Primarosa Flowers Limited v Pemwe Services Limited (Miscellaneous Application E552 of 2023) [2024] KEHC 11945 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E552 OF 2023

AA VISRAM, J

OCTOBER 3, 2024

BETWEEN

PRIMAROSA FLOWERS LIMITED ..... APPLICANT

AND

PEMWE SERVICES LIMITED ..... RESPONDENT

RULING

Background

1. A dispute arose between the parties over outstanding payment for security services. Through a letter dated 8th October, 2021, Muma & Kanyama applied to the Chartered Institute of Arbitrators – Kenya Branch to appoint an Arbitrator. By a letter dated 16th November, 2021, the Institute's Chair appointed Mr. Frank Muchiri, MCIArb, to preside over the matter and the Arbitrator accepted the nomination through a letter dated 19th November, 2021.

The Application

2. The Applicant filed the Chamber Summons, dated 6th July, 2023, under Sections 13, 14 and 19 of the *Arbitration Act* ('the Act") and Rules 14, 15, 31, 66, 69, 70 and 91(f) of the Chartered Institute of Arbitrators – Kenya Branch *Arbitration Rules 2020*, seeking the following orders:-

    1. Spent

    2. Spent

    3. That the Honourable Court be pleased to set aside the entire Ruling dated 7th June 2023 by the Arbitral Tribunal in Pemwe Services Limited v Primarosa Flowers Limited.

4. That the Honourable Court be pleased to uphold the Challenge by the Applicant herein against the Arbitral Tribunal in Pemwe Services Limited v Primarosa Flowers Limited.

5. That the Honourable Court be pleased to make an order that the Arbitral Tribunal in Pemwe Services Limited v Primarosa Flowers Limited withdraw from its office as adjudicator of the proceedings to pave way for the appointment of an independent and competent Tribunal; and

6. That the costs of this Application be awarded to the Applicant.

3. The Application is supported by the grounds on its face and the annexed affidavit sworn by the Applicant's Legal Manager, Sadia Carren, on 6th July, 2023. In short, the grounds are that through an application dated 6th April, 2023, the Applicant sought the recusal of the Arbitrator which was dismissed by the Arbitrator by a ruling dated 7th June, 2023.

4. The grounds put forth for challenging the Arbitral Tribunal were: impartiality; incompetence; failure to convene the preliminary meeting to set the dates for filing pleadings; imposition of dates; allowing the Respondent's application to adduce more evidence; declining its request for typed proceedings; breach of confidentiality; and that the Tribunal erred in its ruling of 7th June, 2023, by failing to take into consideration the evidence tendered in support of the grounds and legal principles for challenge.

Response

5. The Respondent opposed the application through its replying and further affidavits sworn by its Chief Operations Officer, Dennis Mbuvi, on 4th October, 2023, and 7th May, 2024, respectively.

6. Its main contentions were that the Applicant's challenge was an attempt to delay expeditious hearing and determination of the arbitration claim; that the challenge was time barred; and that the same was an afterthought, as it was brought after the completion of 13 sessions, and after the Respondent's case, and during the hearing of the Applicant's case, following its appointment of new counsel. Further, that the grounds for challenge were not supported by any cogent evidence; and that the instant application is also without basis; and should therefore be dismissed with costs.

Submissions

7. The Applicant filed written submissions dated 21st November, 2023, while the Respondent filed written submissions dated 5th December, 2023.

Analysis and Determination

8. I have considered the Application; the grounds; the rival affidavits; submissions and authorities by the respective parties; and the applicable law.

9. The main issue for determination is whether the Applicant has made a case for the grant of orders for the removal of the Arbitral Tribunal from its office?

10. The law applicable to such a challenge is found at Section 14 of the *Arbitration Act*. The same provides as follows: -

> " 14. Challenge procedure
>
> (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an Arbitrator.

(2) Failing an agreement under subsection (1), a party who intends to challenge an Arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the Arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

(4) On an application under subsection (3), the Arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the Arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an Arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful."

11. Before delving into the main issue, I propose to address two preliminary questions: Whether the present Application has been overtaken by events following the completion of the arbitration; and secondly, whether the instant Application was filed outside the 15 days' timeline under Section 14(2) of the *Arbitration Act*.

12. On the first preliminary question, through its further affidavit, the Respondent asserted that the Application has been overtaken by events because the arbitral proceedings have been concluded and a final award published on 15th January, 2024.

13. The Respondent contended that the appropriate remedy lies in an application for setting aside the award, rather than an application to remove the Arbitrator. Further, that the effect of the present Application was intended to reopen the Arbitral proceedings.

14. Counsel pointed out that the court's jurisdiction to interfere with arbitral awards is narrow and circumscribed, and should therefore be exercised sparingly as per section 35(2) of the *Arbitration Act*.

15. Section 14(8) of the *Arbitration Act*, quoted above, however provides that where an application challenging an Arbitrator is pending, parties may continue and conclude arbitral proceedings but the award will not take effect until the application is decided.

16. Based on the above section, the fact that an award has been published does not bar the court from considering an application pursuant to section 14, so long as the same is brought in accordance with its provisions. The reason for this is because if the application is successful, the award is void.

17. The next question is therefore, whether or not the application was raised within the appropriate timelines. The Respondent submitted that the challenge was raised after 13 sessions, and during the course of the substantive hearing.

18. On the other hand, the Applicant contended that this Court has the requisite jurisdiction to determine its application. It relied on *Kenya Ports Authority v Base Titanium Limited* [2021] eKLR in support of the argument that there is a leeway for parties to challenge the Arbitrator even if the appointment was by such party or with its participation.

19. Section 14 (2) of the Act quoted above, provides that a party who intends to challenge an Arbitrator shall, within 15 days or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

20. Based on the record, the Applicant produced a copy of the challenge application dated 6th April, 2023, filed on the same date. It also produced a copy of the Tribunal's ruling of 7th June, 2023. From my reading of the application, the ruling, and the record, it is evident that the grounds raised by the Applicant to challenge the Arbitrator (through its Application dated 6th April, 2023) fell outside of the 15-day timeline provided by Section 14(2) and 17(2) of the *Arbitration Act*.

21. Section 17 (2) of the *Arbitration Act*, regarding the competence of an arbitral tribunal to rule on its jurisdiction, provides as follows:-

> "(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an Arbitrator"

22. Section 5 of the *Arbitration Act* provides that:-

> "
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> "5. Waiver of right to object
> A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object."

23. It is evident from the above quoted section, that once a timeline set out under the Act has expired, a party is deemed to have waived his right to object.

24. In the High Court decision *George Nduati Munene v Mentor Group Limited & Maisiba Samson Kirioba* (Misc. Civil Suit No. 382 of 2014) [2018] eKLR, the Court dismissed a similar application for lack of jurisdiction due to the failure to meet the statutory timelines. It was observed that:-

> "25. The Court has considered the Submissions and Authorities carefully. The Applicant makes serious allegations against the Second Respondent, in particular that he is incompetent, unable to conduct proceedings, biased and possibly corrupt. Before the Court looks at whether there is any merit those allegations the Court must consider whether its jurisdiction is properly engaged. The Applicant's Submissions accept that the process of arbitration is intended to be final and binding. That is provided for in Section 10 of the *Arbitration Act* 1995 as amended. It states that a Court cannot intervene except as provided for in the Act. The Act provides for intervention in very limited circumstances.
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> 26. Those circumstances and the procedure are provided for in Section 13(3) and 14(2) of the *Arbitration Act* (See Mumias Sugar vs Mumias Outgrowers)
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> 27. From the above, it is clear that the Applicant must first take up his challenge with the Arbitrator within 15 days of the event complained of. He did not do so. On those grounds the Arbitrator deemed the challenge unsuccessful. It is correct that the Applicant then made his application to the Court within 30 days but in any event that challenge must be substantiated and within the Court's jurisdiction."

25. In the present matter, it is evident that the Appellant did not raise its challenge within the 15 days period. The next question is therefore, whether it raised its challenge immediately after becoming aware of the circumstance complained of?

26. The Applicant stated that the reasons for its challenge were, in summary:- impartiality; incompetence; failure to convene the preliminary meeting to set the dates for filing pleadings; imposition of dates; allowing the Respondent's application to adduce more evidence; declining its request for typed proceedings; breach of confidentiality; and that the Tribunal erred in its ruling of 7th June, 2023, by failing to take into consideration the evidence tendered in support of the grounds and legal principles for challenge. Looking at the above grounds for removal; it is evident to me that the same relate, by and large, to procedural issues that ought to have been dealt with at the preliminary meeting, or at a pre-hearing conference.

27. The Applicant averred that no such preliminary meeting ever took place. The question is, why did it not request such a meeting, either at the outset, or before the hearing? The allegations referred to as set out above could have been attended to with a simple request for case management.

28. There is insufficient evidence before me to show that the Applicant requested either a preliminary meeting, or case management conference, to deal with the various allegations complained of, and that such request was denied by the Arbitrator, leading to the unresolved issues that are the basis of its complaint.

29. It appears to me, that in the absence of such evidence showing an outright refusal by the Arbitrator to deal with the various allegations, on a balance of probability, it is more likely than not, that the Applicant had no issue with the proceedings at that time, and the grounds raised in the challenge were a mere afterthought.

30. I do not think that a section 14 challenge may be properly raised in such a scenario. The words "after becoming aware of any circumstances" were not intended to do away with a time frame altogether, or to create an open-ended window. Such an interpretation would contradict Section 5 of the Act, as well as the objectives and purpose of arbitration, which include expedition. The above words imply a sense of immediacy, or at the very least, a reasonable period of time within which an Applicant ought to raise its challenge after becoming aware of any justifiable doubts. This did not happen.

31. Based on the record before me, and for the reasons stated above, I find that the Applicant failed to raise its challenge within the timelines set out in the Act. The ruling of the tribunal is accordingly upheld. The Application is without merit. The same is dismissed with costs to the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF OCTOBER 2024

ALEEM VISRAM, FCIARB

JUDGE

In the presence of;

..... For the Applicant

..... For the Respondent