



**Sagitarix Limited v Ndwiga (Miscellaneous Civil Application E119 of 2021)
[2021] KEHC 197 (KLR) (Commercial and Tax) (5 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E119 OF 2021
MW MUIGAI, J
NOVEMBER 5, 2021**

BETWEEN

SAGITARIX LIMITED APPLICANT

AND

ALICE NDWIGA RESPONDENT

RULING

CHAMBER SUMMONS

- 1 The Applicant filed a Chamber Summons Application dated 9th February 2021 for orders that;
 1. The Applicant be granted leave to enforce the Final Award published on 17th July, 2020, by the Arbitrator herein, Ms. Mercy Okiro, as a Decree of the Court.
 2. The costs of this Application be paid by the Respondent herein.
 3. The said Respondent be ordered to pay all such costs and expenses as are incidental to the enforcement and execution of the Final Award aforesaid.

- 2 Which Application was supported by the sworn Affidavit of Moka Lantum dated 9th February 2021 and based on the grounds that: -
 1. In a Final Award dated 17th July, 2020, the Arbitrator awarded to the Applicant as against the Respondent as follows: -
 - a) payment of the sum of Kshs 40,000;



- b) payment of 20% of the legal costs of the Arbitration; and
 - c) payment of 50% of the Arbitrator's fees for the Arbitration.
2. Despite various requests and demands having been made by the Applicant, the Respondent has refused, neglected and/or otherwise failed to comply with any of the Orders made by the Arbitrator as detailed herein-above.
 3. To-date no Order has been made by the Court setting aside or staying enforcement of the said Final Award.
 4. The said Final Award has been duly fled in this cause and the Respondent and Respondent's Advocates are aware of the same.

REPLYING AFFIDAVIT

3 The Application was opposed vide the sworn Affidavit of Alice Ndwiga dated 12th March 2021 and stated;

- a. The Respondent instituted arbitration proceedings as stated in the agreement, seeking to have the Arbitrator determine the issue of unlawful termination of an independent contractor's agreement and the issue of non-payment of terminal dues and to issue an award to thereto.
- b. The Respondent filed a claim dated 18th May 2018 seeking to have the above issues ventilated through arbitration as it was provided in the embattled agreement and was informed that she was required to pay a sum of Ksh.113, 500 as deposit towards the arbitration fee as well as the appointment fee for the arbitration.
- c. Since the Applicant herein had terminated the contract procedurally and had also failed to pay the Respondent her dues as well as the sums in lieu of notice; the Respondent was financially incapacitated and unable to raise the arbitration amount. Therefore, despite wishing to prosecute the arbitration to its logical conclusion, the Respondent was forced to involuntarily withdraw the claim.
- d. The Applicant herein nevertheless took advantage of the Respondent's situation and paid the whole of the arbitration fees and acquired itself an avenue to prosecute a frivolous counterclaim which was based on false and malicious allegations to which it sought a determination and various awards, and to which the honorable Arbitrator awarded liquidated damages against the Respondent and half of the costs of the Arbitration which the Applicant had paid.
- e. The Applicant herein was also awarded legal costs to the tune of 20% of their total legal costs to which the Applicant alleges to stand at a tune of Ksh.120, 000.00. That the Respondent is convinced that the total amount of legal fees being claimed by the Applicant is excess, not proportionate to the pecuniary value of the claim, is extreme and against the law and that the same is simply



aimed at advancing the onslaught of injustice which has so far been meted against the Respondent so far.

- f. The amount stipulated to be the legal cost being claimed by the Applicant is extreme, unjustifiable, exorbitant and not computed to scale as per the available laws and guidelines.
- g. The Applicant's legal costs have been computed according to the law and therefore should not be allowed to levy execution against the Respondent but instead, that the Applicant should file a fully itemized bill of costs to be taxed by the court as per the provisions of the Advocates Act as well as all the other applicable laws.

SUPPLEMENTARY AFFIDAVIT

4 The Applicant filed a Supplementary Affidavit sworn by Dr. Moka Lantum dated 25th May 2021 and stated that; -

1. The issues raised by the Respondent regarding breach of the parties' contract was a matter for determination by the Arbitrator but the Respondent herein opted to voluntarily withdraw her claim, after the close of pleadings and after the Applicant had paid its portion of the Arbitrator's costs as directed, leaving the Applicant's valid counter-claim for determination by the Arbitrator, which the arbitrator did as captured in the Supporting Affidavit. Marked "ML I" are the following; -
 - i. Orders for Directions No. I and 2 on timelines for pleadings and the payment of the arbitrator's costs - pages I to 5.
 - ii. Correspondence exchanged by the parties and the arbitrator on the payment of the arbitrator's costs - pages 6 to 8.
 - iii. Copy of the Applicant's Cheque No. 000058 dated 9th July 2018 towards its portion of the arbitrator's costs - page 9.
 - iv. Arbitrator's acknowledgment of receipt of the Cheque vide her email dated 6th August 2018 and the Respondent's withdrawal of her claim vide her advocates' letter dated 7th August 2018 - pages I0 to II.
 - v. The Orders for Directions No.3 following the Respondent's withdrawal of her claim – pages 12 to 13.
- b. The Respondent has not placed any evidence before the Court to demonstrate that the arbitration proceedings in the hearing and determination of the Applicant's Counter-claim were carried out in an illegal or improper manner.
- c. The Application seeks the enforcement of the Award, not this the Court's determination of the quantum of legal costs, which would be determined by



the Deputy Registrar in due course as per the findings in the Award, following the parties' failure to agree on the said quantum.

- d. The Respondent's assertions and purported objections to the Application are entirely unfounded; the arbitral award is valid and enforceable, and it is fair and just that the Application be allowed.

APPLICANT'S SUBMISSIONS

- 5 The Applicant submitted that none of the Respondent's contentions fall within the statutorily recognized grounds for refusal of recognition or enforcement of an Award as captured by Section 37 of the *Arbitration Act* as upheld by a litany of Court pronouncements on the matter.
- 6 Further, the Respondent did not place any evidence before the Court to demonstrate that the arbitration proceedings in the hearing and determination of the Applicant's Counter-claim were carried out in an illegal or improper manner.
- 7 It was the Applicant's submission that the court has jurisdiction to recognize and grant leave for the enforcement of the Arbitral Award as a Decree of the Court. The Respondent has neither applied to have the Award set aside nor has she availed any of the statutorily recognized grounds to challenge the enforcement of the Award.

RESPONDENT'S SUBMISSIONS

- 8 The Respondent submitted that Section 37 of the *Arbitration act* provides for grounds for refusal of recognition or enforcement of an award. Further, that the Respondent informed the court that the reason as to why she was forced to withdraw her claim was as because she was incapacitated as a result of financial constraints she faced when her contract was unprocedurally terminated and not because of some other reason within her power.
- 9 On whether the Ksh.120, 000 claimed by the Applicant as the 20% of their legal fees is fair and justifiable considering the amount of the subject matter of the arbitration claim; the Respondent submitted that or the applicant to claim that the 20% of their legal costs awarded to them sums up to Ksh.120, 000 means that they are claiming that their total legal costs stood at Ksh.600, 000 which then absurdly means that their legal costs stood at 31.5% of the whole claim and which claim is baseless.
- 10 It was the Respondent's submission that the amount being claimed has been inflated and exaggerated over and above the actual legal costs incurred, and this is with an aim of punishing the respondent for making an attempting at seeking justice.

DETERMINATION

The Applicant seeks to have the Final Award recognized as binding and enforced by the court. I have considered the pleadings and submissions filed by the parties and the issue for determination is whether the Final Award should be recognized?

- 11 The recognition and enforcement of Final Awards is guided by Section 36 of the *Arbitration Act* as follows;
 - (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.

- 12 It is the Court's observation that the Applicant has complied with the provision of Section 36 (3) of the *Arbitration Act* and the certified copy of the Final Award was filed in the court file. The Final Arbitral Award also contains the Arbitration Agreement as produced in the Contract subject of the dispute before the Arbitrator.
- 13 The Respondent in this case instituted arbitration proceedings as stated in the agreement, seeking to have the Arbitrator determine the issue of unlawful termination of an independent contractor's agreement and the issue of non-payment of terminal dues and to issue an award to thereto.
- 14 However, on 7th August 2018, the Respondent wrote to the Arbitrator and opted to voluntarily withdraw her claim. At the close of pleadings, after the Applicant had paid its portion of the Arbitrator's costs as directed, the Applicant's Counter-Claim dated 11th July 2018 was for determination by the Arbitrator.
- 15 It was the Respondent's argument that the amount stipulated to be the legal cost being claimed by the Applicant is extreme, unjustifiable, exorbitant and not computed to scale as per the available laws and guidelines. The Court finds that where parties have chosen Arbitration as the forum of dispute resolution, then the *Arbitration Act* applies;
- 16 Section 32A of the *Arbitration Act* provides that;
- Except as otherwise agreed by the parties, an Arbitral Award is final and is binding upon the parties. No recourse is provided against a Final Award except as in the manner provided for under the Act.
- 17 32B. Costs and expenses
- (1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).
- 18 Recourse to the High Court against the Arbitral Award is by virtue of Section 35** of the Act which provides for the Respondents to file an application for setting aside the Arbitral Award as follows;
- (2) An arbitral award may be set aside by the High Court only if—
- (a) the party making the application furnishes proof—
 - (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 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.

19 The Respondent has neither relied on any of the grounds for setting aside the Arbitral award nor adduced evidence as proof on any of the above stated grounds nor filed any Application seeking to set aside the Final Award. There being no pending application before the Court challenging the award the Court finds no reason not to recognize the Final Award as binding and enforceable.

DISPOSITION

The upshot of the foregoing is that the Applicant's Application of 9th February 2021 to recognize and adopt the Arbitral award of 17th July 2020 as an order of the Court is granted.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH NOVEMBER 2021
(VIRTUAL CONFERENCE)**

M.W. MUIGAI

JUDGE

