Diocesan Synod of Mount Kenya v Log Associates Limited & 3 others (Miscellaneous Application E1210 of 2020) [2021] KEHC 186 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)

Neutral citation: [2021] KEHC 186 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E1210 OF 2020

DAS MAJANJA, J

NOVEMBER 3, 2021

BETWEEN

DIOCESAN SYNOD OF MOUNT KENYA ..... APPLICANT

AND

LOG ASSOCIATES LIMITED ..... 1ST RESPONDENT

PETER KIMANI ..... 2ND RESPONDENT

BOAZ BETT ..... 3RD RESPONDENT

STEPHEN MUGO ..... 4TH RESPONDENT

RULING

1. The Applicant has filed the Notice of Motion dated 11th November 2020 invoking section 36 of the *Arbitration Act*, 1995 principally seeking recognition and enforcement of the Arbitral Award dated 31st March 2020 ("the Award"). The application is supported by the affidavit of its director, James Stanley Mathenge, sworn on 11th November 2020 and the supplementary affidavit of its advocate on record, Patrick Kibuchi, sworn on 25th June 2021.

2. The Respondents oppose the application through the replying affidavit of Ezekiel Oranga, the 1st Respondent's Chief Technical and Operations Officer, sworn on 25th May 2021. The parties canvassed the application by way of written submissions.

3. The facts giving rise to this matter are largely common cause. By a Lease Agreement made on 21st January, 2009 ("the Lease") between the Applicant and the 1st Respondent, the Applicant leased to the 1st Respondent the property known as maisonette No. 4 erected on Land Reference Number 209/1541/6 ("the suit property") for the term and subject to the conditions specified therein. The 2nd,

3rd and 4th Respondents are directors of the 1st Respondent and its guarantors.Clause 10 of the Lease provided for the automatic renewal of the tenancy relationship between the parties thereto for six years on condition that the 1st Respondent should have paid the rental fees, costs and charges and observed and performed the agreements and conditions contained therein on its part.

4. Pursuant to the said clause 10 of the Lease and upon the expiry of the Lease on 30th June 2013, the 1st Respondent executed an offer for lease dated 28th April 2013 under which the 1st Respondent was required to make quarterly payments of the agreed monthly rent of KES 137,787.20.00 amounting to KES 413,361.60 per quarter.

5. A dispute arose between the parties on account of breach of the Lease. The dispute was referred to arbitration pursuant to clause 11 of the Lease and Justice (Rtd) Aaron Ringera appointed as the Sole Arbitrator ('the Arbitrator') by Chartered Institute of Arbitrators.

6. According to the Arbitrator, the Applicant filed its Statement of Claim on 4th October, 2019. Despite service, the 1st Respondent did not file any Statement of Response to the Claim as directed in the Arbitrator's Order No. 1 for Directions as modified by his letter of 19th September 2019 or at all. Further, the 2nd, 3rd and 4th Respondents did not appear to have been served with the Statement of Claim and, thus, no responses were expected from them and none were filed. Nonetheless, the Arbitrator determined the merits of the Applicant's claim where it sought general damages for breach of contract in regard to rent arrears in the sum of KES 1,917,956.40; special damages in respect of the redecoration costs and unpaid utility bills in the sum of KES 122,673.06; interest and costs of the proceedings.

7. The Arbitrator found that the 1st Respondent had breached its contractual obligations in respect of rent, redecoration of the property and settlement of utility bills and that the Applicant is entitled to recover KES 2,289,738.57 inclusive of interest being the contractual debt due under the Lease and KES 522,000.00 on account of fees and expenses paid to the Arbitrator. Both sums would attract simple interest at 12% per annum from the date of the Award until payment in full.

8. It is this Award that the Applicant now seeks to have the court recognize, adopt and enforce as an Order of this Court and forms the basis of the present of application.

The Application and Response

9. The Applicant states that it has complied with the conditions for grant of the application for recognition and enforcement of the Award. It submits that the statutory period of 3 months required to set aside the award has now lapsed and that there is no appeal and/or objection preferred against the Award pending before any court.

10. The Respondents oppose the application. They contend that the arbitral process was flawed and is void ab initio. They state that the Lease was between the Applicant and the 1st Respondent and not the 2nd to 4th Respondents. They submit that a limited liability company is a distinct legal bodyseparate from its owners, members and shareholders hence the 2nd to 4th Respondents cannot be held liable for the acts of the 1st Respondent including its debts and liabilities. They further submit that it is unprocedural for the Applicant to involve the 2nd, 3rd and 4th Respondents in the claim for the alleged rent arrears owed by the 1st Respondent as this violates the principle of corporate personality. They maintain that the Respondents were not represented in the arbitration process and that the process was purely between the Applicant and the Arbitrator.

11. The Respondents also attack the Award on the ground that the Arbitrator did not interrogate the issue of service despite noting that the Respondents were not represented in the proceedings. They contend

that under clause 11 of the Lease, the arbitration proceedings were premature as the Arbitrator did not have the jurisdiction to hear and determine the arbitration.

12. The Respondents submit that under clause 11 of the Lease, the Applicant ought to have engaged in negotiations before proceeding to arbitration hence the arbitration process was null and void for want of jurisdiction. The Respondents further submit that clause 11 of the Lease is very specific as to which matters should be referred arbitration; that is a dispute on "interpretation, rights, obligations and/or implementation of any or more of the provisions of this lease Agreement" and that from the Award, it is clear that the subject of the arbitration was breach of contract which does not fall within the purview of the issues that can be referred to Arbitration under clause 11 of the Lease.

13. The Respondents thus aver that the Arbitrator acted ultra vires his powers by purporting to hear and determine an issue that was outside its mandate in violation of the provisions of section 37 (a)(iv) of the *Arbitration Act* and thus the Award should be set aside.

