Safaricom PLC v Kinetic Controls Limited (Civil Appeal E900 of 2020)
[2024] KEHC 11937 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E900 OF 2020

AA VISRAM, J

OCTOBER 3, 2024

BETWEEN

SAFARICOM PLC ..... APPELLANT

AND

KINETIC CONTROLS LIMITED ..... RESPONDENT

((Being an appeal under Section 39(1)(b) of the Arbitration Act, No. 4 of 1995 from a domestic arbitration award by Anthony F. Gross pursuant to the agreement to appeal on a point of law arising))

JUDGMENT

1. The Appellant instituted this appeal pursuant to Section 39(1)(b) of the *Arbitration Act*, through a Memorandum of Appeal raising six grounds, reproduced below:-

    1. The Honourable Arbitrator erred in law when he failed to find that the duty to plead and prove special damages lay with the Respondent.

    2. The Honourable Arbitrator erred in law when he abdicated his responsibility to resolve the dispute that the parties had mandated him to resolve by stating that he was being asked "to enter into an accounting exercise" which was not the case, as all the Appellant had done was to dispute liability to pay Kshs. 2,597,436.39 (inclusive of VAT) or any part thereof because the Respondent had not demonstrated having rendered services for the same and therefore the Respondent had not proved its entitlement to the said amount or any part thereof.

    3. The Honourable Arbitrator erred in law when he treated his duties, for which he was being paid, with such professional casualness, when he failed to understand the essence of the monetary dispute between the parties was at the heart of the arbitration, which was simply

how much, if at all, was owed by the Appellant to the Respondent, and why. Which can only mean he was intentionally biased or intentionally incompetent in light of his qualifications as a Chartered Arbitrator (C. Arb) the highest rank bestowed on Fellow or C. Arb who has demonstrated to a peer interview panel on advanced knowledge and understanding of arbitration and its practical application, evidencing a professional approach to parties.

4. The Honourable Arbitrator erred in law when he failed to decline to accept the appointment as such if he truly felt incompetent to "enter into an accounting exercise" which was he thought he was being asked to do (which was not the case anyway) so as to pave way for another competent arbitrator"

5. The Honourable Arbitrator erred in law when he failed to hold that, if he "could not unravel the conundrum" as to who between the Appellant and the Respondent, was right and wrong, the Claimant had not proved its case on the disputed sum of Kshs. 13,227,409.00 on a balance of probabilities and proceed to dismiss the claim to that extent.

2. The Appellant prayed that the appeal be allowed, the award published by the Arbitral Tribunal on 20th July, 2020, to the extent of Kshs. 15,824,845.39/=, and the interest in respect of the entire monetary award, be set aside with costs.

Background

3. The Appellant and the Respondent entered into a contract dated 15th August, 2013, for the Provision of Maintenance Services for Mobile Switch Rooms (MSR), Media Gateway/Soft Switch Stations (MGW/MSS) and Major Hub Sites Power and Plant Maintenance Services. According to the Appellant, the contract lapsed by effluxion of time on 31st May, 2017. The Appellant then advertised a tender for the provision of the services, culminating in the award of a contract to the successful bidder, a third party.

4. The Respondent's case was that the Agreement was severally extended at the instance of the Appellant, with extension predicating the termination of the Agreement on several conditions. However, the Appellant terminated the Agreement irregularly on 31st May, 2017, without regard to the special conditions. Further, on 24th November, 2016, when the Agreement was still in force, the Appellant issued a tender for the provision of the same services culminating in the irregular award of the Tender to an entity known as Power Group Technologies Limited.

5. The Respondent commenced arbitration proceedings before A.F Gross, a Chartered Arbitrator, contending that the termination of the contract was in breach of the Agreement, and that it was unfairly treated during the tendering process.

6. In the Award published on 20th July, 2020, the Arbitrator issued the following orders:-

a) The Respondent pay the Claimant the sum of Kshs. 39, 072, 716/= with simple interest from 19th January, 2018 at 12% until payment in full.

b) The parties to bear their own party to party and Advocate to client costs; and

c) The Arbitrator's costs to be apportioned equally.

