Kenya Broadcasting Corporation v Bonten Media Group limited (Miscellaneous Civil Application 131 of 2021) [2022] KEHC 12258 (KLR) (Commercial and Tax) (5 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION 131 OF 2021

WA OKWANY, J

MAY 5, 2022

IN THE MATTER OF THE ARBITRATION ACT, 1995 AND THE ARBITRATION RULES, 1997 AND

IN THE MATTER OF SETTING ASIDE AN ARBITRAL AWARD

BETWEEN

KENYA BROADCASTING CORPORATION ..... APPLICANT

AND

BONTEN MEDIA GROUP LIMITED ..... RESPONDENT

RULING

Introduction

1. The applicant herein, a state corporation engaged in the media industry, entered into an agreement with the respondent for the distribution and transmission services of its digital TV channels. A dispute however arose between the parties, which they referred to arbitration in line with the terms of their agreement. The sole arbitrator, Mr. Calvin Nyachoti, rendered the Award on 25th November 2020 thus triggering the filing of the two applications that are the subject of this ruling.

The Applications.

2. Through the application dated 24th February 2021 (setting aside application), the applicant seeks, *inter alia*, orders to set aside the arbitral award while the application dated 20th April 2021 (recognition application) is for the recognition and adoption of the said award. I will consider the setting aside application first as its outcome will determine the fate of the recognition application. This is to say that should the award be set aside, then it will not be necessary to deal with the recognition application

and conversely, should the setting aside application fail, then the court will proceed to determine the recognition application.

Application dated 24th February 2021

3. The orders sought in the application are as follows: -

    1) Spent.

    2) That this Honourable Court be pleased to set aside the arbitral award dated 25th of November, 2020 issued by Mr. Calvin Nyachoti C.Arb, in so far as the same seeks to disentitle the Applicant off the amounts due and owing from the contract dated 1st January, 2016;

    3) That this Honourable Court be pleased to grant any further orders as it may deem appropriate in the circumstances including remitting the said award dated 25th November, 2020 for corrective action on the impugned portion of the award as purports to dismiss the counterclaim dated 12th March, 2020.

    4) That the costs of this application and incidental expenses thereto be provided for.

4. The application is supported by the affidavit of Mr. Paul Jilani and is based on the following grounds: -

    1) That on the 25th day of November 2020, Mr. Calvin Nyachoti C.Arb, the sole Arbitrator in the dispute between the parties herein, duly delivered an award determining the dispute thereto.

    2) That the humble Applicant herein contends that the Arbitrator went beyond his scope of jurisdiction by re-writing and amending the terms of the Digital Content Transmission and Distribution Agreement (hereinafter referred to as 'the Agreement') dated 1st January, 2016 in the following ways: -

        a) The Arbitrator waved the contractual sum payable to the Applicant supposedly on the basis that the Applicant did not send invoices to the Respondent therein, which is factually incorrect.

        b) That the Arbitrator unilaterally neglected, refused and/or declined to rule on the Applicant's application to adduce additional evidence which proved that the Respondent herein was incapable of being served invoices on the postal address provided, merely on grounds that the Arbitrators costs had not been paid.

        c) That in refusing to rule on the Applicant's application, the Arbitrator infringed on the Applicant's right to be heard and rules of natural justice, which is in conflict with public policy.

        d) That additionally, the sole arbitrator intentionally misconstruction the Agreement entered into by the parties herein and specifically re drafted Clause 11.4 of the Agreement which expressly provides that,

"Any failure or delay by either party in exercising its rights under any provisions of this Agreement shall not be construed as a waiver of those rights at any time or at any future time."

e) The Arbitrator's purported amendment of the contract dated 1st January, 2016 was synonymous with the Arbitrator arrogating himself the jurisdiction to determine a dispute not contemplated by or not falling within the terms of the reference to arbitration, thereby containing decisions on matters beyond the scope of the reference to arbitration.

f) That once the parties agreed that the respondent had utilized the services of the Applicant, the Arbitrator went beyond his powers to waive the contractual sum payable there under as had been expressly provided by the contract.

g) That it is against public policy for the Arbitrator to hold that a parastatal can be disentitled to its statutory fees and levies even after parties had unanimously agreed that services were rendered in accordance with the terms of the said contract dated 1* January, 2016.

h) That despite the Arbitrator in his Arbitral award conceding that the Respondent had utilized services from the Applicant from January 2016 to August 2019 and in addition to the evidence presented by both parties, the Arbitrator proceeded to waive the entire contractual sum payable to the Applicant.

3) Thatwith regard to the foregoing, the award dated 25th November, 2020 was not only in conflict with the public policy of Kenya but also went beyond the scope of reference of the Arbitrator in so far as it purported to disentitle the Applicant of the amounts due and owing from the contract.

4. That it is therefore in the interest of justice that the Arbitration award dated 25th November, 2020is set aside in so far as it purported to disentitle the Applicant of the amounts due and owing from the contract.

5. The respondent opposed the application through the replying affidavit of its Director Mr. Rogers Mwiti Mpuru who states that the arbitrator did not to go beyond the scope of the reference but considered the dispute and gave effect the terms of the parties' agreement. He faults the applicant for misapplying the true meaning of the doctrine of unjust enrichment.

6. I have considered the application and the respondent's response. I have also considered the rival submission made by the parties herein. If find that the main issue for determination is whether applicant has made out a case for the setting aside of the arbitral award.

7. Section 35 of the *Arbitration Act* provides as follows: -

35. 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.

