



EPCO Builders Limited v South Development Company Ltd (Miscellaneous Civil Application E468 of 2019) [2023] KEHC 19855 (KLR) (Commercial and Tax) (14 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19855 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E468 OF 2019
DO CHEPKWONY, J
JUNE 14, 2023
IN THE MATTER OF THE ARBITRATION ACT 1995

BETWEEN

EPCO BUILDERS LIMITED APPLICANT

AND

SOUTH DEVELOPMENT COMPANY LTD RESPONDENT

RULING

1. This Ruling is in respect to the Notice of Motion Application dated October 9, 2019 filed pursuant to Article 48(1) and 165(6) of the *Constitution of Kenya, 2010*, Section 29 (5), 3, 5(2)(a)(iv) and b (ii) of the *Arbitration Act, 1995*.
2. The Application seeks the following orders:
 - a. That this Honourable Court be pleased to set aside Paragraph 228, 229, 230 and 233 of the Final Award of Architect Julius Muthui F. Mutunga dated June 11, 2019.
 - b. That this Honourable be pleased to determine the question of whether the claim of Kshs 60,775,204/= made by the Applicant in its claim is payable and if so order that the same be paid.
 - c. In the alternative to, this Honourable Court to refer Paragraphs 228, 229, 230 and 233 of the Final award for reconsideration with instructions to determine them within the jurisdiction of the Arbitrator.
 - d. Costs of this application be provided for.



3. The Application is based on the grounds on its face and the Supporting Affidavit of Ramji Devji Varsani sworn on October 9, 2019.
4. The Applicant argues that the dispute with the Respondent arose from agreement dated February 6, 2007 for construction and completion of Maisonettes in South C “the JBC” at a cost of Kshs 575,000,000/=. That a the matter was referred for arbitration whereupon Architect Julius F. Mutunga was appointed as the sole arbitrator to hear and determine the dispute.
5. The Applicant holds that the claim before the Arbitrator was for Kshs 19,698,837.00 being the balance of the payment of Certificate N. 29 dated December 21, 2010, Kshs 8,123,065.00 being the amount certified in the revised final certificate dated October 11, 2012 and Kshs 60,775,204.00 as indicated in the final account dated December, 2011. The Applicant holds that the Respondent counterclaimed for Kshs 15,626,666.57 which was dismissed.
6. The Applicant holds that in the Final award, the Arbitrator awarded Kshs 19,698,837.00, Kshs 8,123,065.00 and Kshs 2,203,025 being interest, bringing it to a total of Kshs 30,126,927.50. The Applicant holds that the Arbitrator failed to award Kshs 60,775,204.00 being interest on the delayed payments which accrued by virtue of Clause 34.6 of the JBC.
7. The Applicant has now filed this application seeking to set aside Paragraphs 228, 229, 230 and 233 of the Final Award and for the court to hold that the amount of Kshs 60,775,204.00 is payable or in the alternative, that the said Paragraphs to be referred back to arbitration for reconsideration.
8. The Applicant has raised several reasons as to why it was aggrieved by the decision of the arbitrator which are as follows:-
 - a. The final award is in avoidance of pertinent terms of the JBC contract which govern the obligations of the parties, interest on delayed payment, and the final account, being clause Nos. 2, 3, 4, and 34.
 - b. The part of the final award purports to confer contractual obligations on KPAPS which is not a party to the JBC contract.
 - c. The arbitrator’s decision to constitute KPAPS as a party to the contract amounted to re-writing the contract between the parties, thus amounting to excess jurisdiction and offending the laws of Kenya and public policy.
 - d. By bringing KPAPS into the dispute, the part of the arbitrator’s final award dealt with a dispute who was not contemplated by the contract between parties.
 - e. The claim for interest on delayed payment was not contested by the Respondent. In fact, the Respondent admitted the claim and said that he passed the final account to KPAPS to pay.
 - f. KPAPS made some previous payments to the Applicant on behalf of the Respondent and it was not the Applicant’s employer in the JBC Contract.
 - g. The reasons that the arbitrator gave to constitute KPAPS as a party in the JBC contract between the Applicant and the Respondent offend the Law of Kenya and are therefore contrary to public policy of Kenya.
 - h. The Respondent did not question the final accounts and only passed it to its employer to pay on its behalf as had previously happened.



- i. The effect of the extra-jurisdictional and offensive decisions led the arbitrator to wrongfully deny the applicant his claim of interests on delayed payments of Kshs 60,775,204.00 which is provided for by the contract, calculated in accordance with the provisions of the contract, and accepted by the Respondent as is evidence in the signed final account.
 - j. The arbitrator has no reasons under the Contract for exporting the contractual obligation to pay from the Respondent to KPAPS.
 - k. The arbitrator acted out of his jurisdiction when he lumped together the Applicant and the Respondent and constituted them into a party on one side under a consortium agreement in disregard of the JBC contract and said that they were jointly responsible to KPAPS and would not allow them to punish KPAPS with interest on delayed payment.
 - l. The arbitrator was out of his jurisdiction when he construed KPAPS as a party and decided that it had an obligation to pay the Applicant when it was neither a party to the JBC Contract nor a party in the arbitration proceedings.
9. The Applicant holds that the Arbitrator made the following fundamental in the Final Award:-
- a. The arbitrator ignored the contract between the parties and made his determination on the interest on delayed payment on the basis of extraneous consideration.
 - b. The arbitrator picked and chose part of the Applicant's/Claimant's evidence leaving the rest in a manner that has no logical basis, thereby besmirching the arbitral process.
 - c. The arbitrator created an imaginary contract that never existed between the Applicant/Claimant and KPAPS whereas the Construction contract (the JBC contract) was between the Applicant and the Respondent.
 - d. The arbitrator made his decision on the claim of interest on delayed payment on the basis of an imagined contract between the Applicant and KPAPS, and sought to protect KPAPS on terms which are not rooted in a contract, thereby exceeded his jurisdiction on the issue.
 - e. The arbitrator acted contrary to the Constitutional gains in failing to administer substantive justice and in addition, acted contra the principle of privity of contract.
 - f. The arbitrator in light of the decided the issue of interest on delayed payment outside his jurisdiction as delineated by the contract and, by ignoring the law of contract on privity of contract, went against the public policy of Kenya.
10. The Applicant holds that the Final award should therefore be partially set aside and be reconsidered either by this court or the Arbitrator.

The Respondent's Case

- 11. The application is opposed through the Grounds of Opposition dated December 4, 2019, Notice of Preliminary Objection dated 4th December, 2019 and the Replying Affidavit of David Kuria sworn on June 23, 2020. The Notice of Preliminary Objection was dismissed vide a court ruling delivered on May 31, 2021.
- 12. The Respondent admits that it entered into the JBC with the Applicant whose purpose was to enable the Applicant obtain finances from Old Mutual Assets Managers Limited. The Respondent holds that



the Applicant commenced the works but delayed the completion for about two years, a result of which, the Project Architect under Clause 43.1 issued a Certificate of loss in the sum of Kshs 15,626,666.67 which the Applicant failed to pay. The Respondent argues that it was only after deduction of the said sum of Kshs 15,626,666.67, that interest could be calculated on delayed payments under Clause 34 of the JBC.

13. The Respondent contends that it was a term of the JBC that the employer Kenya Ports Authority Staff Pension Scheme (KPASP) would pay for the works done. It argues that for the successful payment under Interim Certificate No 30 for Kshs 25,116,859.45 and the Final Certificate No 31 for Kshs 8,123,065.00, the Respondent forwarded it to the Employer for payments to be made. The Respondent contends that the Applicant's claim for Kshs 60,775,204.00 lies with the Employer for its payment and not itself since it was only facilitating the works.
14. The Respondent argues that the application is statute barred; the court lacks jurisdiction to handle the matter; is against Section 35 of the *Arbitration Act* having been filed more than 3 months after delivery of the Final award and without leave, it offends the *ratio decidendi* of *Bellevue Company Ltd – vs- Vinayak Builders Limited & another* [2014]eKLR since it seeks orders against a party which was not a party in the arbitration proceedings. The Respondent also argues that the Applicant's claim that the application offends public policy is farfetched and misconceived and therefore the application should be dismissed with costs.
15. In the Ruling of the court delivered on May 31, 2021, Lady Justice M.W. Muigai directed that the issue of statute bar be addressed during the proceedings.

Analysis and Determination

16. In determining the application dated October 9, 2019, I have read through the entire pleadings, submissions and cited case and statute law and find the issues for consideration are as follows:
 - a. Whether this court has jurisdiction to handle the matter.
 - b. What reliefs should the court grant.

Whether this court has jurisdiction to handle the matter

17. As was held by the Supreme Court of Kenya in the case of *Samuel Kamau Macharia –vs- KCB & 2 others*, Civil Application No 2 of 2011, a court derives its jurisdiction either from the *Constitution* or Statute or both. It was held therein thus:-

“A Court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

18. In arbitration matters, a court expressly derives its jurisdiction from the *Arbitration Act*. However, the general position under Section 10 of the *Act* is that courts should not intervene with matters governed by the *Arbitration Act* except where it is provided to the contrary by the Act. Section 32A of the Act goes on to state,

‘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.’



19. A court only derives its jurisdiction under Section 35 of the Act in an application to set aside an award and Section 39 of the Act on appeals on questions of law. The purpose of the restriction of court's intervention is to protect the arbitration process which should be final and binding. (See the Supreme Court decision in Nyutu Agrovat Limited -vs- Airtel Networks Kenya Limited; Chartered Institute of Arbitral Tribunals-Kenya Branch (Interested Party) [2019]eKLR).
20. The Respondent argues that the application is statute time barred under Section 35(3) of the Arbitration Act which states:-
- “(3) 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 34 from the date on which that request had been disposed of by the arbitral award.”
21. In this case, the Applicant invoked Section 34 of the Act which empowers the Arbitrator to correct any computation, clerical or typographical errors. It states,
- [1]. Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties-
- a) A party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and
- b) A party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.
- [2]. If the tribunal considers a request made under subsection (“1) to be justified it shall, after giving the other party 14 days to comment, make a correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.
- [3]. The arbitral may correct any error of the type referred to in subsection (1) (a) on its own initiative within 30 days after the date of the arbitral award.
- [4]. Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.”
22. In this case, the final award was published on June 11, 2019, and having received the award on July 12, 2019, the Applicant wrote a letter dated August 8, 2019 seeking clarifications from the Arbitrator. The Arbitrator issued additional award dated September 12, 2019 and the Application was filed dated October 9, 2019.
23. It is trite that time starts running on the day when the Arbitrator notifies the parties that the award is ready for delivery and not when it was received by the parties as this time depends on certain factors such as payment of the arbitral fees. The court in the case of Mercantile Life and General Assurance Company Limited & Another -vs- Dilip M. Shah & 3 others [2020]eKLR held:-
- “First, once the arbitrator has signed off the award and notified that parties that the it is ready for collection upon payment of fees and expenses, the act of delivery is within the power and



control of the parties. Second and flowing from the first reason, the object of the entire Act would be undermined if a contrary meaning were given to the to the provision.

[20]. I am of the view that consistent with the object of the Act, the only logical interpretation of Section 35(5) of the Act is that an application to set aside must be made within 3 months from the date the award is received and for this purpose, the date of receipt is the date which the parties are notified of the award. In this case, the award was received on August 13, 2019 and the Notice of Motion dated February 24, 2020 filed outside the 3 months prescribed. It is therefore struck out.”

24. In this case, the Final Award was published on June 11, 2019 which is when the time started running. The Application to set aside the award under Section 35(3) of the Act was required to be filed either three months after the date of the award or after the request for clarification was responded to under Section 34 of the Act.
25. In this case, in a letter dated September 5, 2019 the Arbitrator notified the parties that the additional award was ready and it was dated September 12, 2019. The fact that the application was made on October 9, 2022 means that it was within the required period/timelines. In view of this, this application cannot be said to be statute time barred and therefore the court has jurisdiction to handle the matter.
26. The Applicant has invoked Section 35 of the Arbitration Act which gives this Court jurisdiction to hear the matter as far as setting aside the award is concerned. Section 35 of the Act states:-

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- (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
- (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.

27. The Applicant wishes to have the award set aside on the basis that it is in conflict with the public policy of Kenya for failure by the arbitrator to award interest and costs. The court in the case of *Christ for All Nations –vs- Apollo Insurance Co. Ltd* [2002] 2 E.A 366 discussed public policy and 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”.

28. In challenging the award on this ground, the Applicant must identify the public policy which the award has allegedly breached and then demonstrate which part of the award conflicts with that public policy. This point is underpinned by the decision of the court in *Mall Developers Limited –vs- Postal Corporation of Kenya* ML Misc. No 26 of 2013 [2014] eKLR, where the Court observed that:-

“Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy”.

29. In this case, this Court agrees with the Respondent that the Applicant’s position that the final award contravenes public policy is farfetched as the dispute only involves the parties and not the rights of other third parties.

30. On the main issue upon which the Applicant seeks part of the Arbitral award to be set aside on the computation of the final account of Kshs 60, 755,204.00. The court does not have the powers to go into the details of the correctness of the decision of the arbitral Tribunal as it would now be sitting on the appeal of the Arbitral Tribunal. This was the position in the case of *Geo Chem Middle East –v- Kenya Bureau of Standards* [2020]eKLR, where the Supreme Court of Kenya quoted with approval Ochieng J’s holding in the High Court that: -

“It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality



to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal”.

31. In this case, the court cannot determine whether or not the claim of Kshs 60,755,204.00 since this application is only to set aside the award and not an appeal. The application has not satisfied the grounds required for setting aside an arbitral award under Section 35 (2) of the Act and therefore the application is dismissed with costs to the respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14TH DAY OF JUNE, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Macharia counsel for Respondent

No appearance for Applicant

Court Assistant - Martin

