Pinnacle Projects Limited v Matu (Civil Appeal 122 of 2010)
[2021] KECA 102 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 102 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 122 OF 2010

S OLE KANTAI, HA OMONDI & P NYAMWEYA, JJA

OCTOBER 22, 2021

BETWEEN

PINNACLE PROJECTS LIMITED ..... APPELLANT

AND

DICKSON MATU ..... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (P. Kihara Kariuki, J.) dated 30th January, 2009 in HC. Misc. Application No. 742 of 2008)

JUDGMENT

1. By an agreement made in writing dated 10th June, 2005 the respondent, Dickson Matu, appointed the appellant, Pinnacle Projects Limited, as his Project Manager to develop a parcel of land Land Reference 3734/618 (the suit land) on which the respondent planned to erect some town houses. Professional fees payable to the appellant and other consultants was contained in a schedule to the agreement and works commenced as scheduled but in the course of the same disputes arose between the appellant and the respondent. Those disputes were referred to arbitration in terms of Clause 15 of the agreement. A hearing took place before Eng. Isaac Gathungu Wanjohi and in his Final Award published at Nairobi on 5th September, 2008 the arbitrator made certain awards mostly in favour of the appellant as contained in that Award.

2. The Award was filed in court.

3. By Chamber Summons taken by the respondent said to be under Section 35(2) (A) (IV) & B (11) (they are not numbered properly) of the *Arbitration Act* 1995 (Act No. 4 of 1995) and rules 4(1) of the *Arbitration Rules*, 1997 and all other enabling provisions of law it was prayed in the main that the High Court be pleased to set aside the arbitral Award dated 5th September, 2008 to the extent of the award made in favour of the appellant amounting to Ksh.4,851,097.35 together with interest and costs. In grounds in support of the Summons and in an affidavit of the respondent it was said that the award

was in conflict with the public policy of Kenya; that the appellant had by agreement been appointed by the respondent as project manager to develop the suit land; that the agreement/appointment had been terminated, an arbitrator appointed leading to the award. At grounds 5-10 (inclusive) of the summons the respondent stated:

> "5. Despite compelling evidence before the Arbitral Tribunal, the Arbitrator proceeded to make an award of fees to the respondent based on a letter dated 23rd February 2007 addressed to Mugumo Villas Ltd and not the fees as setout in the agreement entered into between the parties dated 10th June 2005.
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> 6. In so doing the Arbitrator clearly went beyond the scope of the provisions and terms of the agreement dated 10th June 2005 which provided for his appointment and empowered him to arbitrate the dispute arising from the said agreement.
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> 7. The agreement of 10th June, 2005 subject matter of the arbitration was not varied and altered as provided for in paragraph 12 of the said agreement and the Arbitrator was therefore bound to award fees based on it and not the letter dated 23/2/07.
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> 8.The applicant will now be compelled to pay fees including marketing fees of Kshs.2,500,000/- based on the letter dated 23/2/07 instead of the Agreement which he entered into with the Respondent.
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> 9. It would be manifestly, unjust, oppressive and illegal for the applicant to be compelled to pay fees based on the letter of 23rd February 2007 and yet there is an agreement dated 10/6/05 between the parties.
>
> 10. It would be just and mete if the orders sought were granted."

4. It was deponed that fees payable to the appellant was as per Clause 1.4 of the said agreement; that as part of dispute resolution a lawyer, **Peter Maina Mukoma** was appointed and as part of his mediation a meeting had been held (chaired by him) by the appellant and the respondent where various courses of action had been agreed and reduced into writing through a letter dated 23rd February, 2007 but that even after this agreement the relationship between the appellant and the respondent deteriorated to the extent that it had to be terminated. The respondent challenged the arbitrator's finding that the said letter constituted a binding agreement between the appellant and the respondent on quantum of fees payable and in holding that wherever that letter was in conflict with any earlier agreement the letter would supersede such earlier agreement.

5. The respondent took issue with the arbitrator not finding that the letter was in respect of Mugumo Villas Limited, a non party to the arbitration, and referred to professionals who did not execute agreements with the said company. Referring to Clause 12 of the agreement (the one dated 10th June, 2005) the respondent stated that that agreement constituted the whole agreement between the parties to it and any notification, amendment, alteration or waiver of any of its provisions could only be effective if made in writing, refer to the agreement and be executed by the parties. Citing this mandate it was the respondent's case that the arbitrator was bound to go by this agreement and could not refer to any other agreement. For all that the respondent contended that the arbitrator had reached findings that enriched the appellant and that it was against the public policy of Kenya for him (the respondent) to be compelled to pay the said award.

6. David Kabubii Kuria, the appellant's Managing Director, in a replying affidavit repeated the history of the matter which we have already set out stating that his company had been appointed by the respondent as "Project Manager and Finance Procurement Consultants". He deponed further that by the time of termination of the contract construction cost stood at approximately Ksh.90,000,000;

professional fees stood at Ksh.5,519,750; that lawyer Mukoma, who drew the impugned letter (dated 23rd February, 2007) and testified in the arbitration proceedings confirmed that all matters he had set out in the letter formed the way forward for the project. Stating that the Summons did not satisfy any of the grounds for setting aside an arbitral award under Section 35 of the *Arbitration Act* he asked that the same be dismissed.

7. The application fell for determination by Kihara Kariuki, J. (as he then was). Of the impugned letter this is how the Judge expressed himself in the ruling delivered on 30th January, 2009:

> "9. There is no dispute that the standard agreements and/or the deeds of variation of previous agreements stipulated or contemplated under the head "Agreements" in the letter dated the 23rd February 2007 were never executed. From the evidence both of the Applicant and the Advocate who drew the letter and indeed the letter itself, it is clear that the parties did not thereby vary the Agreement dated 10th June 2005 – rather, as Mr. Mukoma states in his said affidavit, "I prepared the letter dated 23rd February 2007 highlighting the matters that had been discussed and the agreed way forward for the project"."

8. The Judge found that there was no evidence to show that the agreement of 10th June, 2005 had been varied in terms of its Clause 12; the letter of 23rd February, 2007 was beyond the scope of the reference before the arbitrator. Having reached those conclusions the Judge ordered that the arbitral award be set aside to the extent only of the award in favour of the appellant amounting to Ksh.4,851,097.35 together with interest and costs:

> "...but not otherwise howsoever and in all other respects such arbitral Award be and is hereby confirmed. The Applicant will have his costs of the application. It is so ordered ...."

9. It is those findings that have provoked this appeal drawn for the appellant by its lawyers **M/S Mulondo, Oundu, Muriuki & Company Advocates** where 8 grounds of appeal are taken. These can be summarized: that the Judge erred in law and fact by holding that the letter dated 23rd February, 2007 was beyond the scope of the reference before the arbitrator; that the Judge misapprehended by holding that the award was based on that letter; at ground 3 of Memorandum of Appeal:

> "3. The learned Judge erred in law and fact in failing to find that it was not open to the Respondent to challenge the arbitral award on the ground that the Arbitrator exceeded the scope of his authority as the Respondent did not raise such plea during the arbitral proceedings as required by Section 17(3), (4) and (5) of the *Arbitration Act* No. 4 of 1995."

In other grounds the Judge is faulted for failing to find that it was not open to the respondent to challenge that arbitral award when the arbitration agreement provided that an arbitral award would be final and binding on the parties; that the Judge erred in not finding that the application did not meet the requirement of the *Arbitration Act*. The Judge is further faulted for finding that arbitral award was for Ksh.4,851,097.35 and for setting aside the same; in the penultimate ground the Judge is said not to have considered evidence or exercise discretion properly. In the final ground it is said that the Judge should have found that the application was devoid of merit and it is proposed that we set aside the said ruling and award costs to the respondent.

10. It is on record that the appellant applied at the High Court and that by an order granted by **L. Njagi, J.** on 15th April, 2010 the appellant was granted leave to appeal to this Court against the ruling of Kihara Kariuki, J.

11. It is also on record that the High Court issued a Certificate of Delay dated 2nd June, 2010 showing that it had taken 478 days to prepare the record for purposes of this appeal.

12. The appeal came up for hearing before us on 12th July, 2021 on a virtual platform when learned counsel **Mr. Akello** appeared for the appellant while learned counsel **Mr. Burugu** appeared for the respondent. Both parties had filed written submissions and lists of authorities. Mr. Akello submitted that the appeal was properly before us as **Section 35** of the ***Arbitration Act*** did not take away this Court's jurisdiction to hear appeals from decisions of the High Court made under that Section. Counsel faulted the High Court for partly setting aside the arbitral award and submitted that the matter should have been returned to the arbitrator for a fresh hearing. According to counsel that partial setting aside of the award had caused economic hardship to the appellant. Counsel submitted that the Judge was wrong in disregarding the letter which varied the original agreement, arguing that the arbitrator was right to uphold that letter as part of the original agreement. Finally, that we should set aside the ruling and refer the matter to the arbitrator or to another arbitrator for a further hearing.

13. In opposing the appeal Mr. Burugu supported the finding by the Judge that the impugned letter which set out what the parties had agreed did not form part of the original agreement. According to counsel a fresh agreement should have been entered if the parties to the original agreement wished to vary the terms of the original agreement as there was a mechanism in the original agreement for variation. Counsel supported the findings of the Judge in the impugned ruling as, in his view, the High Court was entitled by **Section 35** of the said **Act** to set aside an arbitral award.

14. In a rejoinder Mr. Akello submitted that appeals to this Court from arbitral proceedings can be on grounds that the award has led to injustice; to clarify the law or where there has been an unfairness in an arbitral award.

15. We have considered the record, submissions made and the law and we come to the following determination of this appeal.

16. The Judge was asked in the Summons to set aside the arbitral award to the extent of the award made in favour of the appellant amounting to Ksh.4,851,097.35 together with interest and costs on various grounds including that the award was against the parties interest and that the arbitrator had incorporated into the original agreement a letter that had been drawn later and which had been signed by the parties. Also that the award was against the public policy of Kenya.

17. As we have seen the Judge held that the letter of 23rd February, 2007 could not form part of the agreement made on 10th June, 2005.

18. The contract made on 10th June, 2005 was made between the appellant and the respondent and those were the parties in the arbitration proceedings. The letter dated 23rd February, 2007 authored by **Nyiha, Mukoma Company Advocates** was addressed to David Kuria (Pinnacle Projects) and the respondent and referred to matters of Mugumo Villas Limited. The whole matter discussed in the letter was on the said Mugumo Villas Limited and its consultants/professionals. The agreement made on 10th June, 2005 provided at Clause 12 that:

19.

> "12.1 This agreement, its Schedules and the documents expressly referred to herein constitute the entire agreement between the Parties and, save as otherwise expressly provided, no modification, amendment, alteration or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement and duly signed by the Parties (or their respective duly authorized representatives)."

In ordinary litigation that would be the end of the matter as the agreement itself identified that it constituted the entire agreement and it could only be varied specifically with reference to itself (the agreement) and duly executed by the parties to it.

20. But this was no ordinary litigation.

21. The parties in dispute freely chose that their differences be resolved through arbitration. They entered into the agreement dated 10th June, 2005 which identified that if a dispute arose between them it should be referred to a single arbitrator appointed by the parties or, if not agreed, an arbitrator appointed by the Chairperson of Chartered Institute of Arbitrators, Kenya branch. When disputes arose parties chose Eng. Isaac Gathungu Wanjohi as single arbitrator and he made the award we have spoken to.

22. The issue before the Judge in the impugned ruling was whether the arbitrator should have referred to or made the letter dated 23rd February, 2007 (by Nyiha Mukoma Company Advocates) a main plank of the award that he made. Proceedings before the arbitrator are not part of the record and the reason is that an arbitrator is not bound to keep or maintain proceedings as is the practice in the courts unless parties to the proceedings make a specific request in that regard. We must therefore go to the award itself to see how that letter entered the proceedings and how the arbitrator dealt with it.

23. This is dealt with by the arbitrator under the heading "3.5A Does the letter of 23rd February, 2008 ref. NM/CONC/M/162/06M from Nyiha Mukoma Company Advocates duly countersigned by the parties constitute an Agreement between them?".

24. The arbitrator discusses the issue to the effect that relations between the parties before him had become strained which had led to the meeting of 23rd February, 2008 chaired by lawyer Mukoma. The lawyer recorded minutes which were countersigned by Kuria for the appellant and the respondent. Various issues were captured in that letter. It was found necessary in the arbitration proceedings to call Mr. Mukoma as a witness and he testified to the content and effect of the meeting of 23rd February, 2008 as captured in the letter. This is how the arbitrator addressed the issue in the award:

> "During the trial, the Parties agreed to adjourn the hearing pending attendance at the tribunal by Mr. Peter Maina Mukoma as a witness to adduce evidence on the status of this document. Eventually, Mr. Mukoma came and testified that he was the author of the document and that it was signed by both parties as an agreement between them. He further testified that although the contracts between the Respondent and the various professionals were never prepared as anticipated, nonetheless the document and the schedule attached to it, was used as a basis to pay fees and costs to the various professionals and service providers.
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> From the letter, it is clear that the meeting dealt quite comprehensively with four matters under the headings of Agreements; Money Matters; the Project and Stamp Duty on Transfer. The fees and costs payable to various professionals amounting to Shs.18,000,000/= were in a list (call it A, when cost of construction was put at Shs.89,800,000/=) annexed to the letter (see document 6 in Claimant's bundle of documents). In my view this list would be contrasted with a similar list (call it B, when cost of construction was put at Shs.89,800,800/=) in pages 11 and 12 of document 2 and 4 (see schedule II) in the Claimant's bundle of documents, with an amount of Shs.20,776,800/= (ie item 6 in page 11 +items in page 12b+c+d+f). Another list (call it C, when the cost of construction was put at Shs.100,000,000/=) dated 20.07.05 was tabled at a site meeting on 8.08.2005. It showed all fees as Shs.15,930,000/= inclusive of VAT including Shs.2,000,000/= for Project Managers, a marketing commission of Shs.2,800,000/=, a fee of Shs.580,000/= for Finance Managers and another Bank facility fee of Shs.500,000 being 1% of Shs.50,000,000/=.

These latter two make a total of Shs.1,080,000/= and the total for project management and finance management is Shs.3,080,000/=. These fees would compare with fees stated to be Shs.3,650,000/= inclusive of VAT in list A. In List, B, there is a provision of Shs.1,500,000/= inclusive VAT for charges for procurement of project bridging finance by financial consultant and a Project Manager's fee of Shs.1,796,000/= plus VAT. These two, sum up to Shs.3,650,000/=. Thus lists A and B do not differ materially on the fees or cost for both the Project Management and Finance Arrangement.

Section 35 of the *Arbitration Act* on "Application for setting aside arbitral award" provides that recourse to the High Court against an arbitral award may be made only on an application for setting aside under that Section.

That Section provides:

"35(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.

(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."

The arbitrator found that the said letter constituted an agreement between the parties and that the letter or agreement superseded any other agreement made by the parties.

25. As we have seen the said **Section 35** of the **Act** is narrow and specific on grounds under which an applicant may approach the High Court to set aside an arbitral award.

26. On whether we have jurisdiction to entertain an appeal from a finding of the High Court on an application under the said Section 35the answer was provided by the Supreme Court of Kenya in Petition No. 12 Of 2016 *Nyutu Agrovet Limited v Airtel Networks Kenya Limited, Chartered Institute of Arbitrators –Kenya Branch [2019] eKLR*. It was found that we do have jurisdiction but must do so within a very limited structure. This is what the Court stated at paragraphs 71 and 72 of the Judgment:

> "71. We have in that context found that the *Arbitration Act* and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration and law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.
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> 72. Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle."

As we have seen problems arose during implementation of the project between the appellant and the respondent. The parties approached lawyer Mukoma where issues were discussed, minutes taken and the way forward in the implementation of the project was agreed. The appellant and the respondent signed that letter. The arbitrator accepted the letter as forming part of the original agreement but that finding was set aside by the Judge.

27. In the strict stricture we have seen set by Section 35 of the Act and as observed by the Supreme Court in Nyutu Agrovet(supra) there was no party to the arbitration agreement who was under some incapacity. The arbitration agreement was valid under Kenyan law; there is no allegation that any party was not given notice of appointment of the arbitrator or was unable to present his case. There is no allegation

that the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contained matters beyond the scope of the reference to arbitration. The composition of the arbitral tribunal or the arbitral procedure was not challenged; the subject matter of the dispute was capable of settlement by arbitration. The award was not against the public policy of Kenya.

28. The principle in arbitration is that parties agree on their own to freely take disputes between them from the court for determination by an independent tribunal which is of their own choice. They put together provisions in an agreement which would provide for how a dispute, if one arose, is to be determined. In many instances (as in the case before the arbitrator) they provide that the arbitrator's award will be final.

29. In the case before the Judge the parties had entered into the agreement dated 10th June, 2005 and in the course of implementation of the project they freely went to lawyer Mukoma and asked that a way forward be found as problems had arisen between them. This was as per Clause 15 of the agreement which provided that the parties attempt mediation failing which an arbitrator be appointed. The matters discussed at the meeting of 23rd February, 2008 related to the matters of implementation of the project that was being implemented by the appellant for the respondent. The arbitrator was presented with that letter which was signed by both parties. He heard the evidence from Mr. Mukoma, the author of the letter, and held that the letter constituted an agreement between the parties. On our own analysis the arbitrator was entitled to make that finding. The Judge erred in holding that the letter was beyond the scope of the reference to arbitration. There was no basis in law under Section 35 of the *Arbitration Act* to set aside any part of the arbitral award. The arbitral award was not against public policy of Kenya at all. This Court stated on the issue of public policy which is a consideration in a matter of this nature in the case of Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR:

> "Public policy, which is a factor we may consider in the exercise of our discretion, is of course an indeterminate principle or doctrine. In years of yore, it was branded "an unruly horse, and when you get astride it, you never know where it will carry you"- **Richardson v Mellish** (1824) 2 Bing 229. Nevertheless, it clearly has reference to ideas which for the time being prevail in a country as to the conditions necessary to ensure its welfare. It is variable and must fluctuate with the circumstances of the time. Ringera J (as he then was) examined several authorities in Christ For All Nations vs. Apollo Insurance Co. Ltd [2002] 2 EA 366 and formed the view that: -
>
> > "although public policy is a most broad concept incapable of precise definition.... . an award could be set aside under section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it was shown that either it was:
> >
> > (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or
> >
> > (b) inimical to the national interest of Kenya or
> >
> > (c) contrary to justice and morality.""

The arbitral award was not inconsistent with the Constitution of Kenya or any other law; it was not inimical to Kenyan national interest; it was not contrary to justice and morality. The award was consistent with the Constitution which promotes resolution of disputes through arbitration or other forms of alternative dispute resolution.

30. We set aside the ruling delivered on 30th January, 2009 and substitute therefore an order dismissing the Chamber Summons dated 9th October, 2008. The appeal succeeds and is allowed with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

S. ole KANTAI

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

Signed

DEPUTY REGISTRAR