



Rongai Tiles & Sanitary Wares Limited v Commissioner of Domestic Taxes (Tax Appeal E011 of 2020) [2021] KEHC 325 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)

Neutral citation: [2021] KEHC 325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E011 OF 2020
DAS MAJANJA, J
DECEMBER 10, 2021**

BETWEEN

RONGAI TILES & SANITARY WARES LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. The application before the court is the Appellant's Notice of Motion dated 18th February 2021 seeking the following orders:
 - (1) The Honourable court do and hereby adopt as an order of this court, the Alternative Dispute Resolution Partial Agreement dated 2nd October 2020 between the Appellant and Respondent Reviewing the Principal Corporation tax, interest, penalties from Kshs. 239,249,340 to a principal of Kshs. 1,553,639/-.
 - (2) The Honourable Court do issue such directions as are necessary for the enforcement of the partial Agreement.
 - (3) The costs of the Application be provided for.
2. The Application is supported by the affidavit of Sumar Mohamed, a director of the Appellant, sworn on 18th February 2021. It is opposed by the Respondent through the replying affidavit of Eugene Wanende, an officer of Kenya Revenue Authority in the Investigation and Enforcement Department, sworn on 19th March 2021.

Applicant's Case



3. The background facts leading to the application are not in dispute. The Tax Appeals Tribunal (“the Tribunal”) delivered its judgment on 26th February 2020 confirming the Respondent’s assessment of KES. 410,093,385.00. Being dissatisfied with the judgment, the Appellant lodged this appeal and together with the appeal, it filed an application dated 9th March 2021 for stay pending appeal. On 6th August 2020, the court granted a conditional order of stay pending appeal.
4. In the course of the proceedings, the court did suggest to the parties to explore the possibility of using the Respondent’s Alternative Dispute Resolution (“ADR”) framework for resolution of the matter. The Appellant states that on 21st July 2020 it presented its workings and documents to the Respondent. The parties engaged in correspondence over a period of 2 months and finally entered into a partial agreement where the Income Tax liability from was reduced from Kshs. 168,261,906/- to Kshs. 1,553,639/-. The parties agreed to refer issue of input VAT deductions to the court for determination. This understanding was encompassed in an Alternative Dispute Resolution Agreement dated 2nd October 2020 (“the ADR Agreement”) executed by the Appellant’s counsel and a representative of the Respondent.
5. The Appellant was surprised when the Respondent by a letter dated 12th October 2020 indicated that it was unwilling to finalize the consent for adoption in court stating instead that the preparation of the consent shall be halted, “to allow for further consultation in order to address concerns that have arisen from the agreement.” The Appellant complains that the Respondent did not make any further communication to it nor give reasons why the consent was halted. It is on this basis that the Appellant filed the instant application.
6. As to whether the court may adopt the ADR Agreement, the Appellant refers to paragraph 50 thereof which states, “where a party to this agreement fails to fulfill its part of the obligation the other party shall be at liberty to enforce the performance of the Agreement,” and paragraph 54 which states that: “the agreement having been concluded and consent adopted is binding on the parties to the extent solely pertaining to the current tax dispute between the parties in Court appeal number E011 of 2020.”
7. The Appellant also relies on Para. 10 of Legal Notice Number 123 of 9th July 2021 which provides that, “where a Party to a tax dispute violates the terms of the settlement agreement between the Parties, the other party may apply to the court or the tribunal for enforcement of the Agreement.” The Appellant also cited the decision in *Commissioner of Investigations and Enforcement v Estama Investments Limited ML HC ITA No. E039 of 2020 [2020] eKLR* where the court upheld an ADR agreement as valid and binding. It held that, “The ADR Agreement between the parties was valid and binding and the only option available for the Tribunal was to resolve the appeal in terms of the agreement. I do not see how the Respondent would suffer prejudice.”
8. The Appellant submits that the ADR Agreement should be enforced. It contends that the Respondent has not made out any basis on the grounds of fraud, misrepresentation or undue influence which would allow the court to set aside an otherwise valid consent or agreement.

Respondent’s Case

9. The Respondent opposes that application and states that the ADR process has collapsed and that it seeks to rescind from the process, its outcomes and have this court determine the matter with finality. The Respondent cites the mandate of the Kenya Revenue Authority under section 5(2) of the *Kenya Revenue Authority Act* (Chapter 469 of the Laws of Kenya) which is to collect and receive revenue which is underpinned and fortified by the National values and principles in the public service contained in Articles 10 and 232 respectively of the Constitution. The Respondent states that the issues in this appeal remain matters of public interest and policy upon whose determination transcends



the peculiar circumstances of the case. It urges the court not to allow the application based on cited provisions of the Constitution.

10. The Respondent submits that even when the parties undertake to have their dispute subjected to ADR, this does not take away the court's mandate to dispense justice as provided in Article 159 and neither does it waive their rights to a judgement on the merits of the case. It further submits that while the court issued directions on advancing ADR as an outlet towards finalizing the matter, the directions were not based on an existing arbitration agreement but rather through the Respondent's ADR framework and facilitated by this court's directions. It submits that the application is premised on a deviation of the court's attention from the tax obligations owed to the Respondent by the Applicant as affirmed by the Tribunal and that the Respondent's legal mandate in enforcing the same.
11. The Respondent claims that the ADR Agreement stemmed from a series of internal administrative checks and balance mechanisms well arrived at after a further review of the documentation. It is the Respondent's submission that the ADR Agreement does not form the basis upon which the appeal is before court but only seeks to address a small feature of what is up for determination in the appeal.
12. The Respondent accepts that the court has jurisdiction to set aside the ADR Agreement and accepts that the court may review it on the basis of principles of contract law. It however submits that court needs to address itself to the fact that the parties' signatures merely allude to the fact that a contract does exist between parties. It further submits that the conduct after the agreement indicates the parties' intention to be bound and whether the agreement should be enforced. The Respondent submits that the Appellant will not suffer any prejudice if the application is denied as the appeal will be heard on merits where all the parties will have a chance to ventilate all their issues.
13. The Respondent maintains that the person representing the Respondent had consent to execute the ADR Agreement but lacked sufficient material facts to inform it to enter into an agreement that safeguards the Respondent's interests adequately. It therefore submits that the ADR Agreement sought to be enforced is akin to a contract entered into through misrepresentation by a party. It adds that the representations by its representative were untenable for want of authority, knowledge and enough material fact to enable him articulate the Respondent's position and enter into the agreement. It urges the court to dispense justice in order to protect the public from deceit and act towards maintaining standards of commercial morality by rejecting this application.
14. In conclusion the Respondent urges the Applicant to embrace a wholesome interpretation of Article 201 of the Constitution of Kenya which provides that the burden of taxation shall be shared equally and dismiss this application and allow for the appeal to be determined upon hearing both parties on merit.

Analysis and determination

15. The main issue in this application is whether the court should enforce or reject the ADR Agreement. I do not think that there is any dispute that the court has jurisdiction to enforce an ADR agreement entered into in the course of the proceeding whether in an appeal or in suit. In any case, ADR is firmly embedded in tax enforcement procedures by virtue of section 55 of the *Tax Procedures Act, 2015* ("the TPA") provides as follows:

55 (1) Where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the settlement shall be made within ninety days from the date the Court or the Tribunal permits the settlement.



- (2) Where parties fail to settle the dispute within the period specified in subsection (1), the dispute shall be referred back to the Court or the Tribunal that permitted the settlement.

16. As to whether the court may enforce an ADR agreement in tax proceedings, I stated as follows in *Commissioner of Investigations and Enforcement v Estama Investments Limited (Supra)*:

- (26) Although both provisions do not provide for the kind orders the Tribunal may make upon receiving the report on settlement, it is not inconsistent with those provisions for the Tribunal to accept any settlement or compromise the Appeal on terms agreed by the parties. This course would be in accordance with the constitutional imperative under Article 159 of the Constitution that enjoins the Tribunal to promote alternative dispute resolution. On the other hand, if there is no settlement, it follows that the Tribunal will proceed with the Appeal to its logical conclusion.

Although the observations were in relation to the Tribunal, they apply with equal force to this court particularly given the imperative of Article 159 of the Constitution.

17. The Respondent has cited various provisions of the Constitution and its special position as a body charged with collecting and receiving revenue as a basis to avoid the ADR Agreement. This argument cannot be accepted because every person who comes before the court is to be treated equally and is not exempted, merely because of its constitutional or statutory position, from the normal incidents of the court processes which include a fair hearing for both the Appellant and Respondent. Specifically, and in reference to Article 159 of the *Constitution*, this court has an affirmative obligation to promote ADR and will give effect to ADR processes in accordance with the law and court procedures particularly where these provisions underpin part of the processes governing its operation such as those in the TPA.
18. As urged by the Appellant, the parties entered into an ADR Agreement which referenced this appeal as shown in para. 54 thereof. This disposes of the argument by the Respondent that the agreement was somewhat peripheral and since it was in reference to this appeal, it cannot be enforced in the appeal. To hold otherwise would undermine not only the efficacy of ADR generally but also that of the Respondent's ADR framework. I therefore hold that the ADR Agreement can be enforced unless the Respondent shows reasons why it should not.
19. The Respondent correctly cites *Wasike v Wamboko [1988] KLR 429* which summarises the principle under which the court acts when setting aside a consent or agreement between the parties. The Court of Appeal stated that, "it is now settled that a consent judgment can only be set aside on the grounds which would justify setting a contract aside," Since the ADR Agreement is a contract, the words of the Court of Appeal in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR* are apposite. It observed that, "The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."
20. The burden is on the Respondent to prove that the ADR Agreement was procured by fraud, coercion, undue influence, mistake or misrepresentation. Making allegations of these vitiating factors does not amount to proof. The party must set out facts and evidence to prove vitiating factors that would entitle the court to either reject the agreement or set it aside. In the replying affidavit, the Respondent agrees that the party entering into the consent on its behalf had the authority to enter agreement but it seems to suggest that it lacked material facts to enter into the agreement.



21. I have read and re-read the Respondent's deposition. It is devoid of any facts or evidence to support a case for vitiating the ADR Agreement. Every vitiating factor must be pleaded with particularity and the deposition of Eugene Wanende lacks any facts. The affidavit lacks any fact and dwells on narrating matters of law and submissions which is a breach of the principle that affidavits must be confined to stating facts. In short, the Respondent has not set out any grounds that would warrant the setting aside of a validly executed ADR Agreement.
22. Lastly, the Respondent has argued that enforcing the ADR Agreement would be against public policy. I disagree. In fact, public policy leans towards giving effect to the agreement freely negotiated and recorded unless either party can prove vitiating factors. More particularly, the Respondent has not articulated any public policy that would support the court's decisions to depart from long established principles.

Disposition

23. At the end of the day, I allow the Notice of Motion dated 18th February 2021 and order as follows:
 - a. The Alternative Dispute Resolution Agreement dated 2nd October 2020 between the Appellant and Respondent be and is hereby adopted as an order of the court and a preliminary decree shall issue to that effect.
 - b. The Appellant shall have the costs of the application.
 - c. The matter is adjourned for directions on the outstanding matters.**

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Mola instructed by Mola, Kimosop and Njeru Advocates for the appellant.

Mr Chabala, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

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