



**Gachoka v Lutukai trading as Gachoka Lutukai & Associates (Arbitration Cause E002 of 2023 & Commercial Case E755 of 2021 (Consolidated)) [2023] KEHC 20581 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20581 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E002 OF 2023 &  
COMMERCIAL CASE E755 OF 2021 (CONSOLIDATED)**

**DAS MAJANJA, J**

**JULY 21, 2023**

**BETWEEN**

**PETER KANGETHE GACHOKA ..... APPLICANT**

**AND**

**PETER SOITA LUTUKAI TRADING AS GACHOKA LUTUKAI &  
ASSOCIATES ..... RESPONDENT**

**RULING**

**Introduction and Background**

1. On 26<sup>th</sup> October 2022, the Arbitral Tribunal (also “the Arbitrator”) published an award in which it allowed the Applicant’s claim to the extent that the Respondent (“Lutukai”) was directed to pay the Applicant (“Gachoka”) Kshs. 32,191,372.00 together with interest at the rate of 10% p.a from 1<sup>st</sup> October 2018. Lutukai was also directed to pay costs of the said arbitration proceedings (“the Award”).
2. Gachoka has filed the Chamber Summons dated 12<sup>th</sup> January 2023 under, inter alia, section 36 of the [Arbitration Act](#) and seeks to enforce the Award. It is supported by the affidavit of Maina Njuguna, an advocate in conduct of this matter on behalf of Gachoka, sworn on 12<sup>th</sup> January 2023.
3. Lutukai has also filed the Notice of Motion dated 17<sup>th</sup> January 2023 made, *inter alia*, under section 35 of the [Arbitration Act](#) seeking to set aside the Award. The application is also supported by his supporting affidavit sworn on 31<sup>st</sup> January 2023 and opposed by Gachoka through the Grounds of Opposition dated 26<sup>th</sup> January 2023 and his affidavit sworn on the same date.



4. The court directed that both applications be heard together. The parties filed written submissions to supplement their arguments. Before dealing with the applications, a brief background of the matter is apposite.
5. At the material time, the parties were partners in the accounting firm known as Messrs. Gachoka Lutukai & Associates, a partnership carrying out accountancy, audit, tax advisory and consultancy services under a Partnership Deed dated 1<sup>st</sup> January 2014 (“the Deed”). Under the Deed, Gachoka agreed to provide the business model, certain assets, inventory, client lists and goodwill while Lutukai agreed to provide technical know-how and expertise to carryout accounting, tax advisory and audit services of the partnership. By a Partnership Buy-out Agreement dated 27<sup>th</sup> January 2014 (“the Agreement”), Gachoka agreed to sell and assign to Lutukai and Lutukai agreed to purchase and take on assignment, all of Gachoka’s rights, title and interest in the partnership for Kshs. 32,000,000.00 payable in annual instalments over a period of 5 years from the date of the Agreement and that each instalment payment after the first instalment payment was subject to a 10% escalation rate.
6. On 12<sup>th</sup> August 2021, Gachoka instructed his advocate to file suit against Lutukai for the recovery of Kshs. 25,511,447.00 and interest being the unpaid balance arising from the Agreement (HCCC No. E755 of 2021). Lutukai successfully challenged the competence of the suit by stating that the claim ought to be prosecuted and referred to arbitration. The court acceded to the application and the suit was referred to arbitration for resolution.

### **Analysis and Determination**

7. I propose to first deal with Lutukai’s application to set aside the Award as this will determine if at all Gachoka’s application to enforce the Award will be considered. The court’s jurisdiction to set aside an arbitral award is delimited by section 35(2) of the [Arbitration Act](#) which provides as follows:
  35. Application for setting aside arbitral award
    - (1) .....
    - (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.
8. In his submissions, Lutukai avers that the Arbitrator misconducted himself in the proceedings by failing to consider relevant facts and evidence he adduced and that instead, the Arbitrator solely relied upon Gachoka’s evidence. That Gachoka fraudulently concealed relevant matters which he ought to have disclosed and he wilfully misled and deceived the Arbitrator leading to the delivery of the impugned Award. He further states that Award deals with a dispute not contemplated by and falling beyond the scope of the reference to arbitration, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, that the subject matter of the dispute was not capable of settlement by arbitration under the law of Kenya and that the award is in conflict with the public policy of Kenya as it is astronomical and without any legal foundation.
9. Lutukai contends that the Arbitrator erred in law and fact in failing to find that it was his case that Gachoka persuaded him to agree to purchase his business then Gachoka and Associates as he wanted to concentrate to his other businesses, but he was not to acquire neither the liabilities nor debts of the defunct firm. That the Arbitrator erred in law and fact in failing to find that in accordance with clause 8.3 of the Agreement, all payments to be made to Gachoka were to be made through Gachoka Lutukai & Associates funds and not by Lutukai directly from his own funds.
10. Lutukai argues that the Arbitrator erred in law and fact in failing to find that during the five years of the Agreement, he did not take any salary or drawings except for a few exceptional cases and that all profit generated by the firm was utilized in paying Gachoka who continually made drawings from the partnership, that were to count towards the purchase repayment. Lutukai adds that the Arbitrator erred in law and fact in failing to find that he had been sued wrongly as he is not a party to bear the terms of the Agreement but the firm as it were. That the Arbitrator erred in law and fact in failing to find that during cross examination, Gachoka admitted to having roles as partners under the Deed which he faithfully conducted and further testified that he received no restrictions from Lutukai in interrogating Gachoka Lutukai & Associates records including the books of accounts. Further, that the Arbitrator erred in law and fact in failing to consider material evidence of Gachoka that he was still a partner during the Buy-Out period and was equally responsible for generating and paying himself the balance of the Purchase Price and not directly by Lutukai.
11. It is apparent from the grounds advanced by Lutukai that he appears to be faulting the Arbitrator’s factual conclusions by inviting the court to re-evaluate the record and come to a different finding on those facts which is akin to hearing an appeal from the Award. I reject such an invitation and will deal with the matter strictly in accordance with what the Act permits. In *Kenya Oil Company Limited & Another v Kenya Pipeline Company* NRB CA Civil Appeal No. 102 of 2012 [2014]eKLLR, the Court



of Appeal accepted the position that the arbitrator is the master of facts and cited with approval the decision in *Geogas S. A. v Trammo Gas Ltd (“the Balears”)* [1993] 1 Lloyd’s LR 215 as follows;

[40] The court in that case was dealing with an appeal under section 1 of the English *Arbitration Act*, 1979. It is necessary to quote at length the words of Lord Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:

The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators’ award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators’ findings of fact.....

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(41) ----- Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator’s finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.

12. On the ground that the Arbitrator misconducted himself in the proceedings by failing to take into account relevant facts and evidence adduced by the Lutukai and solely relied upon Gachoka’s evidence, I accept that this would be a valid ground for setting aside an award as it violates the public policy of Kenya in that it touches on Lutukai’s right to a fair hearing and rules of natural justice that demand that everyone has a right to be heard and that a party must be given an opportunity present its case. Lutukai did not produce a record of the proceedings before the Arbitral Tribunal but a study of the Award shows that both parties were always present for the proceedings and were each given an opportunity to present their cases through their testimonies and documentary evidence.
13. In the Award, the Arbitrator lay out each of the parties’ arguments on each issue and then made a finding and determination based on his analysis of the law and evidence before him. There is no evidence or material to support the argument that the Arbitrator solely relied on Gachoka’s evidence and failed to consider relevant facts and evidence adduced by Lutukai. The fact that the Arbitrator made a decision that was against Lutukai does not mean that he never considered his evidence. In any case, section 20(3) of the *Arbitration Act* gives an arbitral tribunal “...power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.” This ground therefore has no merit.
14. Lutukai contends that Gachoka fraudulently concealed relevant matters which he ought to have disclosed and that he wilfully misled and deceived the Arbitrator leading to the delivery of the Award. I note that Lutukai has not expounded on this issue. He does not mention what these so-called relevant matters are, how they were allegedly fraudulently concealed and how they misled and deceived the Arbitrator. Allegations of fraud are serious and a party alleging them must be plead and prove them with specificity to the required standard. Cogent evidence is needed to establish fraud for an award to be set aside on this ground and since no evidence is available this ground must fail (see *Dorothy Seyanoi Moschioni v Andrew Stuart & another* ML HCCC No. 312 of 2012 [2014] eKLR).



15. Lutukai invokes the ground that award deals with a dispute not contemplated by and falling beyond the scope of the reference to arbitration. The Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR dealt with the contours of this ground and observed as follows:

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

16. The arbitration clause in the Agreement at Clause 19.2 provides that “if a dispute arises out of or in connection with this Agreement, including any question as to its existence, interpretation, validity or termination the Parties shall seek to resolve the matter in dispute by good faith negotiations between them and failing agreement after twenty-one (21) days from the commencement of such negotiations the parties agree to immediately refer the dispute to arbitration.” The wording of this Clause is wide and does not seem to restrict any dispute or difference that may arise between the parties concerning the Agreement. Gachoka’s claim was that Lutukai had not paid up all the instalment payments due to him. Further, as I have stated in the introductory part, in the suit HCCC No. E755 of 2021, Lutukai was emphatic that this dispute was one to be dealt by arbitration.
17. In the Award, the Arbitrator stated that during the hearing, seven issues were before him for determination where Gachoka’s counsel formulated six issues deemed accepted by Lutukai’s counsel who added an additional issue for determination. These issues were as follows: Whether the Parties entered into a valid, mutual and consensual agreement to sell Gachoka’s business? Did Lutukai take on the business and if so, did he honour his bargain to pay the agreed amount? Could Lutukai seek to free himself from a negotiated contract without fulfilling his part of the bargain? Could the Arbitrator re-negotiate the terms of the contract for Lutukai? Did Lutukai have a triable defence on merit? Who was to meet the cost of this Arbitration? Whether Gachoka was deserving of the Orders sought?
18. After the parties filed written submissions, the Arbitrator consolidated the issues for determination as follows:
- a. Whether the Parties had entered into a valid, mutual and consensual Buy-out Agreement and the Deed?
  - b. Who were the parties to the Buy-out Agreement and the Deed; whether the Claimant can free himself from the terms of the negotiated Buy-out Agreement and the Deed: and was the Respondent validly sued as party to the Buy-out Agreement or should the claim have been against the Partnership of Gachoka Lutukai & Associates?
  - c. Would completion by the Claimant under Paragraph 18 of the Buy-out Agreement result in an executed contract or would the Claimant still have rights to demand performance from the Respondent for the amounts due to him under the said agreement?



- d. Was there a breach of the Buy-out Agreement, and if yes, is the Claimant deserving of the orders sought and the quantum?
- e. Who meets the cost of this Arbitration?
19. The consolidated issues framed by the Arbitrator are almost a mirror reflection of the issues framed by the parties and they are all related to the Agreement and thus within the confines of the arbitration agreement. I therefore reject the contention that the Arbitral Tribunal dealt with a dispute not contemplated by and falling beyond the scope of the reference to arbitration since it dealt with issues presented by the parties themselves and were within the Agreement. On the same premises, I reject the ground that the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya as Lutukai had already earlier argued that the dispute ought to be referred to arbitration and it was thus referred. He is thus estopped from claiming otherwise and in any case, I have already found that the dispute fell squarely within the arbitration agreement.
20. Lutukai further objects to the Award on the ground that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. There is no evidence on record that Lutukai objected to the appointment of the Arbitrator by the Institute of Certified Public Accountants of Kenya (ICPAK) on 19<sup>th</sup> April 2021. Sections 13 and 14 of the Arbitration Act provides for the grounds and procedure for challenging an arbitrator which challenge ought to be resolved from the outset and at the earliest possible opportune moments by the arbitral tribunal. Lutukai never invoked this procedure hence the court can only conclude that this ground is an afterthought and Lutukai is now estopped from now claiming that composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. This ground fails.
21. The final ground for consideration is that the Award conflicts with the public policy of Kenya as it is astronomical and without any legal foundation. This ground was expounded upon by Ringera J., in *Christ for all Nations vs Apollo Insurance Co. Ltd.* [2002] EA 366 as follows:
- I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.....
22. The court in Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR also stated as follows:
- 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
23. Lutukai does not explain what it is about the Award that is astronomical when the awarded sum was within what was claimed and within the sums due under the Agreement. On the contrary, the Arbitrator considered the quantum due after concluding that Lutukai had breached the Agreement. I therefore find nothing in the sum awarded that is astronomical and thus against Kenya's public policy. This ground also fails.



24. My analysis of Lutukai's application to set aside above leads me to conclude that it has no merit and it is therefore dismissed. This means that the court can now determine Gachoka's application that seeks to enforce and recognize the award as a judgment and decree of the court. Under section 32(A) of the Arbitration Act, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Arbitration Act. The High Court, under section 36 of the Arbitration Act, has the power to recognise and enforce domestic arbitral awards in the following terms:

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- (1) 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
- (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) .....

25. Section 37 of the Arbitration Act sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award which grounds mirror those in section 35 for setting aside an award. As I have already determined that Lutukai's opposition of the Award lacks merit, I find no other valid reason for the court to refuse to recognize and enforce the Award. The contents of the Award and the Arbitration Agreement are common to the parties and thus, the conditions precedent for enforcing the Award have been met.

### **Disposition**

26. For the reasons I have set out above, I now make the following dispositive orders:

- a. The Respondent's application dated 17<sup>th</sup> January 2023 is dismissed.
- b. The Applicant's application dated 12<sup>th</sup> January 2023 is allowed on terms that the final award of the Arbitrator published on 26<sup>th</sup> October 2022 be and is hereby recognized and adopted as a judgment of the Court and leave is granted to the Applicant to be enforced as such.
- c. The Respondent shall pay the costs of the application assessed at Kshs. 100,000.00

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JULY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Ms Nini instructed by Maina Njuguna and Associates Advocates for the Applicant.

Ms Nyakundi instructed by Koceyo and Company Advocates for the Respondent.

