Squishy Drinks Limited & another v Kevian Kenya Limited & another; Njogu (Arbitrator) (Miscellaneous Application E004 & E220 of 2023 (Consolidated)) [2025] KEHC 1079 (KLR) (Civ) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1079 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS APPLICATION E004 & E220 OF 2023 (CONSOLIDATED)

PJO OTIENO, J

FEBRUARY 28, 2025

BETWEEN

SQUISHY DRINKS LIMITED ..... APPLICANT

AND

KEVIAN KENYA LIMITED ..... RESPONDENT

AND

MR. ANTHONY NJOGU ..... ARBITRATOR

AS CONSOLIDATED WITH

MISCELLANEOUS APPLICATION E220 OF 2023

BETWEEN

KEVIAN KENYA LIMITED ..... APPLICANT

AND

SQUISHY DRINKS LIMITED ..... RESPONDENT

RULING

1. The parties herein entered into an agreement known as the Asset Purchase Agreement dated 30th August 2018 (the "APA"). The Asset Purchase Agreement (APA) was a contract by which the Applicant (SDL) agreed to sell to Respondent (KKL) certain assets subject thereof including a Trademark Number 87240 known as "Squishy".

2. It was also a term of the APA that certain arrangements were to be made towards the business dealings between the parties relating to marketing and distribution of the products being manufactured following the conclusion of the APA. The parties had agreed a consideration of Kshs.23, 000,000.00 and further that the distribution of the products being manufactured under the Squishy brand were, upon completion of the APA, be undertaken by a new entity to be set up for the purpose and known as Squishy Distributors Limited.

3. A dispute arose as to the performance of the said agreement. The Applicant issued a notice of termination dated 2nd May 2019 on the basis that the Respondent had not executed the Exclusive Distribution Agreement that had been intended between it and the Applicant as well as the execution of the Shareholder Agreement between the parties. The Applicant also averred that the Respondent had not made payment of the outstanding balance of the agreed purchase price set out in the APA.

4. The suit was Squishy Drinks Limited versus Kevian Kenva Limited, Milimani High Court Commercial Suit Number 114 of 2019, in which an order was issued referring the dispute to arbitration by dint of Article 9 of the APA. In terms of the contract, the Chairperson of the Chartered Institute of Arbitrators, Kenyan appointed Mr. Anthony Njogu as the sole arbitrator in the matter.

5. The Arbitrator issued and published his final arbitral award on 1st November 2022 in favour of the Applicant. The effect of the award was that; the purported termination notice dated 2nd May 2019 issued by the Applicant was null and void; that the Respondent was entitled to specific performance of the Asset Purchase Agreement dated 30th August 2018 to completion; the applicant was ordered to, within 45 days from the date of the award, execute any necessary documents and forms and to take any necessary action to effect the transfer and assignment of the trademark No 87240 as contemplated in the agreement and lastly that the respondent to pat the balance of the purchase price in accordance with the agreement upon delivery of the registration forms of the assignment of the trademark No 87240.

6. The award dissatisfied the Applicant as it pleased the respondent hence while the applicant seeks its setting aside, the respondent on the other hand has sought its recognition and enforcement with both Applications filed before this court.

7. The court appreciates the two applications to concern the same award and that a decision in one affects the other in a diametrically substantial manner. For that reason, and while honouring the ages of the two applications and the fact that recognition and enforcement can only be considered for determination once there is no application for setting pending, the application for setting aside shall be determined fast and only, if it fails, will there be need and purpose to consider that for enforcement. In that context, the party seeking setting aside shall henceforth be referred to as the applicant while the party seeking enforcement and resisting setting aside shall be referred to as the respondent.

The applications

8. The first application to be filed is a Chamber Summons dated 10th January 2023 and brought pursuant to Section 35(2)(b)(ii) of the *Arbitration Act* and Rule 7 of the Arbitration Rules, 1997. It is supported by an affidavit sworn by one Robert Kaniu Wainaina. The grounds of setting aside as disclosed on the face of the summons and in the Affidavit of support are that the award affronts public policy. It is averred that it overlooks the requirement of authorization under the *Competition Act* and secondly, that the same was vitiated by bias exhibited by the Arbitrator against the applicant.

9. The applicant annexed and exhibited a bundle of document which included the Asset Purchase Agreement, the notice of termination and the award itself.

