



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 532 OF 2014

PAYLESS CARHIRE AND TOURS LTD..... PLAINTIFF

VERSUS

COCA-COLA EAST & CENTRAL AFRICA LTD.....DEFENDANT

RULING

1) Pursuant to the provisions of sections 10, 35 and 39 of the Arbitration Act, 1995, the Respondent herein took out the summons dated 8th April 2015 in which it sought for the appeal to be dismissed and struck out. The respondent filed the affidavit of Antoinette Absaloms in support of the summons. Service of summons was effected upon the firm of Anyoka and Associates, advocates for the appellant. Despite service having been effected the appellant did not deem it fit to file a response hence the Respondent was granted leave to prosecute the summons exparte.

2) I have considered the grounds set out on the face of the summons plus the facts deponed in the supporting affidavit. I have also taken into account the oral submissions of Miss Mwangi, the respondent's learned advocate. It is the submission of the respondent that under Section 39 of the Arbitration Act, no appeal can be preferred to this court without prior consent being obtained from the parties. Secondly it is also argued that the grounds raised in the memorandum of appeal do not fall within the grounds stated under Section 35 of the Arbitration Act.

3) The brief history of this dispute is that the appellant and the respondent entered into a master lease agreement dated 24th September 2004 in which the respondent herein agreed to lease 333 motor vehicles from the appellant on specified terms. The aforesaid agreement contained an arbitration clause binding the parties to the agreement to refer to arbitration any dispute arising from the arbitration agreement. A dispute arose which was eventually referred to Dr. Kariuki Muigua to Arbitrate. The aforesaid arbitrator heard the dispute and on 27th October 2014 he made the following award.

1. The claimants claim of kshs.28,684,313.63 be and is hereby dismissed in its entirety;

2. The Claimants' claim for interest at the rate of 2% over the base rate plus compound interest from the date of default till payment in full be and I hereby dismissed in its entirety;

3. The respondent's counterclaim of kshs.1,355,687.03 plus interest at the contractual rate be and is hereby dismissed in its entirety;

4. That each party shall bear its own costs and expenses for this arbitration;

5. That my fees for this arbitration together with VAT thereon, which are set out in a VAT invoice separately delivered to the parties, shall be borne in equal share by the Claimant and the Respondent; and

6. Any amount that may be paid by any party in taking up this award in excess of its share of my fees shall be refunded to it by the other party forthwith.

4) The appellant being dissatisfied, preferred this appeal. On appeal the appellant put forward the following grounds in its memorandum:

1. The learned arbitrator erred in law when he failed to determine the dispute in accordance with the contract between the parties.

2. The Learned arbitrator erred in law when he imposed an onerous and unreasonable evidential burden on the appellant contrary to Section 20(3) of the Arbitration Act of 1995.

3. The Learned Arbitrator erred in law when he failed to treat each party with equality contrary to express provisions of Section 19 of the Arbitration Act 1995 by undertaking extensive research into the law in support of the respondent's case.

4. The Arbitrator erred in law by radically adjusting the contractual arrangements between the parties and imposing a new contract on the parties.

5. The Arbitrator erred in law by failing to take into consideration all pleading in the making of the final award.

5) The respondent is now before this court seeking to have the appeal dismissed and struck out on the grounds I have outlined hereinabove. The first ground to knock out the appeal is the argument that the appeal cannot stand because no prior consent was obtained from parties prior to the filing of the memorandum of appeal under Section 39 of the Arbitration Act. I have examined the provisions of section 39 (b) and it is clear that parties must agree that an appeal by any party may be made to a court on any question of law arising out of the award. Before Arbitration proceedings commences the arbitrator, usually gives directions on the conduct of proceedings after holding preliminary meetings with the disputants and their advocates. I have looked at the directions given by the Arbitrator on 19.12.2012 and it is apparent that the parties did not expressly consent to the filing of an appeal in court against the arbitrator's award. In the circumstance the appeal is therefore incompetently before this court.

6) The second ground which was ably argued is that the grounds of appeal stated on the face of the memorandum of appeal do not fall within those grounds stated under Section 35 of the Arbitration Act. I have critically examined the grounds set out on the face of the memorandum of appeal and compared with the grounds stated under Section 35 of the arbitration Act. It is clear that the grounds relied on appeal are outside what the statute under section 35 prescribed. It therefore means that this court has no jurisdiction to entertain the appeal under section 10 of the Arbitration Act.

7) In the end, I find the summons to be well founded. It is allowed as prayed.

Dated Signed and Delivered in open court this 6th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent