REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL CASE NO. 182 OF 2013

UNITED (EA) WAREHOUSES LIMITED.....CLAIMANT

-versus-

CARE SOMALIA AND SOUTHERN SUDAN.....RESPONDENT

RULING

INTRODUCTION

1. Briefly, the background of this matter is that the parties herein entered into a contract on 23rd December 2008 with the following main objectives:

i. to provide services with regard to the importation, handling in Mombasa and exportation of approximately 20,000 metric tonnes of relief food arriving on separate shipments from USA between December 2009 and November 2009, requiring clearance at the port, handling, transportation from the port warehouses and warehousing in Mombasa until its final dispatch to Somalia by sea including port clearances
ii. to provide customs clearance in and out of Mandera/Elwak border points and taking charge of the transit bonded warehouse at Mandera.

2. UNITED (EA) WAREHOUSES LIMITED, the Respondent in the arbitration proceedings (hereinafter "the Respondent") was to provide the above services to CARE SOMALIA AND SOUTHERN SUDAN, the Claimant in the arbitration proceedings (hereinafter "the Claimant").
3. The operations of the Claimant became untenable due to the security situation obtaining in Somalia and the Claimant therefore terminated its contract with the Respondent. When the contract was terminated, the Respondent was holding in its warehouse 44,816.36 metric tonnes of food commodities belonging to the Claimant.
4. At the time of termination, the Claimant claimed that the Respondent owed it US$ 33,064.47 being the balance of advanced money while the Respondent claimed that the Claimant owed it US$ 324,260.78 on account of storage charges. This led to a dispute between the parties which was then referred to Mr. Dan K. Ameyo (hereinafter "the Arbitrator") for arbitration.
5. The Arbitrator conducted arbitration proceedings after which he made an Arbitral Award on 23rd April 2013 (hereinafter "the Arbitral Award") in which he awarded the Respondent US$ 291,193.53 being the amount of US$ 324,260.78 which had been counterclaimed by the Respondent on account of accrued storage charges less US$ 33,064.47 which had been claimed by the Claimant.

6. The Respondent then moved to court to enforce the Arbitral Award but before its application could be heard, the Claimant filed an application to set aside the Arbitral Award.
7. Therefore, there are two applications before court. The first is a Chamber Summons application dated 4th September 2013 by the Respondent seeking an order that the Arbitral Award be recognised as binding on the Claimant. The second is a Chamber Summons application dated 12th September 2013 by the Claimant seeking the setting aside of the Arbitral Award.
8. On 28th October 2013, the court directed that both applications be heard together to save on judicial time. Both parties were accordingly directed to file their written submissions. The Respondent filed its written submissions on 11th November 2013 while the Claimant did so on 20th November 2013. The Respondent further filed Reply to Submissions by the Claimant on 29th November 2013.
9. The two applications before court are mutually exclusive. That implies that the success of one application will automatically result in the failure of the other and vice versa. The best course is to first address the Claimant's application because its outcome will determine the direction the Respondent's application will take. To be more precise, if the Claimant's application succeeds, then it will naturally imply that the Arbitral Award is set aside and hence the same cannot be recognised and enforced. If, however, the Claimant's application for the setting aside fails, then there will be nothing to prevent enforcement of the Arbitral Award and hence the Respondent's application should succeed.
10. The Claimant's application is premised on the following grounds:

i. The Arbitrator made fundamental error of law in entertaining and determining a dispute other than that contemplated by the agreement between the parties in that the Arbitrator introduced into the dispute the issue of an agency relationship between the parties which was not in dispute nor was it contemplated by the parties in the reference to arbitration.
ii. The Arbitrator exceeded the scope of the reference by implying terms into the contract between the parties contrary to the explicit terms of the contract and usages of trade applicable to the transaction as contemplated by section 29 (5) of the Arbitration Act, 1995.
iii. The Arbitrator decided the dispute contrary to the express terms of the contract between the parties in that the Award went beyond the scope of the reference to arbitration by determining the liability of the Respondent arising from an alleged agency relationship in complete disregard to the agreement between the parties.
iv. The Arbitral Tribunal awarded the sum of UDS 324,260.78 based on its finding that an agency relationship existed which issue had not been framed by the parties to arbitration.
v. The Award is in conflict with the public policy in Kenya in that it failed to uphold agreements freely entered into despite having made no finding that the agreement between the parties was entered into under duress or fraudulently.
vi. The Arbitral Tribunal made a decision beyond the scope of the reference by applying a rate that was not agreed nor contemplated by the parties to the agreement.
vii. The Award accordingly contained a decision on matters beyond the scope of the reference to arbitration as the Arbitrator introduced the notion of 'market' rates and new terms into the agreement which terms were not contemplated by the parties to the reference.
viii. The Award is accordingly in conflict with the public policy of Kenya in that it fails to hold that parties must be held to their bargain.
ix. The Respondent is likely to enforce the impugned Award to the prejudice of the Respondent and further that such an attempt would defeat the public policy and occasion substantial harm, prejudice and loss to the Applicant.
x. In terms of section 35 (3) of the Arbitration Act, 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; the Applicant received the Award on 12th July 2013.

11. The Respondent opposed the Claimant's application to set aside the Arbitral Award by filing Grounds of Objection dated 10th October 2013 as well as a Replying Affidavit sworn by EDWARD ASENA, the Respondent's General Manager, on 10th October 2013.

Arguments and Submissions by the Claimant

12. Although the Claimant's application is premised on 10 grounds, my view is that the same can be collapsed into two main grounds as follows:

i. **That the Arbitrator exceeded the scope of the reference to arbitration by determining a dispute other than that contemplated in the agreement when he introduced the issue of agency relationship between the parties and when he applied a rate that was not agreed upon by the parties to the agreement.**
ii. **The award is in conflict with the public policy of Kenya in that it failed to uphold agreements freely entered into despite having made no finding that the agreement between the parties was entered into under duress or fraudulently.**

13. The Claimant submitted that the Arbitrator erred in two material aspects; firstly in introducing the concept of an agency relationship between the parties; and secondly in ignoring the rate expressly agreed between the parties and imposing his own. The Claimant contended that an arbitrator cannot determine a dispute independent of the contract as his sole function is to arbitrate in terms of the contract. That an arbitrator has no power apart from what the parties have given him under the contract and if he goes outside the bounds of the contract, he acts without jurisdiction.
14. The Claimant contended that an award which purpots to determine a dispute outside the contract is in contravention of Section 29 (5) of the Arbitration Act and is liable to be set aside in terms of Section 35 (2) (a) (iv) of the Arbitration Act.
15. Section 29 (5) of the Arbitration Act provides that:

> **"(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction."**

Section 35 (2) (a) (iv) of the Arbitration Act provides that:

> **"(2) An arbitral award may be set aside by the High Court only if—**
>
> **(a) the party making the application furnishes proof—**
>
> **i.....**
>
> **ii.....**
>
> **iii.....**
>
> **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."**

16. According to the Claimant, the Arbitrator introduced the issue of an agency relationship between the parties which was not an issue in dispute nor was the same contemplated by the parties in their reference of the matter to arbitration. That the Arbitration Tribunal itself framed the issue of agency as one of the issues of law in dispute yet none of the parties addressed it on the same. That the issue of agency was not pleaded by any of the parties and was not addressed in the written submissions of any of the parties.
17. The Claimant further submitted that the Arbitrator completely dismissed the agreed rate of storage charges of US$ 2 per metric tonne and instead applied market rates of US$ 9 per metric tonne. That it was not open for the Arbitrator to ignore what the parties had agreed upon and to replace the same with his own assessment of the proper rate.

