Talewa Road Contractors Limited v Kenya National Highways Authority (Civil Appeal 246 of 2019) [2021] KECA 276 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 276 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 246 OF 2019

RN NAMBUYE, PO KIAGE & S OLE KANTAI, JJA

NOVEMBER 5, 2021

BETWEEN

TALEWA ROAD CONTRACTORS LIMITED ..... APPELLANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi, (J. A. Makau, J.) dated 14th day of February, 2019 in H.C.C.A No. E001 of 2018)

JUDGMENT

1. By this appeal, the appellant, Talewa Road Contractors Limited challenges the ruling of the High Court (J. A. Makau, J.) by which its application seeking leave to file and serve its memorandum of appeal out of time was struck out. By the same ruling, the respondent's, application seeking the dismissal of the appellant's appeal was allowed.

2. The appellant's application was premised on grounds, inter alia, that; a dispute arose between the appellant and the respondent from a contract for maintenance of Mombasa-Miritini Road and it was referred to arbitration as provided for in the contract; the parties were heard and an arbitral award dated 22nd March 2018 published; dissatisfied with the award, the appellant reserved its right of appeal before the arbitral tribunal on 3rd July 2015 and consequently filed a notice of appeal before the High Court; the Arbitrator however delayed issuing the appellant with part of the typed proceedings hence the delay in filing of the memorandum of appeal.

3. Conversely, the respondent sought the striking out and dismissal of the appeal on grounds that no appeal lay against the Arbitrator's award since the arbitration agreement between the parties made no provision for reservation by a party or parties of the right of appeal.

4. In its memorandum of appeal, the appellant is aggrieved that the learned Judge erred in law in seven respects which can be summarized thus;Striking out the memorandum of appeal dated 21st May

2018.Failing to hold that the appellant and the respondent had agreed to appeal to the High Court on matters of law arising from the Arbitral award pursuant to section 39(1)(a) of the *Arbitration Act*.Holding that the agreement envisaged under section 39(1) of the *Arbitration Act* was required to be in writing.Failing to appreciate that the provisions of the *Civil Procedure Act* and the Rules thereto apply to appeals filed in the High Court from an Arbitral Tribunal under section 39(4) of the *Arbitration Act*.Failing to find that the appellant had demonstrated a good cause to admit the appeal out of time under section 79G of the *Civil Procedure Act*.Expunging the supporting affidavit filed by the appellant on grounds that it was not compliant with section 5 of the *Oaths and Statutory Declaration Act*.

5. The appellant ultimately seeks that the High Court orders be set aside and it be granted costs.

6. The respondent attacked the appeal through a motion dated 26th June 2019, seeking to strike out the record of appeal dated 6th June 2019, under Rule 84 of this Court's Rules. The motion is predicated on 22 grounds largely giving the background of the dispute. In a supporting affidavit sworn on 26th June 2019 by Nathaniel Munga, the senior legal officer of the respondent, it is averred that following the award of the tender for the periodic maintenance of Mombasa-Miritini road to the appellant, a contract was executed between the appellant and the respondent. However, the respondent swears, the appellant was slow in performing the works leading to termination of the contract by the respondent, precipitating a dispute.

7. The respondent asserts that pursuant to clause 67.3 of the contract, any dispute arising from the performance of works under the contract was to be finally resolved by arbitration. Accordingly, Engineer Paul Thang'a was appointed as an arbitrator in the matter and upon hearing all the parties rendered his final decision which was published on 22nd March 2018. The respondent avers that despite the appellant being aware that the arbitral award was not subject to appeal, it still went ahead and filed an appeal at the High Court and subsequently to this Court.

8. According to the respondent, the record of appeal filed by the appellant is contrary to section 39(3) of the *Arbitration Act*, Chapter 49 of the Laws of Kenya ("the *Arbitration Act*"). Moreover, submits the respondent, subsequent to the contract no agreement was entered into by parties which meets the requirements of section 4 of the *Arbitration Act*.

9. In reply to the respondent's application, the appellant filed a replying affidavit dated 14th February 2020, sworn by John Wainaina, its Managing Director. While narrating the background of the matter, he swears that on 3rd July 2015, during a post site meeting before the arbitrator, parties reserved by consent their right to appeal on points of law under Section 39 of the *Arbitration Act*. Pursuant to that right, the appellant instructed its advocates to appeal against the arbitral award and seek an enhancement of the amount awarded to them. The appellant further claims that in instituting the instant appeal it was not required to seek leave under section 39(3)(b) of the *Arbitration Act* because parties had agreed to appeal to the High Court on matters of law before the Arbitral tribunal, and therefore the appeal should be governed by section 39(3)(a) of the *Arbitration Act*.

10. At the hearing of the appeal, learned counsel Mr. Musyoka and Mr. Obok appeared for the appellant and the respondent respectively. Counsel elected to rely on their submissions entirely. In written submissions drawn by Prof. Albert Mumma & Company Advocates, for the respondent, it is posited that the alleged reservation of the right of appeal on points of law was contained in a letter dated 3rd July 2015 authored by the Arbitrator, contrary to section 4(2) and 4(3) of the *Arbitration Act* which require that an arbitration agreement be in writing signed by both parties, or in the form of an exchange of letters between the parties or contained in an exchange of statements of claim and defence. In this

respect, the respondent agrees with the learned Judge's finding that no agreement existed between the parties by which an arbitral award arising from the arbitration process would be appealable.

11. Further, regarding the appellant's prayer for extension of time to file the memorandum of appeal, the respondent contends that the appellant contravened section 79 of the *Civil Procedure Act* which requires that appeals to the High Court be made within 30 days from the date of the decree or order appealed against. In any case, the respondent argues, the appellant could only make the application to appeal out of time where the right of appeal existed, and in this case, that right does not exist. In support of this contention the respondent relies on the Supreme Court decision in *NYUTU AGROVET LIMITED V AIRTEL NETWORKS KENYA LIMITED; CHARTERED INSTITUTE OF ARBITRATORS-KENYA BRANCH (INTERESTED PARTY)* [2019] eKLR.

12. In contesting the respondent's application, the appellant through the law firm of Muriu Mungai & Company Advocates filed written submissions dated 24th February 2020 narrating in detail the history of the dispute. The appellant asserts that pursuant to section 39(1) of the *Arbitration Act*, the agreement to appeal does not have to be contained in the arbitration agreement only as held by the learned Judge. According to the appellant, the agreement to appeal on a point of law was in form of a consent order before the arbitrator and therefore valid and binding. The appellant faults the learned Judge for holding that the *Civil Procedure Act* and rules were not applicable to the instant matter arguing that in accordance with section 79 of the *Civil Procedure Act*, an appeal could be admitted out of time for good and sufficient reason, a threshold the appellant believes it satisfied for the reason that, the arbitrator failed to release some proceedings hence delaying their appeal.

13. The appellant further challenges the learned Judge's disregard of its supporting affidavit on grounds that is was not dated. According to the appellant, the court should have sustained the application under Article 159(2)(d) of the *Constitution* which requires that justice be administered without undue regard to procedural technicalities.

14. We have carefully considered the appeal and the application before us, the rival affidavits and submissions, the Rules of this Court and the law. Before we delve into the appeal, we wish to dispose of the notice of motion seeking to strike it out as its fate will determine whether we shall consider the appeal on merit. The respondent has moved us under Rule 84 of this Court's Rules asserting that, no right of appeal lies to the High Court and/or this Court at the instance of the appellant against the arbitral award. Rule 84 states;

> " A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.
>
> Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

15. The application having been lodged on 28th June 2019 against the record of appeal filed on 6th June 2019, we are satisfied that the application before us is within the timelines in Rule 84. The respondent contends that pursuant to the arbitration agreement, the decision of the arbitrator was final and was not appealable. On the flipside, the appellant disputes this proposition arguing that during a post site meeting held on the 3rd of July 2015, the parties agreed to appeal on matters of law under section 39 of the *Arbitration Act*, as captured by a letter from the Arbitrator dated 3rd July 2015.

16. The arbitration agreement is found at clause 67.3 of the "Contract agreement for the Periodic Maintenance of Mombasa-Miritini (A109) Road between KENYA NATIONAL HIGHWAYS AUTHORITY and M/S TALEWA ROAD CONSTRUCTION LIMITED" dated January 2012. The clause is framed as follows;

> " Any dispute in respect of which:
>
> (a) The decision, if any, of the Engineer has not become final and binding pursuant to sub-clause 67.1, and
>
> (b) Amicable settlement has not been reached within the period stated in sub-clause 67.2, Shall be finally settled, unless otherwise specified in the Contract under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute". (emphasis ours)

17. The letter of 3rd July 2015 from the arbitrator following which the appellant submits that parties reserved their right of appeal on matters of law states as follows;

> " The Claimant has submitted authorities on the right of appeal and the parties have agreed that, they both have reserved the right of appeal on points of law in accordance with s. 39 of the *Arbitration Act*."

18. In considering the parties' contentions on whether the arbitral award was appealable, the learned Judge made reference to the requirements of a valid arbitration agreement as stipulated by section 4 of the *Arbitration Act* and came to the conclusion that; "The appellant/applicant has not averred there was an agreement in writing duly signed by the parties. None has been produced duly executed by both parties or parties counsel by which a resulting arbitral award may be appealable".

19. We agree with the reasoning of the learned judge. Indeed, a reading of section 4 of the *Arbitration Act* distinctly describes forms of arbitration agreements to include; a document signed by both parties, an exchange of letters or other form of written communication providing a record of the agreement, an exchange of statements of claim and defence in which the existence of an agreement is evinced, and an arbitration clause in a contract. In consonance with the foregoing definition of an arbitration agreement, we are persuaded that the only available dispute resolution mechanism for the parties is as stipulated in clause 67.3 of their contract.

20. This Court had occasion to determine a similar appeal in the case of *DOCK WORKERS UNION LIMITED V MESSINA KENYA LIMITED* [2019] eKLR, in which the High Court's finding that the court's jurisdiction was ousted by an arbitration agreement contained in the grievants' contracts of employment was challenged. Affirming that court's finding, the Court stated thus;

> " On the contrary and as rightly held by the learned trial Judge, the parties herein had categorically agreed to refer any ensuing dispute as regards the contract of employment herein to arbitration. Parties have the freedom to choose the regime of the law they want to be governed under and embody it in their contracts. If parties opt to have an arbitration agreement in their contract of employment which spells out how disputes between them would be resolved, that is perfectly within their rights. The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other

than arbitration. They cannot turn around and denounce the arbitration agreement. It is also worth of note that the Constitution of Kenya itself has given prominence to arbitration by acknowledging it as one of the alternative modes of dispute resolution that courts should encourage. The learned Judge cannot therefore be faulted for finding that the arbitration agreement in the parties' contract was valid". (emphasis ours)

We respectfully concur. Parties must abide by the choice of dispute resolution mechanism they freely agree upon, in this case the arbitration process and its outcome. We therefore find and hold that the appellant has no right of appeal in this matter.

21. Ultimately, the notice of motion dated 26th June 2019 is allowed, and the record of appeal dated 4th June, 2019, is hereby struck out. The respondent shall have the costs of both the motion and the stricken appeal.

DATED AND DELIVERED AT NAIROBI THIS 5 TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR