Geothermal Development Company v Lantech Africa Limited (Civil Application E029 of 2021) [2024] KECA 981 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 981 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E029 OF 2021

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

JULY 26, 2024

BETWEEN

GEOTHERMAL DEVELOPMENT COMPANY .... APPLICANT

AND

LANTECH AFRICA LIMITED .... RESPONDENT

(Being an application for leave to appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Okwany, J.) dated 16th December 2020inHC Misc. Application No. 776 of 2020 consolidated withHC Misc. Application No. 779 of 2020)

RULING

1. Before us is a Notice of Motion dated 29th January 2021, brought pursuant to section 75(1) of the *Civil Procedure Act*, sections 3, 3A & 3B of the *Appellate Jurisdiction Act* and Rule 4, 39 (b), 42 & 43 of the *Court of Appeal Rules* in which Geothermal Development Company, ("the applicant"), in the main seeks an order that it be granted leave to appeal to this Court against the ruling and order of the High Court of Kenya at Nairobi (Okwany, J.) delivered on 16th December 2020 in the consolidated High Court Misc. Civil Application Numbers 776 and 779 all of 2020.

2. The applicant's case as gleaned from the record is that it and Lantech Africa Limited, ("the respondent"), on 1st July 2013 entered into a contract for provision of drilling consultancy services at Menengai Geothermal Project of the applicant for a consideration of USD 26,093,020.00 inclusive of tax.

3. The contract was duly executed to conclusion but differences arose with regard to accounts between the parties which necessitated the respondent to issue a demand letter for the sum of USD 17,614,751.39. In response, the applicant stated that following reconciliation of accounts, it had discovered that it had paid the respondent all the sums due under the contract save for one invoice of USD 9,513.68 which it had paid to the Kenya Revenue Authority as part payment of amounts owed by the respondent to it.

4. The dispute was then referred to a single arbitrator in line with the contract. The arbitrator, Mr. Kyalo Mbobu, CIArb, EBS, after hearing the parties, awarded the respondent USD 379,317.90 together with interest at the rate of 14% p.a from 7th July 2013 until payment in full and USD18,206,548.72 with same interest rate from the date of publication of the award until payment in full. However, due to some errors in the award, the respondent under section 34 of the *Arbitration Act* ("the Act"), sought the correction of the same. A corrected final award was thereafter issued to the parties on 20th May 2020.

5. Dissatisfied with the award, the applicant filed an application seeking to set aside the arbitral award whereas the respondent sought the adoption, recognition, and enforcement of the same. The first application was opposed by the respondent by way of a preliminary objection dated 23rd June 2020. The ground being that the application had been filed 3 months after the delivery of the award and was therefore time-barred in terms of section 35 (3) of the *Act* which required such an application to be lodged within 3 months of the award. With regard to the second application, It was urged that the time to challenge the award having expired without such challenge being mounted, it was only fair that the award be recognized and adopted. On 16th December 2020, the High Court delivered its ruling on the consolidated applications in which it upheld the respondent's preliminary objection and struck out the first application, but allowed the second application. The applicant is now before this Court seeking leave to appeal the decision to this Court. This is because there is no automatic right of appeal to this Court from a decision of the High Court arising from an arbitration award. In support of the application, the applicant claims that the High Court did not consider the application on its merits and simply upheld the preliminary objection without any basis. That the High Court misapplied section 35 (3) of the *Act*. As far as it was concerned, the application was filed within the stipulated timelines and was therefore not time-barred, had the court taken into account the time taken to correct the initial award.

6. Further, that the arbitral award which the respondent has asked the Court to recognize and enforce, is the same award that was issued after corrections. That no prejudice would therefore be occasioned to the respondent as the request for correction was at its instance. Given the aforesaid, it was the view of the applicant that the intended appeal raises important jurisprudential questions as to the correct interpretation of section 35 (3) of the *Act*, especially regarding computation of time, where a party files an application under section 34 of the Act for correction of the award. The applicant also reiterated that the arbitral award was for a colossal amount of money. That given the grounds upon which it was sought to be set aside; such as being contrary to public policy and the monies at stake being public funds, it was imperative that in the interests of fairness and justice, leave be granted.

7. The application was opposed by the respondent through the replying affidavit of Aquinas Wasike, a Director, of the respondent dated 30thApril 2021. The respondent deposes that the application is an afterthought and that the applicant was not being candid, is guilty of laches, and material non-disclosure. That the application is premised on grounds that are factually incorrect and plainly misleading. That the discretion of this Court to grant leave to appeal cannot be exercised on the basis of unincorrect and misleading affidavit. That the main reason advanced for filing the application late was that the ruling was not readily available at the time of delivery was farfetched as the ruling was always. That contrary to the assertions by the applicant, the application before the trial court was heard on merits. That the award was published and was ready for collection on 12th November 2019, and that the applicant had 3 months under section 35 of the Act to apply for the setting aside of the award but failed to do so. That the respondent thereafter, about 44 days after the expiry of 3 months, requested for the correction of the award under section 34 of the Act.

8. That save for correction of typographical errors, the Arbitral Tribunal did not issue an additional award as suggested by the applicant. That the trial court did not therefore err in the interpretation of sections 34 and 35(3) of the *Act*, as the delay in picking the arbitral award was the making of the applicant. That this Court's intervention in arbitration matters was narrow and limited to only such interventions as are sanctioned by the *Act*. That the issues of law regarding timelines under the Act have been settled by this Court and therefore the application is a profanation of the oxygen principles. In a supplementary affidavit, sworn by the same deponent, he stated that the application was propelled for ulterior and improper purposes considering the numerous applications filed both in this Court and the trial Court by the applicant. That the application was an abuse of the process of Court and against the principle of finality in arbitral proceedings and anathema in arbitration speak. He went on to depose that the applicant had filed a fresh suit in the High Court in which it seeks to impeach the proceedings before both the Arbitral Tribunal and the High Court, thereby signaling that it had waived the right to seek leave to appeal.

9. The application was canvased by way of written submissions with limited oral highlights. At the hearing, Mr. Ahmednassir, SC, and Mr. Ohaga, SC, appeared for the applicant and respondent respectively. Mr. Ahmednassir, SC, reiterated the averments in the motion and the supporting affidavit which we need not rehash. Suffice to add that the reason advanced by the High Court to strike out the application to set aside the award was that it was filed outside the 3 months window allowed by sections 35 (3) and 43 of the Act. According to the trial court, the computation of 3 months commenced on 12th November 2019 and therefore, time lapsed on 11th February 2020. In the premises, the respondent's application was made long after the 3 months limitation period had expired which wasn't the case. The decision of the trial court was therefore not only contrary to express provisions of section 35 (3) of the *Act*, but it was also contradictory. That the High Court therefore erred in holding that the Act does not require an Arbitral Tribunal to dispatch the award to each party; that delivery of the award happens when the Arbitral Tribunal either gives, yields possession, releases, or makes available for collection a signed copy of the award to the parties; that actual receipt of the signed copy of the award by the party is not necessary; that an arbitral award is deemed to have been received by the parties when the Arbitral Tribunal notifies the parties that a signed copy of the award was ready for collection because it is on that date that the Tribunal makes the signed copy available for collection by the parties.

10. The applicant relied on the cases of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2012] eKLR and *Nyutu Agrovet Limited v Airtel Networks Kenya Limited: Chartered Institute of Arbitrators - Kenya Branch (Interested Party)* [2019] eKLR, to submit that, this Court should grant the applicant leave so as to have a chance to address the procedural failures by the trial court which resulted from the obvious error in computing the limitation period under section 35 (3) of the *Act*. That the miscarriage of justice should not be left to stand considering the colossal amount involved. Senior counsel while placing reliance on the case of *University of Nairobi v Multiscope Consulting Engineers* [2020] eKLR, concluded by submitting that the applicant's intended appeal raises substantial legal and jurisprudential issues that require to be settled by this Court.

11. Mr. Ohaga, SC similarly reiterated the depositions in the respondent's replying and further affidavits which again we need not rehash. Nonetheless, Senior Counsel conceded that the application did raise serious and important jurisprudential questions regarding the correct interpretation of section 35 (3) of the *Act*, with particular regard to computation of time, in circumstances where a party files an application under section 34 of the *Act* for correction of the award. That aspect deserves interrogation by this Court. He, however, went on to submit that any appeal to this Court under section 35 of the *Act* must be with leave of this Court. That such leave is discretionary, which discretion has to be exercised judiciously having regard to the parameters set out in the case of *Nyutu Agrovet* (*supra*). That from

the further affidavit, it is apparent that the applicant had filed a fresh suit in the High Court, seeking to impeach the proceedings before both the Arbitral Tribunal and the trial court which clearly signals an election by the applicant to abandon the intended appeal. This application therefore is not only an attempt at forum shopping but also constitutes a gross abuse of the court process which must not be countenanced.

12. Relying on the cases of *Muchanga Investments Limited v Safaris Unlimited (Africa) & 2 Others* [2009] eKLR; *Beinos v Wiyley* 1973 SA 721 (SCA); *Attahiro v Bagudo* 1998 3 NWLL pt 545 page 656; and Sarak v Kotoye 1992-9 NWLR 9PT (264) 156, counsel submitted that the Court should not grant leave to appeal otherwise there will be a grave danger of both this Court as well as the trial court in the new suit being called upon to conduct parallel proceedings. That this would be the most dangerous exercise fraught with both procedural as well as substantive pitfalls. That in any event, the execution process having commenced, the intended appeal would be superfluous. That the applicant had therefore not approached this Court bona fide considering a plethora of applications it had filed both in this Court and in the High Court including a fresh suit. That the applicant had not offered any security for the due performance of the award should leave be granted, which exposes the respondent to unfathomable prejudice. That it is not in dispute that the final arbitral award was published on 12th November 2019 and the computation of 3 months from the said date shows that time lapsed on11th February 2020, and therefore, the application was made long after the 3 months' period permitted. That the applicant could not rely on the fact that the respondent sought for correction of the final award outside the time permitted for setting aside of an award under section 35 (3) of the *Act* in order to bring itself within the said section. Counsel submitted that the applicant had thus failed to place itself within the parameters set in the Nyutu Agrovet case.

