



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 815 OF 2014

MOVIES FOR YOU LIMITED.....PLAINTIFF

AND

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION....DEFENDANT

RULING

Introduction:-

What is before the court is the Plaintiff's Chamber Summons application dated 17th September 2012. The application has been brought under Sections 35(1), (2)(b)(ii) of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997. In the application, the Plaintiff/Applicant has sought among others the following orders:-

1. THAT this Honourable Court be pleased to set aside the Arbitral Award dated 18th July 2012 made by the sole Arbitrator, Mr. Steven Gatembu Kairu.
2. THAT the costs of the application be in the cause.

The Plaintiff's application is brought on the grounds set out in the body thereof and on the Affidavit of Albert K. Mureithi sworn on 17th September 2012.

Background to the application:-

By a written lease dated 12th August 1996, the Defendant leased to the Plaintiff a portion measuring 13,575 square feet of the building known as Uchumi House comprising of the Theatre, Stores, Booking Office, Bar, Manager's Office and the V.I.P Lounge (hereinafter referred to only as the "the suit property") for a term of 180 months with effect from 1st October 1996 on terms and conditions which were set out in the said lease. The said lease was to expire by effluxion of time on 1st October 2011. Clause 6 of the said lease provided that:

"The Lessor will on the written request of the Lessee made six months before the expiration of the said term and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Lessee grant to Lessee a Lease of the said premises for the further term of 63 months from the expiration of the present term at such rent as the parties hereto may mutually agree and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal..."

On 5th February 2008 before the expiry of its lease, the Plaintiff wrote to the Defendant pursuant to clause

6 of the lease aforesaid requesting for the extension of the said lease for a further term of 63 months. The Defendant informed the Plaintiff that it wanted to carry out some repairs on the suit property and as such it would not renew the lease. The Defendant asked the Plaintiff to vacate and hand over the suit property to the Defendant upon the expiry of the lease on 1st October 2011.

On 27th July 2011, the Plaintiff brought this suit against the Defendant seeking;

(a) An order of injunction to restrain the Defendant from entering, trespassing, remaining on or in any other way interfering with the Plaintiff's occupation of the suit property.

(b) An order that the Defendant does renew the lease agreement dated 12th August 1996 for a further period of 63 months in terms of clause 6 of the said agreement.

On 1st September 2011, the Defendant filed an application under Section 6 of the Arbitration Act 1995 seeking stay of proceedings and reference of the dispute to arbitration in accordance with clause 5 of the lease dated 12th August 1996 which provided as follows;

"Save as may be hereinbefore otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration by a single arbitrator assisted by such assessors or professional advisors as the arbitrator shall deem necessary to appoint to sit with him to be appointed in default of agreement by the chairman for the time being of the Institute of Surveyors of Kenya and every award made shall be deemed to be under the Arbitration Act 1968 or other Act for the time being in force in Kenya in relation to Arbitration".

When the Defendant's application came up for hearing before Mwera J.(as he then was) on 29th September 2011, the parties recorded a consent on the following terms;

(i) The dispute herein is referred to arbitration before an agreed arbitrator STEPHEN(sic) GATEMBU KAIRU.

(ii) To file award in ninety (90) days from today.

(iii) Status quo to last until end of arbitration.

(iv) Liberty to apply.

(v) Costs to follow the arbitration award.

The Arbitration:-

In accordance with the terms of the said order by Mwera J. the dispute between the parties concerning the renewal of the lease was referred to arbitration by Steven GatembuKairu on 10th October 2011 or thereabouts.

The advocates for the parties appeared before the arbitrator on 31st October 2011 for a preliminary meeting at which procedural issues were discussed and agreed upon. The arbitrator thereafter conducted a hearing at which parties adduced oral evidence. At the conclusion of the testimonies by witnesses, the arbitrator visited the suit property at the request of the parties. The parties thereafter made closing submissions. The arbitrator rendered his final award on 18th July 2012. In the award, the arbitrator found that the Plaintiff was not entitled to the renewal of the lease dated 12th August 1996 because as at the time the Plaintiff requested for such renewal, the Plaintiff was in breach of a covenant in the said lease that prohibited the Plaintiff from using the suit property for any other purpose other than that which had been set out in the lease namely, cinema, amusement centres, shops, offices, financial institutions and banks.

The arbitrator made a finding that in breach of that covenant; the Plaintiff was using the suit property for religious activities. The arbitrator dismissed the Plaintiff's claim against the Defendant and ordered the parties to share the arbitrator's costs equally.

