



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS APPLICATION NO. 559 OF 2016

CMC AVIATION LIMITED.....1ST APPLICANT

TRIDENT ENTERPRISES LIMITED.....2ND APPLICANT

VERSUS

ANASTASSIOS D. THOMOS.....RESPONDENT

RULING

1. The application before me seeks the setting aside of certain aspects of the Final Arbitral Award dated 20th May 2016 because the applicants hold the view that the impugned aspects;

a. Were in conflict with Public Policy in Kenya as they amounted to the unjust enrichment of the Respondent;

b. Were in conflict with Public Policy in Kenya as it is inconsistent with the law of Kenya, to the extent that it applied the evidentiary threshold of the Evidence Act, contrary to the express provisions of Section 2 (1) of the Evidence Act;

c. Were contrary to established principles of law and justice, and therefore against Public Policy;

d. Ignored the Applicants' uncontroverted evidence which showed that the Respondent received \$ 22,500.

e. Awarded to the Respondent his salary for September 2010, whereas the Respondent had admitted having received his salary for that month;

f. Ignored evidence which showed that the Respondent had received remittances amounting to \$ 74,000.

2. It is common ground the Applicants were dissatisfied with the Final Arbitral Award, and that they had initially asked the Arbitrator to either clarify or to otherwise correct the aspects in issue.

3. The parties confirmed to the court that the Arbitrator rejected the applicants' application for clarification or correction. It is then that the applicants moved to court to set aside the Award.

4. In the meantime, the Respondent had filed an application at the Employment and Labour Relations Court, for the enforcement of the Award.

5. It is the respondent's view that the applicants ought not to be allowed to canvass their application at the Commercial & Tax Division of the High Court. The first reason for that view is that there already exists a forum, at the Employment & Labour Relations Court, where the parties could canvass their respective positions, in relation to the Arbitral Award.

6. Ordinarily, when one party seeks to enforce an Arbitral Award, whilst the other party seeks to have the Award set aside, the two competing applications would be heard and determined by one Judge. That practice would ordinarily give rise to a single decision, which would either set aside the Award or would, in the alternative, recognise the Award and lead to its enforcement.

7. In this case, the Applicants reason that they came to the High Court because, it is only the High Court which has the requisite jurisdiction to hear and determine applications for setting aside of Arbitral Awards. That reasoning is premised on Section 35 (1) of the Arbitration Act, which reads as follows;

“Recourse to the High Court against an arbitral award may be made only setting aside the award under subsections (2) and (3)...”

8. But the respondent holds the view the law did not preclude him from filing an enforcement application at the Employment and Labour Relations Court.

9. Indeed, because the dispute between the parties herein emanated from an employment contract, the respondent insists that it was only the Employment and Labour Relations Court which had jurisdiction to hear and determine matters pertaining to either the enforcement or the setting aside of the arbitral award.

10. The basis for that argument was, firstly, Article 162 (2) (a) of the Constitution of Kenya, which provides as follows;

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

a. Employment and labour relations”.

11. There is no doubt that the Employment and Labour Relations Court was established by Parliament, pursuant to the Constitutional imperative that a court, with the status of the High Court be established to hear and determine disputes relating to employment and labour relations.

12. However, the reality which we must face is that Arbitration Act specifies, at Section 35 (1) that recourse against an arbitral award may be made to the High Court. Indeed Part VI of the Arbitration Act is clearly headed;

“RECOURSE TO HIGH COURT AGAINST ARBITRAL AWARD”.

13. The respondent has quoted the following words of the Court of Appeal, in **OWNERS of MOTOR VESSEL ‘LILLIAN S’ Vs CALTEX OIL (KENYA) LIMITED [1989] KLR 1;**

“By jurisdiction it is meant the authority which a court has to decide the matters litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both characteristics”.

14. Clearly therefore, the limits of jurisdiction are imposed by statute.

15. The conferment of jurisdiction is not dependent upon logical reasoning alone. In other words, there might exist logical reasons that would be expected to confer jurisdiction on one or another court, but the statute gives the said jurisdiction to a different court.

16. In this case, Section 35 of the Arbitration Act specifically makes reference to the High Court.

17. It is my view that even if the subject matter would ordinarily have fallen for adjudication by the Employment and Labour Relations Court, that fact alone, could not be sufficient to oust the express provision of the statute.

18. But I am also alive to the fact that the Arbitration Act in Kenya was enacted in 1995. At that time, the Courts with the status of the High Court did not exist.

19. Therefore, it cannot be argued that by specifying the High Court as the court to which parties could have recourse against arbitral awards, the Arbitration Act intended to, inter alia, exclude the courts with the status of the High Court.

20. The preamble to the Employment and Labour Relations Court Act No. 18 of 2014 provides as follows;

“An act of parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for all connected purposes”.

21. It is common ground that the relationship between the parties herein was one between an Employer and an Employee.

22. The respondent, **ANASTASSIOS D. THOMOS**, originally lodged a claim at the Industrial Court, being Industrial Cause No. 994 of 2011, asserting that the applicants were liable for his unlawful dismissal/unfair termination.

23. Thereafter, the dispute was referred to arbitration, which culminated in the award that the applicants now seek to set aside.

24. I have summarised the genesis of the dispute for the sole reason of showing that the parties did not go straight to arbitration, after the dispute arose between them.

25. In my considered view, the fact that the dispute was first registered at the Industrial Court, as a claim by an employee who believed that his employers had dismissed him unfairly or had unfairly terminated his services, is significant. I so find because the logical step, after the Arbitrator had delivered his final award, was to revert to the forum before which the dispute was first lodged. And that is what the respondent did, when he filed the application for the enforcement of the award.

26. Of course, the applicants insist that the Employment and Labour Relations Court has no jurisdiction, because Section 35 of the Arbitration Act only makes reference to the High Court.

27. The next issue worthy of consideration is the role which the court plays after an arbitrator delivers his award.

28. Pursuant to Section 35 of the Arbitration Act, the court may set aside the award, but only if the applicant satisfied the terms specified by that statutory provision.

29. And pursuant to Section 37 of the Arbitration Act, the Court may only refuse to recognise and to enforce an award for the reasons set out in that section.

30. In the case of **ANNE MUMBI HINGA Vs VICTORIA NJOKI GATHARA, CIVIL APPEAL No. 8 of 2009**, the Court of Appeal said;

“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right to appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act”.

31. I have spelt out that holding to emphasise the fact that when the High Court is called upon to intervene in an arbitral award, the court is not being called upon to determine the dispute. The dispute would have been resolved by the arbitrator.

32. The court can either recognise the award, so that it can thereafter be enforced, or the court can set aside the award. The court is not authorised to undertake any other role other than either recognition and enforcement of the award or the setting aside of the said award.

33. In effect, the court would not be engaged in the exercise of determining a dispute, such as one relating to employment and labour relations.

34. In the case of **ANNE MUMBI HINGA** (*cited above*) the Court of Appeal said;

“The provisions of the Act are wholly exclusive except where a particular provision invites the court’s intervention or facilitation”.

35. And the provisions of Section 35 of the Arbitration Act invites only the High Court to intervene.

36. Nonetheless, we cannot ignore the fact that this case was initiated before the specialised forum which was, at the material time, mandated to hear and determine disputes relating to Employment and Labour Relations.

37. In practical terms, it could lead to an absurd result if this court were to ignore the foundation upon which the dispute sprung up before it went to arbitration. I so find because good sense and orderliness dictates that the determination of a dispute ought to have a nexus with the source.

38. In the Sixth Schedule to the Constitution of Kenya 2010, Section 7 addresses the issue of Existing Laws, as follows;

“(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution”.

39. It is therefore my considered view that although Section 35 of the Arbitration Act cites the High Court as the forum before which a party can seek to set aside an arbitral award, the Employment and Labour Relations Court would have similar authority if the award was on in relation to employment and labour relations. That is because the constitution had decreed that such matters would be dealt with by the Employment and Labour Relations Court.

40. I am alive to the fact that I have said that when determining issues pursuant to section 35, the court was not authorised to delve into the subject matter of the dispute which had been determined by the arbitrator.

43. But that position is not inconsistent with the finding that where the dispute fell within the jurisdiction of either of the courts with the status of the High Court, the applications for setting aside arbitral awards should only be determined at all costs.

44. Having now held that the Employment and Labour Relations Court has the requisite jurisdiction to hear and determine the application to set aside the award, I direct that the application herein be transferred to that Court. The application will then be heard together with the respondent's application for the enforcement of the arbitral award.

45. Finally, I order that the costs of the application shall abide the determination of the 2 applications by the Employment and Labour Relations Court.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Wataka for the 1st Applicant

Miss Wataka for the 2nd Applicant

Ambala for the Respondent

Collins Odhiambo – Court clerk.