Nairobi West Hospital v Krishnamurthy (Civil Application E220 of 2024) [2024] KECA 1190 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1190 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E220 OF 2024

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

SEPTEMBER 20, 2024

BETWEEN

THE NAIROBI WEST HOSPITAL ..... APPLICANT

AND

NARAYANAN KRISHNAMURTHY ..... RESPONDENT

(Being an Application for stay pending Appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (O. A. Angote, J.) delivered on 14th March, 2024inE.L.C. Cause No. 285 of 2017.)

RULING

1. In the final arbitral award dated and published on 15th December, 2022, the sole Arbitrator made a declaration that the applicant's (The Nairobi West Hospital) termination of the respondent's (Narayanan Krishnamurthy) contract of employment was unfair, unjustified, illegal, null and void; the applicant was ordered to forthwith pay to the respondent USD 141,465.16 and Kshs.9,955,356; the applicant was ordered to pay interest on the said sums at the rate of 14% per annum from 12th July, 2022 until payment in full and the applicant was ordered to meet the costs of the arbitral proceedings.

2. The respondent then moved the Employment and Labour Relations Court ('ELRC') in ELRC Cause No. E573 of 2021 under the provisions of the Arbitral Act and rules made thereunder praying that the award be recognized and adopted as a judgment of the court and that the respondent be granted leave to enforce the award as a decree of the court. It was said in support of the application amongst other things that the applicant had failed to honour the award despite having been served with a remainder to do so thus the application.

3. The applicant moved that court in the said suit praying, inter alia, that the court be pleased to issue an order staying execution of the final award and that the court be pleased to set aside the award. It was explained in that application that the respondent had filed an earlier suit (ELRC E6476 of 2020)

seeking similar orders which had been dismissed for lack of jurisdiction in view of the arbitration agreement the parties being ordered to go to arbitration; the Sole Arbitrator had accepted appointment to arbitrate the dispute between the parties; the arbitrator heard the dispute and published a final award; that the applicant being dissatisfied with the findings in the award had moved the court to set it aside for various stated reasons.

4. The respondent took a preliminary objection citing what he saw as violations of the *Arbitration Act* in timelines within which an application to set aside an arbitral award may be filed; that such an application may be made within 3 months; that the applicant filed its application after the expiry of 3 months period and that for those reasons the application was incompetent and bad in law.

5. In a ruling delivered by Gakeri, J. on 27th July, 2023, the preliminary objection was upheld. The applicant filed a Notice of Appeal against that decision.

6. In the Motion on Notice before us brought under various provisions of law including the *Appellate Jurisdiction Act*, section 35(3) of the *Arbitration Act* and Articles of the *Constitution* the applicant prays in the main:

> " That this Honorable Court be pleased to grant leave to the Applicant to lodge its Appeal against the rulings of Justice Dr. Jacob Gakeri delivered on 27th July 2023; and ..."

7. In grounds in support of the Motion and in a supporting affidavit of Linda Rutto its Manager, Legal and Compliance, the applicant says amongst other things that it has been condemned to pay a colossal arbitral award to the respondent; that the applicant's application to set aside the arbitral award was dismissed in account that it had been filed out of time that the Judge at the same time allowed the respondent's application to enforce the arbitral award. The applicant states that the decision to dismiss the application to set aside the arbitral award was not only factually erroneous but was unsupported by evidence. According to the applicant under section 35 of the *Arbitration Act*:

> "... a party propounding that an application to set aside has been filed out of time must establish two facts wit, the date of receipt of the award and when the application to set aside the award was made. That admittedly, the learned judge was unable to establish any of the foregoing facts for the reason that;
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> a. That parties had adopted contrasting position on the issue of when the award was received by the applicant or its advocates and when the application seeking to set aside the award was filed;
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> b. That there was no evidence on when the Arbitral award was received by the appellant;
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> c. That there was no email from both the appellant and its advocates acknowledging receipt which, according to the court; would have "effortlessly established the fact of receipt beyond adventure"
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> d. Most fundamentally, the learned judge had been improperly moved by way of a preliminary objection in a matter where factual issues were hotly contested; and
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> e. The judge exceeded his jurisdiction by acting as a fact finder in circumstances where each party is expected to prove their case to the required standard of proof."

8. The applicant further says that the ruling effectively denied it the opportunity to challenge the arbitral award which the applicant says offended section 35 of the *Arbitration Act* in that it was in conflict with public policy and the arbitration had exceeded jurisdiction by deciding on issues that had not been contemplated by the terms of reference to arbitration. The applicant says that it is a health facility providing critical services whose operations will be paralyzed if the respondent is allowed to execute the judgment.

9. There are several grounds of appeal set out in the Motion which do not differ from the summary we have already set out. Among the documents attached to the supporting affidavit is a Memorandum of Appeal where 11 grounds of appeal are set out where it is intended to be prayed that the said rulings made on 27th July, 2023 be set aside and that the appeal be allowed.

10. In a replying affidavit the respondent depones that issues litigated before the arbitrator and ELRC should not be reopened; that he worked diligently for the applicant as Group Chief Executive Officer and Managing Director for 4 months until 31st October, 2020 when he was declared redundant; the parties went to arbitration and a final award was published. He thereafter successfully moved ELRC for recognition and enforcement of the award. He explains how the application to set aside award was uploaded by the applicant; that the application was deemed as filed on 22nd March, 2023;

> "... this being seven (7) days after the legally accepted timelines and the Learned Judge Hon. Dr. Jacob Gikeri in his wisdom ruled and rightly so that the Application was filed out of time and the Court lacked jurisdiction to expand time (Annexed herewith and marked NK-9 is a copy of the E- Filing portal interface)."

11. The respondent says that the preliminary objection he filed at ELRC was based on statutory limitation premised on section 35 of the *Arbitration Act*:

> "... which explicitly states, that an application to set aside an arbitral award may not be made three months after the award has been published. Not even a second more can be entertained. ..."

12. He says that the Judge was right to find that he had no jurisdiction to entertain the application which was statute barred and accused the respondent of not keeping to timelines in the previous proceedings. The respondent attaches various documents to the replying affidavit.

13. When the Motion came up for hearing before us on 10th June 2024 learned counsel Mr. Ezekiel Munyua appeared for the applicant while learned counsel Mr. Diro who teamed up with Mr. Mulaku appeared for the respondent. Both sides had filed written submissions and in a highlight of the same counsel for the applicant submitted that there were exceptional circumstances in that the application to recognize and adopt the arbitral award had not been heard as the matter had been determined by ELRC based on a notice of preliminary objection to the effect that the application to set aside the arbitral award had been filed after 90 days of its publication. According to counsel, for such an objection to succeed there must be a demonstration of when the award had been received; time when the application to set aside had been filed and a determination that there is inordinate delay in filing the application. According to counsel those ingredients could only be proved through affidavit or viva voce evidence but in the case before ELRC the facts were not agreed but were disputed. Counsel submitted that there was nothing on record to prove when the award was received; that the virtual system where documents could be accessed had errors where the system was wrongly computing. Counsel submitted that the application to set aside the award had been filed within the statutory timelines but this could not be easily proved because of the errors in the system. Counsel thought that in those circumstances the

Judge erred by shutting the door of justice to the applicant and that this alone satisfied the test in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* [2019] eKLR for this Court to grant leave to appeal. Counsel, in further submissions, faulted the Judge for going to look for information online without hearing parties which, according to counsel, fell foul of the adversarial system where the party alleging had a duty to prove.

14. In opposing the application counsel for the respondent submitted that *Civil Procedure Act* had no application to the *Arbitration Act*; that according to the holding by the Supreme Court of Kenya in Nyutu Agrovet appeal to this Court from the High Court arising from arbitral proceedings is limited to where the High Court has stepped out of section 35 of the *Arbitration Act* and reached a decision that has caused grave injustice to the parties. Counsel submitted that the award having been published on 15th December, 2022 the application to set aside which according to the respondent was filed on 21st March, 2023 was filed late and out of the statutory period allowed by the Act. Counsel concluded by submitting that there is nothing to be appealed; that we have no jurisdiction to entertain the application therefor.

15. In a rejoinder counsel for the applicant submitted that it was wrong for the learned Judge to decide contested matters in a preliminary objection.

We have considered the Motion, the submissions made and the law.

16. The issue that we have to decide is not a difficult one. It is whether the applicant is deserving of our exercise of discretion to grant leave to appeal to the Court from the decision of the High Court in the matter that had arisen from arbitral proceedings.

17. The parties herein agreed to have their dispute determined through arbitration proceedings. A final award was published on 15th December, 2022. The respondent moved ERLC to recognize and enforce the award but the applicant on the hand moved the same court to set aside the award for various stated reasons. The matter was determined through a notice of preliminary objection where the respondent contended that the application to set aside arbitral award had been filed outside the statutory period.

Section 35(3) *Arbitration Act* (the Act) provides:

35. Application for setting aside arbitral award

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

18. The Act prohibits making an application to set aside an arbitral award if 3 months have elapsed after the award was received by the party making the application. It was the applicant's position before ELRC that a party stating that the timelines set in the said section 35 of the Act had to prove the date and time when the party challenging the award received it; when the application to set aside was made and that there was inordinate delay in filing the application to set aside or that the delay was inexcusable.

19. We have gone through the record. It was the applicant's position that it filed the application to set aside arbitral award within the time stated in law but the respondent not only took a contrary position but he also took out a preliminary objection on that issue.

20. The applicant's case before ELRC was that it complied with those timelines to the letter; that there were technical challenges on the part of the court registry portal thus a wrong indication on when the application was paid for.

21. The preliminary objection by the respondent was based on the legal point that statutory timelines had not been complied with. There was no agreement by the parties on whether the application to set aside had been filed on time as the parties took opposite positions on that issue.

22. Law, J.A in the celebrated case of *Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Limited* [1969] EA 696 had this to say on the nature of a preliminary objection and how the court should deal with it:

> " ...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration."

23. Sir Charles Newbold P. added in the same case:

> " ...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop."

24. What was before the Judge were 2 applications, one to recognize and enforce an arbitral award and the other to set aside the award.

25. The applicant complains, rightly we think, that it was wrong for the Judge to look for information on establishing when the latter application was paid for; to find out whether there was a breakdown in the court registry portal without hearing the parties on that issue. The Judge should have allowed the parties to address him on those contested issues. It was wrong for the Judge to determine the contested issues through a preliminary objection and this is an arguable point on appeal.

26. Should we exercise our discretion to exceptionally allow the applicant to appeal to this Court?

27. The point was considered by the Supreme Court in Nyutu Agrovet (*supra*) and this is the guidance we get from that Court.

> " We agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction...."
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> The Supreme Court also had this to say in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR:
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> " (85) Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on appeals arising from Section 35

should be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act.

87. In applying the above criteria, it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration under Article 159(3)(d) so that floodgates are not opened for all and sundry to access the appellate mechanism. Similarly, it would be expected that a leave mechanism would be introduced into our laws by the Legislature to sieve frivolous appeals and not create backlogs in the determination of appeals from setting aside of award decisions by the High Court.

88. In making the above finding, we are affirming the position taken by some benches of the Court of Appeal that Article 164(3) is a jurisdiction that is tied to a party(s) right to appeal to that Court and to completely deny that right would be inimical to the spirit and tenor of the Constitution, 2010. In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in Inco Europe Ltd & others (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances."

28. The circumstances here are that the applicant applied to set aside an arbitral award but a preliminary objection was taken the determination of which the applicant says closed that door of justice to the applicant. The applicant was in the event not heard and was not accorded the opportunity whether it was entitled to set aside the award on grounds set out in section 35 of the *Act.* In those premises we think that the applicant has satisfied the narrow threshold for grant of leave to appeal to this Court. We allow the Motion. Costs will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

S. ole KANTAI

JUDGE OF APPEAL

.....

G. W. NGENYE - MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR