



Mohamed Rabe t/a Safari Plaza Limited v Total Kenya Limited (Commercial Arbitration Cause E086 of 2023) [2024] KEHC 7709 (KLR) (Commercial and Tax) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E086 OF 2023**

PM MULWA, J

JUNE 27, 2024

BETWEEN

MOHAMED RABE T/A SAFARI PLAZA LIMITED APPLICANT

AND

TOTAL KENYA LIMITED RESPONDENT

RULING

1. By a Notice of Motion dated 20th November 2023 the applicant sought orders for the court to set aside in toto the arbitral award dated 12th September 2023 by Andrew Muma Arbitrator in the matter of an arbitration between Mohamed Rabe T/A Safari Plaza Limited (Claimant) & Total Kenya Limited (Respondent).
2. The application was supported by the grounds on the face of it and by the sworn affidavit of Mohamed Rabe who in a nutshell stated that the award offends tenets of public policy as the Arbitrator dealt with issues not contemplated by the parties, the Arbitrator demonstrated bias and re-wrote the terms of the license agreements among other grounds.
3. The respondent opposed the application vide a Replying Affidavit dated 18th December 2023 and contended that the applicant has failed to demonstrate how the Arbitral Award was in conflict with the public policy of Kenya. Further, that the Tribunal's determination is anchored in law and that there can be nothing to remotely suggest that such a determination is against public policy.
4. The parties canvassed the application by way of written submissions which the court has carefully considered alongside the application and the response therewith. The issue for determination is whether the arbitral award should be set aside on the ground that it is contrary to public policy.



5. The applicant contended that the award was contrary to public policy. The issue of public policy was extensively discussed in the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, where the court held:

“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”.

6. To determine whether the award was contrary to public policy it is imperative that the court first establishes whether the Arbitrator dealt with a dispute not contemplated by the parties. The applicant submitted that contrary to public policy the arbitrator on his motion went outside his mandate and dealt with a dispute not contemplated by the terms of reference to arbitration by purporting to increase rent payable by the applicant to the respondent yet the issue was whether it was fair for the respondent to arbitrarily increase the rent contrary to the provisions of the Marketing License Agreements (MLA). No prayer was made by either party for the Arbitrator to impose a new rent on the parties.
7. On the other hand, it was the respondent’s submission that the issue of whether it was fair or not to increase the rent was placed before the tribunal; the tribunal did not determine a dispute not contemplated by the parties by holding that it would be inequitable to allow the Claimant to continue paying the same rent after 7 years. However, the respondent admitted that the additional determination by the arbitrator on what amounted to reasonable rent is a determination that was not contemplated by the parties.
8. On this ground it is indeed clear that the Arbitrator dealt with an issue not contemplated by the parties as evident at Para. 199-201 of the Award, the Arbitrator went on to calculate what he considered to be reasonable rent yet all he was required to determine by the parties was whether the license fee increment by the respondent was fair.
9. Further to the above, it was the applicant’s position that contrary to public policy the Arbitrator re-wrote the terms of the license agreements by issuing an award which indicated that any party was at liberty to terminate the agreement should they oppose the rent increment proposed by the Arbitrator. This is evident at Para. 199 of the Award where the Arbitrator stated that the “the rent shall be effective the issuance of this award and should either party object, the party is at liberty to issue a one month notice to terminate”. Equally this was not an issue to be considered by the Arbitrator.
10. On the issue of bias, it was the applicant’s argument that the Arbitrator demonstrated bias by striking out the external auditor report yet the auditor stated under oath that he understood this duty as an expert witness.
11. Regarding the evidence by an expert witness, this court in *Stephen Kinini Wang’onduru versus The Ark Limited* [2016] eKLR held that:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less...This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known



facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.”

12. At Para. 156 of the Award, the Arbitrator stated that he was not inclined to rely on the auditor’s report as the evidence relied on from the FMS system by the auditor had not been tested. However, at Para. 169 of the Award, he went on to carry out a comparison between the entries in the FMS against the invoices produced. It is this considered opinion that the Arbitrator should have taken the auditor’s evidence into account and tested it against the known facts and in this instance against the invoices produced as opposed to striking it out altogether.
13. The applicant also argued that the Arbitrator found that some claims were barred by statute of limitation despite it being continuous series of breach. That a fresh period of limitation begins to run at every moment during which the breach occurs. That the circumstances under which the breach arose make it fail under the exemption of time limitation.
14. On this issue, the court disagrees with the applicant as the Arbitrator in this instance was guided by the Limitation of Actions Act which allowed him to deal with matters arising within the 6-year period.
15. It is trite that for an Arbitral Award to be against the public policy of Kenya, it must be shown that it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or value in the Kenyan society as was held in the case of *Glencore Grain Limited v TSS Grain Millers* [2002] 1 KLR 606.
16. It is my finding that the Arbitrator in the instant case did indeed deal with matters not contemplated by the parties and the respondent equally acknowledges the same. The applicant has adequately demonstrated that there exist sufficient grounds to warrant the setting aside of the Arbitral Award.
17. It is only prudent and in the interest of justice to set aside the Arbitral Award and allow the issues to be addressed by a different Arbitrator because the award as it is, goes against the tenets of public policy.
18. The upshot is that the Notice of Motion application dated 20th November 2023 has merit and is allowed. I make no orders as to costs.

RULING delivered virtually, dated and signed at **NAIROBI**

This 27th day of **June** 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Akoko for Applicant

Mr. Abdullahi for Respondent

Court Assistant: *Carlos*