Arguments and Submissions by the Respondent

18. The Respondent opposed the Claimant's application seeking to set aside the Arbitral Award by filing the documents mentioned at paragraph 10 above.
19. The Respondent's first opposition was that the Claimant's application is caught by latches as the Award was issued and published on 23rd April, 2013 yet the application was filed on 17th September 2013 beyond the three months contemplated in Section 35 (3) of the Arbitration Act. The Claimant's response to that objection, however, was that pursuant to Section 35 (3) of the Arbitration Act, computation of time should start from the date the party making the application to set aside the award had received it. That the Claimant received the Arbitral Award on 12th July 2013 therefore its application was filed within time.
20. The Respondent submitted that the Arbitrator, sitting as a quasi-judicial body and in compliance with section 29 (5) of the Arbitration Act, was within the scope to make the findings in the Award. That Rule 16 (B) 3 of the Arbitrator Rules of the Chartered Institute of Arbitrators (Kenya Branch), June 1998 confers on the Arbitrator jurisdiction to decide any questions of law arising in the arbitration. The said Rule 16 (B) (3) provides that:

> **"The Arbitral Tribunal has jurisdiction:**
>
> **(1)....**
>
> **(2)....**
>
> **(3) subject to the Act, to decide any question of law arising in the arbitration."**

21. The Respondent submitted that the agreement between the parties referred to the Respondent as C&F agent and also described it as an agency having expertise in the area of Clearing and Forwarding of food commodities and as such agency relationship was inferred in the contract.
22. The Respondent further submitted that the rate of US$ 2 per metric ton was accepted by itself due to duress and the acceptance did not obviate its right to further claim the amount due to it. That the Arbitrator did not impose his own rate because the rate he applied was based on the evidence presented before him which showed the applicable rate as US$ 9 per metric ton.

Issues for Determination

23. In my view, there are three main issues for determination, to wit:

i. Whether the Arbitrator exceeded the scope of the reference to arbitration by the parties;
ii. Whether the Arbitral Award is in conflict with the public policy of Kenya; and
iii. Whether the Claimant's application to set aside the Arbitral Award was filed beyond the time prescribed by Section 35 (3) of the Arbitration Act.

Analysis/Determination

Whether the Arbitrator Exceeded the Scope of the Reference to Arbitration

24. The Claimant's argument is that the issue of the agency relationship between the parties was not a subject of determination before the Arbitrator and therefore by arriving at the conclusion that the contract between the parties created an agency relationship, the Arbitrator exceeded the mandate and jurisdiction that the parties had bestowed upon him.
25. I have carefully perused the documents filed in court by the parties. It appears that the Respondent had filed its issues for the Arbitrator's determination on 17th June 2010 while the Claimant had filed on 29th June 2010. The List of Issues filed by the respective parties at the Arbitration Tribunal were however not availed to this court by either party.
26. In its Written Submissions dated 24th January 2012 and filed at the Arbitration Tribunal, the Claimant raised a total of 13 issues for the Arbitrator's determination. I am however unable to

ascertain what issues the Respondent had raised for determination because the Respondent's Written Submissions filed before the Arbitrator, unlike those of the Claimant, did not highlight the Respondent's issues for determination. I suspect the reason for such omission was that the Respondent had filed the same as a separate document as I discussed in the preceding paragraph.

27. Most, if not all the issues raised by the Claimant for the Arbitrator's determination were factual. One of the issues thereof was "**whether the terms of the agreement were breached**."

28. My considered view is that in order to determine whether the terms of the subject agreement were breached, the Arbitrator was under obligation to ascertain the nature of the contract the parties had entered into, its terms and the obligations it created and/or imposed on the parties. The Arbitrator was under obligation to determine the nature of the relationship between the parties. That relationship, in my view, was based on a contract which the Arbitartor was obligated to interpret using the law of contract and the legal principles applicable to contracts. It is on that backdrop that the Arbitrator, at page 15 of the Arbitral Award, framed, *inter alia*, the following issues for determination:

i. What was the nature of the legal relationships between the parties?
ii. What rights and obligations does the relationship impose on the parties?

