

HCCOMMMISC/E084/2021; LAND LAYBY KENYA LIMITED VS WILFRED OGOT

- Applicant – Wilfred Ogot Lusi
- Respondent – Land Layby Kenya Limited
- Judge(s) – John M. Mativo
- Date of delivery of the Ruling: 7th April 2021
- Court: High Court of Kenya at Nairobi City

SUMMARY OF FACTS

The parties herein entered into a sale agreement in which the Respondent agreed to sell to the Applicant a parcel of land. The agreement contained a reference to arbitration in the event a dispute arose.

A dispute eventually arose and the matter proceeded to arbitration. Upon hearing the dispute, the Arbitrator published the final award in favour of the Applicant.

Thereafter, the Applicant filed an application that sought an order to adopt and recognize the award as a judgment of the court. The Respondent on the other hand filed an application that sought to set aside the arbitral award based on the ground that it was in conflict with the public policy of Kenya.

In response, the Applicant averred that the Respondent failed to meet any of the requirements for setting aside an award pursuant to Section 35 of the Arbitration Act and that the Respondent's prayers were in contravention of Section 10 of the Act which mandatorily limits the court's intervention to only matters permitted by the Act. In other words, the Applicant averred that the Respondent sought to impugn the Arbitrator's finding of fact in contravention of Section 10 of the Act.

ISSUES

Whether the award ought to be recognized and enforced as a judgment of the court or whether it ought to be aside.

ANALYSIS/DETERMINATION

The court was of the view that the Respondent failed to prove the plea that the award offended the public policy of Kenya. The Respondent failed to cite any constitutional or statutory provisions which were offended by the arbitral award.

Furthermore, the Respondent failed to 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.

Lastly, the court held that the Respondent was impermissibly/wrongly challenging the Arbitrator's findings on matters of fact pursuant to Section 35 of the Act. The Judge stated that the alleged errors committed by the Arbitrator had nothing to do with her having exceeded her powers in that, the alleged errors were committed within the scope of her mandate. In other words, the Judge was of the view that the Arbitrator remained within the area ordained to her under the reference to Arbitration.

RULING/HOLDING

Consequently, the Judge held that the Respondent's application that sought to set aside the award lacked merit and dismissed the said application. The Applicant's application was allowed and thus the Judge ordered that the arbitral award be recognized, adopted and enforced as an order of the court.

RATIONALE

The Judge adopted a very narrow interpretation of the public policy ground that could be relied upon to set aside an arbitral award. He stated as follows:-

“Thus, in my view, the scope of the public policy ground of refusal applies only to the fundamental core questions of morality and justice which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defense of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies. This approach also ensures that due respect is given to contract-based awards as an aspect of the product of freely negotiated arbitration agreements entered into willingly between parties.”

Regarding, the Arbitrator's decision itself, the Judge was of the school of thought that it is insufficient to render an arbitral award reviewable just because an Arbitrator committed a factual error which led them to a wrong decision. According to the Judge, only where the mistake is so gross or manifest as to evidence misconduct, mala fides or partiality on the part of the arbitrator will the award be reviewable in terms of Section 35 of the Arbitration Act.

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. It restricts the jurisdiction of the court to only such matters as are provided for by the Act. The Section articulates the need to restrict the court's role in arbitration so as to give effect to the principle of party autonomy.
- Section 10 of the Act permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially.
- Section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. It follows that parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside the award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.
- Section 35(2) of the Arbitration Act sets out the grounds upon which the High Court will set aside an arbitral award.
- By agreeing to arbitration, parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. Parties entering into an arbitration agreement must be aware that the arbitration award will be final, except in limited

circumstances. If parties want the option of appealing the award, such right of appeal must be set out in the arbitration agreement itself.

- The basic tenet of the provision on public policy is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement of the award is sought from being harmed by such recognition and enforcement. A violation of public policy may render an agreement “in-arbitrable.”
- If the court feels that an issue falls in the scope of public policy, the court may intervene only, to protect the benefit of the public.