Ahmed & another v Kossar (Civil Case 29 of 2014)
[2024] KEHC 2928 (KLR) (Civ) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 29 OF 2014

AN ONGERI, J

MARCH 22, 2024

BETWEEN

RAZAK MAQBOOL AHMED ..... 1ST APPLICANT

SABIA KOSAR ..... 2ND APPLICANT

AND

SHAHEEN KOSSAR ..... RESPONDENT

RULING

1. The application coming for consideration in this ruling is the application dated 28/2/2017 seeking the following prayers;

    i. That this court do make an order directing the institute of Arbitrators (Kenya Chartered) to appoint a competent arbitrator to arbitrate in the dispute between the parties herein in line with the contract dated 1/9/2006.

    ii. That the cost of this application be provided for.

2. The application is based on the following grounds;

    i. That the contract dated 1/9/2006 provided that any dispute between the parties be referred to arbitration.

    ii. That the court affirmed that position by its order dated 3/3/2016.

    iii. That however, the approved arbitrator was later found incompetent to undertake the arbitration process herein.

iv. That in the circumstances it is only fair and just that another arbitrator be approved to carry out the arbitration process.

v. That no prejudice will be suffered by the parties herein.

3. The application is supported by the application of Mohamed Razak Mazbook Ahmed sworn on 28/2/2017 in which he deposed that *vide* an agreement dated 1/9/2006 they agreed with the respondent that in the event of a dispute involving the contract the parties shall refer the matter to arbitration. The said agreement settled on Mohammed Yunis Sroya as the arbitrator.

4. He deponed that indeed a dispute arose and the respondent refused to submit themselves to the said arbitrator. As a consequence he filed the cause herein to seek compliance but it was revealed later that Mohamed Yunis Sroya was a member of the chartered institute of Arbitrators and thus not competent to undertake any legal and or meaningful arbitration exercise in Kenya. That as a consequence it has become necessary to have another arbitrator appointed in place of Sroya.

5. The parties filed written submissions as follows; the applicant submitted that the contract dated 1/9/2006 provided that any dispute between the parties be referred to arbitration in terms of clause 8. The respondent further admitted signing the contract and stated that she did not dispute the terms contained in the agreement save for Sroya to be the arbitrator.

6. The applicant submitted that the intention of the parties was clearly spelt out including the mode of dispute resolution. The applicant indicated that the parties must therefore remain bound by their terms and the court will only enforce these terms and not be used as a route for a party to escape from what they consider to be a bad bargain. The Court of Appeal in the case of *National Bank of Kenya Ltd v Pipelastic Samkolit (K) Ltd & Ano* [2001] eKLR had this to say.

> "…..Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contact, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

7. On the question as to whether the prayers in the application dated 28/2/2017 amount to rewriting the contract dated 1/9/2006 the applicant submitted that in the present case the parties did not indicate what would happen incase Sroya was unable to arbitrate.

8. That as a general rule, the terms of a contract must be clear and certain. However, reasonable terms will be implied to give effect to the intention of the parties to cure uncertainty in other respects where the parties have entered into an agreement legally binding on them.

9. The applicant further argued that a provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was the parties' minds or where it is not safe for the court to prefer one possible meaning while bearing in mind that what is in the party's mind is a legal construct and not an enquiry into subjective intent. The Court of Appeal in the case of *National Bank of Kenya Ltd v Duncan Owuor Shakah & Ano* Civil Appeal No. 9 of 1997 on the issue of implying reasonable terms so as to make the contact efficacious had this to say: -

> "As reasonable terms will be implied in respect of remuneration and termination for the carrying out the intention of the parties, the test of reasonableness will be invoked to cure uncertainty in other respects where the parties intended to enter into an agreement legally binding on them".

10. It was therefore the applicant's submission that, there is no question of whether or not the parties herein intended to be bound by their agreement and this court is clothed with the requisite discretion under Section 6(1) of the *Arbitration Act* to make appropriate orders so as to cure the uncertainty and give effect to the terms of the contract which provided for Arbitration and in effect honour the parties wishes on how they wish to resolve their disputes.

11. The respondent alternatively submitted that Mohamed Yunis Sroya, despite not being registered as an Arbitrator in Kenya, was well known to the parties herein, and as a matter of fact was a relative to the parties, was determined by the parties herein to be the best person to resolve any dispute that may arise between the parties. It was on this basis that the parties herein settled for the said Mohamed Yunis Sroya to be the arbitrator in the event that there would be a conflict arising from the said contract.

12. The respondent argued that appointing an arbitrator from the Kenya Chattered Institute of Arbitrators to arbitrate in this matter would be synonymous to forcing the parties into an agreement to submit to a rewritten contract whose terms the parties did not have the freedom to decide. The respondent relied on the court of appeal in the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another* [2002] E.A. 503 where the court stated thus.

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

13. It was the Respondent's position that she only agreed to the said arbitration clause because Mohamed Sroya, the intended arbitrator was privy to the terms of the contract before both parties signed the contract and by reason that they have a kinship relationship (cousins). it is for this reason that the Respondent is apprehensive of ceding her contractual autonomy to any third parties outside her family.

14. The respondent argued that given the circumstances, the court ought not to interfere with the autonomy of the parties. It cannot re-write their preferred choice and should not enforce the arbitration clause in the said Agreement for reason that it is vague.

15. The respondent further argued that the aforementioned clause was incomplete as it was silent on who is supposed to be appointed as arbitrator. If the parties wished to name or appoint another arbitrator, they would have said so expressly. The respondent relied on *Danki Ventures Limited v Sinopec International Petroleum Services Limited* [2014} eKLR the where the Court found an arbitration clause to be inoperative for reason that it did not specify the person who should be appointed as the arbitrator.

16. The sole issue for determination is whether this court should make an order directing the institute of Arbitrators (Kenya Chartered) to appoint a competent arbitrator to arbitrate in the dispute between the parties herein in line with the contract dated 1/9/2006.

17. I find that it is not in dispute that the parties entered into an agreement dated 1/9/2006 in which they had an arbitration clause stating as follows;

> " Should there be any dispute between the lenders and the borrower regarding the true and correct meaning of this agreement the same shall be referred to the Arbitration of Mohamed Yunis Sroya of P. O. Box 46654-00100, G.P.O Nairobi, Kenya and his decision shall be acceptable and binding on both parties".

18. I find that the parties have an arbitration clause in which they ousted the jurisdiction of the court by clearly stating that in the event of a dispute, regarding the true and correct meaning of the agreement

the same shall be referred to the Arbitration of Mohamed Yunis Sroyaof P. O. Box 46654-00100, G.P.O Nairobi, Kenya and his decision shall be acceptable and binding on both parties.

19. In the case of *Danki Ventures Limited v Sinopec International Petroleum Services Limited* [2014] eKLR, the court held as follows;

> " The court cannot impose on the parties either a particular arbitrator or a method for choosing the arbitrator".

20. I find that the parties are bound by the terms of their agreement as they both submitted and further, it is not the duty of the court to rewrite contracts between parties.

21. In the case of *Fairacres Development Ltd vs Margaret Apondi Olotch T/A M.A.Kiosk*, it was held that ;

> " It is trite law that arbitration clauses apply only where there is a dispute between the parties, on a matter covered by the agreement and by the arbitration clause".

22. In the circumstances, this case be and is hereby referred to Mohamed Yunis Sroya to carry out the arbitration between the parties within 30 days of this date.

23. The application dated 28/2/2017 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

* **..... for the Applicant**

..... for the 1st Respondent

..... for the 2nd Respondent