Analysis and Determination

14. The main issue for determination is whether the court should recognize, adopt and enforce the Award. 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:

> 36 (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) .....

15. Section 37 of the *Arbitration Act* sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award as follows:

> 37. Grounds for refusal of recognition or enforcement
>
> (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—
>
> (i) 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, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

16. The Respondents' opposition to the Applicant's application is premised on the grounds of misjoinder of the 2nd, 3rd and 4th Respondents to the arbitration proceedings, lack of jurisdiction of the Arbitrator and the Arbitrator addressing himself on issues that were beyond his scope as per the clause 11 of the Lease.

17. I do not find the ground of misjoinder of parties or jurisdiction of the Arbitrator to be valid grounds to refuse enforce the Award under section 37 aforesaid in the circumstances in this case. I hold that these are issues ought to have been raised before the Arbitrator at the earliest stage and not in the first instance before this court as the Respondents has done. This is the import of sections 17(2) and (3) of the *Arbitration Act* which provide as follows;

> 17 (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 the arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of authority is raised during the arbitral proceedings.

18. The provision goes further to state that the arbitral tribunal may rule on such a plea and the party aggrieved may, within 30 days of the ruling, apply to the High Court to decide the matter. This position is buttressed by the court in a number of cases including *Kenya Airfreight Handing Limited (KAHL) v Model Builders & Civil Engineers (K) Ltd ML HC Misc. Appl. No. 548 of 2016 (OS) [2017] eKLR* and *Team Construction Limited v Carnation Properties Limited ML HC Misc. Appl. No. 548 of 2019 [2019] eKLR* where the court entertained applications made under section 17 of the *Arbitration Act* seeking to remove the arbitrator and or terminate the arbitration proceedings on account of lack of jurisdiction once the arbitral tribunal ruled on the issue of jurisdiction.

19. From the Award, the Arbitrator stated that the 1st Respondent wrote him a letter dated 13th August 2019, where it challenged the Arbitrator's appointment as the Arbitrator and the Arbitrator responded in a letter dated 15th August 2019 stating that he was satisfied, "...in terms of Clause 11 (ii) of the Lease, I was properly appointed as the Sole Arbitrator and that my award would be final and binding on both parties as if I had been appointment by consent." If indeed the 1st Respondent was dissatisfied with this decision, nothing prevented it from applying to the court within 30 days of the decision for the court to determine the whether the Arbitrator had jurisdiction. In the absence of any such challenge, it could only be assumed that the 1st Respondent waived its right to the object to the Arbitrator's jurisdiction. In the same vein, the challenge on jurisdiction based on failure by the parties to engage in negotiations prior to arbitration ought to have been raised in the first instance. Section 5 of the *Arbitration Act* deems a party who, knowing that a provision under the arbitral agreement has not been complied with and yet proceeds with the arbitration without raising an objection to such noncompliance without undue delay, or within the time limited for taking such an action, is deemed to have waived the right to subsequently object to such process.

20. The 1st Respondent's challenge to the Arbitrator's jurisdiction puts to rest its contention that it was not served. Further, it does not deny that it was aware of the arbitration proceedings and that the Applicant's Statement of Claim was duly served upon it. The 1st Respondent chose not to participate in the arbitration proceedings despite being served with the claim. The Arbitrator noted that the 2nd, 3rd and 4th Respondents were never served with the claim and that no responses were expected from them and none were indeed filed. It is on this basis that the Arbitrator proceeded to determine the claim as between the Applicant and the 1st Respondent. This is buttressed by decision that specifically addressed the 1st Respondent as opposed to all the Respondents. I therefore find and hold that misjoinder is not an issue in so far as the Award is not against the 2nd, 3rd and 4th Respondents.

21. This leaves the issue whether the Arbitrator addressed issues beyond the scope of clause 11 of the Lease as the only valid reason under section 37(1)(a)(iv) of the *Arbitration Act* which the court may consider in determining whether to refuse to enforce the Award. According to the Respondents, the Arbitrator could only address issues that relate to interpretation, rights, obligations and/or implementation of any or more of the provisions of the Lease. I do not agree with the Respondents as the opening line of the clause 11 of the Lease states that, "All questions hereinafter in dispute between the parties hereto and all claims for compensation (if any) or otherwise not eventually settled and agreed between the parties hereto shall be referred to arbitration of a single arbitrator...".

22. The use of the phrase, "All questions hereinafter" gives the parties and the Arbitrator a wide jurisdiction to deal with all and any kind of disputes arising from the Lease including the reliefs sought by the Applicant in its claim which were compensatory in nature. This broad approach to arbitration clauses

is now accepted and was elucidated by Lord Hoffman in *Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others [2007] UKHL 40* where he stated that:

> (13) In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with the presumption unless the language makes clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para. 17: "If any businessman did not want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

23. I therefore reject the Respondents' invitation to refuse to recognize and enforce the Award on this ground. The arbitration agreement and the arbitral award are not disputed. The Respondents have not made an application to set aside the Award within prescribed period of 3 months from the date of the delivery of the Award hence nothing stands in the way of recognition and enforcement of the Award.

Disposition

24. For the reasons I have set out, I allow the Applicant's Notice of Motion dated 11th November 2020 on the following terms:

> a. The Arbitral Award dated 31st March 2020 by Justice (Rtd) Aaron Ringera be and is hereby recognised and adopted as a judgment of this court and leave be and is hereby granted to the Applicant to enforce it as an order of this court.
>
> b. The Respondent shall bear the costs of this application.**

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr instructed by Kibuchi and Company Advocates for the Applicant.

Mr instructed by William Case Associates Advocates for the Respondents.