TP v ABP (Miscellaneous Application 20 of 2017)
[2023] KEHC 17490 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17490 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 20 OF 2017

G MUTAI, J

MAY 12, 2023

BETWEEN

TP ..... APPLICANT

AND

ABP ..... RESPONDENT

RULING

1. TP (T) and ABP (AP) are Shia Imami Ismaili Muslims. T and AP got married on November 26, 2000. At the time they celebrated their marriage, they entered into a marriage contract vide which they agreed to be bound by the *Constitution* and personal law of the Shia Imami Ismaili Muslims. They further agreed to refer any dispute in relation to their marriage to the His Highness Prince Aga Khan Shia Imami Ismaili Conciliation and Arbitration Board (the Board) whose decision in such matters would be final, conclusive and binding upon them. Their marriage was blessed with 3 children.

2. The marriage soured. A dispute between TP and AP arose. The dispute was referred to the Board as a disciplinary complaint. TP accused AP of polygamy, which is strictly prohibited in the Ismaili faith, and marrying Amairah Ali, a non-Ismaili. TP claimed that in June 2009, Ali forcibly locked her and the children from the matrimonial home. She further claimed that Ali produced a fake marriage and divorce certificates purportedly conducted before the Kadhi. The Board, in its award of May 11, 2013 found that there was no evidence that AP had married AA. The Board also found that there was lack of clarity as to whether AP had legally divorced TP or that he had committed polygamy. The Board directed AP to pay a monthly upkeep to TP of Kshs 350,000.00 (with 10% annual increment) and to buy for her a 4 bedroomed residential home in a safe, secure area in Mombasa for her and the children.

3. T was aggrieved by the said decision and appealed to His Highness Prince Aga Khan Shia Imami Ismaili International Conciliation and Arbitration Board (ICAB). AP did not make any submissions to ICAB nor did he participate in the hearing in spite of multiple requests to do so. In its award dated December 11, 2013 the ICAB found that AP was still married to T and would remain so until he obtains a valid

divorce. ICAB also found that AP 's marriage to Amairah Ali was in breach of the Shia Imami Ismaili constitution which constitutes grounds for disciplinary action. ICAB then made an award along the following terms: -

i. AP was to pay to TP US $ 1 million within 6 weeks of the date of the award and in default he would pay the said sum with liquidated damages of 12% per annum on the said amount; and

ii. AP was to continue to pay the monthly maintenance to TP and to provide a home for her as directed by the NCAB.

4. AP did not comply with the award. TP therefore filed an application dated May 12, 2017 seeking to have the High Court adopt the arbitral award as the judgment of the court. AP did not file any response despite service of the application. The application was therefore allowed as prayed and the arbitral award adopted as an order of the court on June 21, 2017.

5. Aggrieved by the adoption of the award, Ali moved to the court vide a Notice of Motion application dated July 21, 2017 seeking enlargement of time to file an application to set aside the said arbitral award, review of the order adopting the arbitral award and entry of judgment and that the court does refuse to recognize the arbitral award.

6. In its ruling delivered on May 4, 2018, the court rejected the prayer to extend time for the respondent to challenge the award. However, the court reviewed and vacated the adoption of the award on grounds that the application seeking its adoption did not annex the original copy of the award and the agreement to refer the matter to arbitration nor duly certified copies thereof.

7. By dint of the latter decision AP and TP were technically restored to the position they were before the application dated May 12, 2017 was determined.

8. In view of the above ruling, the applicant sought leave of the court to file a supplementary affidavit to introduce the marriage contract (agreement) in support of the application of May 12, 2017 in compliance with the ruling of May 4, 2018. Leave was granted whereupon TP filed a Supplementary Affidavit. TP was directed to serve AP with the application vide which she sought the adoption of the arbitral award.

9. Service was effected on AP after a great struggle through his security personnel who had instructions to acknowledge service. Despite being served AP did not bother to file a response nor appear for hearing. Hearing of the application therefore proceeded exparte.

10. During the hearing TP relied on her two affidavits in support of the application. The application was not opposed. The Court therefore proceeded to write and deliver its ruling.

11. Onyiego, J stated as follows "there being no objection to the adoption of the award made on December 12, 2015 and the applicant having attached certified copies of the award and the marriage contract (agreement), I have no option but to allow the Chamber Summons dated May 12, 2017 in terms of prayer one and therefore adopt the award dated December 11, 2015 as judgment of the court."

12. The court adopted the arbitral award as the judgment of the court on June 9, 2021. The ruling of the court has not been set aside nor was an appeal lodged against the said decision. As it is the said ruling stands. The arbitral award is therefore a valid judgment of this court.

13. TP attempted to execute the said judgment by taking out notice to show cause which was fixed for hearing on July 21, 2022. The said notice wasn't canvassed as AP filed a Notice of Motion application dated 1July 3, 2022 vide which he sought 7 orders of which the following 2 are most relevant: -

> " (5). The Honourable Court dismiss the arbitration award dated May 11, 2013 as the same contradicts the provisions of the *Arbitration Act, 1995* (as amended in 2009) in that the same breaches public policy in the grounds that the same seeks to grant an award in perpetuity thereby preaching the provisions of public policy;
>
> (6) that the Honourable Court dismiss the arbitration award dated May 11, 2013 as the same does not conform to the provision of section 35, 36 and 37 of the *Arbitration Act, 1995* (as amended in 2009)"

14. AP 's Notice of Motion application was grounded on his affidavit and also on 5 grounds which, on the main, argued that the TP had been paid most of what she was seeking to recover from him.

15. T opposed the said Notice of Motion. She filed a Replying Affidavit on July 19, 2022 vide which she averred that the payments she received from AP were in respect of other matters pending in court between them. She urged the court to dismiss the application and to permit her to execute the award/ judgment without further delay.

16. On July 21, 2022 AP filed what he referred to as "the Notice of Preliminary Objection" dated July 19, 2022. The said notice states that: -

> " take notice that the Respondent herein shall at the first hearing of this case raise a preliminary objection on a point of law to wit that the Application herein is res judicata. The ruling dated 9th June, 2021 references documents that have not been filed before the honourable court and that the Applicant's arbitration award tabled before the honourable court does not meet the requirements of section 36 and 37 of the *Arbitration Act, 1995* (as amended in 2009)".

17. I have quoted the preliminary objection in full as I intend to examine if a preliminary objection can be filed by a party after the court has delivered its judgment, determinative of the issues before the court, and is therefore *functus officio*.

18. Preliminary objection was discussed by the learned Judges of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Law, JA at page 700 held as follows: -

> " So far as I am aware, a preliminary objection consists of points of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit, examples are an objection to the jurisdiction of the court, or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

19. Sir Charles Newbold, President of the Court of Appeal for Eastern Africa added in the said case that: -

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"

20. It is worth noting that at the time the "preliminary objection" was raised the arbitral award had already been adopted by this court. The only pending application, from what I can glean from the record, is that filed by AP on July 13, 2022. It is not clear to me how the cause before me is res judicata as no submissions in support of this contention was led. I note that AP , in challenging an arbitral award already adopted by this court, relies on facts that would in the ordinary course of things be contentious and require production of evidence.

21. Onyiego, J issued directions on December 13, 2022 vide which he asked the parties to file and serve skeleton submissions. The submissions were highlighted before me on March 22, 2023.

The Submissions of AP

22. Mr. Nyamu, learned counsel for AP , submitted that the ruling dated June 9, 2021 referred to documents that had not been filed in court. He argued that the arbitration award adopted by this honourable court did not meet the requirements of sections 36 and 37 of the *Arbitration Act, 1995*, as amended. He pointed out what he said were errors made by the court, in particular, the date of the arbitral award, the name or the identity of the body that made the arbitral award, the date when Taib & Co. Advocates filed their application. It was further submitted that the ruling vide which the award was adopted makes reference to documents not before the court and that the award does not meet the requirements of section 36 and 37 of the *Arbitration Act*. He argued that no document had been produced to show that the parties were bound to arbitrate their dispute or whether their dispute, such as it was is arbitrable. Further grounds in support of the preliminary objection were that the award was signed by unknown individuals, that the award did not state the seat of the arbitral tribunal, that no certified copy of the award was provided. He further submitted that the award wasn't dated and its maker could not be ascertained. I was referred to the *Evidence Act* for the proposition that where a maker of a document cannot be identified the impugned document lacks probative value.

The Submissions of TP

23. T submitted that the preliminary objection is belated as the award had already been adopted by the court. She stated that the arbitral award was adopted by the court and the same has not been set aside and is therefore valid. She argued that a party cannot revisit a matter after a final judgment has been made and a decree issued. It was submitted that by entertaining this preliminary objection I was sitting on appeal on a decision Onyiego J had made. She urged that courts have no jurisdiction to hear arbitral matters save as provided on the *Arbitration Act* and that finality on arbitral proceedings was a good public policy goal. I was referred to what T termed as a departure by Mr. Nyamu from his preliminary objection. Regarding errors counsel for AP said the learned judge made TP argued that errors were factual in nature and thus could not be the basis of preliminary objection. Lastly it was submitted that challenge to arbitral award could only be made under section 35 of the Act and that the law required such challenge to be made within the time stated in the *Arbitration Act*.

Response by counsel for AP

24. Counsel for AP , in response to the submissions made by T, stated that his preliminary objection was founded on sections 36 and 37 of the *Arbitration Act, 1995*. He submitted that there was no agreement between T and AP to refer the matter to arbitration. He therefore submitted that the court was misled into adopting the award.

The law

25. The *Constitution of Kenya, 2010* promotes arbitration and other alternative forms of dispute resolution. Article 159(2) of the *Constitution of Kenya, 2010* provides as follows: -

> "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, *Constitution of Kenya, 2010* mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted."

26. Section 35 of the *Arbitration Act, 1995* lists grounds upon which the High Court may set aside arbitral award. To set aside an arbitral award a party must furnish proof that: -

1. A party to arbitration agreement was under some incapacity;
2. The arbitration agreement is not valid under the law to which the parties have subjected it, to or failing any indication of that law, the laws of Kenya;
3. 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;
4. The arbitral award deals with dispute not contemplated or not falling within the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration;
5. The composition of the arbitral tribunal of the arbitral procedure was not in accordance with the agreement of the parties;
6. The making of the award was induced or affected by fraud, bribery, undue influence or corruption;
7. The High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya; or
8. The award is in conflict with the public policy of Kenya.

27. An application seeking to set aside an arbitral award must be made within 3 months from the date on which the party making the application received the award.

28. Section 36(1) of the *Arbitration Act* states that: -

> "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".

Issues for determination

29. I have carefully considered this matter. In my opinion the following are the issues that this court must consider when making its determination: -

    a. Is the dispute between the Applicant/Respondent capable of arbitration under the laws of Kenya?

    b. Does an arbitral award exist? If so, has the said award been adopted by the court as required by section 36 of the *Arbitration Act*?

    c. Is this court *functus officio*?

    d. Is there a valid preliminary objection?

    I shall look at each point in turn.

Is the dispute between T and AP arbitrable under the laws of Kenya?

30. I must restate that the parties are Shia Imami Ismaili Muslims. When they contracted their marriage they agreed to be bound by the *Constitution* and the personal laws of the said sect. They agreed to refer any dispute in relation to their marriage to the Board. The decision of the Board, as I have earlier stated, would, upon being made, be final and binding on them.

31. A reference was made to the said Board by T. The Board made a decision which was subsequently adopted this court. Was the decision of the Board lawful?

32. The Court of Appeal, sitting in Nairobi, considered a similar matter in the case of *TSJ v SHSR* [2019] eKLR. The appeal arose from the decision of the Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board Nairobi. The Board made an award which, on application for enforcement, was rejected by Kimaru, J (as he then was). On appeal the Court of Appeal stated as follows in paragraphs 37, 38 and 45 of their decision :-

> " 37. As the Court noted in Kenya Oil Company Ltd & another vs. Kenya Pipeline Company Ltd (above) arbitration is underpinned by the principle of party autonomy that as long as it does not offend the strictures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts. Indeed, the learned Judge of the High Court appears to have been alive to this principle when he expressed, in somewhat contradictory terms to what he concluded, that his decision does not however preclude a body such as the Board from arbitrating over disputes relating to custody and maintenance of children where both parties submit to the authority of such a body by agreement.
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> 38. That was precisely the situation here. The learned Judge appears to have overlooked that the parties had indeed submitted to the authority of the Arbitration Board by dint of their religious edict under their constitution. Instructively, it was the husband who had approached the Arbitration Board and commenced the divorce proceedings before it. The same person was to turn around later, perhaps not happy with the arbitral award, to claim want of jurisdiction. The Arbitration Board exercised its powers in accordance with its mandate under its constitutive instrument. The Judge erred in holding that it exceeded its mandate

...

45. Consequently, we allow the appeal and set aside the ruling of the High Court given on 5th June 2014. We substitute therefor an order allowing the appellant's application dated 18th February 2013 in terms of prayer 2 thereof that the arbitral award dated 15th September 2012 given by His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi be forthwith recognized and enforced as an arbitral award."

33. I am bound by the above decision. I therefore find and hold that the dispute between TP and AP is arbitrable. The same is not against public policy.

Does an arbitration award exist? Has the same been adopted by the court?

34. The application for enforcement of the arbitral ward was made to this court pursuant to section 36(1) of the *Arbitration Act, 1995*. I have read the ruling of Onyiego, J. In paragraph 12 of his ruling he states that: -

> " there being no objection to the adoption of the award made on December 12, 2015 and the Applicant having attached certified copies of the award and marriage contract (agreement) I have no option but to allow the chamber summons dated May 12, 2017 in terms of prayer one and therefore adopt the award dated December 11, 2015 as judgment of the court"

35. AP had the option after the award was made to apply to have it set aside. He did no such thing. He could also have applied under section 37 of the *Arbitration Act* to have the award suspended. Yet again he did no such thing.

36. I find and hold that there is a valid arbitral award that is binding on the parties herein. The said award was adopted by this Court and is now a judgment of the Court. It has not been set aside or suspended by this court. It is therefore binding on the parties.

Is the Court *functus officio*?

37. The Court adopted the award June 9, 2021. There is now a decree. Can this court revisit the matter? Njoki Mwangi, J in *John Gilbert Ouma v Kenya Ferry Services Ltd* [2021]eKLR stated as follows:-

> " it is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit based engagement once a final judgment has been entered and a decree issued as is the case herein".

38. The Supreme Court of Kenya expounding on the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & others vs. IEBC & others* [2013] eKLR when it cited with approval an excerpt from an article by Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832:

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

39. In *Telkom Kenya Ltd v John Ochanda & 996 others* [2014]eKLR the Court cited with approval the holding in J*ersey Evening Post Ltd v AL Thani* [2002] JLR 542 at 550 where it was said that :-

> " A court is *functus officio* when it has performed its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when the decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus officio* when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available".

40. I find and hold that this court is *functus officio* and cannot entertain the preliminary objection and the application dated July 14, 2022 filed by AP .

Is there a valid preliminary objection?

41. I have referred to the decision of the Court of Appeal of Eastern Africa in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Lt*d [1969] EA 696. The preliminary objection before me is founded on disputed facts. I therefore find and hold that in the circumstances of this matter a preliminary objection is misguided.

Disposition

42. The upshot of the forgoing is that the preliminary objection filed herein must fail. It is hopeless and has no merit whatsoever. I dismiss the same.

43. This being a family matter I make no orders as to costs

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 12TH DAY OF MAY, 2023 AT MOMBASA VIA MICROSOFT TEAMS

…….

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Steve Nyamu for the Respondent/Applicant

Ms. TP the Applicant/Respondent (in person)

Winnie Migot – Court Assistant