



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC CIVIL SUIT NO E 073 OF 2018

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IN THE MATTER OF THE ARBITRATION ACT, 1995 AND THE ARBITRATION RULES, 1997

AND

IN THE MATTER OF SETTING ASIDE AN ARBITRAL AWARD

GERICK KENYA LIMITEDAPPLICANT

-VERSUS-

HONDA MOTORCYCLE KENYA LIMITEDRESPONDENT

RULING

1. There is a proposition that certain classes of fraud cannot be left to arbitration pursuant to an arbitral agreement and should be determined by the Civil Court. This is one of the arguments made by Gerrick Kenya limited (Gerrick or the Applicant) in seeking the setting aside of the Arbitral Award dated 22nd June 2018 issued by one Patterson Munene Kamaara (**the Arbitrator or Arbitral Tribunal**).
2. The setting aside application dated 20th December 2018 and brought under the provisions of Section 35 of the Arbitration Act (**the Act**) culminates from a dispute between Gerick and Honda Motorcycle Kenya Ltd (Honda) referred to Arbitration. The brief backdrop to the dispute is that by an agreement dated 5th January 2006, Gerick and Honda entered into a non-exclusive dealership agreement (**the agreement**) in which Gerick would sell products, parts and offer services for users of Honda products in Kisii area on behalf of Honda.
3. Under the provisions of clause 20 of the agreement, Honda would supply the products and parts to Gerick on advance payment and supplies would be made upon confirmation of payment by Honda. In a statement of claim filed before the Arbitral Tribunal, Honda made a claim of a principal sum of Kshs.17,041,719 on account of motorcycles and spare parts supplied to Gerick relying on evidence supplied by Gerick alleging that advance payment had been made. It was the case of Honda that no such payments had in fact been made.
4. In response, Gerick filed a statement of defence dated 16th February 2018 pointing out to clause 20 of the agreement. It asserted that it provided for delivery on credit. Gerick then made a repeated defence that it never received the motorcycles and parts as set out in the claim.
5. Upon hearing the dispute, the Arbitral Tribunal, comprised of the single arbitrator, returned an award dated 22nd June 2018 in which he entered judgment in favour of Honda for Kshs.16,721,341.89 with interest at the rate of 12% per annum with effect from 24th August 2016. This award has caused grievance to Gerick which seeks its setting aside on two board grounds. First, that the Arbitrator determined a dispute not contemplated by the arbitral agreement and more specifically that he waded into the sphere of criminal justice, a matter beyond the scope of reference. Second, that he ordered for payment of interest on the sum awarded with effect from 24th August 2016 yet the dispute between the

parties arose on 18th August 2017.

6. It has to be noted that in the course of time, the nature of the application mutated. In a supporting affidavit sworn on 2nd April 2019 by Geoffrey Mayaka Bogonko, Gerick made a new assertion that the Arbitrator admitted evidence in the form of documents after the claimant's witnesses had already been cross-examined thereby grossly prejudicing its right to fair trial. By taking up this new plea, Gerick was seeking to expand the scope of the application without leave of Court. Something the Court is reluctant to allow.

7. A further reason why the Court would not allow the said expansion is because of the provisions of Section 35 (3) of the Arbitration Act which provides:-

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

8. Since the Application for setting aside was made on 21st September 2018 then it can safely be assumed that the award had been received by Gerick on that day. The significance of this is that the attempt to introduce a new matter into the application on 3rd April 2019 would be to take up new ground after 3 months of receipt of the award. The timelines prescribed by Section 35(3) of the Act falls in the scheme of the statute about finality of arbitral awards and speed in which they are intended to bring to dispute resolution. To allow protracted and late post-award proceedings would be to defeat one of the policy objectives of Arbitration.

9. I now turn to consider the submissions by the parties in the context of the Application and response.

10. A forceful submission made by counsel for Gerick is that fraud belongs to a category of disputes which are generally treated as non-arbitrable. Counsel cites this passage in the Indian Supreme Court decision of **A. Ayyasamy v A. Paramasivam & Ors Civil Appeal No. 8245 – 8246 of 2016**:-

“5. ...In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non- arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non- arbitrable[4]:

- (i) patent, trademarks and copyright;
- (ii) anti-trust/competition laws;
- (iii) insolvency/winding up;
- (iv) bribery/corruption;
- (v) fraud;
- (vi) criminal matters.’’

11. The Court went on to say,

“The aforesaid judgment was followed by this Court in N. Radhakrishnan while considering the matter under the present Act. In that case, the respondent had instituted a suit against the appellant, upon which the appellant filed an application under [Section 8](#) of the Act. The applicant made serious allegations against the respondents of having committed malpractices in the account books, and manipulation of the finances of the partnership firm. This Court held that such a case cannot be properly dealt with by the arbitrator, and ought to be settled by the Court, through detailed evidence led by both parties.’’

12. This contention is made in the setting of the claim by Honda that it supplied motorcycles and parts on the fraudulent misrepresentation by the Gerick that it had deposited payment into Honda's account. Indeed, this was the basis of a criminal complaint lodged by Gerick against Geoffrey Mayieka(Mayaka?) Bogonko (a director of Gerick) and which formed the charges he faced in [Nairobi Criminal Case No. 1790 of 2016, Republic –vs- Geoffrey Mayieka\(Mayaka?\) Bogonko](#).

13. The Arbitral Tribunal did not itself feel hamstrung by the subsistence of those criminal proceedings and rendered itself as follows:-

“In my view the arbitrator's jurisdiction is derived from the arbitration agreement, clause 73, of the contract AND the law of arbitration. The criminal proceedings have no bearing to arbitration proceedings except as evidence on the facts giving rise to the proceedings. At criminal Court, the person charged is a director of the Respondent, who is only a witness in the arbitral proceedings. The Criminal case seeks to establish the criminal liability of the accused person, on the standard of beyond reasonable doubt. These arbitral proceedings seek to establish whether the claim as filed and the defences as filed, give rise to any civil liabilities upon either of the parties. The result of criminal process is either conviction or acquittal of the accused. The result of arbitral proceedings is

either civil liability or lack it. The two jurisdictions are completely different, like chalk is different from cheese. The Arbitrator lacks jurisdiction over criminal matters by dint of the provisions of the Arbitration Act. The Arbitrator's jurisdiction includes the powers to determine whether arbitrator has jurisdiction or not (Kompetenz Kompetenz). In this case I find that my jurisdiction is not in any way affected by the criminal case and the Respondent's plea on jurisdiction is dismissed. My findings on this issue are final."

14. Counsel for Honda takes the above holding by the Arbitrator as sufficiently answering the proposition put forward by the Gerick.

15. This court has familiarized itself with the decision in *Ayyasamy (supra)* and finds that the rationale why certain disputes must be considered as non-arbitrable is found in the decision of **Booz Allen & Hamilla Inc –vs- SBI Home Finance Limited and others 2011 5 SCC 532** cited in the said decision. The Court held:-

22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

23. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

16. However, having agreed with the above reasoning, Sikri J in *Ayyasamy* had a little more to be said in respect to when fraud will be held to be non-arbitrable. He held:-

"When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court. The judgment in *N. Radhakrishnan* does not touch upon this aspect and said decision is rendered after finding that allegations of fraud were of serious nature".

17. This Court is persuaded that the authorities provide a useful guide as to when fraud will not be held to be non-arbitrable. To be culled out is that where the allegation of fraud relates to a *right in rem* then a private forum is not suitable. Secondly, even where the matter of fraud relates to a dispute *in personam* but involves a serious or complex question of fraud then arbitration is not the appropriate forum. Again, where an allegation of fraud has been made elsewhere in a public forum, the party against whom the allegation is made has a right to defend himself in that public forum. In addition, it is upon a party who seeks to oust the jurisdiction of the arbitral tribunal to demonstrate that the nature of fraud and circumstances of a dispute makes it non-arbitral.

18. On the overall, nonetheless, the Court must bear in mind that the parties to an arbitration agreement have voluntarily chosen arbitration as their preferred forum for dispute resolution. In doing so they elect a one stop forum as a way of dealing with differences in a speedy and final manner. It is therefore the duty of the Court, as much as is possible, to give effect to the commercial arrangement entered freely by the parties. Save for compelling reason a party should not be permitted to detract from an arbitration agreement. If parties were to be allowed to wriggle out too easily from such arrangement, then commercial world would have little faith of arbitration agreements and arbitration generally. In turn, arbitration as an alternative means of dispute resolution will become less attractive.

19. It is against these principles that the Court considers the argument by Gerick.

20. I have looked at the pleadings before the Arbitrator and the Award itself. The claim by Honda is a claim for money against Gerick. In it Honda seeks to exercise a *right in personam* against Gerick. The *right in personam* being a personal right attached to Honda on account of the

agreement or contract. On the specificity of the allegation of fraud is the following averment in the statement of claim:-

“The claimant supplied the motorcycle and spare parts valued at Kshs.17,041,919.00 replying on evidence supplied by the respondent alleging advance payment had been made. Upon reconciliation of its bank accounts the claimant realized that the evidence of the alleged payment was false and that no payment was made for the motorcycles and spare parts totaling to Kshs. 17,041,919.00”.

21. The sole Arbitrator made three critical findings on that regard:-

- i. Against denial of delivery of the motorcycle and spare parts, Honda had sufficiently proved delivery.
- ii. Honda had provided proof that the payment allegedly made by Gerick had not been paid.
- iii. Gerick made no attempt to prove the alleged payments.

22. Of concern to Gerick is the following holding by the Arbitrator:-

Evidence available shows that the Respondent would order the motorcycles on phone, pay the price of the consignment directly into the Claimant's bank, and then send a copy of the bank slip to the Claimant via a whatsapp photograph. On the strength of the photograph of the pay-in slip, sent through whatsapp, the Claimant delivered the motorcycles and spare parts. This course of dealings went on well for some time, but during the period under review, that is, between April and August 2016, the Respondent sent bank- slips which were inauthentic, not genuine and utterly fake. The inauthenticity of these bank slips was not discovered by the Claimant until August when they carried out their reconciliations.

23. The view of the Court, nevertheless, is that even without making this observation the Arbitrator was able to make a finding of the civil liability of Gerick by making the three findings set out on paragraph 21 above. As he did not and could not make a call on the criminal culpability of Gerick nothing turns on the further observation he had made. The supposed fraud was not complex and on the evidence and material before him the Arbitrator was able to resolve the issue as to whether or not the motorcycles and spare parts supplied had been paid for.

24. Upto there, the Court is unable to find that the matter was not one for arbitration. There is however one other issue that the Court must consider. At the time of Arbitration, criminal proceedings against a director of Gerick in respect to the matters giving raise to the Arbitral claim were still pending. Unlike the Arbitral proceedings, criminal proceedings are public in nature. Should Gerick therefore not have been granted the opportunity to challenge the civil claim in a Civil Court which is a public forum unlike the closet of arbitral proceedings?

25. On this aspect Gerick and its director appear to have taken conflicting positions. Before the Arbitrator, Gerick took up a preliminary objection to the jurisdiction of the Arbitrator to hear and determine the dispute because of the existence of a criminal case. Yet in Judicial review proceedings being Misc. 560 of 2010 Republic –vs- DPP Milimani & Another Exparte Geoffrey M Bogonko ,its Director unsuccessfully sought for the prohibition of the criminal proceedings on the ground that the issue ought to be resolved in accordance with the Arbitration agreement. It is not open for Gerick now to insist on a civil trial on the basis of that argument when the person (Bogonko) facing a public trial for fraud had pushed for resolution of the dispute through arbitration.

26. The Court turns to the second limb of the Application. While Gerick had assailed the Arbitrator for making an award of interest with effect from 24th August 2016 yet the dispute between the parties arose on 18th August 2017, it did not press the point during submission. But let me say this.

27. As correctly argued by counsel for Honda, Section 32c of the Act empowers an Arbitral Tribunal to make an award on interest. It reads:-

32C. Interest

“Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award”.

28. In so far as the arbitral agreement did not forbid the award of interest by the Arbitrator, then he was empowered, if appropriate, to make such order.

29. In the statement of claim Gerick had sought interest at 12% on the sum of Kshs. 17,041,919.00 from the date of each invoice until payment in full. In making his award on interest the Arbitrator reasoned:-

Quite obviously, the Claimant has been kept away from use of their substantial amounts of money for a period of nearly two years. I bear in mind that interest is compensation for denied use of money rather than a penalty of any kind. The Claimant is entitled to a reasonable compensation to loss of use of their money. I award interest at the rate of 12% p.a, simple interest, from 24th August 2016 until payment in full.

30. In the body of the award the Arbitrator had found that 24th August 2016 was the date of the last delivery. Bearing in mind that the arrangement was that payment would be made in advance of delivery, the Arbitrator cannot be faulted for making the date of last delivery as the effective date for the charge of interest. In any event this is a matter that goes to the merit of the award and would not fall in the province

of a section 35 application.

31. In the end, this Court finds no merit in the Notice of Motion dated 20th September 2018. It is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th Day of October 2019

F. TUIYOTT

JUDGE

PRESENT:

Welukwe for Applicant

Ndolo for Respondent

Court Assistant: Nixon