REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: GICHERU, OMOLO & PALL, J.A.
CIVIL APPEAL NO. 125 OF 1991

BETWEEN

INTER-CONTINENTAL HOTELS CORPORATION ..... APPELLANT

AND

MUKAWA (HOTELS) HOLDINGS LIMITED ..... RESPONDENT

(Appeal from a Ruling and Order of the High Court of
Kenya at Nairobi (Justice P.N. Tank) dated 29th
November, 1990
in
H.C.C. SUIT NO. 2787 OF 1990 (O.S.))
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JUDGMENT OF THE COURT

Mukawa (Hotels) Holdings Limited, the respondent herein, is the owner of "a modern first-class international hotel now known as

'LILIAN TOWERS'",

while the appellant, Intercontinental Hotels Corporation, appears to own and manage a chain of hotels world-wide. The appellant is a corporation existing and constituted under the laws of the State of Delaware in the United States of America and has its offices in New York. On the 15th July, 1982 the appellant and the respondent entered into what was described as an "OPERATING AND MANAGEMENT AGREEMENT" and by that agreement, the respondent appointed and employed the appellant

> "to act as its representative for the supervision, direction and control of the management and operation of LILIAN TOWERS, on terms and conditions ....."

therein set forth.

By Article 14.06 of the agreement, the parties provided that:-

> "Any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be finally settled by arbitration in London in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce and judgment upon the award

rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction thereof subject to the right of appeal to the Court of Appeal in London."

Sometime in 1990, the appellant was of the view that a controversy or claim had arisen between the parties and by a document dated the 19th April, 1990, the appellant made a "REQUEST FOR ARBITRATION" to the International Chamber of Commerce. Upon receipt of the request for arbitration, the respondent, founding itself upon section 25(2) of the then Arbitration Act, Chapter 49 Laws of Kenya, (now repealed), filed an originating summons in the High Court of Kenya. The said section 25(2) of the now repealed Chapter 49 of the Laws of Kenya provided as follows:-

> "25.(2) Where an arbitration agreement provides for future differences to be referred to arbitration, and a difference arises which involves the question whether any party has been guilty of fraud, the High Court may order that the agreement shall cease to have effect, and may revoke the authority of an arbitrator or umpire appointed by virtue of the agreement, so far as may be necessary to enable the question of fraud to be determined by the High Court."

In its originating summons, the respondent alleged that there was an issue as to whether the appellant was guilty of fraud against the respondent and because of that allegation, the respondent had sought two basic orders from the High Court, namely:-

1.that the provisions for arbitration contained in the agreement between them and dated the 15th July, 1982, shall cease to have effect;

> and2.that the appointment and authority of the International Chamber of Commerce, the arbitrators appointed by virtue of the agreement, be declared void.

The Summons was supported by the affidavit of one Stanley Munga Githunguri who described himself in the said affidavit as the chairman of the respondent. In paragraphs 4(a) to 4(f) of that affidavit, Mr Githunguri set out the facts and circumstances from which he invited the High Court to conclude that the respondent had some prima facie evidence to show fraud committed against it by the appellant. We think we should let Mr Githunguri speak for himself.

> "4.The amount of Management Fees and RSC are inflated and false as the defendants well know.
>
> (a)the defendants have wrongly and fraudulently used the plaintiff's share of service charge to pay for staff parties and bonuses for expatriate staff without the consent of the plaintiff. In accordance with the Uniform System of Accounts, the plaintiffs' portion shall be credited to their account thus reducing Management Fees appropriately.
>
> (b)The Management Fees are wrongfully and fraudulently not reflected in the administrative and general expenses in line with the Agreement and the Uniform System of Accounts thus reducing the Management Fees apportionment.
>
> (c)The claimed Management Fees, wrongfully and fraudulently, do not reflect proper deductions in the accounts and the PAYE deductions are deliberately and wrongfully not rightfully composed which would reduce the claimed Management Fees.
>
> (d)The Management Fees wrongfully and falsely include telephone bills in the Total Revenue on which the Reimbursement of Systems Cost is calculated. A recomposition of Accounts would reduce the RSC and Management Fees.
>
> (e)The defendants' claims, amongst others, is based on inclusion of division advertising charges contrary to section 3.05 of the Agreement and the plaintiffs have to pay Divisional Advertising in addition, rendering the Current Accounts claim unflated (sic).

(f)The manipulation of accounts is fraudulent accounting by the defendants who are the agents of the plaintiffs."

The other paragraph we think we should add is paragraph 6 in which Mr Githunguri averred:-

"The defendants in their claim have as in the examples above stated misrepresented the actual financial position and suppressed or concealed the true position with a view to fraudulently claiming higher fees."

For the purposes of our judgment, it is enough to simply say that the appellant, through its officials, strenuously denied these allegations by the respondent. Having listened to the extensive and learned arguments of Mr Lakha for the respondent and Mr Deverell for the appellant, the learned Judge of the High Court (Tank, J., as he then was) acceded to the respondent's prayers declaring the arbitration clause as of no effect and ordering further that the question of whether the appellant was guilty of fraud against the respondent should be investigated by the High Court itself. The appeal before us is against these orders. The appellant put before us a total of seven grounds of appeal. We think we should deal with grounds one and two together. In these two grounds the appellant complains -

1.That the learned trial Judge exercised his discretion under section 25(2) of the Arbitration Act Cap 49 (the Act) on wrong principles.

2.That the learned trial Judge failed to take account of the fact that allegations of fraud were made by the party applying for the order under Section 25(2) of the Act and that the party against whom the allegations of fraud were being made was the party wishing to enforce the agreement to refer disputes to arbitration.

The Arbitration Act, Cap 49 was repealed and replaced by the present Arbitration Act, No. 4 of 1995 which became operational on the 2nd January, 1996. The new Act does not contain provision similar to those contained in section 25 of Cap 49 but it was common ground before us that this appeal must be decided in accordance with the terms of the repealed Act. Accordingly, most of what we shall say on section 25 of the old Act, though they are directly relevant to the outcome of the appeal under consideration, are no longer valid propositions under the new Act. It was common ground between the appellant and the respondent that in order to succeed, the respondent had to show prima facie evidence of fraud before the provisions of section 25(2) could be brought into operation. Dealing with ground 2 of their grounds of appeal, Mr Deverell cited to us a large body of English case-law and submitted that there, i.e. in England, it is now settled law that if the party alleging fraud is the one making an application for the cancellation of the arbitration clause, the application would stand no chance of success. Mr Deverell submitted to us that our section 25(2) was similar to the provisions of the equivalent English Act and we ought to interpret our section 25(2) in similar fashion.That is the complaint in ground two of the grounds of appeal. Mr Deverell quoted to us various cases such as RADIO PUBLICITY (UNIVERSAL) LTD V COMPAGNIE LUXEMBOURGOISE etc and OTHERS (1936) Ch D 721. There, Clauson, J, faced with an agreement between an English company and a Luxembourg company, which agreement contained a clause for international arbitration, remarked as follows at page 730:

"..... But even so, in a matter of this kind, where an international agreement of this sort is a clear reference to arbitration proceedings in a foreign country, or, at all events, under the control of a foreign, tribunal, and especially where, as in this case, there is a provision which is aimed at giving power to the arbitration tribunal which is a good deal wider than the power which is usually given by arbitration clauses to arbitrators in accordance with English law ...., having regard to that, I should myself hesitate long, even if I had a discretion, which I am assuming for this purpose I have under section 14, to revoke the arbitration clause, before holding that this is a case in which I ought to exercise that discretion. ..... "

It is clear to us that the situation the English judge was called upon to resolve was very similar to that which the late Mr Justice Tank was called upon to resolve. Our section 25(2) was in similar terms to

section 14 of the English Act, and the two agreements were and are of an international nature. Though the agreement we are considering is of an international nature, we can see nothing in it which would have excluded the application of section 25(2) of our Act. But like Clauson, J., we think Tank, J. ought to have long hesitated before revoking the arbitration clause particularly in view of the fact that it was the party who did not want to go to arbitration that was alleging fraud. For our part, we do not wish to go as far as the English Courts did in cases such as RUSSELL V RUSSELL 14 Ch. D 471, where it was established that -

> "In a case where fraud is charged, the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it and will never do so unless a prima facie case of fraud is proved".

We would, ourselves, simply say that one of the important considerations or factors which a judge must take into account when exercising the discretion under section 25(2) is the question of which party is charging fraud with a view to avoid arbitration. If the party who does not wish to go to arbitration is the one charging fraud, then he must show a prima facie case of fraud and if he succeeds in that, we think it would be unjust to turn around and tell him in effect:

> "Though you have shown, prima facie, that the other side may well be guilty of fraud against you, yet since they want to go to arbitration and do not want your allegation of fraud against them to be publicly investigated, you must nevertheless go to arbitration".

We do not think that was the spirit and intendment of section 25(2) of the repealed Act. But all these are really academic issues because as we have repeatedly said, section 25(2) no longer exists. The question that we must now decide is whether the respondent proved before the trial Judge a prima facie case of fraud. The learned Judge as we have said, thought the respondent had done so. On this finding, we are in respectful agreement with Mr. Deverell that there was absolutely no evidence proving that the appellant was, prima facie, guilty of fraud against the respondent.

We have already set out the basic allegations made by the respondent against the appellant. They were, basically, that certain fees payable by the respondent to the appellant had been inflated by the appellant, that the appellant had applied certain moneys rightly due to the respondent to pay for items such as staff parties and bonuses to the appellant's expatriate staff, that certain fees were not reflected in the accounts, that taxes due were not paid to the government and allegations of such nature. To each and every one of those allegations the respondent had attached the epithets "wrongfully and fraudulently." We do not think those allegation could ever amount to prima facie evidence of fraud. If the books were not properly kept, that is evidence which the respondent can put before the arbitrators and if they were to show that because the books were not properly kept the management fees, as a consequence, became inflated, we have no doubt the arbitrators would know how to deal with the issue.

Again, if the appellant did not pay to the Government taxes and the Government subsequently demanded the taxes from the respondent, and the respondent paid or is still liable to pay them, surely the arbitrators can be expected to know how to deal with such an issue. All the allegations which were made by the respondent are matters which can properly be raised before the arbitrators and we do not think the addition of the epithets "wrongfully and fraudulently" could ever change the basic allegations. Nor can the allegation that the auditors had qualified the accounts of the respondent carry the matter any further.

There is no averment that the accounts were qualified because they were found or were suspected to be fraudulent. There was no affidavit from such auditors explaining the reason or reasons for their qualifying the accounts. That the respondent is a Kenyan company with its registered office in Nairobi, and that it does not own any foreign assets are matters which were wholly irrelevant to the issue of arbitration. The respondent knew all these matters from the beginning but chose to enter into the agreement and having freely entered into that agreement, the respondent cannot now be heard to complain that it is unable to incur costs and participate in a foreign arbitration. We suspect this is the main reason why the respondent was seeking to have the arbitration clause revoked, but since that could not constitute a ground for

revoking the clause, the respondent fastened on the bare and unproven allegations of fraud. With respect to the learned Judge, he erred in acceding to the prayers of the respondent. That being our view of the matter, we allow this appeal and set aside the orders made by the High Court. In place of those orders, we order that the respondent's originating summons dated the 7th June, 1990, be dismissed with costs to the appellant. We also award to the appellant the costs of this appeal. Those shall be our orders.

Dated and delivered at Nairobi this 17th day of January, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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DEPUTY REGISTRAR