The application before the Court:-

It is after the said final arbitration award that the Plaintiff brought the current application seeking the setting aside of the said award. The Plaintiff's application was followed by an application by the Defendant dated 20th September 2012 seeking the extension of the time within which to file the award in court and for the adoption and enforcement of the same. On 25th November 2015, the parties agreed that the Plaintiff's application seeking the setting aside of the award be heard first.

The grounds on which the Plaintiff's application was brought:-

- (a) The arbitrator was ordered by the court to make the award by 31st March 2012 and by making his final award on 18th July 2012 without leave of the court, the arbitrator acted in breach of the said court order and without jurisdiction thereby rendering his award a nullity.
- (b) The arbitrator failed to determine the substance of the dispute justly and fairly in accordance with the laws of Kenya and as such his award is against public policy.
- (c) The arbitrator delved into extraneous issues which were not raised before him by the parties.
- (d) The arbitrator made wrong findings on the factual issues which were raised before him for determination.
- (e) The arbitrator had a duty to appoint assessors or professional advisors to assist him in the arbitration and his failure to do that renders his award incapable of enforcement as it is contrary to the arbitration clause in the Lease Agreement dated 12th August 1996 pursuant to which the dispute had been referred to the arbitrator.

The Parties' respective submissions;

The Plaintiff's application was heard by way of written submissions. The Plaintiff filed its submissions on 8th December 2016 while the Defendant filed its submissions on 8th September 2016. In its submission, the Plaintiff contended that the arbitral tribunal was not properly constituted in that the arbitrator was supposed to be assisted by assessors or professional advisers which did not happen. The Plaintiff submitted that the parties having agreed on how the arbitration proceedings were to be carried out, it was not open to the arbitrator to ignore that agreement. In support of that submission, the Plaintiff cited the case of GachohiMacharia& Another vs. KiaiMbaki and 2 others, Nairobi High Court, Commercial and Admiralty Division Winding Up Cause No. 1 of 2000, where the court stated that "*An arbitrator who acts in manifest disregard of the contract acts without jurisdiction.*" The Plaintiff also cited the case of National Bank of Kenya Ltd. vs. Pipe Plastic Samkolit(K) Ltd. and Another[2002]1 E.A 503. The Plaintiff submitted further that the award made by the arbitrator on 18th July 2012 was made contrary to the court order of 22nd December 2011 that extended the time within which the award was to be made to 31st March 2012. The Plaintiff submitted that an award made contrary to a court order is made without jurisdiction and as such against public policy. On public policy, the Plaintiff cited the cases of Prudential Printers Ltd. vs. Carton Manufacturers Limited [2012] eKLR and Glencore Grain Ltd. vs. TSS Grain Millers Ltd.[2002] 1 KLR 606. The Plaintiff urged the court to find that the award was made without jurisdiction in that, arbitral tribunal was not properly constituted and that the award was made in breach of a court order and to allow the Plaintiff's application.

In its submission in reply, the Defendant submitted that an application to set aside an award is not an appeal and that for an applicant to succeed in such application, it must bring itself within the confines of section 35 of the Arbitration Act 1995. The Defendant submitted that this court can set aside an award

only on limited circumstances. The Defendant submitted that most of the issues raised in the application concern the arbitrator's findings on matters of fact which this court has no jurisdiction to disturb. In support of this submission, the Defendant cited a number of cases including, Nairobi Civil Appeal No. 102 of 2012, Kenya Oil Company Limited & Another vs. Kenya Pipeline Company Limited. On the issue of public policy, the Defendant submitted that the Plaintiff did not establish that the arbitral award in contention was against public policy. The Defendant submitted that the Plaintiff did not show that the award violated any statute or the Constitution or that it was contrary to justice or morality. With regard to the Plaintiff's contention that the award was made outside the time that was set by the court, the Defendant submitted that the arbitration in question was not court sanctioned arbitration under Order 46 of the Civil Procedure Rules and as such it was not time bound. The Defendant submitted that the arbitration in contention was carried out under the Arbitration Act 1995 that does not impose any time lines on the arbitrator. The Defendant submitted that in any event, the fact that the award was made outside the time that was set by the court is not a ground for setting aside an award under the Arbitration Act 1995. The Defendant submitted that the grounds put forward by the Plaintiff do not warrant this court's intervention in the arbitral proceedings in question.

Consideration of the submissions and determination of the issues raised:-

I have considered the Plaintiff's application together with the affidavit and submissions filed in support thereof. I have also considered the Defendant's submissions in opposition to the application. This court's jurisdiction to set aside adomestic arbitration award is provided for in section 35(1) and (2) of the Arbitration Act 1995(hereinafter "the Act") which provides as follows;

"35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made onlyby an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some

incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(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; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or

corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya”.

I am in agreement with the Defendant’s submission that for the Plaintiff’s application to succeed, the Plaintiff had bring itself within the confines of Section 35 of the Act. Section 10 of the Act limits the court’s intervention in the arbitral proceedings to the extent permitted by the Act. In the case of Christ for All Nations vs. Apollo Insurance Co. Ltd.[2002]2 E.A.366 which was cited by the Defendant, the court stated that;

“...the public policy of Kenya leans towards the finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act.”

The Plaintiff’s application was brought under section 35(2)(b)(ii) of the Act. Essentially, the plaintiff challenged the award on the ground of public policy. It has been held in a number of cases that public policy as a defence to the enforcement of an arbitral award should be approached with caution. In the case of Richard –vs- Mellish [1824-34] All E.R. Rep. 258, Justice Burrough had this to say on public policy:-

“I protest against arguing too strongly upon public policy. It is a very unruly horse, and when once you get a stride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when the other points fail.”

In the case of, Deutsche Schachtbau-Und Tiefbohrgesellschaftm.b.h. –vs- Ras Al Khaimah National Oil Co. And Shell International Petroleum Co. Ltd. [1987] 2 Lloyds Law Report 246 it was held as follows at page 254 on the issue public policy and the enforcement of the arbitration award:-

“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Justice Burrough remarked in Richardson –vs- Melish, (1824) 2 Bing, 229 at pg. 252 “It is never argued at all but when other points fail”. It has to be shown that there is some element of illegality or that the enforcement of the award 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.”

In the United States of America Court of Appeal case of Parsons &Whittemore Overseas Co., Inc –vs- Societe Generale De L’Industrie Du Papier (RAKTA), 508 F 2d 969 (2nd Cir. 1974) in which the enforcement of a foreign arbitral award was challenged on the ground of public policy, the court stated as follows:-

“We conclude therefore that the convention’s public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”

In the Singapore case of Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald &McArthy Pte Ltd (1996) 1 SLR 34 Judith Prakash J. Made the following observation on public policy defence:-

“In my view, public policy did not require that this Court refuse to enforce the award obtained by the Plaintiffs. There was no allegation of illegality or fraud and enforcement would not therefore be injurious to the public good”.

In the case of, Christ for All Nations vs. Apollo Insurance Co. Ltd.(supra), the court stated that;

“Public Policy is a broad concept incapable of precise definition. An award can be set aside under section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it is shown that it was either(a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or(c) contrary to justice and morality.”

The Plaintiff having brought its application under Section 35(2)(b)(ii) of the Act, the burden was on it to demonstrate any of the grounds set out in the case cited above for setting aside an arbitration award on public policy grounds. I am not satisfied that the Plaintiff has discharged this burden. The Plaintiff has not persuaded me that the arbitral award in contention is inconsistent with the Constitution of Kenya or any law applicable in Kenya. In its submission, the Plaintiff has contended that the award was contrary to section 35(2)(v) of the Act in that, the arbitral tribunal was not properly and lawfully constituted. This contention in my view has no merit and is an afterthought. The Plaintiff's application as I have set out above, was not brought under Section 35(2)(v) of the Act. The contention that the arbitral tribunal was not lawfully constituted was raised by the Plaintiff for the first time in its submissions. There is no averment to that effect in the application dated 17th September 2012 or the affidavit in support thereof. The Plaintiff having chosen to challenge the award on public policy grounds cannot be allowed to bring up new grounds of attack at the submission stage. Secondly, I am of the view that under Clause 5 of the Lease, the appointment of assessors or professional advisers to assist in the arbitration was at the discretion of the arbitrator. It is not correct as contended by the Plaintiff that such appointment was mandatory. A perusal of the final arbitral award shows that the Plaintiff did not raise the issue of the composition of the arbitral tribunal before the arbitrator. I find no basis in this contention.

The other ground of attack on which the Plaintiff's public policy argument is hinged is the Plaintiff's contention that the arbitral award was made contrary to a court order and as such was made without jurisdiction. I am in agreement with the Plaintiff that pursuant to the order that referred the dispute to arbitration, the arbitrator was supposed to file his award in court within 90 days from 29th September 2011. This initial period was to expire on 29th December 2011. On 22nd December 2011, the court on application by the Plaintiff extended the period within which the award was to be filed until 31st March 2012. This period was not extended again. It is common ground that the award herein was made on 18th July 2012 beyond the period within which the same was to be filed in court. I am not in agreement with the plaintiff that the arbitrator had no jurisdiction to make the award after 31st March 2012. In my view, the time frame that was fixed by the court was for filing the award in court not for the making of the award. That time can be extended by the Court and in fact, the plaintiff had applied for and obtained the first extension. There is now a pending application by the Defendant for the extension of the time within which to file the said award which application the court will consider on its own merits. I am not persuaded therefore that the arbitral tribunal had no jurisdiction to make the final award in contention and that the said award is null and void on that account.

I wish to add that, under section 17(1) of the Arbitration Act, the Arbitral Tribunal has power to decide on its own jurisdiction and any party aggrieved by such determination has a right to appeal to this court within 30 days to determine the matter and the decision of the court on the issue is final. I am of the view that a party who has failed to challenge the jurisdiction of the arbitral tribunal before the tribunal cannot be allowed to wait until after the arbitral tribunal has rendered its final award to raise the issue of jurisdiction as a ground for setting aside the final award or as a defence to the enforcement application raising it as a public policy issue.

The Plaintiff has therefore failed to demonstrate that the award was contrary to the Constitution of Kenya or any law applicable in Kenya. The Plaintiff has also not placed any material before this Court to demonstrate that the award herein is offensive to justice and morality or that it is inimical to the interest of Kenya. From the foregoing, it is clear that the main ground that was relied on by the Plaintiff to challenge the arbitration award herein fails. In its affidavit in support of the application, the Plaintiff had raised other issues which touched on the arbitrator's interpretation of the terms of the lease that the parties had

entered into and the arbitrator's findings on the factual issues that were raised before him. On these issues, I am in agreement with the Defendant that this court has no jurisdiction to re-open the findings of fact that have already been made by the arbitral tribunal. In the case of Nairobi Misc. HCCC No.213 of 2014, Tcat Limited vs. Joseph Arthur Kibutu, which was cited by the Defendant, the court stated that;

“As stated herein above, the court does not have any jurisdiction to re-open findings of fact that have already been made by the arbitral tribunal. Once an arbitrator makes a finding of fact, the court cannot review it even if it is of the view that it would have arrived at a different conclusion. See the case of Geogas S.A vs. Tammo Gas Limited(“The Baleares”) 3 All ER 554.”

In the Tanzanian case of DB Shapriya and Co. Ltd. –vs- Bish International BV (2) [2003] 2 E.A. 404 it was held that if a question of law is specifically referred and it becomes evident that the parties desired to have a decision on that question from the arbitrator, the court will not interfere with the award of the arbitrator on that question on the ground that there is an error of law apparent on the face of the record even if the view taken by the arbitrator does not accord with the view of the Court.

In the case of Nairobi Golf Hotels Ltd. vs. Linotic Floor Company Ltd. [2015]eKLR the court stated as follows;

“We agree with the finding of the High Court of Tanzania in DB Shapriya and Co. Ltd. v. Bish International BV (2)(2003) 2 EA 404, (cited by the learned counsel for the appellant) to the effect that;

“Courts cannot interfere with the findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct. The court's intervention is limited to errors of law which are apparent on the face of the award”.

Due to the foregoing, this court cannot interrogate the definition which the arbitrator gave to the word “amusement” or the interpretation which he gave certain terms of the lease agreement which the parties had entered into. The upshot of the foregoing is that the Plaintiff's application dated 17th September 2012 is not for granting. I wish to observe that even if the Plaintiff had demonstrated that good grounds exist that would warrant the setting aside of the arbitration award dated 18th July 2012, I would have been very reluctant to do so. I have noted that the bone of contention before the arbitrator was whether the Plaintiff was entitled to the extension of the lease over the suit property for a further term of 63 months from with effect from 1st October 2011. The arbitrator made a finding that the Plaintiff was not entitled to that extension. Assuming that the arbitrator was wrong in his finding and that the Plaintiff was indeed entitled to the lease extension, the extended lease would have expired on 31st December 2016.

What this means is that the Plaintiff's extended lease if it was granted would have expired before the date of this ruling and it would have been a mere academic exercise to set aside the award and start the whole process again. That would have aided the Plaintiff who has enjoyed the full term of the would have been extended lease courtesy of the status quo order which was made herein on 22nd December 2011 to continue in occupation of the suit property beyond the term that was contemplated by the parties.

For the foregoing reasons, the Chamber Summons application dated 17th September 2012 is without merit. The same is dismissed with costs to the Defendant.

Delivered and Signed at Nairobi this 24th day of January, 2017.

S. OKONG'O

JUDGE.

In the presence of:-

N/A	for Plaintiff
Mr. Salury	for Defendant
Kajuju	Court Assistant