



**Workforce Africa Limited v Ecart Services Kenya Limited Trading as Jumia Kenya
(Miscellaneous Application E766 of 2022) [2023] KEHC 18239 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
MISCELLANEOUS APPLICATION E766 OF 2022**

DAS MAJANJA, J

MAY 26, 2023

BETWEEN

WORKFORCE AFRICA LIMITED APPLICANT

AND

**ECART SERVICES KENYA LIMITED TRADING AS JUMIA
KENYA RESPONDENT**

RULING

1. The Applicant (“Workforce Africa”) has invoked section 36 of the *Arbitration Act, 1995* and filed the Notice of Motion dated October 17, 2022 seeking recognition and enforcement of an arbitral award dated August 31, 2022 (“the Award”). The application is supported by grounds set out on its face and the supporting affidavit of its director, Christopher Karani, sworn on October 17, 2022. It is opposed by the Respondent (“Jumia”) through the replying affidavit of its Head of Legal, Kennedy Ngugi sworn on January 18, 2023.
2. Jumia has filed the Notice of Motion dated November 1, 2022 and seeks to set aside the Award under section 35 of the *Arbitration Act*. Its application is supported by the grounds on its face and the supporting affidavit of Kennedy Ngugi sworn on 1st November 2022. It is opposed by the Applicant through the replying affidavit of Christopher Karani sworn on November 10, 2022.
3. I directed that both applications be considered together and in that regard, the parties have also filed written submissions in support of their respective positions. A background of the matter is appropriate in order to resolve the applications.
4. On April 1, 2019, the parties entered into a Labour Outsourcing Agreement under which Workforce Africa would provide labour and support services to Jumia on terms and conditions of the agreement for a period of one year (“the Agreement”). In March 2020, Jumia withheld management fee payments to Workforce Africa on the ground that Workforce Africa was not remitting statutory deductions of



some employees. The matter was not resolved because on June 5, 2020, Workforce Africa demanded Kshs 4,361,379.29 in respect of unpaid invoices for the services rendered.

5. As the demands went answered, Workforce Africa filed a suit in the magistrate's court to recover the amount. The suit was stayed pending reference to arbitration. On August 14, 2020, Jumia paid Kshs 1,628,742.70 to Workforce Africa leaving a balance of Kshs 2,732,636.59 which formed the basis of the claim before the Arbitral Tribunal ("the Arbitrator"). After hearing the matter, the Arbitrator published the Award.
6. The Arbitrator identified five issues for determination. First, whether Workforce Africa was in breach of the Agreement. Second, whether Jumia was in breach of the Agreement. Third, whether Jumia was entitled to withhold payment. Fourth, whether Workforce Africa was entitled to the reliefs sought and last, who was to bear the costs of the arbitration.
7. On the first issue, the Arbitrator held that while Workforce Africa, as the employer, had an obligation to calculate all statutory payments and deduct them from the payroll (employee's salary) and then remit the correct amounts to the various statutory bodies in a timely manner in accordance with the law, he found that Jumia did not provide such evidence of the employees' complaints to the arbitration. As such, the Arbitrator concluded that Workforce Africa was not in breach of the Agreement.
8. On the second issue, the Arbitrator found that even after Jumia raised concerns about Workforce Africa not remitting the statutory deductions, it still continued to receive services from Workforce Africa until the expiry of the Agreement at the end of March 2020. The Arbitrator accepted that these services must be paid for unless there was a contractual provision in the Agreement not to do so otherwise Jumia would be in breach of the Agreement. He further found that the only remedy available to Jumia for any breach of the Agreement by Workforce Africa was to terminate it in accordance with Clause 4.2 and 4.3 thereof. That Jumia did not exercise any of these rights under the Agreement and instead opted to make unilateral decisions without giving notice and only informed Workforce Africa after taking action which is contrary to their Agreement. The Arbitrator found that under Clause 9.8 of the Agreement, the statutory deductions did not form part of the fee due to Workforce Africa and that no part of the management fee was in dispute. That withholding management fees was not a remedy available to Jumia, and the only entity who could raise the complaint of non-remittance of statutory deduction was the employees - directly to their employer using the available legal channels, and perhaps with the assistance of Jumia.
9. The Arbitrator thus held that Jumia had no authority in the Agreement to withhold the management fees and that Jumia was in breach of Clause 9.10 Agreement that states that "At no one time should the Company owe the Contractor more than one full month of gross Invoice". The Arbitrator found that Jumia owed Workforce Africa 3 months' invoices for the months of January, February and March 2020 and later 2 months' invoices after making part payment for March 2020 and that the Agreement does not have a clause where the payment of the management fee is conditional unless there is a disagreement with the fee invoice itself as provided for in Clause 9.9 of the Agreement. For these reasons, the Arbitrator concluded that it is not enough for Jumia to claim with reasons that they were justified to withhold the management fees as it ought to have demonstrated the provisions of the Agreement that gave them the right to do so, which they had not done. The Arbitrator therefore found that Jumia was in breach of the Agreement.
10. Having found that Jumia was in breach of the Agreement, the Arbitrator held that Jumia was not entitled to withhold payment due to Workforce Africa. As a consequence, the Arbitrator found that Work Africa was entitled to the payment of Kshs 2,732,636.59 being the unpaid management fees,



interest on this sum at 13% per annum from 1st March 2020 and that Jumia was to pay Workforce Africa reasonable legal costs of the arbitration proceedings.

Analysis and Determination

11. From the reliefs sought and submissions, the main issue for determination is whether the Award ought to be set aside and if the answer is in the negative, whether it ought to be recognized and enforced as a decree of the court.
12. It is common ground that the court’s jurisdiction in determining whether an award should be set aside is circumscribed by section 35 of the *Arbitration Act* which provision material to Jumia’s case provides as follows:

35. Application for setting aside arbitral award

- (1)
- (2) An arbitral award may be set aside by the High Court only if—
 - (a) the party making the application furnishes proof—
.....
 - (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
- (b)

13. Jumia’s application is premised on the ground that the Award was made in excess and outside of the scope of the terms of the Agreement and dealt with a dispute not contemplated by the parties.
14. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No 71 of 2016 [2020] eKLR 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 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.



15. The arbitration clause in the Agreement is not in dispute and clause 22.2 thereof provides that “Should any disputes of whatsoever nature arise at any time between the Parties concerning this Agreement or an Assignment or its interpretation or effect or as to the rights, duties, or liabilities of the Parties under or pursuant to this Agreement or otherwise or as to any other matter in any other way arising out of this Agreement, then a meeting between the duly nominated Representatives of each Party shall be held at a mutually convenient time and place.” Clause 22.4 then proceeds to state that, “If they fail to so resolve the dispute/difference between them amicably, the matter shall be referred to the settlement by an arbitrator mutually agreed upon by the Parties.”
16. The dispute resolution clause as drafted is wide enough to encompass disputes of whatever nature. In *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* ML HC Misc. Application No 129 of 2014 [2015] eKLR, the court explained that the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law.
17. Jumia bases its argument that the Arbitrator exceeded the scope of the reference on three grounds. First, that there was no basis for the Arbitrator to hold that the decision to withhold the management fee was unilateral whereas there was no dispute that a meeting was held in accordance with Clause 22.2 of the Dispute Resolution Clause in the Agreement and the parties had arrived at the solution to withhold the management fee to allow Workforce Africa to remedy the breaches outlined therein. Second, it points out that Workforce Africa admitted that it had failed to remit various statutory deductions on behalf of a number of employees, thereby being in breach of the Agreement but that the Arbitrator inexplicably placed a burden on Jumia to avail the said employees to prove that in fact Workforce Africa had not complied with the remittance of the deductions which was, again, not an issue in dispute and the said employees were not parties to the Agreement.
18. Jumia also faults the award of 13% interest per annum from March 1, 2020 by stating that the Arbitrator’s actions to employ the arithmetic above, expanded the margins and boundaries of the contract between the parties whereas Workforce Africa did not address this issue in its submissions and the rate is not justified and the date given therein was neither raised nor addressed by either party.
19. Against the arguments raised by the Jumia, it is important to note that the dispute between the parties arose from the Agreement the subject of which was the payment of the management fees provided for under the Agreement. Workforce Africa, in its Statement of Claim called on the Arbitrator to find whether there was a valid and binding contract between the parties, whether there was any breach of the Agreement by Workforce Africa, whether there was any action taken by Jumia to notify Workforce Africa of any breach to be remedied and/or to terminate the contract in line with its clear provisions and whether Jumia owed Workforce Africa the sum of Kshs 2,732,636.59. Workforce also prayed for interest.
20. The parties advanced their respective positions on the dispute but the Arbitrator stated in the Award that the parties could not agree on the issues for determination. Under the Arbitrator’s terms of engagement dated March 3, 2022 executed and agreed to by the parties, the scope of the arbitration was to be determined by the Arbitrator following the exchange of the claim and any reply and/or counterclaim, should the parties fail to agree.
21. From the issues framed by the Arbitrator for determination vis-à-vis the arbitration agreement, I fail to see what issue was outside the scope of the arbitration. The said issues framed were already anticipated by the parties when they agreed to refer any dispute arising out of the Agreement to arbitration. Jumia also anticipated the said issues from the Statement of Claim and actually responded to them in its reply.



22. The issue of interest was part of the Arbitrators Terms and Conditions of Appointment, where it was agreed that the arbitration would be conducted in accordance with Arbitration Act and that the Arbitration Rules of the Chartered Institute of Arbitration, Kenya Branch, would apply. Under section 32C of the Arbitration Act and Rule 90(j) of the Arbitration Rules, an arbitral tribunal is granted power and jurisdiction to award simple interest, “on any sum and to any date, at such rates and with such rates as it decides appropriate.” Workforce Africa prayed for interest though at commercial rates. The relief that ought to be granted was an issue for determination and the Award dealt with and gave reasons for reaching the decision on awarding simple interest at 13% from March 1, 2020.
23. My appreciation of the grounds fronted by Jumia to support to set aside the Award, is that Jumia is inviting the court to reappraise the facts and evidence and come to a different conclusion than that arrived at by the Arbitrator. Ultimately the Arbitral Tribunal was called upon to determine whether the Applicant was entitled to management fees and it found in favour of the Applicant upon consideration of all contractual provisions and evidence. I agree with Workforce Africa that an application to set aside an award is not an appeal and this court cannot purport to sit as an appellate court in such an application. This position was sanctioned by the Supreme Court in Geo Chem Middle East v Kenya Bureau of Standards SCK Petition No 47 of 2019 [2020] eKLR where it agreed with the following dicta by Ochieng’ J.,:
- Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act. Any other intervention by the Court is expressly prohibited by Section 10 of the Act. I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal...
24. The court thus rejects the entreaty by Jumia to re-open the dispute and arguments by the parties before the Arbitrator so that it can come to a different conclusion from that reached by the Arbitrator. An arbitral tribunal is the master of facts and the Arbitrator was entitled to review the evidence and come to his own conclusion even if the same was wrong, or that the court might have a different opinion to his findings. Section 35 of the Arbitration Act was never meant to elevate the court to sit as an appellate court in arbitration matters. While the Supreme Court in Nyutu Agrovot limited v Airtel Networks Kenya Limited (2019) eKLR stated that there could be legitimate instances where a party can appeal a decision stemming from arbitration, the apex court cautioned that courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. It should now be clear that Jumia has failed to make a case for setting aside the Award.
25. Having dispensed with the application to set aside the Award, I now consider whether the Award should be recognized and enforced. Under section 32(A) of the Arbitration Act, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Arbitration Act. The High Court, under section 36 of the Arbitration Act, has the power to recognise and enforce domestic arbitral awards once the original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it. Section 37 of the Arbitration Act sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award which grounds mirror those in section 35 for setting aside an award.
26. The arbitration agreement and the Award are common cause. Further, since Workforce Africa has furnished the court with the certified copies of the arbitration agreement and the Award and the



grounds for setting aside the Award dismissed, I do not find any reason to refuse the application for recognition and enforcement of the Award.

27. Jumia has also not disputed that Workforce Africa spent a total of Kshs 150,000.00 in the arbitration which is supported by fees notes duly marked as paid by the Arbitrator. I hold that Workforce Africa is entitled to reasonable legal costs incurred in the arbitral proceedings.

Disposition

28. For these reasons, I have outlined above I make the following orders:
- a. The Respondent's Notice of Motion dated November 1, 2022 is dismissed.
 - b. The Applicant's Notice of Motion dated October 17, 2022 is allowed on terms that the Award dated August 31, 2022 be and is hereby recognized and entered as a judgment of this court and that leave be and is hereby granted to the Applicant to enforce the Award.
 - c. The Respondent shall pay the Applicant Kshs 150,000.00 being costs incurred in the arbitral proceedings.
 - d. The Respondent shall pay the Applicant costs of both applications assessed at Kshs 85,000.00.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Amisi instructed by Lehmann Associates Advocates for the Applicant

Instructed by Igeria and Ngugi Advocates for the Respondent

