REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMMISC/E007/2021

CITATION: MANARA LIMITED AND MANARA LIMITED VS BRITANIA FOODS LIMITED

RULING

Introduction and Background

1. The Applicant has moved this court by the Chamber Summons dated 4th January 2021. It invokes, inter alia, the provisions of sections 35(2)(b)(i), 3, 4 and 39 (2)(b) of the Arbitration Act No. 4 of 1995 ("the Act") and seeks to set aside the Arbitral Award of Dr Francis Kariuki dated 21st October 2019 and delivered to the parties on 21st October 2020 ("the Award").

2. The application is supported by the supporting affidavit of Amos Kiragu Mwangi, the Applicant's Managing Director, sworn on 4th January 2021. The application is opposed by the Respondent through the replying affidavit of Julius Sing'oei, its Head of Sales and Distribution, sworn on 23rd February 2021.

3. The application was canvassed by way of written submissions with the parties advancing their respective positions.

4. The facts giving rise to the dispute are as follows. On 12th January 2017, the parties entered into a Distributorship Agreement ("the Agreement") wherein the Respondent appointed the Applicant as one of its authorized distributors for the Respondent's products within the authorized territory in accordance with the terms and conditions set out in the Agreement. By a notice dated 30th August 2017, the Respondent terminated the Agreement pursuant to clause 17.2.6 thereof and cited, inter alia, the Applicant's inefficient infrastructure that led to clogging of the Applicant's territory with slow moving products.

5. Aggrieved by the Respondent's actions, the Applicant filed Milimani Magistrates Court Civil Suit No. 6672 of 2017, Manara Limited v Jambo East Africa Limited seeking damages from the Respondent for alleged loss incurred and illegal termination of the Agreement. The court referred the matter to arbitration on 13th June 2018.

6. The Respondent's claim against the Applicant before the Arbitrator was for goods worth KES. 8,577,248.00 sold and delivered but not paid for. The Respondent also contended that the Applicant's performance under the Agreement was below the expected standard whereupon it issued several demands but the Applicant failed to rectify the breaches. As a result, the Respondent exercised its right to terminate the Agreement on 30th August 2017. The Respondent then proceeded to liquidate the Applicant's Guarantee with KCB Bank amounting to KES. 4,500,000.00 thus leaving a balance of KES.

4,077,248.00 which it claimed together with costs and interest.

7. In its defence, the Applicant stated that it diligently executed the Agreement. It contended that the termination was illegal and that at the time of termination, it only owed KES 4,136,960.00 after deduction of the amount of KES. 4,500,000.00 guaranteed by KCB Bank. It stated the it did not settle the amount demanded due to the illegal termination, a subsequent court order and interference with the Agreement by the Respondent which resulted in some of its goods expiring and which had to be destroyed. The Applicant also filed a counterclaim seeking a declaration that the notice of termination dated 30th August 2017 was unlawful, illegal and contrary to the terms of the Agreement, special damages amounting to KES. 8,201,999.40, general damages for breach of contract, costs and interest.

8. After hearing the matter, Dr Francis Kariuki ("the Arbitrator") found that the Applicant was liable to pay the Respondent KES. 4,077,248.00 being the amount due and owing under the Agreement together with costs of the reference and interest in the sum of KES. 4,077,248.00 at the rate of 12% per annum from 12th February 2019 until payment in full. The Arbitrator also granted the declaration that the termination notice dated 30th August 2017 was unlawful, illegal and contrary to the terms of the Agreement.

9. The Applicant seeks to set aside the Award on the ground that it is contrary to public policy and that the Arbitrator dealt with matters outside the scope of the reference.

The Application

10. In its submissions and deposition, the Applicant has set out various instances where it submits the Award is contrary to public policy. The Applicant submits that the Arbitrator exhibited open bias in awarding the Respondent all the prayers sought in the claim apart from one and denying the Applicant all the reliefs sought in his counterclaim despite finding that Agreement had been illegally terminated by the Respondent.

11. The Applicant contends that the natural consequence flowing out of breach of contract is a right to claim damages as a form of compensation for loss suffered. In this case, the Applicant submits that despite finding that the Respondent illegally terminated the Agreement, the Arbitrator failed to award the Applicant, as the aggrieved party, any damages. The Applicant submits that the Award is contrary to public policy as the Arbitrator found out that both parties had breached the Agreement yet only one party was awarded damages.

12. The Applicant complains that the Arbitrator disregarded the rules of evidence as provided in the Evidence Act (Chapter 80 Laws of Kenya) as regards consideration and weighing of evidence submitted by both parties in the Arbitration for instance, he failed to consider the evidence by Applicant's demonstrating that it had incurred massive loss as a result of the illegal and improper termination of the Agreement by the Respondent.

13. The Applicant submits that the Arbitrator erred by proceeding to determine issues that were never raised by the parties for determination. For example, the Arbitrator considered whether there was focus from the Respondent's team on the Applicant's products thus low sales and high stock holdings at the Respondent's store which fact had not been raised by the parties.

14. As regards the award of KES. 4,077,248.00, the Applicant submits the Award is harsh, unjust and immoral since the Arbitrator, in addition to awarding the Respondent the principal sum, proceeded to order the Applicant to pay interest at the rate of 12% per annum from 12th February 2019 until payment in full. It avers that the rate of interest cannot be justified as it is higher than the rate allowed by the Central Bank of Kenya at the time the Award was delivered.

15. The Applicant maintains that the Arbitrator exhibited open bias by awarding the Respondent all the

prayers sought apart from one, denying the Applicant all the prayers sought and disallowing the Applicant's counterclaim even after finding that the Respondent illegally terminated the Agreement. It states that it suffered immense loss as a result of the illegal termination and it accuses the Arbitrator of ignoring the act that it had invested in substantial infrastructure comprising a fleet of delivery vehicles, staff, staff training, warehousing facilities, information technology systems and developed customer relations to meet targets under the Agreement.

16. The Applicant submits that the Award was factually incorrect, legally unsound and goes against public policy and it is in the public interest that the prayers sought in the application are granted.

The Respondent's Reply

17. The Respondent submits that the Arbitrator correctly applied his mind to the facts and the law and came to the correct conclusion hence the Applicant has not established that the Award is contrary to public policy.

18. The Respondent submits that although the Arbitrator found that the Respondent herein illegally terminated the Agreement, he proceeded to determine that Applicant was not entitled to general damages since clause 17.3 of the Agreement between the parties provides that the Applicant herein shall have no right to any compensation from the Respondent herein upon termination of the Agreement. The Respondent submits that the proper remedy for breach of contract is an award of special damages which must be specifically pleaded and strictly proved. It also submits that it is trite law that no damages can be awarded for breach of contract and in this case despite finding that the Applicant had also breached the Agreement, did not award the Respondent herein general damages.

19. The Respondent further submits that the Arbitrator determined and gave an extensive analysis of the evidence produced by both parties in each of the heads of the claim for special damages and found that the Applicant was not entitled to the award of special damages since the same were not proved as required under the law.

20. As regards the award of KES. 4,077,2478 being the amount due and owing under the Agreement, the Respondent submits that this amount was in dispute and it was owed and the Arbitrator cannot therefore be faulted for affirming that position. The Respondent rejects the Applicant's contention that the Award is contrary to public policy since the Arbitrator disregarded the rules of evidence under the Evidence Act in considering and weighing evidence in support of the Applicant's case during the hearing. It submits that Applicant failed to discharge the burden of proving its case on the balance of probabilities. It submits that an Arbitrator is a master of facts and as such, merits and factual appreciation of the case by the Arbitrator should not be interfered with as was held by the court in **Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited ML HC Misc. Civil Appl. No. 278 of 2017 [2018] eKLR** and **Kenya Oil Company Limited & Another v Kenya Pipeline Co. NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR** where it was held that the principle of party autonomy decrees that a court should not question the arbitrators' findings of fact. It urged that the court should not set aside an award simply because it would have reached a different conclusion on questions of facts.

21. In response to the Applicant's claim that the Arbitrator invited himself to determine "whether there was focus from Manara's team on Britania products thus low sales and high stock holdings at Manara Stores", it points out that the Arbitrator did not determine whether there was focus from the Applicant's team on the Respondent's products as alleged but only referred to an email of 19th April, 2017 which the Respondent relied on during hearing where a conclusion was reached to the effect that there was lack of focus from Manara's team on Britania products thus low sales and high stock holdings at Manara Stores. In the Respondent's view, the Arbitrator did not travel out of the scope of the Arbitration as alleged or at all.

22. The Respondent concludes by stating that the Applicant has not satisfied the conditions set under the

law in setting aside the Award herein and reiterated that the Agreement provided for finality of Arbitration. In the foregoing, it holds that the application is an abuse of the Court process, unmeritorious, misconceived and incompetent and the same should be dismissed.

Analysis and Determination

23. The main issue falling for determination is whether the Award ought to be set aside. The court's jurisdiction in determining this issue is circumscribed by section 35 of the Act which, at the part material to this application, provides as follows:

35 (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if-

(a) the party making the application furnishes proof-

(i) that 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, the laws of Kenya; or

(iii) the party making the application 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 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

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

(b) the High Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Kenya; or

(ii) the award is in conflict with the public policy of Kenya:

(3) ----------

(4) ---------- [Emphasis mine]

24. Both sides took a common position as what constitutes public policy. They cited **Christ for all Nations v Apollo Insurance Co. Ltd [2002] EA 366** cited with approval by the Court of Appeal in **Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR [2006] eKLR**. Ringera J., elucidated the meaning of the public policy as a consideration for setting aside an arbitral award under section 35 (2)(b)(ii) of the Act as follows:

An award could be set aside under page 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.

