Njama Limited v Kenya Agricultural & Livestock Research (Formerly Kenya Agricultural Research Institute) (Civil Application E254 of 2020) [2022] KECA 997 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 997 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E254 OF 2020

DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA

SEPTEMBER 23, 2022

BETWEEN

NJAMA LIMITED ..... APPLICANT

AND

KENYA AGRICULTURAL & LIVESTOCK RESEARCH (FORMERLY KENYA AGRICULTURAL RESEARCH INSTITUTE) ..... RESPONDENT

(Being an application for leave to appeal under rule 4 of this Court's Rules against the decree and ruling of the High Court at Nairobi (F.Ochieng, J as he then was) dated 18th January 2017inMisc. Application No. 514 of 2014)

RULING

1. Njama Limited (the applicant), was a successful bidder for a tender to undertake rehabilitation works at KARI NVRC Muguga. However, a dispute arose and pursuant to the Arbitration agreement provided for in their contract, the dispute was referred to a single arbitrator, Mr. A. G. Nyakundi, who heard the same and delivered his Award on 31st August, 2012 in favour of the applicant. In the Award, the respondent was ordered to pay the applicant a sum of Ksh. 20,225,455.40 as the owed amount and a sum of Ksh. 2,124,600 as costs of the dispute within 30 days.

2. Aggrieved by the Award, the respondent moved to the High Court to have the Award set aside on the ground that it was plainly wrong. The application was opposed by the applicant on grounds that the application was an appeal against the Award in disguise. The application was heard and, in a ruling, dated 17th April, 2015 the Award published on 31st August, 2012 and delivered on 19th August, 2014 was set aside.

3. Upon receipt of the ruling, the applicant once again moved the same court vide a notice of motion dated 23rd August, 2016 seeking to have the court direct that the matter be referred back for arbitration and that the arbitrator renders an award within the parameters set in the ruling dated 17th April, 2015.

4. The notice of motion was heard and the court in a ruling dated 18th January, 2017 held that the orders for setting aside the arbitral award were final and hence dismissed the application for being unmerited with costs to the respondent. Miss Ncharo, counsel who was present in court when the ruling was delivered made an oral application for leave to appeal against the said decision, which was opposed by the respondent, and it was declined.

5. It is against the above background that the applicant moved to this Court vide a notice of motion dated 20th August, 2020 seeking leave to appeal against the decision delivered on 18th January, 2017. The application is premised on grounds that: it is dissatisfied with the entire ruling; the decision was not clear whether the dispute should be referred back to the arbitrator or not; that matters under section 35 of the *Arbitration Act* are appealable; its intended appeal has high chances of success and that on 7th August, 2020 obtained extension of time to file an application for leave to appeal to this Court.

6. The motion is supported by the affidavit of Francis Njakwe Maina, a director of the applicant, sworn on 20th August, 2020. He deposes in summary that; the applicant undertook rehabilitation works at the respondent's premises but the same was not adequately paid for and the arbitrator ruled in its favour vide a final award dated 31st August, 2012, however the respondent was dissatisfied with the same and filed a notice of motion dated 29th October 2014, to have the arbitrator's award set aside for various reasons, including that the arbitrator had acted beyond his jurisdiction; that it has an arguable appeal with high chances of success; that the 14 days granted to file an application for leave to appeal expired; the respondent shall not suffer any prejudice if the order is granted.

7. In opposing the motion, the respondent filed a replying affidavit sworn by Eliud Kireger dated 21st January, 2021. He has asked this Court to decline granting leave for the reason that the applicant never asked the High Court to stay proceedings in the High Court and allow the arbitrator to determine the dispute conclusively and, therefore, it is estopped from asking this Court to grant leave, when the High Court had already become functus officio once it set aside the arbitral award, which has not been appealed against to date.

8. The respondent depones that the intended appeal does not fall within the limited permitted exceptional cases where appeals under section 35 of the *Arbitration Act* are allowed and that there is no ground of appeal which merits any serious judicial considerations, since the clerical errors in the ruling dated 18th January 2017 had already been corrected by the High Court order of 22nd March, 2019 and that under section 35(4) the applicant had failed to seek for stay of the proceedings to set aside.

9. That further, the respondent shall be greatly prejudiced as the matter has been pending since 2012 and that the motion should be dismissed with costs. Parties filed submissions in support of their respective positions.

10. The applicant urges that the intended appeal is arguable for the reason that the court erred in holding that under section 35 of the *Arbitration Act*, the High Court decision was final and it was not appealable. The applicant urges that this Court has on various decisions held that it can hear an appeal on arbitration under the said section. He in conclusion asked us to allow the application and grant leave to appeal.

11. In its submissions in opposition to the application, the respondent urges this Court to, inter alia, note that the High Court ruling delivered on 17th April, 2015 which set aside the Award has not been

challenged. The intended appeal is against the learned Judge's decision declining to send the matter back to an arbitrator for determination.

12. In addition, the respondent submits that if leave is granted then the Court will be imposing a contract on the parties on referral of dispute back to the arbitrator even after the final award was set aside without orders referring it back to the arbitrator having been sought. The Court is urged to find that appeals to this Court from an Arbitration award are restricted and it would be detrimental to the expeditious disposal of arbitration matters as was held in *Geo Chem Middle East v. Kenya Bureau of Standards* [2019] eKLR and *Synergy Industrial Credit Limited v. Cape Holdings Limited* [2019] eKLR. Finally, the Court is urged to decline the orders sought and dismiss the application.

13. When the application came up for plenary virtual hearing before us on 27th April, 2022 learned counsel Mr Fredrick Thuita and Mr Saenyi appeared for the applicant and the respondent respectively. They highlighted the submissions which we have summarised here in extenso and so we need not rehash the oral highlights here. My Thuita's emphasis was nonetheless on the claim that the learned Judge's decision was not fair and needs to be redressed by this Court. On the other hand, Mr Saenyi emphasised that the application was bad in law and the Court had no jurisdiction to grant the prayers sought even under Article 159 of *the Constitution*, cited by learned counsel for the respondent, and that the Award in question was issued over 10 years ago.

14. We have considered the applicant's notice of motion, the rival affidavits and both written and oral submissions by learned counsel and the law. The first thing we must make clear is that the appeal before us is not one challenging the decision setting aside the arbitral award, but the decision by the learned Judge declining to reopen the matter and issue further orders referring the matter back for arbitration. The application does not, therefore, in our considered view fall within the purview of sections 35 or 39 of the *Arbitration Act*. We note that the Ruling the applicant seeks leave to appeal against was predicated on sections 3A, 3B and section 63 of the *Civil Procedure Act* and not under any Arbitral law. As has been often pronounced by the High Court and also by this Court, the *Arbitration Act* is self-sufficing and unless otherwise stated in the Act itself, provisions of the *Civil Procedure Act* do not apply. The application before Ochieng, J. (as he then was), was indeed deficient on that account. What the applicant ought to have done is invoke section 35(4) of the *Arbitration Act* which provides as follows:-

> " The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award." (Emphasis provided).

The above provision is self-explanatory and we need not say more.

15. Before us, the applicant maintained that he was relying on Article 159 of *the Constitution* to invoke our jurisdiction. We observe that on the face of the application before us, no provisions of the law invoking this Court's jurisdiction have been cited. The applicant seems to rely on the fact that Ouko, J. (as he then was), extended time under Rule 4 of the Court of Appeal Rules for the applicant to file the intended appeal against the 2nd Ruling by Ochieng, J. out of time. This extension did not mean that leave would be automatically granted.

16. We think we have said enough to demonstrate that this application is for dismissal. We find this application devoid of merit and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR