



Josef v Golden Century Limited (Miscellaneous Application E581 of 2022 & E068 of 2023 (Consolidated)) [2024] KEHC 1152 (KLR) (Commercial and Tax) (12 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E581 OF 2022 & E068 OF 2023 (CONSOLIDATED)**

JWW MONG'ARE, J

FEBRUARY 12, 2024

BETWEEN

SCRIBOSKI ROMUALD JOSEF PLAINTIFF

AND

GOLDEN CENTURY LIMITED DEFENDANT

RULING

1. By a sale agreement dated 20th December 2020, Prof. Romuald Josef Sciborski (the Plaintiff) and Ann Muthoni Thumbi contracted with Golden Century Limited (Defendant) for the sale and purchase of Apartment Number B-004, Block B on the ground floor of Golden Century Apartments on LR. No. 3734/1478. Before the completion of the sale, a dispute arose and the Plaintiff filed the present suit seeking among other orders to have the dispute resolved through arbitration in accordance with clause 18.1 of the sale agreement. Subsequently, the arbitral process commenced conducted by the sole arbitrator, Aasif Karim and a final Arbitral Award was therefore rendered on 23rd July 2023 in the following terms:-
 - a. The Respondent has succeeded on this Arbitration.
 - b. The amount payable by the Claimant will be Kshs.14,650,000/- plus interest of Kshs.4,287,486/- to make a total of Kshs.19,057,486/-. The amount to be paid within 75 days of the date of my award. Refer to my award 47(e). Failure to do the same, parties will follow 47(f).
 - c. I have assessed the costs of the Award in the sum of Kshs.1,931,000/-. The amount to be paid not later than 14 days from the date of my Award. Where one Party pays more than its share, that Party is entitled to recover the overpayment from the other Party within 75 days of the



date of the Award. Thereafter simple interest shall accrue at 12% on the outstanding amount till payment in full.

The Claimant will bear 90% of the Arbitration Costs.

The Respondent will bear 10% of the Arbitration Costs as time we spent on areas where Respondent did not succeed in its prayers.

- d. I am grateful to the Counsel for their indulgence on this dispute. One of the principle and advantages of Arbitration is speed with which a dispute can be determined or resolved. This has been achieved.
 - e. I also did suggest on various occasions to the Parties that Mediation be tried to resolve the difference and dispute, before the Award is Published. While the same was not taken up, I do pray that the Parties in future in any of their respective disputes consider Mediation first towards resolving any dispute. This is where all parties can succeed with a “win win” situation.
 - f. The above is full and final settlement of all the issues put before me for my Determination under my Terms of Reference and put before me in this Arbitration.
2. The Defendant, Golden Century Limited, filed the first Application on 1st August 2023 seeking for the recognition and adoption of the Arbitral Award as judgment and decree of this court, while the Plaintiff, filed an application on 22nd August 2023, in Misc. App. E068 of 2023, seeking to set aside the said Arbitral Award. The two applications were consolidated and heard together through written submissions and oral highlights of the same before the court.
 3. For good order, I will first address the application in Misc Cause No. E581 of 2022 whose outcome will either way determine the findings in the second application in Misc. App. No. E068 of 2023.
 4. The notice of motion application filed by the Defendant on 1st August 2023 pursuant to section 36 and 36 of the Arbitration Act, seeks the following orders:-
 1. That the Arbitrator’s final award dated 15th July 2023 between Prof. Romuald Josef Sciborski and Golden Century Limited be adopted as an award of this Honourable Court in settlement of the dispute between the parties.
 2. That a Decree to reflect the orders of the Arbitrator.
 3. That the costs of this application and entire suit be awarded to the Defendant/Applicant.
 5. The second notice of motion Application filed in Misc. App. No. E068 of 2023 by the Plaintiff on 23rd August 2023 pursuant to Section 35 of the Arbitration Act seeks for orders:-
 1. Spent.
 2. Spent
 3. Spent
 4. Spent.
 5. That pending the hearing and determination of this Application this court be pleased to grant orders staying the final award issued by the Arbitral Tribunal on 15th July 2023 in respect of the reference before Aasif Karim.
 6. That this Honourable Court be pleased to set aside the final award issued by the Arbitral Tribunal on 15th July 2023 in respect of the reference before Aasif Karim.



7. That costs of this application be provided for.

The Defendants/Applicant Case

6. The Defendant/Applicant has brought this application seeking for orders to enforce and recognize as a decree of this court the arbitral award delivered on 17th July, 2023 by the Hon. Arbitrator, Aasif Karim as a Judgment of this Honourable Court. The Application is supported by the grounds set on its face and the supporting affidavit of LAN XIAO sworn on 1st August 2023.
7. The Applicant has urged the court pursuant to Section 36 of the *Arbitration Act*, 1995, to adopt the above award as an order the Honourable Court and grant leave to the Applicant to enforce the Final Award as a decree of this Honourable Court. In compliance therefore the Applicant attached to this application a duly certified copy of the Final Arbitration Award and the Sale Agreement dated 22nd December 2020 containing the arbitral clause under clause 18.1 therein.

The Plaintiff /Respondents Case

8. Prof. Romuald Josef Sciborski, the Plaintiff /Respondent herein opposed the application. In addition to filing a replying affidavit to this application sworn on 30th August 2023, the Plaintiff also filed his own set of application being Misc. App. No E068 of 2023 ostensibly seeking to set aside the said arbitral award of 15th July 2023 issued by Aasif Karim. The Plaintiff has raised various grounds by which he argues that the arbitration award goes against public policy and should be set aside in that it failed to address several issues raised by the Plaintiff.
9. The Plaintiff has urged the court to find that the arbitrator failed to consider the fact that the arrangement to purchase the apartment jointly with Ann Muthoni was frustrated by her inability to pay her part of the purchase price and that having brought in the European Foundation for Polish-kenyan Cooperation on board, where he was the President, the Ukraine-Russia war frustrated its ability to move funds from Europe to China and hence impeding his ability to complete the sale.
10. The Plaintiff further contended that the Arbitrator of failed to protect his rights as a consumer as envisioned in the *Consumer Protection Act* by refusing to hold that the Respondent, in its marketing had lied about the features of the Apartment and that by constructing another building adjacent to the suit premises, the same interfered with the promised ambience and amounted to false marketing and therefore against public policy.
11. Further, the Plaintiff has accused the Arbitrator of being unprocedural increasing his professional fees from Kshs.400,000/- to Kshs.1,850,000/- was a demonstration that the Arbitrator's conduct was questionable and unethical. He cast aspersions on the integrity and character of the Arbitrator on the issue raising the arbitration fees from what was originally agreed by suggesting that the same was affected by fraud, undue influence and or corruption on the part of the respondent. He accused the Arbitrator of conducting the Arbitral proceedings in a fashion that contravened the provisions of article 46 & 50(a) the of *Constitution* of Kenya and sections 3(4) of the *Consumer protection Act* of Kenya and hence urged the court to find that the same was against public policy.

Analysis and Determination

12. I have considered the pleadings by the parties in this matter and the written and oral submissions. I note from the outset that there is no dispute to the existence of an arbitration clause in the sale agreement subject matter of the dispute herein. I further note that both parties submitted themselves voluntarily to the arbitration process in line with Clause 18.1 of the Sale agreement between the parties dated 20th



December 2020. To my mind, for enforcement of an arbitral award, the operative sections is sections 36 and 37 of the Arbitration Act. Under Section 32(A) of the 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 Act. The High Court under section 36 has the power to recognize and enforce domestic arbitral award on the following terms:

“36

- (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) ...
- (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)
- (5)

13. Section 37 of the Act, on the other hand, provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows:-

37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—
- (a) At the request of the party against whom it is invoked, if that party furnishes the High Court proof that;
 - (i) 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, under the law of the state where the arbitral award was made;
 - (iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or



- (v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
 - (vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or
 - (vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;
- (b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya. [Emphasis mine].

14. I am satisfied therefore that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the Sale agreement dated 22nd December 2020 which contain the arbitration clause under clause 18.1 thereto and a certified copy of the Final Arbitral Award published on 23rd July 2023 by the sole arbitrator Aasif Karim. In any event both the Sale agreement and the Final Award are not in dispute. Since the Applicant has established a case for recognition and enforcement of the Final Award, the burden is on the Respondent to demonstrate that the court should not recognize the award based on the circumstances set out in section 37 of the Act.
15. In the replying affidavit and the application seeking to set aside the award dated 22nd August 2023 the Plaintiff has urged the court to find that the award is against public policy. Accordingly, the issue that arises for determination is “whether the Plaintiff has satisfied the tenets set by section 37 of the Arbitration Act to warrant a finding that the Award was against public policy.”
16. I have considered the issue as to what, in the courts view, would amount to” public policy.” Justice Ringera in *Christ for All Nations v Apollo Insurance Company Limited*, summed up ‘public policy’ as follows” That public policy is a most broad concept incapable of precise definition’, and he likened it to ‘an unruly horse’ that ‘once one got astride of it you never know where it will carry you’. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).
17. It is important to note that the Plaintiff moved the Court on 2nd August 2022 and among other prayers/ therein, sought to have the dispute referred to arbitration. It is therefore correct to state that the Plaintiff was the first party to declare that a dispute existed and to commit to have the same resolved by an Arbitrator in line with the arbitration clause in the sale agreement. In his replying affidavit and subsequent application for setting aside, the Plaintiff has raised various grounds to persuade the court that the final award was against public policy.
18. I have perused the final arbitration award and note that the grounds raised by the arbitrator in the replying affidavit to this application and the setting aside application in Misc App. E068 of 2023 were



properly considered and a determination made by the Arbitrator. For instance, the issue of the takeover of Ann Muthoni's share of the award by the European Foundation For Polish-kenya was raised and a determination of the same made and the finding by the arbitrator is documented in the final award. Secondly, the doctrine of frustration by the eruption of Ukraine-Russia as a factor contributing to the inability of the purchaser to complete the sale, I note that the same was also considered and a determination made. The issue of breach of the Plaintiff's consumer rights was also considered by the Arbitrator and a finding therein arrived at. In sum, the grounds upon which the Plaintiff sought to rely on, in my view, were adequately determined and are well documented in the final award. As correctly held by the court in the case of *Mabican Investments Limited v Giovanni Gaidi & 80 others* (2005)eKLR, "A court will not interfere with the decision of an arbitrator even if it is apparently a misinterpretation of 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."

19. Similarly in the case before me, it is not the place of this court to interfere with an arbitral award properly issued. Having considered the allegations that the award is against public policy and going by the definition of what amounts to public policy is in light of the decision by the Hon. Justice Ringera(RTD) in the *Christ for all nations case(supra)* which I find persuasive and I find the what is disputed by the Respondent is matter that falls within the purview of the arbitrator. I hold that the same was properly adjudicated and the arbitrator, as was expected of him, made a determination on the issue. To my mind, a matter cannot be deemed to be against public policy if one side of a dispute has been declared unsuccessful. It must be something that stands against the agreed tenets of written law or the *constitution*. As the learned Judge stated:-

"In order for this court to set aside the award for contravening public policy, the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator."

In the matter before me, I am persuaded that the award is not one that fits the criteria above and as such, it is not against public policy as provided under section 37 of the *Arbitration Act*.

14. In conclusion I find and hold that the application by the Defendant filed on 1st August 2023 for adoption and recognition of the Final Arbitral Award issued by Aasif Karim on 23rd July 2023 is successful. The said Arbitral Award is hereby adopted and recognized as a judgment and decree of this court. Subsequently, I find the Application in Misc. E068 of 2023 by the Plaintiff without merit. The same is hereby dismissed in its entirety with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Njoroge for the Defendant/Applicant - Golden Century
2. N/A for the Plaintiff /Respondent - Prof Romuald Josef Scirborski



3. Amos - Court Assistant