10. In response and in resistance to the Chamber Summons dated 10th January 2023, the Respondent through its Director, Richard Kimani Rugendo swore a Replying Affidavit and Further Affidavits dated 17th March 2023 and 19th March 2024 respectively. In the said Affidavits, the Respondent avers that the entire Misc. Application No. E004 of 2023 for setting aside the arbitral award is wholly misconceived and is a re-litigation of the matters adjudicated over by the Arbitrator which issues have been adjudicated upon in detail and with finality.

11. The Respondent posited that as at the time the Applicant sought to terminate the agreement by the notice dated 2nd May 2019, alleging failure by the respondent to execute and complete paperwork required to complete the transaction, it was in fact the applicant who had breached its obligations in the contract. The Applicant failed to deliver to the respondent transfers of the aforesaid Trademark Number 87240 in 'registrable form' in line with Clause 7.2 of the agreement which required the same be delivered prior to the payment of the amount contemplated under clause 3.2. It was stressed that as at the time of the purported termination, the applicant had only shared with respondent's advocate, a photocopy of the Form T-14 being an assignment of Trademark Number 87240.

12. The Respondent added that it relied on the assurances and arrangements between the parties during the performance of the agreement. Further, that it commenced the use of the Trademark Number 87240 "Squishy" and was manufacturing, packaging and distributing juices under the mark throughout Kenya with the full knowledge and complicity of applicant. The Respondent further avers that the Applicant in Civil Suit Number 114 of 2019 Squishy Drinks Limited Vs Kevian Kenya Limited misled the court in granting injunctive reliefs against it by concealing the fact that in line with APA's provisions, it had acquired the said rights of using the Squishy Trademark with the consent and assurance of the applicant and was not "passing off" as was alleged by the applicant.

13. It was pointed out that the applicant has tried every trick in the books to frustrate the resolution of the dispute and gave the following instances as example;

    a. Following the appointment of the Sole Arbitrator, the applicant approached the court seeking the disqualification of the Arbitrator. That Application was dismissed by Hon. Justice Majanja, in a ruling delivered on 27th July 2020.

    b. Soon thereafter amidst the arbitral proceedings, the Applicant once more approached the Court vide an application dated 28th October 2020 seeking orders for Summons to be issued to the Director of Competition Authority of Kenya and the Registrar of Trade Marks to appear as "expert witnesses" before the arbitral tribunal. The arbitrator dismissed that request by the ruling of 20th January 2021.

14. The Respondent asserts that at the arbitral proceedings, the question of whether the transaction between SDL and KKL was a merger was at the heart of the dispute and fell for determination by the Arbitrator as had been covenanted between the parties. It pointed out that its Statement of Claim dated 3rd April 2020 sought inter alia, a declaration that the purported termination of the agreement was invalid and unlawful as well as Orders for the transfer of the Trademark number 87240 in the name applicant in favour of the Respondent.

15. In the proceedings, the applicant filed a Counterclaim dated 21st September 2020 alleging that the parties had signed an agreement toward merging business interest and further, that the transactions envisioned in the merger were yet to be completed owing principally to delays occasioned by the Respondent. In its Defence to Counterclaim, the Respondent denied any existence of a merger asserting that the agreement spoke for itself. It also denied any role by the Competition Authority of Kenya (CAK) in the performance of the agreement to the respondent. That with the agreement

strictly being an Agreement for the purchase, the assets listed therein did not require the involvement of the excuse of the Competition Authority of Kenya. That contention was viewed to have only been contrived by the Applicant long after it had unlawfully terminated the agreement and before moving to Court in HCCC 114 of 2019 Squishy Drinks Limited vs Kevian Kenya Limited because the alleged need and lack of approval was never mentioned in the purported termination notice. It was highlighted that the issue of whether the subject transaction was a merger was given due consideration by the Arbitrator in his award with a factual finding of there being no absolute change in the control of the applicant neither did the respondent have direct or indirect control on the affairs of applicant pursuant to the agreement.

16. On the clarification sought by the applicant from the arbitrator, the Respondent posits that the request was made 39 days after arbitral award, and outside the 30 days window period permitted under Section 34(1) of the *Arbitration Act*.

17. The Respondent insists that Arbitrator determined the dispute within the parameters of the Law and did not make any determination contrary to public policy. Further, that the decision by itself does not require any clarification whatsoever asserting that the Application only attempts to appeal the decision of the Arbitrator hence ought to be dismissed with costs for lack of merit.

18. In conclusion, the Respondent urges this Court to dismiss the request for setting aside and instead allow the Application for the recognition of the arbitral award with the ancillary order that the Deputy Registrar of the Court executes the necessary documents to enable the transfer of the Trademark 87240.

19. The second application was also by way of Chamber Summons dated 20.03.2023 and seeks for the recognition and enforcement of the award as a decree of the court. The application was supported by the Affidavit sworn by Richard Kimani Rugendo on behalf of the Respondent. The application for recognition and enforcement of the award is premised on the facts that there being an award that pends realization and to which the applicant had sought setting aside, it was practical that the application for enforcement be heard simultaneously with that of setting aside. It was also underscored that the law in Kenya favour the finality of arbitral awards as a way of enforcing party autonomy.

20. The respondent, like the applicant, also annexed several documents used at the arbitration including the agreements between the parties and the award itself.

21. The application was resisted by the applicant on the strength of the Replying Affidavit sworn by its director one Robert who asserts that the applicant only became aware of the award on the 5th December, 2022 and the advocate then sent out a request for clarification on the 9th December, but by the date of filling the application for setting aside no acknowledgement had been received from the arbitrator. It stresses the fact that the award nullifies the statutory jurisdiction of the Competition Authority of Kenya to control mergers and acquisition. The award is then termed illegal and per incuriam for disregard of section 43 of the *Competition Act* and the notice from the Authority. It is stressed that to adopt the award would be to set a stage for unsanctioned mergers. The arbitrator is faulted for exhibiting bias by failing to find that the respondent had acquired an indirect control of the applicant and further, by purporting to rewrite the contract between the parties by compelling the applicant to effect a transfer contrary to clause 7(2)c of the agreement which only envisaged the delivery of a deed of assignment in registrable form. The other evidence of bias was the imposition of strict compliance timelines in the award. The applicant as such urged that the application for adoption be dismissed and the award be set aside.

The Submissions

22. By its submission dated 24th February 2023, the applicant grounds its contentions on two grounds which it also isolates as the issues for determination by the court. The issues are: -

    i. Whether the Award is against the public policy of the Republic of Kenya?

    ii. Whether the Arbitrator demonstrated bias against the Applicant in the award?

23. On whether the Arbitral Award goes against the Public Policy of the Republic of Kenya, the Applicant submits that the Award gives legal effect to an unsanctioned merger and rubbishing the legal requirement for consent of the Competition Authority of Kenya. It is the Applicant's case that all mergers, or agreements that would constitute mergers, must be subject to prior CAK approval as provided under Section 42(3) of the *Competition Act*.

24. The Arbitrator's analysis is faulted for failure to consider the Respondent's indirect control under the Asset Purchase Agreement and more so the admission of the Respondent's Director Mr Richard Kimani Rugendo, that the Directors of the Applicant were his employees and the legal effects of indirect control. The Asset Purchase Agreement was viewed an agreement by which the Respondent purchased assets from Squishy Drinks Limited and completely took over the plant and machinery of Squishy Drinks Limited which resulted in a change of control of the business stripping its directors the control of the plant to the Respondent's employees operating in his premises.

25. It is stressed that the Arbitrator erred in nullifying the jurisdiction of the Competition Authority of Kenya under Section 42 of the *Competition Act* in determining and authorizing and controlling merger transactions for the reasons that; that no effort was made by Respondent to seek the required consents as was anchored not only in Article 6.1 (c) and 5.1(a) & (b) of the Asset Purchase Agreement imposing an obligation on the parties to cooperate in the filing of information with any governmental authority.

26. On whether the Arbitrator demonstrated open bias against the Applicant in the award, the Applicant presents to have been given obligations not contemplated in the agreement with strict timelines to it and none to the Respondent. The Applicant points article 6.3 (b) of the agreement that mandated that in the event of satisfaction, or failure of performance prior to the time specified therefore, the party to whose benefit the condition was inserted had the election to terminate the agreement, in which case no party shall be under further obligation to the other to complete the transaction of purchase and sale contemplated by the agreement. On the basis of such covenant the applicant asserts that it validly terminated the Agreement on the account that the Respondent did not fulfil its obligation in obtaining the necessary consents from the Competition Authority of Kenya to validate the transaction. It asserts that due to this substantial breach and non-performance, it exercised its right to terminate the contract hence the respondents continued use of the mark after termination of the Contract amounted to violation of the Respondent's trademark rights. On the same basis, it is submitted that the Arbitrator erred in imposing on the applicant specific performance to transfer his trademark rights to the Respondent yet he was exercising his right to terminate the contract under the Laws of Contract. The Applicant further submits that the Arbitrator demonstrated bias by directing the Applicant's to not only transmit the Deed of Assignment in registrable form, but also creating timelines that were not under the contemplation of the parties, and further directing the Applicant to register the trademark in favour of the Respondent.

27. In conclusion, the Applicant reiterated that if the Honourable court does adopt the award, it will be against public policy of the need to obtain approval from Competition Authority of Kenya under section 42 of the *Competition Act* purposed to enhance the principles of public good by promoting and

protecting effective competition in markets and preventing misleading market conduct throughout Kenya.

28. The applicant cited to court the decision in Five Forty Aviation Ltd vs Erwan Lanoe (2019) eKLR for the established position of the law that it is never the duty or liberty of the court to write the parties' terms of the agreement.

29. For the Respondent, its written submissions were to the effect that the Application to Set Aside an Arbitral Award pursuant to Section 35 of the *Arbitration Act* invokes a very narrow jurisdiction and affirms that, save for the right to seek the setting aside of the award, the decision of the Arbitral Tribunal must remain final. The decision in Kenya Tea Development Agency Ltd and 7 Others V Savings Tea Brokers Limited was cited where the court stated that:

> " The Jurisdiction of the Court under Section 35 of the *Arbitration Act* is a strict one. A party invoking that jurisdiction must bring himself under that specific jurisdiction"

30. The Respondent submits that the limited jurisdiction of the court under Sections 35 of the *Arbitration Act* is a concession that Section 35 is indeed the only recourse available to a party, and that with the exception of the recourse to the Court vide Section 35, the subject arbitral award is final. It supports that position by citing the case of Airtel Networks Kenya Limited vs. Nyutu Agrovet Limited (2011) eKLR where the court stated that:

> " ...I have already stated that the parties have settled the issues for determination before the arbitrator. I am then of the considered opinion that it was in the contemplation of the parties when they executed the commercial agreement aforementioned that the finding of the arbitrator would be final and binding.
>
> That is the reason why the Applicant has come to court to set aside the arbitral award under section 35 and not by way of appeal."

31. The Respondent further submit that a party invoking Section 35 of the *Arbitration act* essentially appreciates it is only recourse available. It adds that a careful reading of the setting aside Application demonstrates that the matters relied upon are essentially the same as those relied in the Response to the Statement of claim. The Respondent submits that Applicant in essence is regurgitating its defense in the arbitration proceedings and effectively advancing an appeal which is not within the contemplation of the parties in their Arbitration Agreement. It adds that the grounds advanced do not fit into the realm of a decision against public policy as provided under Section 35 of the Act.

32. The Respondent then cites the decisions in Castle Investments Company Limited vs Board of Governors – Our Lady of Mercy Girls Secondary School [2019] eKLR and Christ for All Nations Vs Apollo Insurance Co. Ltd (2002) 2 EA 366 to urge that the matters relied on by the applicants in the present application do not fit into the narrow confines of Section 35 of the Act and therefore do not warrant the setting aside of the arbitral award on the ground of being contrary to public policy.

33. On the sought clarification of the award, the Respondent submits that the subject award was issued to the parties on 2nd November 2022 vide the email of the Arbitrator and as such, the Applicant therefore cannot in good course attempt to seek a clarification over 30 days later. It is the Respondent's submission that Section 34(2) grants the Tribunal the liberty at its sole discretion "if the tribunal considers a request made under subsection (1) to be justified" to give the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not and the correction or clarification shall be deemed to be part of the award, it is asserted that the Tribunal was within its rights not to issue a clarification sought.

34. The Respondent sums up the submissions by highlighting that it did present a duly certified copy of the arbitration agreement which under Article 9(a) established its dispute resolution as well as the appointment of the arbitrator. In conclusion, the Respondent cites provisions of Article 159(2)(a) to (e) of *the constitution* then submits that all matters considered, the application for enforcement, though resisted on technicalities by the Respondent, ought to be allowed in the interests of finality of arbitration and closure of the dispute and litigation.

35. Both counsel attended court and offered oral highlights of the submission for which the court commend them.

Issues Analysis and Determination

36. The court has anxiously considered the two rival applications on record together with the Supporting and opposing Affidavits on both as well as the parties' respective written submissions as highlighted. The court having reviewed the papers filed discerns the issues pertinent for determination to be whether: -

    a. The applicant has met the threshold for setting aside an arbitral award?

    b. Only if the above is answered in the negative, if the award should be enforced?

37. Section 35 of the *Arbitration Act* enumerates eight (8) grounds for setting aside of an award. The first six grounds are availed to a party aggrieved by an award to substantiate its case to the court while the last two ground, need not be at the instance of a party, provided that the court gets satisfied that the factors exist as to vitiate the award.[1]

38. Acting within the confines of the room provided by the statute on the permitted instances of court's interference in matters arbitration, the courts mandate is to interrogate and establish if the award in this matter affronts Kenyan public policy or if it is vitiated by a demonstrated bias on the part of the arbitrator.

39. The case and argument by the applicant is that the agreement between the parties was one that envisaged merger or takeover of the business of the applicant by the respondent for which reason it was subject to the approval of the Competition authority of Kenya, (henceforth 'the Authority') pursuant to section 42 of the *Competition Act*.

40. It is thus submitted that the Respondent's purchase of the identified assets of the Applicant, completely took over the Applicant's plant and machinery and resulted in a change of control of the business stripping the Applicant's directors of control and powers over the plant. It is further contended that the parties act of creating a resultant business under the name of Squishy Distributors

[1] 35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

a. The party making the application furnishes proof;

i. ...

ii. ...

b. The High court finds that; -

i. ...

ii. The Award is in conflict with the public policy of Kenya."

Limited, the respondent gave to its director, a super controlling shareholding in that company that was to handle the distribution of Squishy drinks under the agreement hence a proof of indirect control of the applicant by the Respondent.

41. The court proceeds from the appreciation that the agreement subject of these proceedings was for the sale of agreed and disclosed assets only and not shares. The court appreciates that control of a limited liability company, like the applicant, is through decision making at governance level and not otherwise. One needs to sit on the board to make a decision on behalf of the company

42. The plain words of article 2(1)a of the agreement as read with schedule 6 leave no doubt on the assets purchased. The question on the target of the sale under the Asset Purchase Agreement was a matter of fact the parties voluntarily and conscientiously left to the determination of the arbitrator as the master of facts. A court of law has no liberty nor jurisdiction to interfere with parties' choice of dispute resolution forum. It cannot insist that it determines a dispute the parties have contractually expressed an unequivocal desire not to be handled by the court. It is called party autonomy which ought to be respected unless it be determined to have been an illegality by virtue of being contra statue or policy having the force of law.

43. Having heard the parties and reviewed the corpus of evidence laid before it, the Arbitrator made findings that; the Applicant tendered no evidence demonstrating that its control was affected or handed over to the Respondent; that no evidence was led to demonstrate that the purchase of the assets set out in the agreement was a transaction that was meant to either lead to termination of the existence of the Applicant or lead in any way to the Respondent having a level of control over the Applicant's company. The Tribunal's decision was that agreement was valid contract and did not constitute a merger owing to the lack of direct or indirect control by the Respondent over the Applicant.

44. For there to have been a merger, the beacon light is found in the words of section 2 of the *Competition Act*, 2010, on the definition of the term merger. In the words of the statute, a merger is disclosed when an agreement or undertaking discloses 'an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of g business, or other assets of a business in Kenya in any manner and includes takeover'

45. For purposes of regulating competition for the benefit of the public, as the consumer of goods and services, Section 41(3) of the Act further provides that 'a person is deemed to controls an undertaking of an enterprise if that person beneficially owns more than one half of the issued share capital or business or assets of the undertaking.'

46. Besides control at the board level, the court has perused the record presented in the matter and has failed to find any material to disclose that by the agreement between the parties, the respondent acquired more than one half of the undertaking of the applicant. But even then, that alone wouldn't be the mandate of the court to set aside an award under the Act. It would be a mandate had the court been executing an appellate mandate. In fact, by article 2.2 of the agreement parties agreed on the excluded assets from the sale. Unfortunately, no value of such assets was disclosed in the agreement or before the arbitrator to merit a finding on the threshold of more than half of the undertaking of the applicant. On the basis that the assets sold were not proved to have been the only assets of the applicant as an undertaking or of them having constituted more than half of the entire assets of the undertaking, the court finds that there was no merger or takeover to invite the regulation by the authority under section 42 of the Act. It thus cannot be said, based on the evidence presented, that the award or indeed the respondent, as faulted by the applicant, usurped, circumvented or nullified the statutory mandate and jurisdiction of the authority.

47. The second reason the court find to have excluded the transaction from operating as a merger is to be found in the terms of the agreement which are self-speaking. While the applicant contends that it was a requirement to obtain approval of the Competition Authority, the same is not explicit from the words of the agreement. What is explicit is the schedule 5 which identify the only consent to be obtained to be the applicant's shareholders resolution.

48. Based on the plain words of the parties' contract, the court finds that the parties did not anticipate a merger or takeover for which reason there was no contemplation that the approval of the Completion Authority was a condition precedent to the completion of the sale.

49. Tritely, parties must be held to their bargain by being reminded that the court cannot, even by ingenuity be invited and persuaded to rewrite for the parties their bargain. The hallowed position of the law needs no reinstatement but it is enough to cite the decision of the Court of Appeal in National Bank of Kenya Ltd –vs – Pipeplastic Samkolit (k) Limited [2002] eKLR decreeing the restraint the court has to exercise concerning the contract between parties. The court said: -

> " A Court of law cannot rewrite a contract between the parties. The parties are bound by their terms of the contract unless coercion, fraud or undue influence are pleaded and proved."

50. The parties having covenanted on what was sold, the price thereof and the forum for dispute resolution, the court's duty is only to enforce the intention of the parties. In a matter like this where the court has no, based on the wishes of both parties, liberty to intervene freely, the court has no option but to let the party autonomy prevail. The wishes of the parties, in term of the very well-trodden path on the tenure and purpose of the *Arbitration Act* is that, parties bind themselves that the arbitrator's decision on both finding of fact and law shall always be finally binding upon both, save for the narrow alley the court is permitted to pass before venturing into interference[2].

51. The court takes the view that whether the agreement amounted to a merger or takeover as decided by the arbitrator and based on the interpretation of the agreement, was a finding of fact that must always be left to the master in accordance with the wishes of the parties in their contract. See The Court of Appeal decision in Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited [2014] eKLR.

52. Narrowing down to the applicant's case that the award offends public policy; the court proceeds from the well-established position of the law that he who relies on the ground of public policy to upset an award must prove that national interests have been perverted or trodden upon with disregard. Violation of public policy does not mean fairness and justice in the eyes of the party applying to set aside. It must be a matter that pervades the personal interests of the parties in the particular dispute. See Mall Developers Limited v Postal Corporation of Kenya [2014] eKLR

53. The court has not been persuaded that public policy in Kenya has been violated by the award because of the alleged need for approval of the Competition Authority. The court views order number 3, as issued by the arbitrator, to be an appropriately enabling and facilitative order anticipating that every applicable law be complied with. Even if it became necessary to seek any regulator's approval, nothing in the award stops the parties, in the spirit of article 5 of the agreement, from making any fillings as may be appropriate to effectuate the parties' contractual wishes confirmed by the award. The attack on the award as affronting public policy is found to lack merit and thus fails.

[2] Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366, Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR

54. The court further finds that there was no demonstrated bias on the arbitrator in arriving at the conclusions he made. A decision maker must as of necessity arrive at a conclusion. In adversarial for a like arbitration, unlike mediation, it is difficult, almost unforeseeable that an award would always be palatable to both sides. Just that one side is not happy is never the yardstick to establish bias. In arbitration where promptitude is a hallowed virtue, setting timelines for compliance can never be viewed as bias. The kind of bias that would vitiate an arbitrator's award must be real-bias not just subjectively perceived suspicion.

55. The axiomatic conclusion by the court is that no material has been availed to merit setting aside the award. The chamber summons dated 10.01.2023 is adjudged to be misconceived and is thus dismissed with costs.

56. In the architecture of the spirit and letter of the *arbitration Act*, in line with the jurisprudence from jurisdictions where the model law governs the practice of arbitration, the only time an award may be refused, otherwise than by an application for setting aside, is where the court is satisfied that the conditions and parameters under section 37(1)(ii) militate against, recognition, adoption and enforcement. In the absence of a motion by one of the parties, refusal can only be made on the basis of AN affront to public policy. In this matter, the court has considered an application for setting aside based on allegations of violation of public policy and disallowed same. That position leaves no impediment against the request for adoption and enforcement. It follows that the chambers summons dated 20.03.2023 stands to be allowed as prayed.

57. It is so allowed and orders made that; -

    a. The final Arbitral Award save As to Quantum of Costs, dated the 1st of November, 2022, and rendered by the sole Arbitrator, Anthony Njogu, be recognised adopted and enforced as an order of the court.

    b. The costs of these proceeding, as consolidated are awarded to the respondent to be paid by the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 28TH DAY OF FEBRUARY, 2025.

PATRICK J O OTIENO

JUDGE