25. As I considered the arguments raised by the Applicant and the responses by the Respondent, I was becoming more convinced that the court was being called upon to consider the merits of the Award. In fact, the court in **Christ for all Nations v Apollo Insurance Co. Ltd (Supra)** warned that not every infraction whether of precedent or misinterpretation of law or misapprehension of facts falls within the scope of the public policy exception. The learned judge observed that:

[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and

parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act.

26. Public policy, as a ground for setting aside an arbitral award, must be narrow in scope and an assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then demonstrate which part of the award conflicts with that public policy. This point is underpinned by the decision of the court in **Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR** where the court observed that:
Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy. [Emphasis mine]

27. The case before the Arbitrator, as I have outlined above, was based on the Agreement which both parties claimed the other party had breached. The Arbitrator framed issues for determination, heard evidence of two witnesses and made a finding on each issue. I note that in the Award, the Arbitrator made reference to the following agreed facts including, inter alia, that the Agreement was valid and as a result of which goods were delivered to the Applicant and invoices issued, that none of the invoices were disputed, that the Agreement was terminated and that the at the time of termination the Applicant owed the Respondent KES. 8,577,248.00.

28. I fail to see how the Award went against the Constitution, legislation or the national interest for a number of reasons to warrant setting aside the Award. The Arbitrator explained why, despite finding that the notice of termination was defective, he nevertheless declined to award damages. The Applicant did not point to any law that requires that a finding of breach of contract, ipso facto, entitles the party to damages in the absence of proof of special damages. More importantly, the manner in which the Arbitrator dealt with the evidence before him is within his jurisdiction and this court cannot interfere as doing so would be as if this court is sitting as an appellate court contrary to section 35 of the Act. Further, it is irrelevant whether this Court considers those findings of fact by the Arbitrator to be right or wrong. It also does not matter how obvious a mistake by the Arbitrator is on issues of fact, or what the scale of the financial consequences of the mistake of fact might be (see **Kenya Oil Company Limited & Another v Kenya Pipeline Co. (Supra)).** The court's hands are tied by the parties opting to pursue the matter through arbitration. I therefore find and hold that the Applicant has not raised any issue that rises to the level of a violation of public policy to warrant the setting aside of the Award.

29. 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, without 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.

30. The reference by the Respondent was in respect of violation of the Agreement and failure by the Applicant to pay it the balance of KES. 4,077, 248.00 whereas the Applicant's counter-claim was in respect of illegal and/or unfair termination of the Agreement. The Applicant complains that Arbitrator

invited himself to consider whether there was focus from the Applicant's team on the Respondent's products thus low sales and high stock holdings at the Applicant's stores, which the Applicant contends was not an issue presented to the Arbitrator and thus went beyond his scope. I have gone through the said holding of the Arbitrator and find that he was making reference to an email dated 18th May 2017 that was produced as evidence by the Respondent where in the opinion of the sender, there was 'lack-of focus from Manara's team on Britania products thus low sales and high stock holding at Manara's stores.' The sender also noted that the Applicant was also dealing with the products of the Respondent's competitors and the Arbitrator held that the Applicant did not produce evidence to show that it had written authority to deal with other products. The Arbitrator thus held that *'The fact that it did supply those products, as the evidence shows, compromised its capacity to market, sell and distribute the Claimant's products in violation of Clause 3 of the Agreement.'*

31. As stated before and it is common ground, the issue of violation of the Agreement was central to the dispute between the parties and this is what prompted the reference to the Arbitrator. The Arbitrator made a determination on whether or not there were any such violations. In the foregoing, it is my view that the Arbitrator did not go beyond the scope of the reference as has been contended by the Applicant and that the Arbitrator rightly relied on the evidence available to him to make the said determination. As the court noted in **Mahican Investments Limited & 3 Others v Giovanni Gaida & 80 Others NRB Misc. Civil Appl. No. 792 of 2004 [2005] eKLR [2005] eKLR**, *"In order to succeed (in showing that the matters objected are outside the scope of the reference to arbitration) the application must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."[Emphasis mine]*

32. The Applicant has not demonstrated that the Arbitrator went outside the scope of the reference. This ground therefore fails.

Disposition
33. The Chamber Summons dated 4th January 2020 lacks merit. It is hereby dismissed with costs to the Respondent.

SIGNED AT NAIROBI

D. S. MAJANJA
JUDGE

DATED and DELIVERED at NAIROBI this 21st day of MAY 2021.

JOHN M. MATIVO
JUDGE

SIGNED BY: HON. MR. JUSTICE D. S. MAJANJA