13. The simple issue for our determination is whether or not to grant leave sought. In interpreting the right of appeal under the Act, it must be appreciated that the law envisages the limitation of judicial intervention in arbitral proceedings. This has been succinctly captured in section 10 of the *Act* which provides that "except as provided by the Act, no court shall intervene in matters governed by the Act". The principle of finality of the arbitration process which is the basis of limitation of the court's intervention has been reiterated in numerous decisions of this Court. In *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR which position was upheld in *Nyutu Agrovet Limited* (supra) this Court in upholding the principle decided that as a matter of public policy, it is in the public interest that there should be an end to litigation and the Act underscores that policy.

14. The Act, however, envisions certain instances that may warrant the court's intervention in the arbitral process. For instance, under section 39 of the *Act*, where parties have agreed that an application by any party may be made to a court to determine any question of law arising in the course of the arbitration or an appeal by a party may be made to a court on any question of law arising out of the award, such application or appeal may be made to the High Court. The section further grants the right of appeal to this Court against a decision of the High Court, if parties have agreed prior to the delivery of the arbitral award and if this Court is satisfied that a point of law of general importance is involved, and that the determination will substantially affect the rights of one or more of the parties involved.

15. The right to appeal to this Court was succinctly made clear in the case of *Nyutu Agrovet Limited* (*supra*). The Supreme Court held that an appeal may lie to this Court against a decision of the High Court made pursuant to section 35 of the *Act* upon grant of leave in exceptional cases. The court further held that for leave to be granted, the intended appellant must demonstrate that in arriving at its decision, the High Court went beyond the grounds set out under section 35 of the *Act*,there was unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process and to prevent injustices. In summary, the Supreme Court decided that this Court

has residual jurisdiction to entertain an appeal under section 35 of the Act in exceptional and limited circumstances where there is need to correct palpable injustice.

16. However, it is worth noting that the Supreme Court stated that there was no express right of appeal against the decision of the High Court in arbitral proceedings, and leave must first be sought and obtained.

17. Similarly, in the case of *M/s Muthaura Construction Ltd v Moyale Suppliers & Transporters Ltd* [2017] eKLR, this Court held that an application for leave to appeal must demonstrate that the order of the High Court being appealed against is erroneous, and that the intended appeal has a likelihood of success. The threshold for granting leave to appeal in arbitration matters is therefore relatively high. It should also be appreciated that the grounds for granting leave to appeal may vary depending on the particular circumstances of each case.

18. In the application before us, it is contended that the applicant intends to pursue in this Court the question of interpretation of the law as to when time should start running in situations where a party had applied for rectification or correction of errors in the award published by the arbitrator earlier. The applicant found itself in such a situation when its application in the High Court to set aside the arbitral award under section 35 of the Act was dismissed on grounds that it had been filed outside the 3 months statutory period. This issue which the applicant considers to be of jurisprudential moment has been conceded by the respondent as earlier stated. We therefore wish not to belabor the point. Suffice to add that we are in agreement that the said issue raises considerable questions of law and public importance that should be canvassed, considered, and rested by this Court.

19. The respondent has raised the issue of delay in filing the current application. However, from the record, it is apparent that by an order of this Court, the applicant who had made an application under rule 4 of *Court's Rules* was granted leave to file the application out of time by Laibuta, J.A. We cannot therefore re-visit the issue. As regards the conduct of the applicant in filing several applications and suits in various courts, counsel for the applicant readily admitted the accusation but justified it on account of desperation. Who can fault it! The respondent also referred this Court to a fresh suit filed by the applicant in the High Court. As we are not privy to the facts of the new case, the less we say about it, the better.

20. In any case, having filed several applications or suits per se would not be a bar to the consideration of this application on merits. Lastly, and as relates to execution and subsequent recovery of substantial amount of the arbitral award, we do not think that this by itself, should be a ground to deny a deserving applicant leave to appeal to this Court.

21. In the end, we allow the application with the consequence that the applicant is granted leave to appeal to this Court against the ruling and order delivered on 16th December 2020. The leave is granted on condition that the intended appeal should be filed within the next thirty (30) days from the date hereof, failing which leave hereby granted shall automatically lapse. Costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

...

K. M'INOTI

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR