Pili Management Consultants Limited v China Fushun No 1 Building Engineering Company Limited (Miscellaneous Application E1000 of 2020) [2021] KEHC 234 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)

Neutral citation: [2021] KEHC 234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E1000 OF 2020

WA OKWANY, J

NOVEMBER 11, 2021

BETWEEN

PILI MANAGEMENT CONSULTANTS LIMITED ..... APPLICANT

AND

CHINA FUSHUN NO 1 BUILDING ENGINEERING COMPANY LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect to the application dated 28th April 2021 wherein the applicant seeks the following orders;

    1. Spent
    2. THAT there be a stay of arbitral proceedings pending before the Hon. Justice (Rtd) Aaron Ringera pending hearing and determination of this application inter-parties and the eventual hearing and determination of the intended appeal.
    3. THAT the applicant be granted leave to file an appeal against the ruling and orders given in this cause by Hon Justice Wilfrida Okwany on the 22nd day of April 2021
    4. THAT such further or other orders be granted as this court may deem just and expedient in the circumstances of this case.
    5. THAT costs of this application be provided for.

2. The application is supported by the affidavit of the applicant's Director Mr. Hezron Awiti Bollo and is premised on the following grounds; -

    i. This court delivered a ruling on 22nd April 2021 dismissing the applicant's application seeking the removal of the Hon Mr. Justice (Rtd) Ringera as the sole Arbitrator in the dispute between the parties herein.

    ii. The applicant is aggrieved by the said ruling and orders and it is desirous of filing an appeal against the ruling/orders.

    iii. Leave to appeal is necessary as it has been held by the court of appeal in *Mahan Limited Vs Villa care Limited, Civil Application No 323 of 2020* and in Nyutu Agrovet Ltd Vs Airtel Networks Kenya Ltd & Another [2019 eKLR

    iv. The applicant stands to suffer grave injustice if it is not granted leave to appeal against the decision because the arbitrator has locked out the applicant from presenting its defence/response to the claim.

    v. The applicant has a good appeal with high prospects of success.

    vi. It is only fair and just that the applicant is granted an opportunity to pursue an appeal and stay of further proceedings should be granted in the interim so that success of the appeal is not rendered nugatory.

3. The respondent opposed the application through grounds of opposition dated 11th May 2021 where it lists the following grounds: -

    1. That the instant application is frivolous vexatious and an abuse of the court process as it offends the provisions of sections 10 and 14(6) of the *Arbitration Act*.

    2. The application is fatally and incurably defective as the ruling/order sought to be appealed from is not appealable.

    3. The applicant has not nearly enough satisfied the conditions for the grant of the prayers sought and specifically the instant application does not fall within the ambit of exceptional circumstances necessitating grant of leave to appeal as set out by the supreme court in Nyutu Agrovet limited Vs Airtel Networks Kenya Limited; Chartered Institute of arbitrators- Kenya branch (interested party {2019} eKLR.

    4. That the applicant has misapprehended the decision of the Court of appeal and Supreme Court of Kenya by relying on the authorities in its list of authorities which Authorities relate to the applications under section 35 and not Section 14 of the *Arbitration Act*.

    5. That from the foregoing it follows that the applicant is only forum shopping and completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice

    6. The instant application as drawn and filed and indeed the grounds relied upon offend the principle of finality in the arbitral process.

4. The application was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

5. The applicant herein is aggrieved by the orders of this court issued on 22nd April 2021 dismissing the application dated 18th August 2020 wherein it sought orders to remove the sole arbitrator Rtd. Justice Aaron Ringera. The applicant's case is that it intends to appeal against the impugned decision and therefore seeks leave to file an appeal and orders to stay the proceedings before the arbitrator.

6. The applicant argued that this court has jurisdiction to grant it leave to appeal against the impugned ruling. It submitted that even though the case of *Nyutu Agrovet Limited vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR* mentioned Section 35 of the *Arbitration Act* (the Act), the right of appeal lies in all the sections of the Act

7. In a rejoinder, the respondent argued that the application does not fall under the exceptional circumstances that necessitate the grant of leave to appeal as set out by the supreme court in the Nyutu Agrovet Limited (supra). According to the respondent, the Nyutu case was only with regard to Section 35 of the Act.

8. The supreme court held as follows in the Nyutu Agrovet case (supra): -

> "Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.
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> .....
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> (77) In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.[78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a

shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate. [79] Having held as above, does the case at hand justify the Court of Appeal's intervention? In answer to that question, it will be noted that the High Court (Kimondo J) set aside the arbitral award on the grounds inter alia that the award contained decisions on matters outside the distributorship agreement, the terms of the reference to arbitration or the contemplation of parties. In granting leave to appeal, the learned Judge washed his hands of the matter and left it to the Court of Appeal to determine the question of the right to appeal to that Court. It so determined hence the present Appeal."

9. The principle that emerges from the above decision is that the court's jurisdiction is limited by Section 10 of the Act. The said section stipulates as follows: -

> Except as provided in this Act, no court shall intervene in matters governed by this Act.

10. A simple reading of the above provision reveals that the intention of the statute is to limit the court's involvement/intervention in consensual arbitral proceedings only to specific circumstances prescribed in the Act or the Rules made under the Act. A similar provision can be found under Article 5 of the Model Law which stipulates that: -

> In matters governed by this Law, no court shall intervene except where so provided in this Law.

11. The official commentary on this Article by the UN Secretary-General is contained in A/CN.9/264 (reproduced in the Yearbook of the United Nations Commission on International Trade Law, 1985, Volume XVI, United Nations publication) p112 is as follows: -

> " 1. This article relates to the crucial and complex issue of the role of courts with regard to arbitrations. The Working Group adopted it on a tentative basis and invited the Commission to reconsider that decision in the light of comments by Governments and international organizations. In assessing the desirability and appropriateness of this provision, the following considerations should be taken into account.
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> 2. Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.

3. Consequently, the desired balance between the independence of the arbitral process and the intervention by courts should be sought by expressing all instances of court involvement in the Model Law but cannot be obtained within article 5 or by its deletion. The Commission may, thus, wish to consider whether any further such instance need be included, in addition to the various instances already covered in the present text. These are not only the functions entrusted to the Court specified in article 6, Le. the functions referred to in articles 11 (3), (4), 13 (3), 14 and 34 (2), but also those instances of court involvement envisaged in articles 9 (interim measures of protection), 27 (assistance in taking evidence), 35 and 36 (recognition and enforcement of awards)." (Emphasis added)

12. From the above text, it is clear that where the Model Law requires court intervention, the Law provides so specifically. Similarly, under the *Arbitration Act*, where court intervention is desired or anticipated, a provision is made for it.

13. It is also trite that the intention of the Act and indeed the very essence of arbitration is that the arbitral award is final and binding on the parties, unless the parties agree otherwise (see section 32A). This is the reason why in the majority of limited occasions where the court is entitled, under the Act, to intervene in arbitration through an application made to court, and to make a decision in respect of such application, the court's decision is generally stated as final and not subject to appeal. Examples of such instances can be found under Sections 12(8), 14(6), 15(3), 16A (3), 17(7) and 32B (6) of the Act.

14. Furthermore, when parties choose arbitration as the forum for resolving their disputes they also retain the overall power to agree on any matter and on any aspect of the arbitration. It is for this reason that the Act is punctuated by phrases such as "unless the parties otherwise agree" and "unless otherwise agreed by the parties" and "the parties are free to agree". I am of the view that these phrases did not find their way into the Act by accident or default as they emphasize the high value placed on party autonomy and consensus in arbitration. They also underline the importance of finality of the arbitral process.

15. Party autonomy and the requirement for consensus is so critical that even where a question of law arises in a domestic arbitration, parties cannot turn to court for answers since Section 39 of the *Arbitration Act* provides that such recourse is possible only if "the parties have agreed".

16. My finding is that Section 14(6) of the Act prohibits appeals from decisions of the High Court on a challenge to the arbitrator. The said section stipulates as follows: -

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

17. In the present case, this court rendered itself on the applicant's challenge on the arbitrator's impartiality through an application brought under Section 14 of the Act. Under Section 14(6) of the Act, the said decision is final and no appeal can lie against it. I therefore find that it would be futile for the Court to even entertain an application for leave to appeal in its respect.

18. My further finding is that this court does not have the jurisdiction to grant leave to appeal against the impugned decision. I say so because as opposed to the present case where the decision that the applicant seeks to appeal against was with regard to an application brought under Section 14 of the Act, the appeal in the Nyutu's case was with respect to an application brought under Section 35 of the Act.

19. On the issue of stay of proceedings before the Arbitral tribunal pending appeal, I find that no compelling reasons have been advanced to warrant the granting of the of stay in view of the fact that the appeal in question has not been filed. I am guided by the decision in *Kenya Ports Authority vs Base Titanium Limited [2021] eKLR* where the court observed that

> "The decision in Equity Bank Ltd vs. Adopt A Light Ltd [2015] eKLR was cited for that preposition. The point made is that Section 14(8) does not grant to the court jurisdiction to grant stay of proceedings and that even if the court was to be minded to grant such stay, it should be wary and cautious to grant stay only when compelling reasons are availed and that in the instant case no compelling reason had been preferred. Instead, the respondent cites and relies on Section 14(8) to dictate that the proceedings be in progress save that any award thereby reached does not take effect until the challenge has been overcome and further that it should be borne in mind that parties would always design to abuse the arbitral process by attempts at removing the arbitrator. Even though the submissions made in this regard are very forceful, I consider the same immaterial because this prayer was merely intended to be interlocutory and pending determination of the matter. Now that I have heard the matter and I am determining it finally, it would be futile to seek to consider such a prayer unless one sets on a superfluous journey."

20. Moreover, having found that the court has no jurisdiction to grant the prayer for leave for appeal, I find that there is no basis for granting an order to stay the proceedings before the arbitrator.

21. In conclusion, I find that the application dated 28th April 2021 lacks merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Amuga for the Applicant.

Mr. Kereka for Kimathi for the Respondent.

Court Assistant: Margaret