Safaricom Limited v Abiero & another (Commercial Arbitration Cause E057 of 2024) [2024] KEHC 15743 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E057 OF 2024

A MABEYA, J

DECEMBER 6, 2024

BETWEEN

SAFARICOM LIMITED ..... APPLICANT

AND

MILLICENT ABIERO ..... 1ST RESPONDENT

JUSTUS OBUYA ..... 2ND RESPONDENT

RULING

1. This ruling determines two applications, the summons by the applicant dated 2/9/2024 for setting aside the arbitral award and the summons by the respondents dated 3/9/2024 for recognition and adoption of the arbitral award. I propose to start with the applicant's application.

Application dated 2/9/2024

2. The application was brought under section 35 of the *Arbitration Act* 1995 Rule 7 of the Arbitration Rules 1997, sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules 2010. It sought the setting aside the arbitral award published on 3/6/2024 by the Honorable Arbitrator.

3. In support of the application, the applicant relied on the grounds set out on the face thereof and the supporting affidavit of DANIEL NDABA sworn on 2/9/2024. It was averred that the dispute was submitted to the arbitral tribunal by the respondents. The respondents claim was that the 2nd respondent was a virtual card holder under the MPESA global and had used the card to pay for the 1st respondent's visa processing fee.

4. That the payment was not reflected and as a result whereof, there was a delay in the processing of the Visa and consequently she could not travel to the UK. That the respondents claimed that the 1st respondent was unable to travel to the UK which occasioned the loss of sterling pounds 3,136,000.00 approximately Kshs. 517,518,993.44 claimed by the 2nd respondent.

5. The applicant filed a challenge on jurisdiction two times. The 1st challenge was dismissed by the arbitrator on 3/10/2023 whereas the 2nd challenge was handled at the final award. It was the applicant's contention that the award ought to be set aside since it was based on an invalid or nonexistent arbitration agreement. The applicant had never entered into an agreement with the 2nd respondent with respect to issuance and use of an MPESA card, the MPESA Virtual card terms and conditions are clear that the dispute under the agreement would be determined by a Kenyan Court.

6. Additionally, the applicant contended that the arbitrator misconducted himself in the interpretation of the clause with respect to third parties and ignored the provisions of the Mpesa virtual card terms and conditions. The applicant faulted the arbitrator for relying on the respondents' terms and conditions thus rewriting the agreement of the parties.

7. It was the applicant's position that the arbitrator dealt with a dispute not contemplated by and not falling within the terms of reference to arbitration in that the agreement which gave rise to the dispute between the parties was governed by the Mpesa Globalpay terms and conditions retrieved from the website. That the only dispute contemplated under the Mpesa Virtual Card Terms and conditions were disputes relating to the use of the applicants International Money Remittance Service.

8. It was further contended that the award offended the public policy of Kenya as the claim was filed by the applicant who was not a party to the arbitration agreement between the applicant and the respondent. That an introduction of the 1st respondent to the award and agency relationship was against party autonomy.

9. The application was opposed by the respondents vide a replying affidavit sworn by MILLICENT ABIERO OUMA on 5/9/2024. She stated that the applicant had made a first challenge to the jurisdiction of the arbitrator to determine their dispute. That both parties produced different terms and conditions and the arbitral tribunal dismissed the application. That if the applicant was aggrieved by that decision, it ought to have moved then to the High Court under section 17(6) & (7) of the *Arbitration Act*.

10. That the 2nd challenge on the jurisdiction was also dismissed by the arbitral tribunal and the High Court had no the jurisdiction to address the issue at this stage. On public policy, it was contended that the principal of agency was a common law exception to the doctrine of privity of contract which was not against public policy. That the applicant was accorded a fair hearing and when the proceedings commenced, the applicant was well represented.

11. The application was canvassed by way of written submissions which I have considered.

12. The applicant submitted that section 4(2) of the *Arbitration Act* 1995 ("the Act") prescribes the form of an arbitration agreement which states that it should be in writing. That according to section 35(2)(a)(ii) of the Act, an award can be set aside if it is not in writing. Counsel submitted that it was not in dispute that the applicant has never entered into any agreement with the 1st respondent for any services offered.

13. That the only contract entered was with the 2nd respondent for the provision of services related to the issuance and use of an MPESA Virtual Card. That the applicable terms and conditions governing MPESA Virtual Card were Mpesa Virtual Card Terms and Conditions. That these conditions stipulate

under clause 16.4 and 16.5, that a dispute arising in connection with the agreement would be solved by a court of competent jurisdiction in Kenya. That the arbitrator failed to consider the applicability of these terms and conditions and rather applied the erroneous Mpesa Global Pay terms and Conditions provided by the respondent.

14. It was the applicant's submissions that there was no valid written arbitration agreement that would permit the respondents to initiate arbitral proceedings. That third parties were not party to the agreement and could therefore not be bound by the terms therein. That the principal-agent relationship constituted of a desperate attempt to establish a contractual link that was non-existent between the parties and the 1st respondent. That the Mpesa virtual card was between the 2nd respondent and the applicant.

15. Counsel further submitted that the dispute contemplated in the Mpesa Virtual Card terms and conditions were disputes relating to the use of the applicant's International money remittance service and terms and conditions found therein. That the dispute submitted by the 1st respondent did not stem from the terms and conditions as the pleadings before the arbitrator was with respect to defamation, negligence and subsequent loses arising from breach of contract. Counsel submitted that the arbitrator was biased in the manner she conducted the arbitration and there was a likelihood of bias.

16. As to whether the award was against the public policy of Kenya, it was submitted that the arbitrator addressed a claim filed by the 1st respondent who was not a signatory to the agreement. That the arbitrator selectively misinterpreted the agreement and improperly shifted the burden of proof. It was urged that the award be set aside.

17. For the respondents, it was submitted that the Court could not interfere with the arbitrator's position on jurisdiction at this stage since the applicant had an opportunity to challenge the same at an appropriate time but failed to do so. That the arbitrator's findings were correct with respect to the law of contract and agency. That the respondents had a principal and agency relationship whereby, the 1st respondent appointed the 2nd respondent to lodge a UK VISA application and make payments using the MPESA Global Pay platform by the applicant.

18. On whether the dispute did not fall within the terms of reference to arbitration, it was submitted that the applicable arbitral agreement was established as the MPESA Global Pay Terms and conditions. That the issue of jurisdiction was not up for consideration at this stage. It was the respondent's submission that the applicant was given a fair hearing as it was given an opportunity to reply to the claim and raise a preliminary objection on jurisdiction. On public policy, it was submitted that the principle of agency was a common law exception to the doctrine of privity of contract.

19. I have considered the pleadings before Court and the submissions on record as well as the authorities cited. The main issue for determination is whether the applicant has met the threshold for setting aside the arbitral award.

20. Section 35 of the Act sets out the grounds for setting aside of an award as follows: -

> " An arbitral award may be set aside by the High Court only if—
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> (a) the party making the application furnishes proof—
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> (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."

21. The applicant's case was premised on three grounds, first the issue of jurisdiction of the arbitral award was extensively submitted on. It was the applicant's contention that there was no valid agreement between the applicant and the respondents. That the agreement that gave rise to the dispute between the applicant and the respondents was governed by the Mpesa Virtual Card Terms and Conditions and not the MPESA Global Pay Terms and conditions retrieved from the website.

22. Pursuant to section 17 of the *arbitration Act*, this Court does not have original jurisdiction to hear and determine questions on the jurisdiction of the arbitral tribunal. The arbitral tribunal has to rule on it as preliminary question and if one is unsatisfied, he is to move this Court under section 17(6) which provides that: -

> " Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter."

23. In the present case, it is undisputed that the question of the jurisdiction of the arbitral tribunal was raised before the arbitrator as a preliminary matter. The applicant had challenged the jurisdiction of the tribunal concerning the applicable terms and conditions between the parties. The arbitrator ruled that the applicable contract was the Mpesa Global Pay terms and conditions.

24. The applicant had a window of 30 days to challenge that finding on the applicable contract terms in this case. It failed to exercise that right and therefore, it cannot at this stage raise that issue. The ruling of the arbitrator on the contract applicable having not been set aside at the appropriate stage, remains valid and enforceable between the parties.

25. The second ground raised by the applicant is that the award deals with a dispute not contemplated by and or falling within the terms of reference of arbitration. It was argued by the applicant that the only disputes contemplated under the MPESA virtual card terms and conditions are disputes relating to the use of the applicant's International money remittance service and the terms and conditions set out therein. According to the applicant, the terms and conditions did not cover the claim for defamation, negligence and consequential loss arising from the 1st respondent's alleged breach of contract.

26. The Court reiterates that the applicable terms and conditions are the Mpesa Global Pay terms and conditions and not the Mpesa Virtual Card Terms and Conditions. That was the finding that was made by the arbitrator at the preliminary stage and the applicant did not challenge the same. These conditions are therefore applicable in ascertaining whether the award was within the scope of reference to arbitration.

27. Clause 16.4 of the terms and conditions grant the parties the right to seek arbitration as a means of dispute resolution where there is a dispute with respect to the agreement. As a result of the applicant's breach, the respondents felt defamed and suffered negligence. These consequences are not trivial and cannot be disregarded, as they are directly tied to the applicant's conduct and the breach of the contractual obligations outlined in the Mpesa Global Pay terms. In this regard, the Court finds that the award was based on disputes contemplated and arising out of the Mpesa Global Pay terms and conditions which the tribunal had found preliminarily as applicable.

28. The applicant raised the issue of public policy where it was contended that the award offends public policy of Kenya. The applicant's position that the claim was filed by the 1st respondent who was not a party to the arbitration agreement and thus it introduced a stranger to the agreement. the applicant further faulted the arbitrator for finding that there was an agency relationship and also the fact that the arbitrator placed reliance to the Mpesa GlobalPay terms and conditions.

29. In Christ for All Nations vs. Apollo Insurance Co. Ltd [2002] 2 E.A 366, the court 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
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> (a) inconsistent with *the Constitution* or any other law of Kenya whether written or unwritten, or
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> (b) inimical to the national interest of Kenya,
>
> (c) contrary to justice and morality".

30. In Mall Developers Limited vs. Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR, 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."

31. Similarly, in Dinesh Construction Ltd & Another v Aircon Electronic Services (Nairobi) Ltd (2021) eKLR, the court stated as follows: -

> " Although framed broadly, public policy as a ground for setting aside an arbitral award must be narrow in scope and the assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and must then show which part of the award conflicts with that policy."

32. In light of the above principles, the ground of public policy for setting aside an arbitral award is only applicable when there is clear evidence that the award contradicts *the constitution* or any written law, is detrimental to the national interest of Kenya, or is in direct opposition to principles of justice, or is manifestly arbitrary and unfair. An applicant relying on this ground must specify the public policy relied on and the parts of the award that is contrary to that public policy.

33. Upon reviewing the arguments presented by the applicant regarding public policy, it is evident that the applicant is merely contesting the correctness of the arbitral award. I should point out here that, when parties voluntarily choose arbitration as the method of dispute resolution, they must be prepared to accept and be bound by the outcome of that arbitration.

34. The jurisdiction of the Court under section 35 of the Act is not appellate in nature. It is not meant to review the merits of an award or substitute the tribunal's judgment or opinion with its own. The doctrine of party autonomy and finality must be upheld.

35. The court's role is limited to ensuring that the award does not violate public policy or basic legal principles. In this case, no sufficient grounds have been presented to suggest that the award contravenes Kenya's constitution, written law, or national interests, or that it is inherently unjust, arbitrary, or unfair.

36. In Nyutu Agrovet Limited v Airtel Networks Limited, Civil Appeal (Application) No. Nai 61 of 2012, the decision of a five-judge bench of the Court of Appeal laid out the following principles: -

> " An arbitral award is final and binding on the parties; the intervention of the Court as regards an award delivered by an arbitral tribunal is limited strictly to the grounds set out in Section 35 of the *Arbitration Act* and no more; the authority of the court in dealing with an application under Section 35 does not confer upon it an appellate jurisdiction meaning that the court is not entitled to review the decision of the arbitrators for the purposes of substituting its own view or conclusions with that of the arbitral tribunal. The court will respect the fact that the parties opted to go to an arbitral tribunal instead of going to court and therefore except for the grounds set out in Section 35, it will not interfere with an arbitral award even if the court itself, on the facts as proven, might have reached a different conclusion; that our *Arbitration Act* is in keeping with the UNCITRAL Model Law to which Kenya is a signatory and so in keeping with its international obligations, it must uphold, respect and enforce the arbitral process; that the intervention of the court must be in furtherance, and not in hindrance of the arbitral process."

37. On the material before Court, I find no grounds to conclude that the award was harmful to the public, offensive or contained any element of illegality. Furthermore, there is no indication that the award

violates the fundamental norms or values of society. The issues raised in the award pertain to matters that were within the scope of the arbitral tribunal's jurisdiction and expertise. To address these issues now would amount to the Court acting as an appellate body, which is beyond its jurisdiction.

38. Accordingly, I find that the applicant has not met the threshold for setting aside the arbitral award. The application dated 2/7/2024 is without merit and the same is dismissed with costs.

Application dated 3/9/2024

39. The respondent filed the application under section 36 of the *Arbitration Act* CAP 49 Laws of Kenya, rule 9 of the Arbitration rules, Legal notice 58 of 1997, inherent jurisdiction of the court. The application sought the recognition and adoption and enforcement of the arbitral award published on 3/6/2024 and 21/8/2024 as a judgment of the Court.

40. The application was supported by the grounds on the face of it and supported by the supporting affidavit of MILLICENT ABIERO OUMA sworn on 3/9/2024. The respondent opposed the application vide a replying affidavit of DANIEL NDABA sworn on 4/11/2024,

41. Under section 36 of the Act, the High Court has the power to recognize and enforce domestic arbitral award in the following terms: -

> "(1) An arbitral award, irrespective of the state in which it was made 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) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
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> (a) the duly authenticated original arbitral award or a duly certified copy of it; and
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> (b) the original arbitration agreement or a duly certified copy of it.
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> (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language."

42. In Samura Engineering Limited vs Don-Wood Co Ltd [2014] eKLR, it was held: -

> " Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to *the Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed..."

43. I have considered the application and from the record it is evident that the respondent has complied by the provisions of the law required for adoption and recognition of the award. The applicant has furnished a certified copy of the Award published on 3/6/2024 and a certified copy of the Agreement containing the arbitration clause. Having discharged this burden, nothing stands in the way of allowing the application as prayed since the application for setting aside the award has been dismissed.

44. Consequently, the respondent's application to recognize and enforce the Award is hereby allowed on the following terms: -

a. That the application dated 2/9/2024 is dismissed with costs to the respondents.

b. The final award published on 3/6/2024 and the award of costs dated 21/8/2024 by the sole arbitrator be and is hereby recognized and adopted as a decree of this Court.

c. The respondent is granted leave to enforce the award as a decree of the Court

d. The applicant shall bear the costs of the applications.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE