



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 711 OF 2012
NYAYO TEA ZONES DEVELOPMENT CORPORATION.....APPLICANT
VERSUS
NJUCA CONSOLIDATED CO. LTD.....RESPONDENT
ARISING OUT OF AN ARBITRATION
BETWEEN
NJUCA CONSOLIDATED CO. LTD.....CLAIMANT
AND
NYAYO TEA ZONES DEVELOPMENT CORPORATION.....APPLICANT
RULING

1. The Application before Court is brought by the Applicant and is dated 21st November 2012. It seeks Orders that this Court be pleased to direct that the Respondent to the Application does deposit the sum of Shs. 26,753,206.00 being the undisputed amount awarded in the Final Amended Award of the Arbitrator **Onesimus Mwangi Gichuri** dated 23rd October 2012 with the Applicant herein, pending the hearing and determination of prayer 3 of the Application. That prayer asks of this Court to set aside the Award of Shs. 70,631,527.35 being the amount detailed by the said Arbitrator in the said Final Amended Award as well as the consequential Orders dismissing the Applicant's Counterclaim in the arbitration. The Application is brought under the provisions of **section 35 (1) & (2) (iv), (vi), (b), (ii)** of the *Arbitration Act (1995)* as well as **rule 7** of the *Arbitration Rules, 1997*.

2. The Application before Court is supported on the following grounds:

“a) The Award is fundamentally flawed and contrary to policy having been grounded on matters that were beyond the scope of reference to arbitration.

b) The Arbitrator went out of his way to hold that the government through the Ministry of Public Works made payments on Post Election Violence claims in a bid to sustain the Respondent's claim contrary to the doctrine of Force Majeure under clause 40.4.1 of the Contract and the Respondent having offered no evidence to support his claim of Post Election

Violence.

c) **The Amended Final Award on Loss of Profit on Omitted works is based on un-agreed figure of Kshs. 29,660,545.00 hence the Arbitrator based his decision on matters beyond the scope of the reference to arbitration to the detriment of the Applicant.**

d) **The Arbitrator in the Amended Final Award purported to treat the Final Account Summary dated 11/10/2012 for the sum of Kshs. 97,374,733.00 as an agreement by the parties yet there was nototal agreement on the same thus arrived at an erroneous Award.**

e) **The Arbitrator proceeded to make the Final Amended Award without making any adjustments on the Claimant's costs even after being supplied with the Revised Final Summary Account dated 11/10/2012 which had a reduced figure of Kshs. 97,374,733.00 from Kshs. 129,932,860.35.**

f) **The Arbitrator relied entirely on the Respondent's pleadings and submissions and failed to consider the Claimant's Pleadings and submissions thus arriving at an unfair decision to the detriment of the Claimant.**

g) **It is imperative that the orders sought herein are granted".**

3. The Application was supported by the Affidavit of **Charles M. Mucheke**, the Acting Managing Director of the Applicant, sworn on even date with the Application. Bearing in mind those sub sections of **section 35 (1) and (2)** of the *Arbitration Act* under which the Application before Court is brought, I was of the view that paragraphs 2,, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the said Affidavit were irrelevant as those paragraphs dealt with matters prior to the appointment of the Arbitrator on 28th January 2011. However the Court notes that the Arbitrator made an initial Award on 5th September 2012 detailing an amount payable to the Respondent to this Application of Shs. 129,932,860.35. The Arbitrator did not award the Applicant's Counterclaim. Thereafter the Applicant being dissatisfied with the Arbitrator's said Award requested for the same to be reviewed which resulted in a Final Amended Award in favour of the Respondent herein in the amount of Shs. 97,374,733.00 of which Shs. 26,753,206.00 was the undisputed amount based on items agreed between the parties and Shs. 70,621,527.35 being the amount of items evaluated and awarded by the Arbitrator.

4. As regards paragraph 19 of the Affidavit in support of the Application before Court, the deponent detailed that the Applicant was dissatisfied with the said Award on a number of grounds. Unfortunately, the only ground relevant to the Application before Court is subparagraph 19 a) that the Award is fundamentally flawed and contrary to public policy as well as being grounded on matters beyond the scope of reference to arbitration. As I understood the position of the Applicant, the only two grounds for seeking to set-aside the Award were based under **section 35 (2) (a) (iv) and 35 (2) (b) (ii)**. Such reads as follows:

"(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; and

(ii) the award is in conflict with the public policy of Kenya:"

5. One **P. N. Wachira** detailing that he was the Managing Director of the Respondent company swore a Replying Affidavit dated 26th August 2013. At the outset of his Affidavit, the deponent maintained that the Application before Court was incompetent and an abuse of the Court's process. He detailed that the matters raised therein were not grounds for setting aside the arbitral award as contemplated by **sections 35 (2) and (3)** of the *Arbitration Act (1995)*. In his view, the Applicant herein was attempting to make a partial appeal as against the decision of the Arbitrator. The deponent then went on to comment

extensively as to the proceedings before the Arbitrator and responding paragraph by paragraph to the Affidavit in support of the Application.

7. Coming to paragraph 19 of that Affidavit, Mr. Wachira maintained that the Respondent had totally misapprehended the provisions of **section 35** of the Arbitration Act which sets out only limited grounds upon which the Court can set aside an arbitration Award. The claims made in the arbitration by the Applicant were based on duly signed payment certificates issued by the Project Architect after assessment by the Project Quantity Surveyor. Those consultants had been appointed by the Respondent. Mr. Wachira noted that in view of the fact that the claims had been assessed and certificates for payment issued, the claim of the Respondent that the Arbitrator had acted beyond the scope of reference to arbitration was far-fetched and had no legal basis. The Applicant also noted that the amounts awarded as payable had been arrived at after several meetings between the Project Quantity Surveyor and an architect employed by the Applicant. Such calculations were submitted to the arbitrator and the amounts awarded arose from such agreement. As a result, the claim that the Award was against public policy was baseless and not supported by an iota of evidence. The deponent concluded his said Affidavit by detailing that the Respondent's allegations did not fly in the face of **section 35** of the *Arbitration Act*. The Award was based on the Contract as between the parties and there was nothing to show that the arbitrator went beyond the reference before him. Further, there was nothing to show that the Award was as against public policy.

7. The Applicant's submissions in respect of its Application before Court were filed herein on 25th March 2014. They commenced by setting out the prayers of the Application as well as the grounds upon which it was based. Paragraphs 3 to 21 comprised of a reiteration of the Affidavit in support of the Application. In my view, those submissions all amounted to an appeal as against the Award on matters of fact. They certainly did not address the two issues before this Court namely: whether the arbitrator had gone outside the terms of reference or whether the Award was contrary to public policy. However, as regards the former, the Applicant referred this Court to the finding of **Kimondo J.** in **Airtel Networks Kenya Ltd v Nyutu Agrovet Ltd (2011) e KLR** as well as that of **Kimaru J.** in the case of **Rural Housing Estates Ltd v Eldoret Municipal Counsel (2009) eKLR**. The Applicant maintained that the Award on the contractual claim together with interest thereon should be found to be unwarranted and should be set aside. Paragraphs 24, 25, 26 and 27 of the Respondent's submissions related to findings of the arbitrator in terms of loss of profit on omitted works, interest on fluctuations and the Respondent's cost of claim. I did not consider that these paragraphs were relevant in any way to the Application before Court.

8. The Respondent's submissions also set out the Orders sought by the Applicant as well as the grounds in support of the Application before Court. Thereafter, the Respondent submitted that, under the Arbitration Act, one of its objectives as was the need to have first instance finality in disputes which have been referred to arbitration. To this end, the Respondent referred to the cases of **Kenya Shell Ltd v Kobil Petroleum Ltd (2006) 2 EA 132 (CAK)** and **Christ For All Nations v Apollo Insurance Company Ltd (2002) 2 EA 336 (CCK)**. The Respondent pointed out that the correct position in law as detailed in the **Kenya Shell** case by the Court of Appeal was that:

“The law in Kenya therefore is that challenge to an arbitral award can only be within the narrow confines of section 35 of the Arbitration Act.”

The Respondent also pointed out those subsections of **section 35** of the *Arbitration Act* which applied to the Application before Court as I have set out above. The Respondent then narrowed down the issues as it saw it to, namely:

“a) Whether the Award is contrary to public policy; and

b) Whether the Arbitrator based his decision on matters beyond the scope of the reference to arbitration.”

9. As regards a) above, the Respondent referred the Court to the finding of **Ringera J.** in the **Christ For All Nations** case as above when with regard to the question of public policy the learned Judge held as follows:

“Now although decisions of foreign tribunals are not binding on Kenyan courts, they may be persuasive. And although the interpretation of the parameters of the public policy of India has been made in the context of enforcement of foreign awards, the persuasive value is not any the less particularly where it is evident from Section 37 (1) (b) (ii) of the Arbitration Act that in Kenya foreign awards may be denied recognition and enforcement if such recognition and enforcement would be contrary to the Public Policy of Kenya. In my opinion the same principles of law which apply under section 37 (1) (b) (ii) to non recognition and non enforcement of a foreign award would apply to the setting aside of a local award under section 35 (2) (b) (ii).

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. 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”.

As regards b) above, the Respondent referred the Court to both the finding of **Ringera J.** (supra) as well as the **Court of Appeal’s** dicta in the **Kenya Shell** case (supra). In the latter, the Court held:

“The only ground taken up by the applicant to challenge the award was under section 35 (2) (a) (iv) of the Act. The plain reading of the provision and the issues submitted to the tribunal for adjudication does not reveal that the tribunal went outside its jurisdiction. The argument intended to be advanced that clause 18 was not considered at all or was considered outside the context of the agreement between the parties is, in our view, fanciful. It was in fact considered and if it is the contention that the tribunal completely misconstrued the clause in law, then we say with the Superior Court that there was no challenge made in that respect before it and it does not arise before this Court. At all events the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under section 10 of the Act unless either party can satisfy that court that it ought to be lawful set aside. In this case the decision was final”.

10. The Respondent submitted that the biggest issue that the Applicant seemed to have with regard to the arbitration was what it termed “Post-Election Violence” claims. The Respondent maintained, with reference to the Award, that it was obvious that the claim challenged by the Applicant was awarded under Clause 37 of the contract between the parties. It had nothing to do with *force majeure*. The Respondent believed that, as the claim was based on the contract, the same was payable. In its view, the arbitral tribunal had framed all the issues of law and fact and had analysed the claim under the various heads and made findings thereunder. The arbitrator then awarded what he thought was due. The Respondent pointed to the Award which it maintained had been arrived at by setting out the claim and response, identifying the issues and making findings based on the facts as adduced, submissions made and by reference to the scales for professional services set out in the appropriate statute and the Bills of Quantities. On that basis, the Respondent submitted that the arbitral tribunal did not base its decision on matters beyond the scope of the reference to arbitration.

11. With regard to prayer 2 of the Application dated 21st November 2012, the same seeks an Order that the Respondent herein should deposit the sum of Shs. 26,753,206.00 with the Applicant pending the hearing and determination of this application in terms of prayer 3 of the application. (Underlining mine). That prayer was never granted by this or any other Court and now that this Court is determining prayer 3

of the Application, the same must be considered as spent. In any event, the prayer was based on the arbitral Award and could not have been granted as the Applicant had not complied with **section 36 (3)** of the *Arbitration Act*. The Applicant has not furnished the Court with the original arbitral award or a duly certified copy of it. Further, it had not furnished the Court with the original arbitration agreement or a duly certified copy of it. However, all that would seem to be now, by the by.

12. As regards the submission by the Applicant that the arbitrator ruled on matters that were beyond the scope of the reference, I have taken a long look at the Award herein as well as the JBC Contract entered as between the parties dated 17th April 2007. In the referral of this matter to arbitration, I have no doubt that the provisions of clause 45 of the said Contract were complied with to the extent that the appointment of the arbitrator was made by the Chairman for the time being of the Architectural Association of Kenya in accordance with clause 45.1. As regards the Award itself including both the Final Award and the Amended Final Award, I cannot see where the Arbitrator has slipped up in any way. He has carefully set out his terms of reference and made his findings based, in my view, solely on the said Contract. I have to say that I was particularly impressed with the Arbitrator's evaluation of the post-election violence claim. In my view, the Arbitrator has dealt with all matters as regards the reference before him and has not gone outside the parameters set by both parties.

13. Under this heading, I am bound by and adopt the finding of the Court of Appeal in the **Kenya Shell** case (supra). I have considered both the Airtel Networks and Rural Housing Estate cases cited to Court by the Applicant. In my view, both those cases were decided on their own facts and the two Judges who determined the same did, indeed, set aside the awards therein. On my part, I gleaned assistance from the quotation of Lord Upjohn in the English case **Tersons Ltd vs Stevenage Development Corporation (1963) 3 All ER 863** detailed in the **Rural House Estates** case, thus:

“The courts will not interfere with the conduct of proceedings by the arbitrator except in circumstances which are now well defined. If the arbitrator is guilty of misconduct, his award may be set aside or remitted. If the award contains an error of law on its face, it may be sent back or remitted. If a special case is stated on a question of law, the court will determine that question of the law within the framework of the particular special case. But if there is no misconduct, if there is no error of law on the face of the award, or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law so long as any mistake of law does not appear on the face of the award”.

In all arbitrations of this nature there has to be a winner and a loser. In this case, the loser is the Applicant and it is my belief that the Application before this Court is an attempt by the Applicant to postpone making payment to the Respondent in accordance with the findings in the Award.

14. Turning now to the submission that the Award was contrary to public policy, again I fully adopt the finding of **Ringera J.** in the **Christ For All Nations** case (again supra). I do not find that the Award herein is inconsistent with the Constitution or other laws of Kenya. I do not find that it is inimical to the national interest of Kenya and I do not find that it is contrary to justice or morality. I am fully cognizant of the provisions of **section 10** of the *Arbitration Act* (now *Cap 49*) which was highlighted in the above quotation from the Kenya Shell case. The same reads:

“10. Except as provided in this Act, no court shall intervene in matters governed by this Act.”

15. In conclusion therefore, I find no merit in the Applicant's Notice of Motion dated 21st November 2011 and dismiss the same with costs to the Respondent.

DATED and delivered at Nairobi this 15th day of July, 2014.

J. B. HAVELOCK

JUDGE