Virmint Company Limited v Effie Ogenda t/a Western Safe Energy Solutions (Arbitration Cause E025 of 2022) [2023] KEHC 4109 (KLR) (Commercial and Tax) (9 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4109 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E025 OF 2022

PN GICHOHI, J

MAY 9, 2023

BETWEEN

VIRMINT COMPANY LIMITED ..... CLAIMANT

AND

EFFIE OGENDA T/A WESTERN SAFE ENERGY SOLUTIONS ... RESPONDENT

RULING

1. By Chamber Summons dated March 7, 2022 under a certificate of urgency and filed through firm of Munyao-Kayugira & Co Advocates, the Claimant moved this Court under Section 36 of the *Arbitration Act*, 1995 and Rule 9 of the *Arbitration Rules 1997*, and seeks orders that:-

    1. Spent

    2. The Arbitral Award published on August 23, 2021 be and is hereby recognised by this Court as binding on the parties and the same be given a Serial Number in the Commercial Registry Register of this Court.

    3. The Claimant be granted leave for enforcement of the said Arbitral Award as the decree of this Court in terms of the Draft Decree annexed the Affidavit of Michael Eganza Rundu herein.

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

2. The grounds are on the face of the application that the Claimant and the Respondent entered into a Settlement Agreement dated October 21, 2020 for payment of the amounts acknowledged and agreed upon and the same provided for a mediation and subsequently arbitration as a way resolving any dispute as may arise between them. That a dispute did arise and the Claimant referred it to Mediation pursuant to Clause 9 of the Settlement Agreement but it was unsuccessful.

3. This caused the Claimant to move to the Chairperson of the Chattered Institute of Arbitrators Kenya Chapter and he appointed Jane Njeri Onyango as the Arbitrator. The Arbitrator did hear the claim and rendered a final Award on August 23, 2021 except on costs. The Respondent has never applied to set aside the Arbitral Award.

4. This application is supported by the affidavit sworn by Michael Eganza Rundu on March 7, 2022 in his capacity as one of the Directors of the Claimant. While making reference to the documents annexed to the affidavit , counsel states that the Claimant entered into a partnership agreement with the Respondent and one Roselyne Owuyo for the supply of Boiler Fuel to Golden Africa Limited. That while the Claimant honoured his obligation as per the agreement, the Respondent failed to deliver bio fuels paid for by the Claimant thus leading to a dispute.

5. He called for a meeting on August 12, 2020 upon which an agreement was reached on the amount due as there was a clear admission of the liability. A draft agreement was prepared and negotiations ensued on the same. He states that even though the initial agreement was for supply of boiler fuel from which the Claimant would recover its capital investment, the Respondent opted for and drafted a debt settlement agreement which the claimant accepted.

6. Both parties executed it but the Respondent never made any payments pursuant to the settlement agreement leading to activation of the dispute resolution clause which led to mediation which failed. He states that the matter went for arbitration but the Respondent failed to file a response. The claim proceeded undefended. And the Arbitrator made the Arbitral Award.

7. When served with this application, the Respondent, through the firm of Onyango & Aywa Advocates, filed grounds of opposition dated March 28, 2022 and a replying affidavit sworn by the Respondent on April 19, 2022. The contention is that the Respondent was not able to present her case during the arbitral proceedings for reasons that the costs and expenses of the arbitration were inhibitive and beyond her financial capacity.

8. She states that despite her protest on the said costs of arbitration, the Arbitrator proceeded on mistaken assumption that parties to the arbitration had agreed on the process and consequently, the Respondent is saddled with costs and expenses that were not consented to or acceded to. For those reasons, the Respondents states that the Final Award offends Art 50 of the *Constitution* and is contrary to public policy.

9. Terming the application premature, the Respondent states that it seeks to circumvent the opportunity for exhaustion of due process safeguards available in relation to setting aside the award under Sec 35 of the Arbitration Act for reasons that:

    1. The Final Award was said to have been released on February 7, 2022.

    2. The Respondent was not able to participate in the arbitration and had no capacity to come to come to the knowledge of the publication of the Arbitral Award.

    3. The Respondent has never been served with the said Award to date.

10. The Respondent further states that the amounts claimed in the application are without basis as there is no evidence of a certificate of costs assessed by the Arbitrator or a consent by parties.

SUBMISSIONS

11. The Respondent filed their submissions dated May 20, 2022. They emphasise the contents of the grounds of opposition and the replying affidavit and on the issue as to whether the arbitration offends

the constitutionality on the Respondent's right to a fair hearing, counsel submits that the Respondent was locked out from participation in the process of arbitral proceedings thus violating her right to fair trial under Article 25 (c) and 50 (1) of the *Constitution* and Section 19 of the Arbitration Act that dictates that parties to the Arbitral proceedings should be treated with equality and that subject to Section 20, be given a fair and reasonable opportunity to present their case.

12. On issue as to whether the Arbitral Award is contrary to Public Policy, counsel cites the case of *Christ of All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366* and submits that the Award was contrary to public policy as the as the Respondent who was a party to arbitration agreement was not able to present her case during the arbitral proceedings for reasons that costs and expenses of the arbitration were beyond her financial ability.

13. On whether the application is premature, counsel submits that the Final Award is said to have been released on February 7, 2022 but having not been able to participate in the arbitral proceedings, the Respondent had no means or capacity to come to the knowledge of the publication and /or release of the of the Award and that to date, the Respondent has never been formally served with the same. That as a consequence, the Respondent seeks protection under Section 35 of the Arbitration Act by having the Award set aside.

14. On the other hand, the Claimant filed submissions dated May 23, 2022. Counsel submits that that the Applicant has met the threshold for recognition and enforcement of the Aawrd under Section 36 of the Arbitration Act as he has filed the settlement Award agreement dated October 21, 2020 and a certified copy of the Arbitral Award published on August 23, 2021.

15. On the Respondent's allegation that did not come to the knowledge of the Award , Counsel submits that the Award was published on August 23, 2021 and the parties were notified to collect the same. Counsel relies on the case of *Mahican Investments Limited & 3 others v Giovani Gaida & 80 others [2005] eKLR* where Justice Ransley adopted the reasoning by Justice Nyamu in Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others HC Misc Application No 238 of 2003 and held that that receipt means when notice is given that the Arbitral Award is ready for collection. Counsel therefore submits that the Respondent had three months to apply to this Court for setting aside the said Award in line with Section 35 (3) of the Arbitration Act but did not do so and therefore, the Award should be recognised and enforced by this Court.

16. On the issue as to whether the recognition and enforcement are contrary to public policy of Kenya, counsel relies on the case of *Magnate Ventures Limited v Kenya Railways Golf Club (Interested Party) [2019] eKLR* and submits that in the spirit of Section 19 of the Arbitration Act, the Respondent was granted equal opportunity to that of the Claimant to participate in the arbitral proceedings and present her case but she failed, ignored and/or neglected to file a response. That by absconding the said proceedings, the Respondent waived her right to be heard and hence Article 50 of the *Constitution* cannot come to her aid.

17. On the issue of Arbitrator's fees, counsel submits that the Arbitrator solved the issue through Order Direction -1 and further, that the Arbitrator did not lock out any party for lack of fees. That instead , the Arbitrator continually gave the Respondent multiple opportunities to file her response. Counsel further submits that having sought the inclusion of the arbitration clause, the Respondent cannot be heard to complain that the fees was prohibitive. That in any event, the Arbitrator did not peg participation of parties in the proceedings on the payment of fees.

18. On the issue by the Respondent that the Final Award is contrary to public policy, counsel relies on the case of *Anne Mumbi v Victoria Njoki Gathara [2009] eKLR* and submits that there is nothing on record or during the arbitral proceedings to suggest that there was an element of illegality or anything

injurious to the public good. Lastly counsel urges the Court to allow the Claimant's application as prayed thus bring a closure to this matter.

DETERMINATION

19. From the material presented before this court, the issues for determination are :

    1. Whether the Claimant has met threshold for the Recognition and enforcement of the Award.

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

    3. Who should be awarded cost of this application.

20. The basis for the adoption and recognition 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) .'

21. The Claimant is compliant with Sec 36 (3)(a) and (b) of the Arbitration Act in that they filed before this Court a certified copy of the Final Arbitral Award and a certified copy of the Settlement Agreement which this Court also accessed from the portal.

22. The Settlement Agreement between the parties dated October 21, 2020 provided for dispute resolution mechanism at clause 9. The Final Award was published on August 23, 2021 and this is a domestic Award.

23. 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.'

24. The contention by the Respondent is that they have never been served with the Award to date. A look at the Award reveals that the Arbitrator wrote thereon that 'due to covid protocols Award delivered in absence of parties' representatives and 'Released on February 7, 2022 at 12.20 pm Claimant Counsel to serve the Respondent's Counsel with their copy of this Award.' The annextures herein show that the Respondent was notified to collect the Award but did not act and guided by the case of Mahican Investments Limited & 3 others (Supra) receipt of the awarded means the date the Respondent was notified that the Award was ready for collection.

25. Having complied with the said provisions, then the Claimant then the grounds upon which High Court may decline to recognise and enforce the Award are provided for Section 37 of the Arbitration Act 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.'

26. The Respondent argues that the Award was contrary to public policy for reasons that though the Respondent was a party to arbitration agreement, she was not able to present her case during the arbitral proceedings as the costs and expenses of the arbitration were beyond her financial ability. In

the case Christ for all Nations v Apollo Insurance Company limited [2002] EA 366, on which the Respondent rely, 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.'

27. Based on that authority, the Respondent argues that she was not given an opportunity to present her case and therefore a violation of her constitutional right to a fair hearing. The contrary is revealed by the Arbitral Proceedings that led to the Final Award.

28. The Respondent was represented by Okumu Kubai & Co Advocates and said advocate raised the issues of Arbitrator's fees during the preliminary meetings held in this matter. The Arbitrator gave reasons as to why she could not lower the fees from Kshs 12,000/- per hour to Kshs 5,000/- and from Kshs 20,000/- to Kshs 10,000/- as appointment fees as sought by the Respondent. Their request to have the Arbitrator remit the matter to CIArb for appointment of another Arbitrator who could charge less was declined for reasons that the Arbitrator had no powers to do so. The Arbitrator directed the matter to proceed as she had jurisdiction to hear the matter.

29. There was no action taken by the Respondent pursuant to that Order. There is nothing to show in those proceedings that the Respondents were denied filing of their Responses or denied hearing due to lack of fees. The Respondent deliberately chose to ignore the several Orders of Directions given by the Arbitrator and failed to attend the proceedings or file any response to the Claimant's claim.

30. A party who voluntarily agree to have the dispute between him and the other party resolved through arbitration but choses not to comply with Orders of Directions cannot turn round and seek refuge in Art 50 of the *Constitution*.

31. The Arbitral proceedings reflect full compliance with not only Section 19 of the Arbitration Act by the Arbitrator giving the parties therein equal opportunity to participate and present their case but also the ultimate Constitutional right to a fair trial.

32. Intervention by the court in an application for enforcement of an Arbitral Award on the ground that the Award is contrary to public policy has been subject in several cases. The Court of Appeal in the case of Anne Mumbi v Victoria Njoki Gathara [2009] eKLR, had this to say on the issue;

> ' One of the grounds relied on to invite the superior courts intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised – see the case of Deutscche Schachtbau vs Shell International Petroleum & Company Ltd (1990) 1AC 295, Court of Appeal. There is nothing whatsoever indicating that the award before us, fell under any of the above definitions of public policy, so as to warrant a challenge under the public policy exception.'

33. There is nothing here to show that the Final Arbitration Award is against public policy and there is no reason whatsoever for this court to entertain the alleged challenge.

34. Further, there is evidence which is annexed on notification dated August 23, 2021 made by the Arbitrator to parties that 'the Award is ready to be delivered upon settlement of the Arbitrator's fees as per the enclosed statement of costs'. The Claimant went ahead to clear the fees and costs and obtained the Award so as to proceed with its enforcement.

35. From the foregoing, it is clear that the Respondent's opposition to the Claimant's application herein lacks merit. As regards costs, the same follow the event. This Court is therefore satisfied that the Applicant/Claimant is deserving of the orders sought in the Application dated March 7, 2022 . The application is therefore allowed in the following terms;

    1. The Arbitral Award made by the Sole Arbitrator Jane Njeri Onyango on August 23, 2021 be and is hereby recognised and adopted as the judgment of this court.

    2. The Applicant is granted leave to enforce the said Award as the decree of this court.

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

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 9TH DAY OF MAY , 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Mwalo for Applicant

N/A for the Respondent

Daniel Otieno, Court Assistant