Ocean View Residency Limited v China New Era Group (K) Limited & another (Commercial Case E002 of 2023) [2023] KEHC 27237 (KLR) (6 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E002 OF 2023

DKN MAGARE, J

DECEMBER 6, 2023

BETWEEN

OCEAN VIEW RESIDENCY LIMITED ..... APPLICANT

AND

CHINA NEW ERA GROUP (K) LIMITED ..... 1ST RESPONDENT

WHINTO ARCHITECTS (K) LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The decision was reached by the Arbitrator on 16/12/2022 by the sole arbitrator AG Mahdry. The applicant made an application dated 15/3/2023 to enforce the award. The Respondent subsequently sought to have an interpretation of a clear provisions of the award. The arbitrator dismissed the interpretation.

2. The applicant through its Managing director Liu Dong Sheng, stated that though the arbitration was decided on 16/12/2022, attempts to recover them has been futile. They annexed the Ruling and the letter demanding the same dated 20/2/2023. The affidavit is drawn in the most award way with the last page and the 2nd page separated badly. It is high time parties gave seriousness with drawing off affidavit which are solemn documents.

3. I have just made a ruling dismissing the challenge to the arbitration. There is no longer an independent to the agreement. My duty under Section 36 of the *Arbitration Act* is as doth: -

> " Part Vii – Recognition and Enforcement of awards
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> 36. Recognition and enforcement of awards

(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) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

(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.

(4) 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.

(5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

4. In *University of Nairobi v Nyoro Construction Company Limited & another* (Arbitration Cause E011 of 2021) [2021] KEHC 380 (KLR) (Commercial and Tax) (22 December 2021) (Ruling), justice Majanja stated as follows: -

> " The reason for this approach is not difficult to discern and was summarized by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* SCK Petition No 12 of 2016 [2019] eKLR as follows:
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> > " the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the court process. The *Act* was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the *Act* speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the *Arbitration Act* indicates that, "the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process." It was also reiterated that the limitation of the extent of the courts' interference was to ensure an, "expeditious and efficient way of handling commercial disputes."(53)Similarly, the Model Law also advocates for "limiting and clearly defining court involvement" in arbitration. This reasoning is informed by the fact that "parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality

and expediency of the arbitral process." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our *Constitution* in article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all courts to promote it. However, the arbitration process is not absolutely immune from the court process, hence the present conundrum."

5. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, the supreme Court Maraga; CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) stated as doth: -

> "(65) This position, the Court stated, was for purposes of protecting the integrity of the decision making process or the decision maker which a Court should be vigilant to protect but not an attack on the decision itself. Particularly, at paragraph 72 the Court elaborated on the said principle as follows per Lord Justice Rix (per incuriam);
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> > "The truth of the matter is: there are all sorts of contexts in which, for good reason, Parliament has provided that there should be restrictions on the appeal process, and a limit to appellate jurisdiction. In such situations, ..., it is natural to conclude that, even in the absence of express language, the statute intended the lower court's discretion as to whether or not to give permission to appeal to a higher court to be exclusive and final. However, there is no similar rationality, it may be said, no good reason at all, for thinking that a court's unfairness is to be left incapable of appellate review. While bearing fully in mind the need for finality in litigation, and the injustice which may itself be created by losing sight of that need, this court ... recognised the imperative need for an effective remedy, in a possible case of bias, to maintain confidence in the administration of justice.... It adopted the words of Lord Diplock in another case of the need for courts to have power "to maintain its character as a court of justice" ... Although the context there might have been one where it was assumed that the court in question had an underlying or inherent jurisdiction, I cite the doctrine to highlight the unlikelihood that Parliament, a fortiori in a situation where an appeal jurisdiction was possible, intended the unfair process of a lower court to be immune from appellate review."

6. Given that there is no impairment, I find that the application dated 15/3/2023 is merited. I allowed prayer 1, a formal ward prepared by Ali Mandhdry Chartered arbitrator dated 16/12/2022 be adopted as the judgment of the court.

7. In the circumstances I allow the application dated 15/3/2023 allowing for enforcement of the award as a judgment of the court.

Determination

8. The upshot of the foregoing as that I make the following orders.

a. The award given on 16/12/2022 is made a judgment of this court.

b. Leave be granted to the applicant to enforce the award as the decree of the court.

c. Costs to the Applicant

d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF DECEMBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Okong'o for the Applicant

Mr. Wekesa for the Respondent

Court AssistanT - Brian