7. Out of the amount awarded, the Appellant paid Kshs. 23,247,562.25/=. However, it was dissatisfied with a portion of the award being the sum of Kshs. 15,824,845.39/= and the interest on the entire Award at the rate of 12% from 19th January, 2018, prompting this appeal.

Submissions

8. Through written submissions dated 8th April, 2024, the Appellant submitted that a question of law arises where the Arbitrator failed to evaluate the pleadings and the evidence to arrive at the conclusion that Kshs. 15,824,845.39/= was owed to the Respondent. It asserted that the Arbitrator also erred by awarding interest on the Kshs. 23,247,870/= without a finding of failure on the part of the Appellant to pay earlier, which raises a point of law.

9. On its part, the Respondent filed written submissions dated 21st June, 2024. The Respondent did not dispute that the parties reserved their right to appeal to this Court on points of law and consequently, to the jurisdiction of this Court to hear this appeal pursuant to Section 39 (1)(b) of the *Arbitration Act*.

10. However, the Respondent argued that this Court's jurisdiction in the instant appeal is limited to questions of law arising during the arbitration or from the Award, citing the English case of Geogas S. A v Trammo Gas Ltd (The "Baleares") [1993] 1 Lloyd's L R 215. It also argued that the parties agreed to honour and accept the Arbitrator's findings of fact.

11. The Respondent contended that the grounds of appeal raised touching on the Arbitrator's conduct are not questions of law to be determined under Section 39 of the *Arbitration Act*. It again relied on the Geogas S. A v Trammo Gas Ltd case [supra] on what a question of law entails.

12. The Respondent further argued that the Arbitrator acted lawfully, and that Section 20 (2) of the *Arbitration Act* gives sufficient latitude to an Arbitrator to conduct the arbitration proceedings as he deems fit, and to avoid unnecessary delay or expense.

13. The Respondent pointed out that the Appellant was bound to pay it for all reasonable documented costs incurred in anticipation of completion of the support services under Clause 16.4 (e) of the Agreement. However, since the parties did not undertake a joint reconciliation exercise before the termination of the agreement, the Arbitrator, with the explicit consent of the parties, ordered the parties to reconcile what was due and owing to the Respondent. The same culminated in a Joint Report, which formed the basis of the Award of Special Damages.

Analysis and Determination

14. I have considered the record of appeal; the rival submissions; and the authorities filed by the respective parties.

15. Section 39 (1) and (2) of the *Arbitration Act* provides that:-

> " 39. Questions of law arising in domestic arbitration
>
> Where in the case of a domestic arbitration, the parties have agreed that—
>
> (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
>
> (b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.
>
> (2) On an application or appeal being made to it under subsection (1) the High Court shall—
>
> (a) determine the question of law arising; (emphasis mine)

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration."

16. Further to the above, paragraph 3.3.1 and 3.3.2 of the award states as follows:-

"3.3.1 The Claimant's advocate via letter dated 29th January 2019 retained the right of appeal on points of law, opted to have costs follow the event and that the same should not be capped and opted to use Adopt technologies as the stenographers subject to confirmation of the Respondent.

3.3.2 The Respondent's advocate via letter dated 19th February 2019 reserved the right of appeal on points of law and communicated their lack of objection to use of Adopt technologies as the stenographers."

17. Based on the above, the court's jurisdiction was invoked by the Appellant pursuant to the section 39 of the Act. However, the dispute may only be resolved by this court if the same falls within the category of a question(s) of law within meaning of the Act.

18. The appeal arises from the tribunal's finding that Kshs. 39,072,716/= was payable to the Respondent. The Arbitrator's reasoning was as follows: -

"...I will not attempt to enter into an accounting exercise. What is claimed and provable or not will guide me. Furthermore, I am not obliged to concern myself with the internal requirements of LPO's, certification or I- portal input. I shall restrict myself to the liquidated amounts I find owed:

14.3.1. Whether the Claimant is entitled to damages and interest as claimed or at all:

14.3.1.1 Item 1, unpaid invoices

14.3.1.1 Kinetic claims 5,636,608/- and Safaricom accepts 2,956,012/-.

14.3.1.1 The difference is the previously unclaimed and now unproven and supposedly unprovable opening balance of 2,899,296 allegedly due since 2015.

14.3.1.1 I am no accountant and it is disingenuous to expect me to unravel this unilateral and retrospective claim as an opening balance in an audited account with no supporting documents.

14.3.1.1 I therefore find Kshs. 2,956,012/- to be owed to the claimant.

14.3.1.2 Item 2. Total works done as per LPO but not invoiced

14. the claimant prays for Kshs. 23,165,438/-. The Respondent denies into alia
3.1.2.1 1,383,300 in respect of uncertified and unverifiable and previously unclaimed amounts inclusive of an unsupportable storage charge. I accept the difference of 21,782,138/- is owed.

14.3.1.3 Item 3. Work done with no Purchase Orders

14.3.1.3 is agreed at 1,107,157/-.

14.3.1.4 Item 4. Ongoing work of running LPOs

14.3.1.4 this item is a hornet's nest with the claimant insisting items purchased under revolving LPOs, whilst the Respondent insists on a finite certification.

14.3.1.4 It is impossible for me to unravel this conundrum. I have studied Annexure 4A in some detail and I am inclined to favour the claimant's assertions therein. I therefore accept the claimant is owed 13,227,409/-.

14.3.1.4 Total:

2,956,012/-

21,782,138/-

1,107,157/-

13,227,409/-

39,072,716/-

Interest will accrue thereon at 12% simple interest from the date of institution of these arbitration proceedings namely 19th January 2018 in accordance with section 22 of the *Arbitration Act*, 1995. I certainly considered the request for compound interest but the findings on special damages was far from certain nor liquidated and I have therefore declined to such request."

19. From the above, it is evident that the Arbitrator made his award on damages based on the difference of what had been admitted by the Appellant, and based on his understanding and consideration of annex 4A of the documentation produced by the parties.

20. Further, he arrived at his finding based on, in his own words, "what is claimed and provable". To my mind, the same was simply another way of saying that damages would be awarded on the basis that the same have been pleaded and proved.

21. This court must consider if the appeal raises a question of law in relation to the finding by the Arbitrator. I ask myself, how broad, or how narrow, should the interpretation of a question of law be in relation to section 39 of the Act?

22. To my mind, arbitration proceedings are consensual and intended to be final and binding. The purpose and objectives of the Act are to ensure that party autonomy is respected in the choice of arena of dispute resolution. Court interference ought to be minimal, and only carried out in accordance with the objectives and purpose of the Act, and as provided by the Act.

23. Therefore, any interference by the court, including and in relation to a section 39 appeal, must take into consideration the objectives and purpose of the Act. Accordingly, in my view, the court ought to apply a narrow interpretation in terms of what it construes as a question of law arising pursuant to section 39 of the Act.

24. Having read the various authorities submitted by the parties, I must state from the outset that much of our case law in Kenya is based on old English authorities, which by and large, are now outdated. This is because the English *Arbitration Act* has been repealed, and or, amended, several times over the years.

25. However, in spite of the above, I still think that English authorities remain persuasive in Kenya because the objects and purpose of arbitration remain fundamentally the same. I must also state that our 1995 Kenyan Act is based on the UNCITRAL Model Law, whereas the English Act, is not. The English

Act, at present, is unique and specifically designed; it is a product arising out of the challenges that the English courts have faced over the years in relation to arbitration.

26. However, having clarified the above, in my view, the objectives and purpose of the English Act and the Kenyan Act, are at present in harmony. The English Act and authorities may still, therefore, provide useful guidance despite the caveat set out above.

27. The Respondent relied on the English authority of Geogas S. A v Trammo Gas Ltd case [supra], in which the Court observed as follows:-

> " 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."

28. In the same case, the court also discussed what constitutes a question of law in the following terms:-

> " It is often difficult to decide what is a question of law, or a question of mixed law and fact, rather than a pure question of fact. In law the context is always of critical importance. The enquiry "is it a question of law" must therefore always be answered by the counter enquiry "for what purpose?". What is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitration. In short the closest attention must always be paid to the context in order to decide whether a question of law arises. Given the fact that the resolution of this preliminary issue determines whether the court has jurisdiction to substitute its view for the view of the tribunal, freely chosen by the parties of full contractual capacity, there is in my view no sensible reason for adopting an enlarged view of what constitutes a question of law." (emphasis mine)

29. In our own jurisdiction, the court has variously stated that in an appeal in relation to questions of law, the court ought to interfere only where a Tribunal's findings were based on no evidence whatsoever, or based on the wrong principles. See the Court of Appeal decisions in Mwangi v Wambugu (1984) KLR 453 and Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others [2013] eKLR.

30. I am also cognizant of the decision of the Court of Appeal in *Kenya Oil Company Limited & another v Kenya Pipeline Company (Civil Appeal No. 102 of 2012*) [2014] eKLR, relied on by the Appellant, where the court found that a question of law was one involving the application of law to facts, on the basis that the Arbitrator did not understand the principle of law; and therefore, did not reach the correct conclusion. I would, however, distinguish the above stated authority from the facts in the present matter because the said authority is related to a "documents only" arbitration, which is not the case here.

31. Guided by the law as set out above, I ask myself what is the real purpose of the present appeal? I cannot help but think that the real purpose is to invite this court to engage in a reassessment of damages, and thereafter, arrive at a different quantum payable by the Appellant. I do not think the same may be construed question of law. Such an exercise is essentially a fact-finding mission. To misconstrue the

same as a question of law would run the risk of opening up the flood gates, and this court would find itself dealing with countless appeals from arbitral tribunals seeking a re-assessment of quantum.

32. In my view, a point of law arising from the lower court ought to be understood and read in a broader context from one arising out of arbitration because those matters arose from court process to begin with. This is different to an appeal arising from arbitration.

33. Guided by the principles set out in the *Arbitration Act*, I am of the view that a question of law arising out of an arbitration award ought to be clearly and precisely identified, and articulated as a question.

34. It should be clear to the court what the question of law is; how it affects the rights of the Appellant; and it should be clear that it is just in all circumstances for the court to determine the question. I do not think that the present grounds of appeal as articulated, qualify.

35. Additionally, I do not think that the window created by section 39 was intended for appeals based primarily on quantum. The Act contemplates a narrow interpretation of a question of law. Namely, in situations where the decision of the tribunal on the question is obviously wrong; or one of general public importance; and the decision of the tribunal is at least open to serious doubt; and despite the agreement between the parties to resolve the matter by arbitration, it is still just and proper in all circumstances for the court determined the said question.

36. In the present matter, I am satisfied that it was sufficient for the tribunal to assess the damages based on the principle of law articulated by the Arbitrator, after having identified the various documents that he relied on for his finding. In this case, namely, Annex 4 A among other documentation. This is also in line with the decision of the Court of Appeal decision in *Joh Richard Okuku Oloo v South Nyanza Sugar Co. Ltd (Civil Appeal No. 278 of 2010*) [2013] eKLR, where the court articulated that while special damages must be specifically pleaded and proved, the degree and certainty must necessarily depend on the circumstances, and the nature of the act complained of.

37. Similarly, I am persuaded that the ground of appeal in relation to the applicability of 'interest' is not a proper question of law as contemplated under section 39 of the Act. In addition to the reasons outlined above, the question in relation to 'interest' has been articulated in an argumentative and imprecise manner. From what I am able to decipher, the question before me is, when should interest have run from? That is a question of fact, not law.

38. The law on interest in arbitral matters is clear. The *Arbitration Act* expressly states as follows at section 32 of the Act:-

Section 32C

> Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.

39. Based on the above, it is evident that a tribunal may calculate the rate upon which, and the date from which interest shall run, and the date upon which the same may rest. Such calculations are however based on facts of the case. Accordingly, a ground of appeal relating to the appropriate date from which interest ought to have run, and arguing the reasons why, are questions of fact, not law. The same is not an appropriate ground of appeal within the contemplation of section 39 of the Act.

40. Based on the reasons above, I find that the appeal is without merit. The same is dismissed with costs.

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

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....

For the Appellant

.....

For the Respondent