, 2023 taken out by Faulu Micro Finance Bank Limited, the 3rd Respondent herein in which the applicant sought for the arbitration award made on February 8, 2021, Felix Muhoma Osonga -vs- Diamond Trust Bank Limited and CIC General Insurance Limited by Mr. Frank Muchiri to be set aside. Diamond Trust Bank (K) Limited and Felix Muhoma Osonga, the Applicant and 1st Respondent respectively opposed the application
2. When the aforesaid summons came up for interpartes herein, this court directed the Summons to be disposed of by written submissions.
3. I have considered the grounds stated on the face of the Summons plus the facts deponed in the rival Affidavits. I have further considered the rival written submissions. Before delving deeper into the substance of the Summons, I wish to set out in brief the background of this dispute. The 3rd Respondent/Applicant stated that it is the financier of Motor Vehicle Registration No. KCF 803Y Faw Lorry and as such it is entitled to the proceeds of the Insurance Compensation claim.
4. The 3rd Respondent/Applicant and the Applicant/Respondent entered into a contract where the Institution financed for the purchase of the aforesaid Motor Vehicle by advancing a sum of



- Kshs.4,050,600/= and the 3rd Respondent/Applicant was noted on the Motor Vehicle Insurance Policy as 1st loss payee.
5. It is said that there existed a tripartite between the 3rd Respondent/Applicant, the 1st Respondent and the 2nd Respondent an Insurance Premium Finance Agreement dated June 7, 2018 through the 1st Respondent financed premium payments for the aforesaid Motor Vehicle.
 6. It is said that the aforesaid Insurance Premium Finance Agreement had an arbitral clause wherein any dispute or differences arising between the parties in connection with the agreement should be referred to arbitration. The Applicant, pursuant to the arbitral clause commenced arbitral proceedings via a statement of claim dated December 5, 2019 and amended on May 6, 2020. The same were served upon the 1st and 2nd Respondents herein.
 7. The 1st Respondent filed a statement of response. It would appear the 2nd Respondent did not deem it fit to file any response to the claim.
 8. The Arbitral proceedings proceeded for hearing and the arbitrator issued a final award on February 8, 2021. The 1st Respondent is said to have settled the award made against it in the sum of Kshs.63,879/75 being half the travel expenses incurred by the Applicant of Kshs.108,000/= plus accrued interest at 14% p.a.
 9. The 3rd Respondent filed the instant summons dated 9/2/2023 seeking to set aside the award after the lapse of two years from February 8, 2021. The Applicant put forward the following grounds as the basis of the Summons.
 - i. That the arbitral awards was not contemplated by or falling within the terms of the reference to arbitration and or that it contains decisions on matters beyond the scope of the reference to arbitration.
 - ii. That the 3rd Respondent/applicant was not given Notice of the Appointment of an Arbitration and or of the Arbitral Proceedings
 - iii. That the recognition of the arbitral award would be Contrary to Public Policy.
 10. Two main issues arose for determination in the instant summons:-

First, whether a Party not Privy to a contract may apply for the setting aside of an arbitral award! It is the submission of the 3rd Respondent/Applicant that it was entitled to the first loss payee rights under the Insurance Policy contract over Motor Vehicle registration No.KCF 803F and that any adjudication over a dispute relating to an Insurance Compensation thereon ought to have included it as a party thereto.
 11. The 3rd Respondent further argued that such rights are intensically linked to compensation claim since it stood to be directly affected by any decision in such an adjudication as to render it as a necessary party thereto.
 12. The 3rd Respondent/Applicant also complained that it was not notified of the arbitral proceedings therefore it could not participate in those proceedings. This court was therefore urged to set aside the award.
 13. The 1st Respondent urged this court to find that there is no privity of contract between the Applicant, the 1st Respondent and the 2nd Respondent to the Insurance Premium Finance Agreement. The 1st Respondent stated that the contract between the applicant, 1st and 2nd Respondents did not involve the 3rd Respondent/Applicant hence it wasn't a necessary party to be enjoined in the arbitral proceedings



therefore the trio were free to pursue the arbitration proceedings without the involvement of the 3rd Respondent/Applicant.

14. The 1st Respondent further submitted that the 3rd Respondent was informed of the arbitral proceedings but it chose to ignore the same by failing to participate.
15. The Applicant on the other hand oppose the Summons arguing that the 3rd Respondent/Applicant was not entitled to apply for the setting aside of the arbitral award since it had no privity of contract. It is also its submissions that the 3rd Respondent/Applicant waived its right to take part in the arbitral proceedings.
16. Having considered the rival arguments, I am satisfied that the 3rd Respondent/Applicant was not privy to the Insurance Finance Agreement hence it is not entitled to seek for the setting aside of the arbitral award. I am also convinced that the 3rd Respondent/Applicant was informed of the existence of the arbitral proceedings and it decided not to participate in those proceedings thus waiving its right. I am further convinced that the 3rd Respondent/Applicant in the circumstances of this case is not a necessary party.
17. The Second Main issue is whether the award is contrary to Public Policy. The 3rd Respondent/Applicant stated that since it was not involved in the arbitral proceedings, its constitutional rights under Article 50 of the [Constitution of Kenya, 2010](#) was breached thus the award contravened the Public Policy.
18. The Applicant and the 1st Respondent are of the submission that the award is not against Public Policy. I have already come to the conclusion that the 3rd Respondent was informed and invited to participate in the arbitral proceedings but it chose not to participate and waited until the lapse of two years from the conclusion of the arbitral proceedings that it filed the instant application.
19. I am persuaded that there is no iota of evidence that the arbitral proceedings were inconsistent with the Constitution or any other law in Kenya. The 3rd Respondent/Applicant has therefore failed to prove how the arbitral award has violated the Principle of Public Policy.
20. In the end, I find no merit in the chamber summons dated February 9, 2023. The same is dismissed with costs to the Applicant the 1st and the 2nd Respondents.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF MAY, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Njoroge for the Applicant

No Appearance for the Respondent

