



**CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH LIMITED
SUMMARY CASE LAW**

**MISCELLANEOUS CASE NO. E465 OF 2019
MATRIX BUSINESS CONSULTANTS LIMITED & 4 OTHERS –VS- SAFARICOM LIMITED**

- Applicant – Matrix Business Consultants Limited, Pemocom Communications Limited, Saniwalo Communications Limited, Rozacom Communications Limited and Daco Communications Limited
- Respondent – Safaricom Limited
- Judge(s) – David Shikomera Majanja
- Date of delivery of the Ruling: 14th February 2020 in Nairobi
- Court: High Court at Nairobi (Milimani Law Courts); Commercial, Tax & Admiralty Division

SUMMARY OF FACTS

This matter arose from a disputed Arbitral Award that was published by Arthur Igeria (hereinafter, the “Arbitrator”) on 10th July 2019, who had been appointed as the arbitrator to handle the dispute between the Applicants and the Respondent.

The background of the matter is that the Applicants had entered into separate “**Mpesa Cash Merchant Agreements**” contracts with the Respondent. According to the contract, the Applicants would act as cash merchants within the Respondent’s electronic money transfer system. The contract would be renewed annually on 31st December of each year upon proof of satisfactory performance. The dispute specifically arose on 16th January 2013 where the Respondent issued notices to terminate the respective agreements/contracts made with the Applicants but backdated the notices to 2nd January 2013 so that the agreements would terminate on 31st January 2013. The Arbitrator found and held that the notices were good and proper as per the contract and thus dismissed the prayers of the Applicants in the award he published.

The Applicants then applied to the High Court to set aside the award published on the basis of public policy in that, the award violated the Applicant’s right to have the dispute determined by application of the law and that the arbitrator exhibited bias in favour of the Respondent. Moreover, the Applicant submitted that the award was contrary to public policy to the extent that it promoted unjust enrichment by allowing the Respondent to withhold the Applicant’s profits due to them for work done pursuant to the contracts. The Respondent on the other hand submitted that the Applicants had not satisfied the conditions for setting aside an arbitral award under Section 35(2) of the Arbitration Act to warrant the court to set aside the award. Specifically, the Respondent averred that the Applicants did not establish that the award was against public policy. Regarding the averment of bias on the part of the Arbitrator, the Respondents submitted that the Applicants bore the burden of proof to establish their case and that the issues raised by the Applicants including the backdating of the notices and breach of contract were not proved.

ISSUES

The following issue arose for determination by the Judge:

“Whether the standard of proof was met to meet the grounds for setting aside an award pursuant to Section 35 of the Arbitration Act?”

HOLDING

The Judge held that when parties agree to have an arbitrator to determine a dispute between them, pursuant to an arbitration clause, they must take the consequences that the decisions may be or for against one of the parties to the dispute. He further stated that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award.

In a nutshell, the Judge put emphasis on the finality of an Arbitral Award. According to the Judge, the court should not interfere with the decision of an arbitrator even if it is apparently a misinterpretation of a contract, as such interference would place the court in the position of a Court of Appeal, which the whole intent of the Arbitration Act is to avoid.

Therefore, the Judge dismissed the application put forward by the Applicants.

RATIONALE

The *ratio decidendi* applied by the Judge is that the grounds for setting aside an arbitral award should be interpreted narrowly, with specific emphasis on the public policy ground. According to the Judge, Applicants must be put to strict proof in order to satisfy any of the grounds. In the absence of that, then the finality of an arbitral awards should be respected and courts should not interfere.



CI Arb
evolving to resolve

Kenya Branch

CASE RELEVANCE

- Section 35 of the Arbitration Act 1995 speaks to the finality of Arbitral Awards.
- The decision(s) arrived upon by an Arbitral Tribunal are final and binding. Parties who forward a dispute to an arbitration ought to anticipate the final and binding nature of arbitral awards.
- The public policy ground for setting aside an Arbitral Awards ought to be interpreted narrowly(strictly) according to the current jurisprudence.



CI Arb
evolving to resolve

Kenya Branch