29. After hearing the parties' witnesses and considering the evidence tabled before him as well as the submissions by the parties, the Arbitrator rendered himself as follows on the nature of the relationship between the parties:

> ***"I must state from the outset that in my considered opinion, the contract between the parties was in the nature of an agency. The Claimant was the principal and the Respondent was the agent...***
>
> ***I have no doubt in my mind that a valid and binding agency agreement ensued between the parties. That agreement was express, contractual and in writing. That agreement contained in the contract in which the duties and obligations of the agent and the principal were spelt out in clauses 4 and 5 respectively."***

30. The Arbitrator then went on to discuss the principles of agency after which he held as follows:

> ***"Applying the above principles of agency to the facts and circumstances of this case, I find that the Respondent as the Claimant's agent had both powers and duties under the contract. I also find that the Respondent had authority to act on behalf of the Claimant. That authority was both express and implied in the contract between the parties. Under Clause 4.1 of the contract, the Respondent had an obligation to make the necessary arrangement, in advance, to undertake the clearing of contracted shipment. The contracted tonnage for shipment was set out in Clause 1.1 of the contract as approximately 20,000 MT within a duration of one year with effect from December 2008 to November 2009...***
>
> ***The overall objective of the agency between the Claimant and the Respondent, as set out in Clause 1.1 of the contract, was to provide services with regard to the importation handling and exportation of the 20,000 MT and any other changes in tonnage as envisaged in Clause 3 (b)...***
>
> ***The Respondent was the C&F agent with contractual duty to arrange adequate warehousing and storage facility, not only for the tonnage specified in Clause 1.1 of the contract, but also for any changes in tonnage as contemplated in Clause 3 (b)...***
>
> ***The law as I understand it and this is the main thrust of the Respondent's case, is that where the agent incurs exceptional expenses, the agent will be entitled to reimbursement. Although not expressed in the contract, this is a term that is implied in agency agreements. I find and hold that since the Respondent had authority incidental***

to the Claimant's express authority to arrange storage, the Respondent was carrying out the Claimant's instructions in obtaining extra warehousing facilities. I further find and hold that the Respondent is entitled to reimbursement of costs and expenses incurred in the exceptional circumstances it was conditioned into in this case."

31. One of the issues for the Arbitrator's determination was whether the agreement between the parties had been breached by any party. In order to determine the said issue, the Arbitrator interrogated the relationship and the nature of the contract between the parties. He applied the law of contract and the principles of agency to the facts before him, the circumstances of the case and the clauses in the contract in order to arrive at the conclusion that the relationship between the parties was one of agency. He did not go outside the scope of the contract. In fact he quoted various clauses in the contract to support his reasoning.
32. Can it then be said that the Arbitrator went outside his mandate, that he went outside the agreement between the parties and determined issues other than those referred to him? My answer is no. The Arbitrator only applied the law and principles of agency in order to interpret the agreement between the parties and determine the issues raised before him, one of which was whether there was breach of the agreement. He simply interrogated the evidence placed before him and applied legal principles in order to interpret the contract and come to the conclusion that the relationship between the parties was based on agency contract.
33. By applying the law of contract and the legal principles of agency so as to determine the issues between the parties, the Arbitrator did not exceed his mandate. I say so because Rule 16 B (3) of the Arbitrator Rules of the Chartered Institute of Arbitrators (Kenya Branch), 1998 empowers an arbitrator to decide any question of law arising in the arbitration.
34. It is also true that the Claimant was aware that the Respondent was an agent as the Respondent was described as a "C&F (clearing and forwarding) agent" in the subject agreement.
35. The Claimant further argued that the Arbitrator exceeded his mandate when he applied rates (of storage charges) of US$ 9 per metric tonne which was contrary to US$ 2 that the parties had agreed upon. To start with, this a question of fact. The Arbitrator arrived at his decision after hearing the testimony of witnesses and after considering the evidence tendered before him. By asking this court to set aside the Arbitral Award on the basis that the Arbitrator applied the wrong rate, the Claimant is asking this court to sit on an appeal against the decision of the Arbitrator, a remedy which is not available under the Arbitration Act.

Whether the Award is in Conflict with the Public policy of Kenya

36. The Claimant's case is that the Arbitral Award is in conflict with the public policy of Kenya because it failed to uphold agreements freely entered into by the parties and failed to hold that parties must be held to their bargain.
37. Public policy was considered by Ringera, J (as he then was) in the case of **CHRIST FOR ALL NATIONS v. APOLLO INSURANCE CO. LTD (2002) 2 E.A. 366** in which he stated that in Kenya an act is contrary to public policy if it was:

> **"(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. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals".**

38. In the case of **RWAMA FARMERS CO-OPERATIVE SOCIETY LIMITED v. THIKA COFFEE MILLS LIMITED [2012] eKLR**, Mabeya, J. stated that:

> **"From the foregoing, it is quite clear that that term "conflict with the Public Policy" used in Section 35 (2) (b) of the Arbitration Act, is akin to "contrary to Public**

Policy", "against Public Policy" "opposed to Public Policy." These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

39. In the case of **NATIONAL OIL CORPORATION OF KENYA LIMITED v. PRISKO PETROLEUM NETWORK LIMITED [2014] eKLR**, Gikonyo J. stated as follows:

> **"The argument that the award herein should be set aside for it violates public policy on account of errors of law and fact, I say the following. I admit, just as Ringera J proclaimed in ALL NAKONS V. APPOLLO INSURANCE CO. LTD [2002] 2 E.A 366, public policy is most broad concept incapable of precise definition. But that does not mean it is an impossible ground; it has been unpacked and a successful Applicant should establish facts that the award is:-**
>
> **(a) Inconsistent with the Constitution or other laws of Kenya;**
>
> **or**
>
> **(b) Inimical to the national interest of Kenya; or**
>
> **(c) Contrary to Justice and Morality."**

40. In my view, although "conflict with the public policy" used in Section 35 (2) (b) of the Arbitration Act cannot be put in a pigeon hole of specific legal definition, I do not agree that in the circumstances obtaining in this case, the Claimant's argument that the Arbitral Award is on conflict with public policy because it failed to uphold agreements freely entered into by the parties can hold water. The Arbitrator simply interpreted the agreement entered into by the parties using the applicable law of contact and known legal principles. He then upheld the contract based on such interpretation and therefore he did not fail to uphold the agreement as alleged by the Claimant. The Arbitral Award was, in my view, therefore, not in conflict with public policy.

Whether the Claimant's Application was Filed out of Time

41. The Respondent contends that the Claimant's application to set aside the Arbitral Award was filed beyond the time prescribed by Section 35 (3) of the Arbitration Act. That section provides as follows:

> **"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."** (emphasis mine)

42. The Claimant denied that it filed the application beyond the permitted three months because time is computed from the time the applicant had received the award. The Claimant stated that it received the award on 12th July 2013 and therefore by the time it filed the application on 17th September 2013, three months had not expired. The Respondent on the other hand contended that the award was issued and published on 23rd April 2013 and therefore the Claimant was time-barred.

43. I have seen the Supporting Affidavit sworn on 4th September 2013 by SAMUEL S. OUMA, the Respondent's counsel in Support of the Chamber Summons application of even date for the enforcement and recognition of the Arbitral Award. At paragraph 3 of the said Affidavit, it is deponed as follows:

> **"THAT subsequently parties were afforded an opportunity to be heard and submissions filed culminating in the Award dated 23rd April 2013 being published on**

12th July 2013."

44. Clearly, the foregoing averrement under oath confirms the Claimant's position that the Arbitral Award was dated 23rd April 2013 but was received by the parties on 12th July 2013. I do not understand the about turn made by the Respondent to later claim that the Claimant received the award on 23rd April 2013. Since Section 35 (3) provides that time should start running from the date the applicant received the award, the Claimant's application was filed within time. The Respondent's challenge to the Respondent's application on the basis that the same was filed out of time should therefore be rejected.

Conclusion

45. Having found that there is no merit in the Claimant's application seeking to set aside the arbitral award, it follows that the Respondent's application shall succeed. The Respondent in compliance with section 36 of the Arbitration Act filed certified copy of the arbitration agreement, and certified copy of the Arbitral Award. Accordingly the Final Arbitral Award dated 24th April 2013 is hereby recognised as binding and is enforceable. The Respondent is awarded costs.

Dated and delivered at Mombasa this 9th day of July 2015.

MARY KASANGO

JUDGE

9.7.2015

Coram

Before Justice Kasango

C/Assistant – Kavuku

For Claimant:

For Respondent:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE