REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CASE NO. 373 OF 2014

SANDHOE INVESTMENTS KENYA LIMITED……..…APPLICANT

VERSUS

SEVEN TWENTY INVESTMENTS LIMITED…….....RESPONDENT

RULING

1. The application dated 12th August 2014 seeks to set aside the Final Arbitration Award which was made on 10th July 2014.
2. The application is premised on two issues, namely:

i. *The Award dealt with a dispute which was not contemplated by the terms of the reference to the arbitration, and it therefore contained decisions beyond the scope of the reference, and*
ii. *The Award was in blatant conflict with the public policy of Kenya.*

3. The arbitrator was faulted for elevating the applicant's bank to the same position as that of the applicant. As far as the applicant was concerned, the arbitrator had gone far beyond the scope of the inquiry and the reference when he made a finding that the conduct of a Third Party was determinative of whether or not the parties to the Agreement understood that time was of the essence.
4. The applicant's bankers were said to have accepted the late payment of the deposit and also of installments from the claimant. That fact was construed by the arbitrator as constituting an acceptance of the late payments from the claimant.
5. Flowing from that reasoning, the applicant and the claimant were held to have demonstrated, through their conduct, that time was not of the essence under the Agreement.
6. I understood the applicant to be saying that the conduct of its bankers cannot be equated to its conduct.
7. By concluding that the applicant had demonstrated that the late receipt by the bank constituted an acceptance of such payment, the arbitrator is said to have flouted the most rudimentary principle of contract law, which is the privity of contract.
8. In the case of **CHRIST FOR ALL NATIONS VS APOLLO INSURANCE CO. LIMITED [2002] 2 E.A 366, at pages 369-370,** Ringera J. (as he then was) expressed himself thus:

> "*I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it, you never know where it will carry you, an award*

could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either: (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality".

9. Using that decision, the applicant is basically saying that the arbitrator made an erroneous decision, when he impliedly held that the acceptance of money by the applicant's bankers was equivalent to an acceptance by the applicant.
10. Assuming that the arbitrator actually held that the acceptance by the bankers of the applicant could be construed as an acceptance by the applicant itself, I think that it is important for the applicant to be reminded about what Ringera J. said in the case of **CHRIST FOR ALL NATIONS VS APOLLO INSURANCE CO. LTD [2002] 2 E.A 366, at page 370;**

> *"To accept the Applicant's contention would be tantamount to accepting a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, an injustice is perpetrated.*
>
> *He must be told clearly that an order of fact or law or mixed fact and law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the Public Policy of Kenya. On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right to challenge within the narrow confines of section 35 of the Arbitration Act".*

11. Those same words would apply, with equal force, to the issues regarding, the arbitrator's findings on;

a. *The validity of the Rescission Note;*
b. *The question as to whether or not the Respondent was Ready, Able and Willing to Pay the Entire Balance of USD 124 038.00; and*
c. *Costs.*

12. In effect, even if the Arbitrator erred by making a decision on matters of law or of fact or of mixed fact and law, or even if the construction of the contract was erroneous, that cannot be said to be inconsistent with the Public Policy of Kenya.
13. No arbitrator or Judge can play the role of God. None of them can lay claim to infallibility.
14. That is why the legal systems all over the world created appellate courts, which could then have a second or even a third look at the decision that was made at the first instance.
15. The very existence of the appellate structures is an acknowledgment that decision makers can make mistakes.
16. If each mistake was deemed to be against public policy, because it was not consistent with the constitution or other laws, many decision makers would find themselves condemned on the basis of re-evaluations pegged upon the unruly horse.
17. In my considered view, the definition that was offered by Ringera J. needs to be narrowed down. My said view is informed by the following words of Sir Johnson Donaldson MR. in the case of **NATIONAL OIL COMPANY [1987] 2 ALL E R 769, at page 779;**

> *"Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in* ***Richardson Vs Mellish***
>
> *'it is never argued at all, but when other points fail, it has to be shown that there is an element of illegality or that enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the*

powers of the state are exercised".

18. I am persuaded that Burrough J. was right to have introduced the foregoing qualification to the definition of that which ought to be sufficient public policy consideration to justify the setting aside of an arbitral award.
19. My learned brother, Mabeya J. was similarly persuaded in the case of **RWAMA FARMERS CO-OPERATIVE SOCIETY LIMITED VS THIKA COFFEE MILLS LIMITED HCCC NO. 836 OF 2003,** wherein he pronounced himself thus;

> *"To my mind, therefore, I have not found anything that is injurious to the public, offensive, with an element of illegality, that which is unacceptable to the Kenyan society, with the award. I find that there is nothing in the Award that is contrary to public policy of Kenya".*

20. I must therefore ask myself whether or not the applicant has demonstrated that the Award dealt with a dispute which was not contemplated, so that it went beyond the scope of the reference. If that be the case, is the award in blatant conflict with the public policy of Kenya?
21. First, it is noted that the Issues which were for determination by the Arbitrator were as follows:

> *"1. What were the terms of the agreement regarding completion?*
>
> *2. Whether time was of the essence with respect to the parties obligations under the agreement;*
>
> *3. Whether the rescission notice issued by the Respondent on 31st July, 2013 was proper, valid and lawful;*
>
> *4. What constituted the purchase price under the agreement and whether or not this was paid;*
>
> *5. What was the effect, if any, of the undertaking from Barclays Bank on the parties' respective obligations;*
>
> *6. Whether the Claimant was ready, able and willing to pay the entire balance of USD 124,038.00 on the completion date;*
>
> *7. Whether the provision allowing forfeiture of the monies already paid as well as repossession of the aircrafts is enforceable in law;*
>
> *8. What reliefs are available to the Claimant and the Respondent under the Statement of Claim and the Counterclaim, respectively.*
>
> *9. Who should bear the costs of both the arbitration and the reference".*

22. From the List of the Issues above, it is crystal clear that the matters which the applicant has raised in this application were also issues which were to be determined by the Arbitrator.

23. The four matters that the applicant has taken issue with are:

> *a) On Time Being of the Essence;*
>
> *b) On Validity of the Rescission Notice;*
>
> *c) On Whether the Respondent was Ready, Able and Willing to Pay the*

Entire Balance of USD 124,038.00 on the Completion Date;

d) On Costs.

24. Those matters are numbered (2), (3) and (9) on the List of the Issues before the Arbitrator. Therefore, when the Arbitrator adjudicated on the said matters he did not deal with disputes which had not been contemplated, nor did the Arbitrator's decision go beyond the scope of the reference.

25. To my mind, when the Arbitrator made reference to the effect of the bank's failure to enforce the undertaking between the bank and the Respondent, he was taking into account the Issue No. 5, which had sought to know the effect of the undertaking from Barclays Bank, on the obligations of the respective parties.

26. As regards the applicant's contention that the decision on the validity of the rescission notice was beyond the scope of the reference, I find that the position taken by the applicant is self-contradictory.

27. The Arbitrator is said to have;

> "*correctly set out the judicial precedents in Kenya concerning the issue of time being of the essence, which precedents identify three (3) independent ways of determining the issues…"*

However, the Arbitrator then pegged his decision on only one of those 3 ways.

28. Assuming that the applicant was right about the Arbitrator's use of one of the three ways of determining the issue, that cannot then be said to constitute a decision that went beyond the scope of the reference. I so find because the issue for determination was within the scope of the reference, and the decision utilized one of the three independent ways of determining the issue.

29. In any event, the applicant had, in its submissions to the Arbitrator, made elaborate comments on the amounts of money which were paid by the Claimant, in contrast to the monies which ought to have been paid. Those comments were made when the applicant was discussing the validity of the rescission notice.

30. In those circumstances, the parties should have expected the Arbitrator to touch on those issues which they had canvassed. Therefore, when the arbitrator touched on those matters, he cannot have acted beyond the scope of the reference.

31. Meanwhile, the arbitrator was faulted for completely ignoring or neglecting crucial evidence on the question regarding the Claimant's ability and willingness to pay the entire balance of USD 124,038.00.

32. To my mind this issue is intertwined with the validity of the rescission notice.

33. I so find because the sums being demanded by the applicant exceeded USD 700,000.00. That sum was said to be inclusive of arrears. The existence of arrears connotes the failure by a person who had an obligation to make payments, to comply with his obligations timeously or at all. In effect, that party would be in default of one or more terms of the contract. It is such kind of default that would trigger the other party, to issue a notice to the defaulter.

34. If there was no default, there would never arise the need for notice.

35. In this case, the arbitrator held that the amounts claimed by the applicant, as the balance of the purchase price, was not accurate. The arbitrator also held that the rescission notice was addressed to the wrong party.

36. Those decisions were not only in relation to matters that were in issue before the Arbitrator, but they were also based on the evidence led and the submissions made by the respective parties.

37. Therefore, the Award did not deal with any dispute which had not been contemplated by the terms of the reference to the Arbitration. Secondly, the Award did not contain any decisions which were beyond the scope of the reference.

38. Thirdly, the Award is not in any way in conflict with the public policy of Kenya.

39. In the result, the application lacks merit. It is therefore dismissed, with costs to the Respondent.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **10th day** of **February** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mwangi for the Applicant

Njuguna for the Respondent.

Collins Odhiambo – Court clerk.