BSC Kenya Limited v Frick India Limited (Miscellaneous Application Arbitration E049 & E056 of 2023 (Consolidated)) [2024] KEHC 5947 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION ARBITRATION E049 & E056 OF 2023 (CONSOLIDATED)

FG MUGAMBI, J

MAY 24, 2024

BETWEEN

BSC KENYA LIMITED ..... APPLICANT

AND

FRICK INDIA LIMITED ..... RESPONDENT

RULING

1. The two applications before the court arise from a final arbitral award dated 19th May 2023 (the award), published by Olatunde Busari, FCIS, C.Arb, acting as the sole arbitrator. The application filed in MISC ARB E049/2023 dated 19th June 2023, seeks to set aside the arbitral award. It is supported by an affidavit sworn on the same date by Wilco Hendriks, the Managing Director and Chief Executive Officer of the applicant (BSC Kenya (BSC)).

2. The basis of the application is an alleged apparent bias on the arbitrator's part, evident in the evaluation of the question of delay. BSC criticize the learned arbitrator for attributing the termination of the contract between the parties to delays caused by BSC Kenya, even though the respondent (FRICK) had not cited this as a reason for termination.

3. They also contest the dismissal of BSC's claim for damages due to lack of evidence of payment and for failing to consider the evidence provided by BSC. The applicants argue that this bias demonstrated by the arbitrator was against public policy, undermining the basic principles of fairness and fair treatment.

4. The application is opposed through a replying affidavit sworn on September 13, 2023, by Jasmohan SingH, the Managing Director of FRICK, who argue that BSC has not demonstrated to this Honorable Court that the award is contrary to public policy to warrant its setting aside. They caution the court against the temptation to sit in an appeal on factual issues while considering the application.

5. The second application, filed in HCCOMMISC E056/2023, also arises from the same award and is in tun filed by FRICK, seeking leave to enforce the award. The two matters were consolidated following the directions of this court.

Analysis and Determination

6. Having carefully considered all the pleadings, submissions and evidence presented by the parties, for good order I shall begin by addressing the application to set aside the award.

7. FRICK takes issue with the non-joinder of the arbitrator in these proceedings as required under rule 7 of the *Arbitration Rules* 1997 (the rules) under which the application is brought. For the avoidance of doubt rule 7 provides as follows:

> " An application under section 35 of the *Act* shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator."

8. My understanding of rule 7 is that the arbitrator is required to be notified about the application filed under section 35 hence the need for service, but there is no mandatory requirement that the arbitrator should be a party to the proceedings. This position is confirmed by section 35 which is silent on the need for joinder of the arbitrator in applications for setting aside an arbitral award.

9. It is also clear from judicial pronouncements that the arbitrator's role is to resolve the dispute. Once the award is issued, their role is considered complete, and they should not be dragged into the arena of the dispute between the parties. Ordinarily, the arbitrator remains an independent bystander in such applications, and thus, this omission at non-joinder does not in any way render the application defective.

10. Before substantively addressing the application for setting aside, it is imperative for the court to contextualize its decision. The court's role in such proceedings is limited, except as permitted under the Act. Section 10 of the *Act* clearly states:

> " Except as provided in this Act, no court shall intervene in matters governed by this Act."

11. The limited scope for court intervention was emphasized by the Supreme Court in *Synergy Industrial Credit Limited v Cape Holdings Limited,* [2019] eKLR. The Court held as follows:

> " Once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. An aggrieved party can approach the High Court for setting aside the award only on specified grounds. Section 35 ensures courts can correct specific errors of law to prevent a miscarriage of justice, without undermining the efficiency of arbitration."

12. The policy to restrict judicial review of arbitral awards and to confine review to that specified in the Act aligns with the UNCITRAL model and is very much alive and reflected in the Kenyan Act. The court in the decision of *Mahan Limited V Villa Care Limited,* [2019] eKLR, captures this spirit in the following words:

> " This Court has considered the arguments made for and against setting aside the award. The Applicant argues that the Arbitrator misconstrued the evidence and law, typically an appeal argument. Section 35 application jurisdiction is limited. Parties elect to arbitrate to avoid

court litigation and should not set aside an award simply because it is unfavorable. The applicant must demonstrate that the Section 35 grounds exist."

13. Against this background, I now consider the main grounds for setting aside the award, as outlined in section 35(2) of the *Arbitration Act*. I note that a section 35 application is not an appeal. It just seeks to set aside an award on grounds that must be framed within the parameters of that section and proved. FRICK relies on section 35(2)(b) where this court may set aside an award if the award is in conflict with the public policy of Kenya.

14. They also allege bias on the part of the arbitrator which undermined the basic principles of fairness and fair treatment and was therefore a breach of public policy. In the case of *Christ for All Nations v Apollo Insurance Co Ltd*, [2002] 2 EA 366, Ringera J noted that for an award to be set aside on this ground, it must be shown to be:

> "i. Inconsistent with *the Constitution* of Kenya or any other written law;
>
> ii. Against the national interests of the Republic; or
>
> iii. Contrary to justice and morality."

15. Likewise, the court in *Dinesh Construction Limited & Another v Aircon Electronic Services (Nairobi) Limited*, [2021] eKLR, also held that:

> "Public policy as a ground for setting aside an arbitral award must be narrow in scope. The assertion that an award is contrary to public policy of Kenya cannot be vague and generalized."

16. Within the context of these judicial authorities it is my finding that besides the applicant's divergent view from the arbitrator's finding, no other evidence of bias has been established. Likewise, no specific reason has been provided to demonstrate how the award violates Kenyan public policy. I also take note that the allegation was not raised during the arbitration proceedings where it ought to have been first raised for the arbitrator to address himself to the allegations before being brought to this court.

17. I further note the averments by FRICK and the concerns raised over the interpretation of the facts and particularly with respect to the termination of the agreement between the parties. On this, it is my view that a dissimilarity with an arbitrator's interpretation does not necessarily establish bias. Jurisprudence is now crystalized on the courts' limited role in second-guessing arbitrators' findings of fact (see *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited*, NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR).

18. One of the most commonly cited passages is the holding in *Geogas S.A V Trammo Gas Ltd, (The "Baleares")* 1 Lloyds LR 215, where Steyn LJ stated as follows:

> "Arbitrators are the masters of the facts. On appeal, the court must accept the arbitrators' factual findings, regardless of perceived mistakes. The principle of party autonomy decrees that a court should not question arbitrators' findings of fact."

19. For the reasons that I have stated, I am not convinced that FRICK in this application has proved any ground for setting aside the arbitral award under section 35 of the Act.

20. I now turn to address the application dated July 4, 2023, filed by BSC.The application is brought under section 36(2) of the *Act* and seeks recognition of the arbitral award as well as leave to enforce the award as a decree of this court. For clarity, section 36(3) requires that:

> " Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—
>
> (a) the original arbitral award or a duly certified copy of it; and
>
> (b) the original arbitration agreement or a duly certified copy of it."

21. BSC has attached a copy of the agreement dated August 30, 2019. Article 16.1 thereof contains the arbitral clause under which the matter was referred to arbitration. A certified copy of the final award by the arbitrator has also been attached, in compliance with Section 36 of the *Arbitration Act*.

Disposition

22. In conclusion, therefore the application dated June 19, 2023, for setting aside the arbitral award is dismissed with costs. Conversely, the application dated July 4, 2023, for recognition and enforcement of the arbitral award dated 19th May 2023, published by Olatunde Busari, FCIS, C.Arb, acting as sole Arbitrator, is hereby adopted as a judgment of this court with leave to execute the final decree emanating therefrom.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE