



Thaara Limited v WS Insight (K) Limited & another (Civil Application E218 of 2024) [2024] KECA 1464 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1464 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E218 OF 2024
DK MUSINGA, MSA MAKHANDIA & JM MATIVO, JJA
OCTOBER 25, 2024**

BETWEEN

THAARA LIMITED APPLICANT

AND

WS INSIGHT (K) LIMITED 1ST RESPONDENT

PARBAT SIYANI CONSTRUCTION LIMITED 2ND RESPONDENT

(Being an application seeking leave to appeal against the Judgment of the High Court of Kenya at Nairobi (Majanja, J.) delivered on 8th May 2024 in HCCOMMARB E025 of 2023)

RULING

1. By a notice of motion dated 13th May 2024, the applicant seeks leave to appeal from the judgment of Majanja, J in HCCOMMARB E025 of 2023 on 8th May 2024. In the impugned judgment, the High Court allowed enforcement of an arbitral award published by Eng. Basil O. Odigie on 27th March 2023 as a decree of the court. The court also assessed costs of the application at Kshs 100,000 to be paid by the applicant.
2. In its affidavit in support of the application sworn by Peter Nderitu Gethi, the Managing Director of the applicant, he states that the applicant, (Thaara Limited), as the employer, entered into an agreement with the 2nd respondent, (Parbat Sayani Construction Limited), as the main contractor, for construction of a Mall along Limuru Road; that the 2nd respondent entered into two contracts with the 1st respondent as a sub-contractor; that disputes arose between the 1st respondent and the 2nd respondent and the 1st respondent invoked Clause 31 of the sub-contracts to refer the dispute to arbitration.
3. In his award, the arbitrator found in favour of the 1st respondent as against the applicant. The applicant applied to set aside the award, while the respondent applied for its enforcement. The High Court



dismissed the application to set aside the award and allowed the application for its enforcement. The applicant's contention before the High Court was that there was no arbitration agreement between the applicant and the 1st respondent and, therefore, the arbitrator had no jurisdiction to hear the dispute that was referred to him. The applicant faults the learned judge for overruling its objection.

4. In its submissions before this Court, the applicant states that its application for leave to appeal satisfies the requirements as set out by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited, Chartered Institute of Arbitrators – Kenya Branch* (Petition No 12 of 2016) 2019 [KESC 11] (KLR) (6th December 2019) (Judgment), where the Court held as follows:

“[77] In concluding on this issue, 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).”

5. The applicant further contends that the High Court committed a grave error and delivered a decision so grave and manifestly wrong as the judge failed to abide by the principle of party autonomy in arbitration, namely, that there must be an agreement that disputes be referred to arbitration.
6. The respondents opposed the application. The 1st respondent contends that the applicant has totally failed to bring its case within the circumscribed and narrow jurisdiction for granting leave to appeal, and has not demonstrated that the learned judge in dismissing its application to set aside the arbitral award stepped outside the grounds set out in section 35(2)(3) of the *Arbitration Act*; and neither has the applicant demonstrated how the decision of the High Court is so grave and so manifestly wrong that it has completely closed the doors of justice to it.
7. The 1st respondent supports the finding by the learned judge's finding that:

“(i) as per the sub contracts, there existed an arbitration agreement between Thaara Ltd and WS Insight (K) Ltd for any dispute that WS Insight (K) Ltd may have had against Thaara Ltd. And as a matter of evidence and fact Thaara Ltd had authority to make direct payments to WS Insight (K) Ltd and that if Thaara Ltd failed to make such payments, then WS Insight (K) Ltd was entitled to invoke clause 31 of the subcontract against Thaara Ltd.

ii. As per the arbitration clause in the subcontracts, if the sub-contractor is aggrieved by any inaction of the employer then the sub-contractor is entitled to institute arbitration proceedings against the employer. WS Insight (K) Ltd was aggrieved by the inaction of Thaara Ltd not making payment in respect of the final account. Therefore it cannot be said that the Arbitrator dealt with issues not contemplated in the arbitration agreement because such an inaction is contemplated by the parties to give rise to a dispute that is to be resolved by Arbitration.

iii. The issue of whether there was a collateral agreement between WS Insight (K) Ltd and the Thaara Ltd. was presented for the Hon. Arbitrator's determination by Parbat Siyani Construction Ltd and therefore he Hon. Arbitrator was entitled to make determination on it.

iii. Having already found that there existed an arbitration agreement between Thaara Ltd and WS Insight (K) Limited, therefore the award is not contrary to public policy as it was based on an arbitration agreement between parties.”



8. The 1st respondent further submitted that the proposed grounds of appeal are challenging the merits of the arbitral award because:

“(a) The Applicant’s application to set aside the Arbitral Award on grounds that the Award was void for want of jurisdiction in that there was no contract or arbitration agreement between itself and WS Insight (K) Ltd as required under section 3 and 4 of the [Arbitration Act](#) and that the Award dealt with a dispute not contemplated by or falling within the terms of reference to arbitration was dismissed in the ruling by Hon. Justice Majanja delivered on 8th May 2024 which found that:

- i. As per the sub contracts, there existed an arbitration agreement between Thaara Ltd and WS Insight (K) Ltd for any dispute that WS Insight (K) Ltd may have had against Thaara Ltd. And as a matter of evidence and fact Thaara Ltd had authority to make direct payments to WS Insight (K) Ltd and that if Thaara Ltd failed to make such payments, then WS Insight (K) Ltd was entitled to invoke clause 31 of the subcontract against Thaara Ltd.
- ii. As per the arbitration clause in the sub contracts, if the sub-contractor is aggrieved by any inaction of the employer then the sub-contractor is entitled to institute arbitration proceedings against the employer. WS Insight (K) Ltd was aggrieved by the inaction of Thaara Ltd not making payment in respect of the final account. Therefore it cannot be said that the Arbitrator dealt with issues not contemplated in the arbitration agreement because such an inaction is contemplated by the parties to give rise to a dispute that is to be resolved by Arbitration.
- iii. The issue of whether there was a collateral agreement between WS Insight (K) Ltd and the Thaara Ltd. was presented for the Hon. Arbitrator’s determination by Parbat Siyani Construction Ltd and therefore the Hon. Arbitrator was entitled to make a determination on it.
- iv. Having already found that there existed an arbitration agreement between Thaara Ltd and WS Insight (K) Limited, therefore the Award is not contrary to public policy as it was based on an arbitration agreement between parties.

b. The Main Contract, the two Nominated Sub-Contractor Agreements and the two letters of appointment dated 13th July 2015, identify the existence of a defined contractual relationship between Thaara Ltd and the WS Insight (K) Ltd.

- i. Clause 31.5 of the Main Contract states that the Contractor and the Nominated Sub-Contractor shall enter into a sub-contract agreement. Pursuant to this provision as well the letters dated 13th July 2015, WS Insight (K) Ltd and Parbat Siyani Construction Ltd entered into the two Nominated Sub-Contractor Agreements.
- ii. Clause 1 of the two Nominated Sub-Contractor Agreements provides that the Agreement is supplemental to the Main Contract. Further, Clause 1.5 of the Nominated Sub-Contractor Agreements state that the Architect, with the approval of the Employer, has nominated the Sub-Contractor to carry out the works.
- iii. Clause 31 of the Nominated Sub-Contractor Agreements provides for settlement of any disputes arising to be solely through arbitration and the parties agreed to be bound by the Award of the arbitrator. The 1st Respondent’s Advocates on record have advised



me, which advice I verily believe to be true that the Nominated Sub-Contracts fit in the Main Contract, and they are supplemental to the Main Contract.

- b. The background of the sub contracts including the mode of execution clearly demonstrates a clear contractual relationship between Thaara Ltd and the WS Insight (K) Ltd:
 - i. Based on the two letters each dated 13th July 2015, Barker & Barton LLP wrote to the WS Insight (K) Ltd stating that Thaara Ltd had accepted the WS Insight (K) Ltd's commercial and performance specification offers. Thaara Ltd. Unequivocally communicated its acceptance of the WS Insight (K) Ltd commercial and performance specification offer dated 3rd July 2015 through the letters dated 13th July 2015.
 - ii. Thaara Ltd made direct payments to the WS Insight (K) Ltd on various occasions.
 - iii. The performance bond issued by WS Insight (K) Ltd was in favour of Thaara Ltd.
 - iv. Thaara Ltd commissioned a system audit that was conducted by its agent, Pinkerton Kenya Ltd. of the equipment supplied by the WS Insight (K) Ltd and ordered for a valuation of the works by the said agents.”
9. For the aforesaid reasons, the 1st respondent urged us to find that the threshold for exercise of this Court's narrow and circumscribed jurisdiction has not been met by the applicant and dismiss the application with costs.
10. In its submissions, the 2nd respondent, in addition to the 1st respondent's contention that the application does not meet the threshold for grant of leave, further contends that the applicant's intended appeal is an attack on the High Court's failure to interrogate facts that were presented before the arbitrator, which is improper because the arbitrator is the master of facts and his finding of fact that there was privity of contract between the applicant and the 1st respondent should be upheld.
11. We have considered the application, all the affidavits sworn by the parties as well as the respective submissions and the relevant case law. We have also considered the oral highlights of the parties' submissions by their respective advocates. It is trite that this Court has a narrow and circumscribed jurisdiction to entertain appeals from decisions made under section 35 of the *Arbitration Act* in circumstances as spelt out by the Supreme Court in *Nyutu Agrovet v Airtel Networks Limited; Chartered Institute of Arbitrators - Kenya Branch (supra)*.
12. Looking at the proposed grounds of appeal, we agree with the respondents that the applicant's application seeks to challenge the merits of the arbitral award. Indeed, the arbitrator is the master of facts and, in our view, the arbitrator made well founded determinations as to whether there was an arbitration agreement between the applicant and the 1st respondent.
13. In the impugned ruling, the learned judge at paragraphs 27 and 28 also highlighted his views on the existence of an arbitration agreement between the applicant and the 1st respondent. We agree with learned judge.
14. In our considered view, therefore, there does not exist exceptional circumstances that would warrant grant of leave to appeal as sought by the applicant. Consequently, we hereby dismiss this application with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

D. K. MUSINGA, (P.)

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**JUDGE OF APPEAL
ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL
J. MATIVO**

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JUDGE OF APPEAL

I certify that this is a true copy of the

Signed

DEPUTY REGISTRAR