8. The applicant argued that the Arbitrator dealt with issues outside the scope of the arbitration agreement by waiving the contractual sum payable to the applicant and by declining to rule on the application to adduce additional evidence. The applicant further faulted the Arbitrator for misconstruing the parties' agreement and more specifically clause 11.4 of the agreement.

9. On its part, the respondent argued that the grounds cited by the applicant do not fall under grounds for setting aside an award as provided for under Section 35 of the *Arbitration Act*. The respondent observed that the application is couched as an appeal and added that the applicant did not demonstrate how the award conflicted with public policy.

10. In *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR the Court of Appeal observed as follows: -

> " "In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, without in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc. (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings."

11. Clause VI of the subject agreement dated 12th July 2016 states as follows on reference to arbitration: -

> " Any matter unspecified in this agreement or any doubt arising from the interpretation of the terms and conditions herein or any other dispute regarding this agreement shall be handled and settled through friendly consultation between the parties, failure to which it shall be referred to arbitration in accordance with the provisions of the *Arbitration Act*, Laws of Kenya"

12. A close reading of the aforementioned clause reveals the intention of the parties was to refer any disputes arising from their agreement to arbitration. The Clause is wide in its application and covers any dispute whether specified or unspecified and include the interpretation of the terms and conditions of the Clause.

13. The dispute between the parties herein was with regard to breach of the 2nd contract. The claimant alleged that that the respondent stopped transmitting and distributing its digital TV content thus precipitating reference to arbitration. I have perused the award and I note that he arbitrator confined himself to the arbitral clause in interpreting the contracts signed by the parties.

14. In *Mahican Investments Limited and 3 others v Giovanni Gaida & Others* NRB HC Misc. Appl. No. 792 of 2004 [2005] eKLR, it was held that: -

> " A court will not interfere with the decision of an Arbitrator even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

15. Guided by the decision in the above-cited case and the terms of the parties' agreement, I find that the arbitrator acted within the limits of the matters under reference.

16. The applicant also contended that the arbitral award was contrary to public policy. In *Christ for all Nations v Apollo Insurance Co. Ltd*. [2002] EA 366 Ringera J. (as he then was) explained the scope of public policy in respect to the setting aside an arbitral award as follows: -

> " An award could be set aside under page 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."

17. 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."

18. The same issue was addressed by the Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR, where it was held that: -

> "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."

19. In *Open Joint Stock Company Zambeznstony Technology v Gibb Africa Limited* [2001] the court held as follows on public policy: -

> "I may perhaps add that public policy, in my view, generally refers to the set of stoic-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure there from can be entertained. Public policy acts as a shield for safeguarding the public good, upholding Justice and morality and preserving the deep rooted interest of a given society."

20. The principle that emerges from the above-cited cases, it is that an applicant seeking to set aside an award on the ground of public policy, must demonstrate that the award is inconsistent with the Constitution or any written law, is inimical to the national interest of Kenya and is contrary to justice and morality. The applicant argued that it is against public policy to deny a parastatal its statutory fees and levies. The respondent submitted that the arbitrator did not deliver his ruling on the application to admit new evidence on grounds that the arbitrator's fees had not been paid.

21. In order to set aside the award on the grounds of public policy, the applicant must demonstrate that the arbitrator committed an illegality that goes against morality, societal values and the rules of natural justice. In the instant case, I find that the applicant herein has not demonstrated that the arbitrator conducted himself in a manner that was unjust to the parties. This court appreciates the fact that the parties voluntarily elected arbitration as their dispute resolution mechanism and that the court's intervention is limited to the circumstances outlined under Section 35(2) of the *Arbitration Act*.

22. For the above reasons, I find that I find that the application dated 24th February 2021 lacks merit and I therefore dismiss it with costs to the respondent.

Application dated 20th April 2021

23. The respondent filed the application dated 20th April 2021 seeking the recognition and enforcement of the award dated 25th November 2020. The application is brought under Section 36 of the *Arbitration* Ad, 1995 and Rules 4(1) and 9, of the *Arbitration Rules*. It is supported by the affidavit of Mr. Rogers Mwiti Mpuru and is based on the following grounds: -

    a) That the parties herein submitted to the Jurisdiction of the Arbitrator.

    b) That the parties were accorded a free and fair hearing by the Arbitrator Mr. Calvin Nyachoti C.Arb. by being allowed to produce evidence and call witnesses.

    c) That the Arbitrator in arriving in his decision and Award considered the submissions of both parties in a fair and balanced manner.

    d) That the award is based on the correct interpretation and application of the law.

e) That it is in the interest of justice that the Arbitral Award by Mr. Calvin Nyachoti be recognized, and adopted as an order of this Honourable Court.

24. The main issue for determination is whether the applicant has met the conditions stipulated in the *Arbitration Act* for the enforcement of an arbitral award. Section 36 of the *Arbitration act* sets out the legal parameters governing enforcement an adoption of an 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.

25. In *Samura Engineering Limited v Don-Wood Co Ltd* [2014] eKLR the court of held as follows: -

> " 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..."

26. The respondent did not oppose the application. I note that the applicant has met the preconditions for the enforcement of an award by attaching he certified copy of the arbitral award and a copy of the arbitration agreement to the application. I am satisfied that the applicant has met the conditions set under Section 36 of the *Arbitration Act* and I therefore allow the application dated 20th April 2021 as prayed with costs to the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Umazi for Walukwe for Applicant.

Mr. Obando for Abdikadir Sheikh for the Respondent.

Court Assistant- Sylvia