

**HCCOMMARB/E006/2021; TREAT OF THE DAY (EA) LIMITED VS UTILITY
TRADING LIMITED CONSOLIDATED WITH HCCOMMMISC/E160/2021; UTILITY
GROUP KENYA LIMITED VS TREAT OF THE DAY (EA) LIMITED**

- 1st Applicant – Treat of the Day (EA) Limited
- 2nd Applicant – Utility Trading Limited
- Judge(s) –John M. Mativo
- Date of delivery of the Ruling: 13th July 2021
- Court: High Court of Kenya at Nairobi City (Milimani Law Courts)

SUMMARY OF FACTS

The parties herein entered into a Joint Venture which sought to achieve a long-term partnership involving a broad range of macadamia value chain with the objective of becoming a large processor and exporter of Macadamia from Kenya. Clause 7 of their Memorandum of Understanding provided for the reference to arbitration in the event a dispute arises.

A dispute arose as to the performance and breach of the MOU which was referred to arbitration. The Sole Arbitrator rendered his award in favour of the 2nd Applicant.

The 1st Applicant then filed an Application at the High Court (**HCCOMMARB/E006/2021**) seeking to set aside the arbitral award. The 2nd Applicant also filed an Application (**HCCOMMMISC/E160/2021**) seeking an order that the award be recognized as binding and be enforced by the court.

THE FIRST APPLICATION

In the first application, the 1st Applicant, Treat of the Day (EA) Limited claimed that the award granted the 2nd Applicant, Utility Trading Limited, compensation in relation to terms outside the contract. The second claim was that the award was designed to confer an undue and undeserved benefit and to unjustly enrich the 2nd Applicant in flagrant disregard/contravention of the public policy of Kenya. The third claim was that the award was contrary to established principles of law and justice and offended the constitutional principles on standard of conduct expected of a person interpreting and/or applying the law. Additionally, the 1st Applicant claimed that the effect of the award was to legitimize an illegality and to aid the 2nd Applicant in deriving benefit from a contract that they themselves breached and that the award had the effect of allowing the 2nd Applicant to

unjustly profit from its own wrongs and to unfairly punish a hapless party who at all times acted as part of the contract. Lastly, the 1st Applicant claimed that the award was oppressive, and, and payments in furtherance of the award would amount to an illegality and/or contrary to the public interest.

In response, the 2nd Applicant claimed that the Arbitrator did not act arbitrarily, irrationally or capriciously as claimed. The 2nd Applicant also claimed that the award was based on the rule of law and careful consideration of the party's obligations under the contract. Thirdly, the 2nd Applicant claimed that the dispute determined and the award fell within the terms of reference. The 2nd Applicant further claimed that the award was not in conflict with the public policy of the Republic of Kenya nor did it seek to amend the contract. Lastly, the 2nd Applicant stated that the award did not confer to it undue and undeserved benefit nor did it contravene public policy of Kenya, or principles of law and justice or constitutional provisions.

THE SECOND APPLICATION

In the second Application, the 2nd Applicant sought an order that the final award be recognized as binding and the same be enforced by the court.

The Application was founded on the grounds that the parties did not reserve the right of appeal and that it was in the interests of justice that the final award be enforced.

In response, the 1st Applicant claimed that the award was contrary to public policy. He further claimed that the Sole Arbitrator disregarded the doctrine of freedom of contract

In further response, the 2nd Applicant submitted that the 1st Applicant was asking the court to substitute the arbitral tribunal's findings and decision with its own which would amount to asking the court to sit on appeal against the award. The 2nd Applicant submitted that the court lacked the jurisdiction to do so. The 2nd Applicant also submitted that the arbitral tribunal followed due process and made a proper and reasoned award. The 2nd Applicant argued that the 1st Applicant failed to establish any of the grounds for setting aside the award under Sections 35 or 37 of the Arbitration Act to warrant refusal for recognition and enforcement of the award.

ISSUES

Whether the award ought to be set aside?

ANALYSIS/DETERMINATION

The Judge held that no argument was advanced before him to suggest that the dispute was not conducted in a procedurally fair manner or that the existence of exceptional circumstances to warrant the limited court intervention. Thus, the Judge held that the argument made by the 1st Applicant that the Arbitrator went outside his mandate by determining matters not contemplated in the MOU could not stand. In other words, the Judge held that the decision rendered by the Arbitrator did not go beyond the scope of the reference to Arbitration.

The Judge further held that the 1st Applicant did not furnish any proof to suggest that the award rendered was against the public policy of Kenya. He stated:

“The applicant cannot purport to rewrite the contract by attempting to free itself from the arbitration outcome which is binding upon the parties by hiding behind the concept of public policy.”

RULING/HOLDING

Accordingly, the Judge found and held that the 1st Applicant failed to establish any grounds for the court to set aside the arbitral award. Consequently, the 1st Application, **HCCOMMARB/E006/2021**, was dismissed.

The Judge subsequently held that the 2nd Application (**HCCOMMMISC/E160/2021**) was merited. He allowed the said application and ordered that the arbitral award would be recognized, adopted and enforced as an order of the court.

RATIONALE

The Judge applied the school of thought that an Arbitrator in an arbitration ought to apply the law but if he errs in his understanding or application of the law the parties have to live with it. He stated:

“If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.”

Regarding the public policy issue, the Judge arrived at his decision based on a narrow/strict interpretation of the exception in that the court must see that the recognition and enforcement of an award violates public policy if such recognition and enforcement may endanger the interest of

the state's citizens by executing its public authority. According to the Judge, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of a state's public will not be considered as a bar to recognize or enforce the award.

Further, he was of the view that a party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

CASE RELEVANCE

- Section 10 of the Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. Section 10 restricts the jurisdiction of the court to only such matters as are provided for by the Act.
- The Arbitrator is only subject to the limitations under the Act. The Act confers the Arbitrator with exclusive jurisdiction over questions of fact and law which flows from the provisions of the Act which exclude appeals and limits reviews. The court may only be approached as provided by the Act. Unless the arbitration provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms. The Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions submitted to it, including any question of law.
- Under Section 35(1) of the Act, recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsection (2). This implies that an applicant seeking to set aside an arbitral award must demonstrate the grounds under the said sub-section.
- A party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.