

**HCCOMMMISC/E007/2021; MANARA LIMITED AND MANARA LIMITED VS
BRITANIA FOODS LIMITED**

- Applicant – Manara Limited
- Respondent – Britania Foods Limited
- Judge(s) – David Shikomera Majanja
- Date of delivery of the Ruling: 21st May 2021
- Court: High Court of Kenya at Nairobi City (Milimani Commercial Courts Commercial and Tax Division)

SUMMARY OF FACTS

The parties herein entered into a Distributorship Agreement (“the Agreement”) wherein the Respondent appointed the Applicant as one of its authorised distributors for the Respondent’s products within the authorized territory by the terms and conditions set out in the Agreement.

Following a dispute regarding the performance of the Agreement and its subsequent termination, the matter was referred to arbitration.

After hearing the matter, the Arbitrator published the final award in favour of the Respondent. Thereafter, the Applicant filed an application in court that sought to set aside the award on the following grounds:

- i) 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 the Agreement had been illegally terminated by the Respondent.
- ii) The award was contrary to public policy as the Arbitrator found that both parties had breached the Agreement yet only one party was awarded damages.
- iii) 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.
- iv) The Arbitrator erred by proceeding to determine issues that were never raised by the parties for determination.
- v) The award was harsh, unjust and immoral.

ISSUES

Whether the award ought to be set aside?

ANALYSIS & DETERMINATION

The court relied on Section 35 of the Arbitration Act which expressly sets out the grounds to be satisfied for setting aside an arbitral award. In citing the case of *Christ of All Nations v Apollo Insurance Co. Ltd [2002] EA 366* with respect to what constitutes public policy, the court was of the view that not every infraction whether of precedent or misinterpretation of law or misapprehension of facts falls within the scope of the public policy exception.

In relying on the case of *Mall Developers Limited vs Postal Corporation of Kenya ML Misc. No.26 of 2013 [2014]eKLR*, the court stated that 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 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.

In light of the foregoing, the court held that the award did not contravene the Constitution, legislation or the national interest to warrant setting aside the award and instead, the Arbitrator acted within his jurisdiction in determining the matter.

Moreover, the court held that it was irrelevant whether it considered those findings of fact by the Arbitrator to be wrong. In relying on the case of *Kenya Oil Company Limited & Anor v Kenya Pipeline Co.*, it also held that it 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.

Consequently, the court held that its hands were tied by the parties opting to pursue the matter through arbitration.

RULING/HOLDING

The court dismissed the Applicant's application as it found and held that the Applicant did not raise any issue that rose to the level of a violation of public policy to warrant the setting aside of the award.

RATIONALE

The court arrived at its decision based on the principle of the finality of arbitral awards. The Judge was of the view that courts should not render decisions based on the merits of an arbitral award. The judge also adopted a narrow/strict interpretation of the public policy exception for setting aside an arbitral award.

CASE RELEVANCE

- Section 35 of the Arbitration Act sets out the grounds upon which a party can apply to the court to set aside an arbitral award. For any ground to be satisfied a party will be put to strict proof to show the ground exists.
- Courts tend to adopt a narrow interpretation of the public policy exception as was seen in the *Christ of All Nations* and *Mall Developers Ltd* cases.
- Courts respect the finality of arbitral awards and do not render decisions based on the merits of an arbitral award.