Interveg Export EPZ Limited v Self Help Africa (Miscellaneous Civil Application E009 of 2024) [2024] KEHC 8419 (KLR) (Civ) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8419 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION E009 OF 2024

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

INTERVEG EXPORT EPZ LIMITED ..... APPLICANT

AND

SELF HELP AFRICA ..... RESPONDENT

RULING

1. Kenya has had a High Court since 1897 and even before then. Nevertheless the parties herein, over 120 years since establishment of the High Court, chose Arbitration as a mode of dispute resolution.

2. This court is enjoined to respect the choice of the parties. This is a constitutional imperative under Article 159(2)(1) of *the Constitution*. It provides as doth:-

> "(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that-

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law."

3. *The Constitution* thus provides not for protection or application but promotion of Alternative Dispute Resolution Mechanisms. These mechanisms are not inferior but are granted protection by state. As such the court, and in particular the High Court has a very strict mandate under the *Arbitration Act*.

4. The mandate was well enumerated in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016)* [2019] KESC 11 (KLR) (6 December 2019) (Judgment) as doth:-

"

" 57. Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

58. Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only.

However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question."

5. An award was made by single Mediator, Anthony Milimu Lubulellah FCIArb, on 15/9/2023. Pursuant thereto, Sections 35 and 36 kicked in. There is no limitation for enforcement in the Act

outside the *Limitation of Actions Act*. Challenge of the award is provided under Section 35(3) of the *Arbitration Act* as follows:-

> " An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award."

6. The reasons for setting aside an award under Section 35 are as doth:-

> " (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."

7. The award given was as follows:

   i. The Claimant was in breach of the Contract Agreement dated 30th January, 2020 without lawful cause.

   ii. The Contract dated 30th January, 2020 shall continue on the basis of an order of specific performance as prayed in the Respondent's Counter-claim.

   iii. The Claimant's Claim dated 25th May, 2022 be and is hereby dismissed.

   iv. The Respondent's Counter-claim dated 23rd August, 2022 is allowed in terms of direction (i) and (ii) above.

   v. The Claimant shall pay to the Respondent costs of the Claim and Counter-claim in the sum of Kshs.1,113,600.

   vi. The Claimant shall pay the balance of the Arbitration costs in the sum of Kshs.1,068,575, and if the Respondent shall have already paid the Arbitration costs above, the Claimant shall immediately reimburse the amount so paid to the Respondent.

   vii. Any sum that remains unpaid under this Award shall attract simple interest at the rate of 14% p.a. from the date of publication of this Award until payment in full.

8. The claimant was awarded for NIL for all issues while respondent on (b) (d) and (e).

9. The Appellant, Self Help Africa filed an application dated 27/2/2024 supported by the affidavit of Andy Simpson, a team leader at Self Help Africa overseeing the AgriFI Kenya Challenge Fund Project.

10. They stated that on receipt of the award he wrote a letter under Section 34 on 18/1/2024 seeking clarification. The Arbitrator is stated to have concluded that a sum of Kshs. 3,324,570.15 was unutilized.

11. They stated that the order for specific performance was unable of performance. The terms of the contract were to terminate on 23/7/2022. The project was also to terminate on 21/6/2024. Clause 1.3 indicates that the total of Euro 400,000 was to be provided by 1/2/2020.

12. The agreement provides that the organization shall return unspent funds plus interest accumulated. The period covered as per clause 20.1 is 1/2/2020 to 23/7/2022. Clause 8 thereof provided for Arbitration.

13. The Applicant moved the LSK for appointment of an Arbitrator. The Chairperson of the Branch caucus, Linda Koome, then acting as the President appointed Anthony Milimu Lubulellah, FCIArb. This was notified to the parties on 15/2/2022 with 26 directions for a preliminary meeting on 24/2/2022. The final award gives the history of the case for which this court has no appellate jurisdiction over.

14. The awards were given. The Applicant was wondering what will become of unutilized funds. Specific performance includes clauses of the contract for return of unutilized funds. This cannot be a problem.

15. Specific performance includes termination of the project on its due date. The issue of specific performance of itself is not a ground for setting aside the claim. If the contract is incapable of performance, that is the next level of the dispute but not the dispute submitted to the sole arbitrator.

16. There are no grounds for setting aside the award. Though the writing of the award leaves a lot of questions hanging, the questions submitted to the Mediator were all answered.

17. Secondly the award was published on 15/9/2023. Ipso facto, the time for setting aside was before 15/1/2024. Section 34 is not a refuge for a party whose time for setting aside has lapsed. The Section provides as follows:

> " 34(1) Within 30 days after receipt of the arbitral award, unless a different period
>
> of time has been agreed upon by the parties—
>
> (a) a party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and
>
> (b) a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.
>
> (2) If the tribunal considers a request made under subsection (1) to be justified it shall, after giving 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.
>
> (3) The arbitral tribunal may correct any error of the type referred to in subsection (1)(a) on its own initiative within 30 days after the date of the arbitral award.
>
> (4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.
>
> (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or (5).
>
> (7) Section 32 shall apply to a correction or an interpretation of the arbitral award or to an additional arbitral award made under this section."

18. The letter to the Mediator on 18/1/2024 had nothing to do with the mediation. Consequently the timelines for setting aside the award lapsed. There is no basis for extending the same. Even if the court wished to extend the same, there is no application. Nevertheless, it is doubtful that the court has jurisdiction to extend time within which to apply to set aside the award.

19. On the other hand Interveg Export EPZ Ltd applied to have the award enforced in the following terms in an application dated 31/1/2024. This application is expressed to be brought under Section 36(1)

and 3 of the *Arbitration Act* and Rules 3, 4 and 6 of the *Arbitration Rules 1997*. The Section provides as follows:-

> " 36(1) A domestic arbitral award, 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) ...
>
> (3) 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.

20. There is no public policy issue raised or noted for not enforcing the Award. The award is and was actually settled by Arbitration. Parties submitted to the jurisdiction of the Arbitrator. There was no challenge to the jurisdiction before the arbitration. Both parties have filed responses, however, they go to the merit of the arbitration. It is neither desirable nor the proper procedure to treat this as an appeal.

21. It is doubtful that the award for specific performance can be enforced after 21/6/2024. Consequently, I adopt the award subject only that the order of Specific Performance lapsed on 21/6/2024 and the tribunal cannot extend life of the contract.

22. Given that costs have already been given, each party to bear their own costs for both applications.

Determination

23. In the circumstances I make the following orders:-

a. The Application dated 31/1/2024 is allowed to the extent only that the order for Specific Performance should not exceed the last day of the contract, that is, 21/6/2024.

b. The Application dated 27/2/2024 is dismissed.

c. Each party to bear their own costs.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of:-

Maina for the Applicant

Ms. Konya for the Respondent

Court Assistant - Jedidah