Africa Reit Limited v China National Aero-Technology International Engineering Corporation (Commercial Arbitration Cause E077 of 2022) [2023] KEHC 17828 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E077 OF 2022

A MABEYA, J

MAY 19, 2023

BETWEEN

AFRICA REIT LIMITED ..... APPLICANT

AND

CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION ..... RESPONDENT

RULING

1. Before court are two applications. The application dated November 29, 2022 by the applicant for setting aside the arbitral award and the application dated November 24, 2022 by the respondent for recognition and adoption of the award dated August 31, 2022. The court will first determine the application for the applicant first.

Application Dated November 29, 2022

2. The application was brought under section 35(1) (2) (3) and (4) of the *Arbitration Act*, section 1A, 1B &3A of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules*. It sought to set aside, vacate and/or dissolve the arbitral award made by the sole arbitrator Dr Allan Abwunza on August 31, 2022.

3. The application was founded on the grounds set out on the face of it and on the supporting affidavit of Joyce Wanjiru Ndungu sworn on November 29, 2022. The applicant's case was that in an agreement and conditions of contract for building works dated March 28, 2012 between it and the respondent, it was agreed that the respondent would erect and complete the applicant's proposed serviced apartments for a sum of Kshs 190,000,000/-.

4. The project was meant to commence by October 17, 2011 and be completed within 44 weeks, that is by August 17, 2012. However, the respondent delayed in completing the project and correcting the defects in the project which caused the applicant to incur additional costs.

5. A dispute arose and the matter was referred to arbitration. By an award dated August 31, 2022, the applicant's claim was dismissed while the respondent's counterclaim for Kshs 60,074,550/- was allowed. The applicant contended that the award ought to be set aside on the grounds that the parties lacked capacity to confer jurisdiction upon the arbitrator on matters that went beyond the scope of the contract.

6. That on several occasions the arbitral tribunal implied on the intention of the parties when interpreting the terms of the contract and this amounted to re- writing the contract. It was contended the award was contrary to the basic principles of justice and fairness thus in conflict with the public policy of Kenya.

7. The respondent opposed the application *vide* a replying affidavit of Wang Jin sworn on December 23, 2022. It was the respondent's case that it carried out the works as per the contract and the same was handed over to the applicant. That after the final account was given, the applicant failed to settle Kshs 68,666,485/- which amount had been negotiated and entered into in a settlement agreement.

8. That the applicant had acknowledged the debt owed to the respondent for seven years but still instituted the claim at the arbitral tribunal. That the application was only meant to frustrate the respondent from realizing the amount owed to it. It contended that the applicant had not met the conditions set out in section 35(2)(i) of the *Arbitration Act* ("the Act") for setting aside the arbitral award. That the arbitral tribunal had the jurisdiction to determine the dispute and the applicant had failed to demonstrate sufficient cause to warrant the orders sought.

9. The parties filed their respective submissions which were ably hi-lighted by learned counsel. The applicant submitted that the arbitral tribunal did not have jurisdiction to determine the respondent's counterclaim as it was time barred. Counsel submitted that the award of the arbitrator went beyond the scope of the reference of the contract. That the arbitrator re-wrote the terms of the contract when it determined that the applicant had usurped the roles of the architect and quantity surveyor. The cases of *Peter Ouma Onyango v Max Calson* [2021] Eklr, *TSC v KNUT & 3 others* [2015]eKLR and *Zakhem International v Quality Inspectors* [2019] were relied on in support of those submissions.

10. On its part, the respondent submitted that the court did not have the jurisdiction to interfere with the arbitrator's findings on facts as doing so would amount to the court sitting on an appellate capacity. That the application was meant to delay the respondent from realizing or recovering its debt. That the applicant could not challenge the tribunal's jurisdiction at this stage as it should have been raised in the proceedings and appealed against within 30 days. The respondent further submitted that the final award was not contrary to public policy.

11. The cases of *Kenya Oil Company Ltd v Kenya Pipeline Company*, *Samuel Kamau Muhindi v Blue Shield* [2021] eKLR, *Nyuttu Aggrovet v Airtel Networks* [2019] eKLR amongst others were cited in support of those submissions.

12. The applicant seeks to set aside the arbitral award on the grounds that the award went beyond the scope of the agreement between the parties and that the award offends public policy.

13. Section 35 of the 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.

14. 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, with-out 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 N*inth 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."

15. The applicant's contention was that the issue of jurisdiction had been raised at the arbitral tribunal however the parties agreed by consent that the arbitral tribunal had jurisdiction to hear and determine the dispute. The applicant further contended that the parties lacked capacity to confer jurisdiction on matters that went beyond the scope of the contract.

16. It is common ground that parties entered into an agreement for building works dated March 28, 2012. Clause 45 thereof provided that settlement of the disputes shall be resolved by arbitration. The duty of the arbitrator was to establish whether the parties had breached the terms of the agreement and further to ascertain whether he was under an obligation to determine the nature of the dispute.

17. From the record, it is clear that the arbitrator raised the issue of jurisdiction and both parties allowed him to proceed. Can it be said that the arbitrator went beyond his mandate? The answer is in the negative. While it is correct that parties cannot confer jurisdiction on a tribunal or court, the issue of jurisdiction should be raised at the earliest and be determined. I find that the challenge on the arbitrator's jurisdiction is an afterthought.

18. Further, a decision having already been made by the arbitrator regarding his jurisdiction I find that any further challenge on jurisdiction could only have been raised through an appeal against the decision as provided for in section 17(6) of the Act. Accordingly, that ground fails.

19. The second issue is whether the award was in conflict with the public policy of Kenya. Public policy was considered by Ringera, J (as he then was) in the case of *Christ for All Nations v Apollo Insurance Co Ltd* (2002) 2 EA 366 in which he stated that in Kenya an act is contrary to public policy if it was: -

> "(a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals".

20. In *Rwama Farmers Co-operative Society Limited v Thika Coffee Mills Limited* [2012] eKLR, after citing with approval cases in India, England and Kenya on the issue of public policy, the court stated that: -

> "From the foregoing, it is quite clear that the term "conflict with the public policy" used in section 35 (2) (b) of the *Arbitration Act*, is akin to 'contrary to public policy', 'against public policy' or 'opposed to public policy.' These terms do not seem to have a precise definition but they connote, that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

1. Further, in *National Oil Corporation Of Kenya Limited v Prisko Petroleum Network Limited* [2014] eKLR, Gikonyo J stated as follows: -

> > "The argument that the award herein should be set aside for it violates public policy on account of errors of law and fact, I say

the following. I admit, just as Ringera J proclaimed in *All Nakons v Appollo Insurance Co Ltd* [2002] 2 EA 366, public policy is most broad concept incapable of precise definition. But that does not mean it is an impossible ground; it has been unpacked and a successful applicant should establish facts that the award is:-

(a) Inconsistent with the Constitution or other laws of Kenya;

or

(b) Inimical to the national interest of Kenya; or

(c) Contrary to justice and morality."

21. From the foregoing, in order to prove that an award is against the public policy the applicant has to demonstrate that the award is inconsistent with the *Constitution* or any written law, inimical to the national interest of Kenya or contrary to justice and morality, or is injurious to the public, offensive, contains that which is unacceptable and that violate the basic norms of society.

22. In the present case, all that the applicant claims to be against public policy is the claim that the tribunal misinterpreted the contract and read it in a manner that favored the respondent. Can that fit in the aforesaid attempted definition of 'contrary to public policy'. I think not.

23. I therefore find that the applicant has failed to demonstrate that the award offends public policy and in what way.

24. In the upshot, the applicant has failed to establish the basis for setting aside the arbitral award dated August 31, 2022. For the reasons stated above, I find no merit in the application dated November 29, 2022 and hereby dismiss the same with costs to the respondent.

Application Dated November 24, 2022.

25. The second application was brought under section 36(1) of the Act, 1995 and rules 4 and 9 of the *Arbitration Rules 1997*. The applicant sought for the recognition and adoption of the final award by Dr Allan A. Abwunza as an order of the court and judgment be entered in the terms of the award.

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

> " 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..."

27. In the present case, the respondent met the conditions for recognition and enforcement of an award under section 36 of the Act.

28. Accordingly, I make the final orders as follows: -

a. The application dated November 29, 2022 is dismissed with costs.

b. The chamber summons dated November 24, 2022 is allowed and the final award published on August 31, 2022 be and is hereby recognized and adopted as a judgment of this court.

c. The respondent shall have the costs of the summons.

29 It is so ordered.

DATED and DELIVERED at Nairobi this 19th day of May, 2023.

A. MABEYA, FCIArb

JUDGE