REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. APPLICATION NO. 65 OF 2021

KIKENNI PROPERTIES LIMITED.....1ST APPLICANT

TAKAUNGU SPICE LIMITED.....2ND APPLICANT

VERSUS

VIPINGO RIDGE LIMITED.....RESPONDENT

CORAM: Hon. Justice S.M Githinji

Walker Kontos advocates for the Applicants

A.B Patel & Patel advocates for the Respondent

R U L I N G

Background

The applicants brought this application vide a Notice of Motion dated 30th August 2021 seeking the following orders;

a. Spent

b. Spent

c. That pending the hearing and determination of the application, there be a stay of further proceedings in the arbitration reference between the parties pending before Mr. Allen Waiyaki Gichuki ("the Arbitral Tribunal").

d. The interim award issued by the Arbitral Tribunal on the 6th August 2021 for which reasons were provided on the 18th August 2021 be set aside.

e. That the honorable court grants any other order it deems fit in the circumstances.

f. Costs of the application be provided for.

The application is supported by the affidavit of **Kenneth Kiplagat** a director of the 2nd applicant, who states that the matter arises out of sub lease agreements in respect of Plot numbers A64 and F 20 on the Respondent's parcel of land known as Land reference number 24880 which has been referred to an arbitration pursuant an order made on the 11th March in Malindi HCCC No. 8 of 2019. That the arbitral reference is part heard and further hearing had been fixed for the 12th to 17th September 2021.

He further states that the Applicant has filed 4 witness statements and the Respondent has also filed 4 witness statement.

He avers that on 6th august 2021, the Arbitral Tribunal delivered an interim Award dismissing an application that the applicants herein had made for leave to introduce an additional witness Damaris Karanja to give evidence in the reference and for the evidence of two of its

witnesses Jackson Onyango and Anne Muraya to testify virtually.

He contends that the interim award offends public policy in that it curtails the Applicants' right to be heard and the same is capable of being set aside under section 35 of the Arbitration Act.

The respondent filed a replying affidavit sworn by one of its directors **Alastair Cavenagh** on 14th September 2021 who contends that the supporting affidavit by the Applicant is less candid and has deliberately misled the court to interfere with the Interim award of the tribunal. That the resolution of disputes by arbitration is a free choice made by parties by agreement and in law intervention by court is not permitted except in circumstances governed by the arbitration Act.

He further states that as per Section 7 (2) of the Arbitration Act, where a tribunal has ruled on any matter relevant to the application, this honorable court is obliged to treat the ruling or any finding made in the course of the ruling as conclusive for the purposes of the application.

He avers that the only issue for consideration by this court is whether the decision of the tribunal made on 6th august 2021 is in breach of public policy as is now alleged by the Applicants and that the Interim award does not in any way offend public policy and this application ought to be dismissed.

Submissions of the Parties

The Applicants' Submissions

The applicants submit that while it is true that Section 1o of the Arbitration Act precludes the courts from interfering with arbitrations, there are exceptions and one of those exceptions is where such award offends public policy. They relied on the case of ***Easy Properties Limited versus Express Connections Limited (2021).***

That one key practice is reluctance by courts to dismiss new evidence adduced during trial if leave to adduce the same was sought early in the proceeding. They relied on the cases of ***Britania Sacco V Jambo Biscuits Limited [2018] eKLR*** and ***Johana Kipkemei Too v Hellen Tum [2014] eKLR***.

They submit that justice is served by allowing parties to present their case in full even if it means allowing them to adduce evidence after the close of pleadings and discovery, and even after the hearing of the matter has begun. The main consideration when deciding whether to allow new evidence is whether the opposing party will be prejudiced by the new evidence.

As regards virtual hearing, the applicants submit that, they only request for two of their witnesses to testify virtually due to the unique circumstances surrounding them especially one Jackson Onyango who is currently battling cancer and would be exposed to covid-19 virus if he travels to Vipingo to testify.

The Respondent's Submissions

The respondent submits that the right to a fair hearing is a double edged sword and that the Respondent equally enjoys the right to have the dispute determined fairly, justly and expeditiously.

That the application is an abuse of the court process and ought to be dismissed.

Analysis and determination

Issues for determination

1. **What jurisdiction should the court invoke in determining whether or not to set aside the interim award?**

2. **Whether the interim award is in conflict with public policy of Kenya under Section 35 of the Arbitration Act?**

3. **Who is to bear the costs of the application?**

An application for setting aside an Arbitral award is envisaged by Section 35 of the Arbitration Act and it is not an appeal from the Arbitral award. In considering an application for setting aside an Arbitral Award, the court exercises original jurisdiction as opposed to appellate jurisdiction.

In ***Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016] eKLR*** the court held that;

> **"The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award."**

In the case of ***Rashid Moledina & Co (Mombasa) Limited & Others vs Hoima Ginners Limited (1967) E.A. 645,*** it was held that; -

"Courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute".

Kenya Shell Ltd vs Kobil Petroleum Ltd [2006] eKLR where the Court of Appeal expressed the views of Ringera J in the case of ***Christ for All Nations vs Apollo Insurance Co. Ltd (2002) EA 366*** where the court held that;

"Although public policy is a most broad concept incapable of precise definition…. An award could 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 either it was:

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."

In ***Continental Homes Ltd vs Suncoast Investments Ltd [2018] eKLR*** the court held that;

"In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator."

While analyzing the provisions of **Section 35**, I am aware that the circumstances of cases vary. In the instant case, the applicants herein seek to set aside the interim arbitral award awarded on 6th August 2021 dismissing their leave to have an additional witness give evidence in the reference and two of their witnesses testify virtually.

The witness sought to be introduced served as the respondent's former Chief Finance officer for a period of eight years and she was expected to shed light on the contested issue of service charge accountability among other things.

For the two witnesses that the applicants seek to testify virtually, they give reason that one of them is undergoing cancer treatment and it would be unfair to have them travel to Vipingo for a hearing.

Article 47 (1) and **(2)** of the Constitution provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

51. Apart from that provision, ***Section 4(1), (2)*** and ***(3)*** of the ***Fair Administrative Action Act*** provides as follows:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

In ***Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2***

KLR 553 held:

> **"The Court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.**

In the Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

> **"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."**

In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected by it a fair hearing, cannot by any stretch of imagination be termed as fair and offends the provisions of Article 50 of the Constitution which accords the right to a fair hearing.

I do note that only one witness had testified in this matter. This is the applicants' witness. The big question is; would there be prejudice suffered by the Respondent in the event that additional witnesses are introduced?

I have read through the pleadings and submissions of the applicant and thus I'm alive to the position previously held by the witness the applicants seek to introduce. I am of the opinion that the witness would be in a position to shed more light to the dispute at the hearing of the reference. Furthermore, the Respondent will also have the opportunity to test the credibility of the evidence of the witness during cross examination. Furthermore, the respondent's case is still unheard and they would have a similar opportunity for rebuttal evidence if need be.

The respondent has not demonstrated how they would be prejudiced if the applicants are allowed to have the additional witness.

On the issue of a virtual hearing for two of its witnesses, the applicants aver that one of their witness is a cancer patient undergoing treatment. I do note that there are no medical records by the applicants in support of the same. However, be it as it may, it is in the public knowledge that in downscaling court operations following the Covid -19 pandemic, Courts mostly resulted to virtual hearings. The same has been going on for over a year. I do not find any reason why the tribunal would be reluctant to accommodate virtual hearings.

Disposition

1. **The interim award issued by the Arbitral tribunal on 6th August 2021 be and is hereby set aside.**

2. **Costs of this application shall abide by the outcome of the reference.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIRTUALLY THIS 17TH DAY OF NOVEMBER, 2021

In the presence/absence of; -

1. Mr Ogunde for the Applicant - present

2. Mr Khanghlam for the Respondent – absent and informed of the ruling.

3. Michael Odhiambo-C/A

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S. M. GITHINJI

JUDGE

17/11/2021