Machiri Limited v Kenya Airport Authority (Commercial Arbitration Cause E057 & E053 of 2023 (Consolidated)) [2024] KEHC 3303 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E057 & E053 OF 2023 (CONSOLIDATED)

A MABEYA, J

MARCH 21, 2024

BETWEEN

MACHIRI LIMITED ..... CLAIMANT

AND

KENYA AIRPORT AUTHORITY ..... RESPONDENT

RULING

1. This ruling determines two applications. The application dated 30/6/2023 by the respondent for setting aside the arbitral award published on 6/4/2023 and the claimant's application dated 19/7/2023 for enforcement of the award. I propose to start with the application for setting aside the award since its outcome will have a direct bearing on the enforcement of the award.

Application dated 30/6/2023

2. Vide a Chamber Summons dated 30/6/2023, the respondent, Kenya Airports Authority, moved the Court under sections 35 of the *Arbitration Act* 1995, section 1A, 1B, 3A of the *Civil Procedure Act* and Rules 4(2), 7,11 of the Arbitration Rules 1997 to set aside the arbitral award published by Hon. Mr. Nyagah Boore Kithinji on 6/4/2023.

3. The respondent relied on the grounds on the face of the application and the supporting affidavit sworn by Margaret Munene on 30/6/2023. The respondent's case was that on 6/6/2014, the parties entered into an agreement for the demolition of the then existing Airport halls, Baggage area and Multi-Storey Office block at the Jomo Kenyatta International Airport for a consideration of Kshs. 388,210,597.70 plus VAT.

4. That a dispute ensued during the contract period and the same was referred to arbitration and the award was published in favour of the claimant. The respondent faulted the tribunal for holding that

the project contract was governed only by the FIDIC Conditions of Contract for Design- Building and Turnkey First Edition 1995.

5. According to the respondent, the parties are bound by the terms of their contract and the arbitral tribunal should not have rewritten the contract between the parties. That the award offends the provisions of section 35(3)(iv) and 35(2) (b) (ii) of the *Arbitration Act* and is against the public policy of Kenya.

6. It was further contended that the tribunal failed to consider the hierarchy of the contract documents and failed to consider the effect of the agreements and the tender provisions on the FIDIC Conditions of Contract for Design- Building and Turnkey First Edition 1995. It was contended that the respondent being a public body, it was required to adhere to the law and use of public finances and in this relation, the tender was awarded in compliance with the *Public Procurement and Asset Disposal Act*.

7. It was further contended that the tender superseded the FIDIC Conditions of Contract for Design-Building and Turnkey First Edition 1995 and the claimant accepted the modifications to the clauses. That the award was manifestly excessive and punitive contrary to the law, the principles of public finance and public policy.

8. The claimant opposed the application vide a replying affidavit sworn by Eng. James Mbugua Macharia on 3/8/2023. It was the claimant's contention that the work it was contracted for was completed and handed over on 15/7/2016 and the respondent issued a certificate of completion therefor. That a dispute ensued when the respondent failed to make the necessary payments and subsequently the dispute was referred to arbitration.

9. That the agreement between the parties took precedence over all other agreements and the respondent's contention that the tribunal held that the contractual relationship was governed by the FIDIC Conditions was not true. That despite the contract being for a fixed term, the respondent allowed time extensions which were covered under clauses 2.2, 3.5 and 8.3 to which the arbitrator allowed for additional costs.

10. The claimant further contended that the contract provided for interest for late payment and the tribunal had calculated the delayed payments as per the documents before him. That this position was also applied in the calculation of interest based on the moneys that had been deducted in Certificate Nos. 6 and 9. That in the premises, the application should be dismissed.

11. The application was canvassed by way of written submissions which I have considered. It was the respondent's submission that the tribunal failed to consider the effect of the agreement and the tender provisions on the FIDIC Conditions of Contract. That this amounted to rewriting the contract between the parties. That the award covered aspects that were not contemplated under the contract. That clause 13.8 of the FIDIC Conditions on late payment was not applicable since it contradicts the provisions of section 140 of the *Public Procurement and Asset Disposal Act*, 2015 ("PPADA") which could apply retrospectively.

12. It was further submitted that the tribunal erred in computing interest monthly rather than in accordance with the prevailing mean commercial lending rates as determined by the Central Bank of Kenya. That all extensions under the repealed act were to be brought with conformity with the PPADA and where there was conflict between the repealed act and the PPADA, provisions of the latter would apply.

13. On its part, the claimant submitted that clause 8 of the contract envisioned a variation of price and the extension of time was granted due to the delay occasioned by the respondent. That the extension of time was granted pursuant to clauses 2.2, 3.5, 8.3 of the FIDIC Conditions of contract.

14. As to whether the award was against public policy, it was submitted that section 32C of the *arbitration Act* gave the tribunal the discretion to determine the rate of interest to be applied in an arbitral award. That the applicant did not dispute that there were delayed payments and the contract provided for interest on overdue payments.

15. Further, it was submitted that clause 13.8 of the conditions for contract provided for 3% above the Central Bank rate and that Regulation 139(5) of the Public Procurement and Disposal Regulations provides that interest would be commercial rates. That the issue of the rate of interest or compound interest was not an issue that was in dispute before the tribunal. That at the time, the Central Bank rate of interest was 10.5 while under clause 13.8 the applicable interest was 13.5 and therefore, the applicable interest would be the commercial rate which ranges from 14% to 17%.

16. I have considered the application, the response and the submissions on record. The main issue for determination is whether the applicant has met the threshold for setting aside an arbitral award.

17. The applicant invoked section 35 of the *Arbitration Act* which sets out the grounds for setting aside an award as follows: -

> "
>
> "(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).
>
> (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.

..."

18. In *Kenya Oil Company Limited & Another v. Kenya Pipeline Co. NRB* [2014] eKLR, the Court of Appeal cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd* (The "Baleares") 1 Lloyds LR 215: -

> " The arbitrators are the masters of the facts. On an appeal, the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

19. The grounds upon which the present application was founded on were that the tribunal considered matters that were not before it, that the tribunal re-wrote the contract between the parties and that the award was against the public policy of Kenya.

20. On what amounts to public policy, Ringera J held in Christ for *All Nations v. Apollo insurance Company Limited* [2002] EA 366 that: -

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the *Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

21. In *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR, the court observed that: -

> " Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy."

22. Further, in Kenya *Shell Limited v Kobil Petroleum Limited* [2006] eKLR, the Court of Appeal, addressed the effect of section 35 of the *Arbitration Act*, as follows: -

> " 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 is shown that it was either (a) inconsistent with the *Constitution* or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality."

23. The respondent contended that the tribunal did not confine itself to the provisions of the contract but rather relied on the FIDIC Conditions in his decision. It submitted that the tribunal computed interest monthly rather than on the prevailing lending rates. Further, it faulted the tribunal for allegedly contradicting the provisions of the PPADA on the interest.

24. From the record, it is not in dispute that the contract between the parties was executed in the year 2014. The applicant has relied on section 140 of the PPADA which provides that the interest on delayed performance would be paid based on prevailing mean commercial lending rate as determined by Central Bank of Kenya.

25. In its decision, the tribunal awarded compound interest at 3% above the discount rate of the Central Bank of Kenya. In my view, the respondent did not demonstrate how the award was against the law. There is no evidence that section 140 of the PPADA was meant to apply retrospectively. This is so because the contract was governed by the provisions of law that were in place before the enactment of the PPADA.

26. In *Centurion Engineers & Builders Limited v Kenya Bureau of Standards* (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) (27 October 2023), the Court of Appeal held: -

> " Consequently, we hold that the issue as raised by the respondent on the contravention of the PPDA is a mere afterthought aimed at avoiding liability to fulfil its contractual obligations. It is not disputed that the appellant indeed carried out and completed the additional works as instructed, and handed over the project to the respondent, who has since taken possession of the premises for its day-to-day business without paying the appellant the contractual sums due. We agree with the appellant that it is indeed entitled to the value for work done under the contract as mutually agreed upon by the parties.
>
> We are not persuaded by the respondent's argument that the arbitrator's award was contrary to public policy, as it is on the record that the respondent being a public entity used a private document whilst engaging the appellant to undertake works for it. The respondent cannot be seen to hide under the provisions of the PPDA, yet it was never referred to in the contract between the parties. The respondent being a public body ought to have governed itself as such and not at the last-minute try and turn tables."

27. The totality of the foregoing is that the respondent has failed to demonstrate how the award offends public policy of Kenya. There exist no sufficient grounds to warrant setting aside of the arbitral award. The application has not met the threshold for the conditions provided for under section 35 of the *Act*.

Application dated 19/7/2023

28. The application was brought under section 36 of the *Arbitration Act*, 1995 and rule 9 and 11 of the *Arbitration rules* 1997. It sought the recognition and enforcement of the award published on 6/4/2023.

29. Under section 36 of the *Act*, the High Court has the power to recognize and enforce domestic arbitral award as follows: -

> " 36(1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
>
> (2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
>
> (a) the duly authenticated original arbitral award or a duly certified copy of it; and
>
> (b) the original arbitration agreement or a duly certified copy of it.
>
> (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified 'translation of it into the English language."

30. In *Samura Engineering Limited v Don-Wood Co Ltd* [2014] eKLR, the court held: -

> " Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the *Act*, and I should add, to the *Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed..."

31. In the present case, the claimant filed the certified copies of the award and agreement. Since the application for setting aside of the award was not allowed the grounds set out in section 37 of the *Act* which are identical to the grounds in section 35 of the *Act* have not been met. The application is hereby allowed.

32. Accordingly, the Court makes the following orders: -

a. The application dated 30/6/2023 to set aside the award dated 6/4/2023 is hereby dismissed.

b. The claimant's application dated 19/7/2023 to recognize and enforce the award is hereby allowed.

c. Consequently, the final award published on 6/4/2023 by Hon. Mr. Nyagah Boore Kithinji, the sole arbitrator, is hereby recognized and adopted as a decree of this Court

d. The respondent shall bear the costs of both applications.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE