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Kenya Branch

CASE LAW SUMMARY

MISC. CIVIL APPL. NO. 216 OF 2018
MAHAN LIMITED VS VILLA CARE LIMITED [2021] eKLR

Date of delivery of the Ruling: 19th March 2021

SUMMARY OF FACTS

The dispute between the Applicant and the Respondent was arbitrated upon by Ms. Kethi Kilonzo who delivered a final award in favour of the Respondent. The Applicant was aggrieved by the decision and filed an application under Section 35 of the Arbitration Act, 1995 seeking to set asi8de the award. The Respondent on the other hand filed an application seeking to enforce the award as a decree of the court.

The Applicant challenged the award on the grounds that it was a flagrant disregard of the law of contract; that it was oppressive and designed to unjustly enrich the Respondent and that the Arbitrator went beyond the scope of her jurisdiction and purported to rewrite the contract. Furthermore, that she acted contrary to the established principles of law and that she considered extraneous matters that were not pleaded. Lastly, she was accused of bias against the Applicant.

The High Court was of the view that the Applicant neither provided sufficient evidence to support their evidence nor did the arbitral tribunal deal with a dispute that went beyond the scope of the reference or not contemplated by the parties. In a ruling delivered by Tuiyott J., the Applicant's application was dismissed whereas the Respondent's application was allowed.

Dissatisfied by the ruling and the order, the Applicant filed a notice of appeal at the Court of Appeal that evidenced its intention to appeal the High Court ruling. Furthermore, the Applicant filed a Notice of Motion application pursuant to Rules 5(2)(b), 41 and 42 of the Court of Appeal Rules, 2010, and Sections 3A and 3B of the Appellate Jurisdiction Act, seeking the stay of execution of the said ruling and order pending the hearing and determination of the intended appeal.

The Respondent opposed the application by deposing that the Court of Appeal lacked the jurisdiction to entertain the application as there was no competent appeal arising out of the

invocation of Section 35 of the Act as the Applicant had not met the threshold set out by the Supreme Court in the case of *Nyutu Agrovet v Airtel Networks Ltd. & another [2019] eKLR* with regard to appeals to the Court of Appeal arising out of arbitration proceedings and in particular, Section 35 of the Arbitration Act and further, that the Applicant did not have an arguable appeal.
On the other hand, the Respondent urged the court to find that the Applicant had not met the threshold for admitting an appeal out of arbitration proceedings as laid out in the *Nyutu* case and that there was no competent appeal to sustain the present application having regard to the provisions of Section 35 of the Act.

ISSUES

Whether the Applicant's application and Notice of Appeal filed before the Court of Appeal are incompetent?

ANALYSIS/DETERMINATION

Placing reliance on the *Nyutu* case, the court determined that the Applicant failed to seek leave before filing their Notice of Appeal and the application at the Court of Appeal. The Court of Appeal was of the view that the Notice of Appeal and the application were based on quicksand because the Applicant failed to seek and obtain leave of the trial court or the Court of Appeal so as to file the Notice of Appeal and the application.

The court therefore held that in the absence of leave, the Applicant's application was incompetent.

RULING/HOLDING

The Court of Appeal held that the Applicant's application was incompetent and was accordingly struck out.

RATIONALE

The court adopted a strict interpretation of the Supreme Court decision in the *Nyutu* case in that, a party who desires to appeal against arbitration proceedings at the Court of Appeal ought to first obtain leave of either the trial court or the Court of Appeal.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPL. NO. 216 OF 2018

MAHAN LIMITED.....APPLICANT

VS.

VILLA CARE LIMITED.....RESPONDENT

RULING

1. Two competing applications are made in respect of the Arbitral Award dated 2nd February 2018 by Ms Kethi D. Kilonzo FCI Arb. That of 2nd May 2018 seeks to set it aside while that of 9th October 2018 is for enforcement. By agreement of parties the two were argued back to back. The outcome of one determines the other.

2. And so I start with the setting aside summons which is brought under the provisions of Section 35 of the Arbitration Act (The Act) which provides:-

S.35. Application for setting aside arbitral award

(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 law of Kenya; or

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

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

3. The Applicant challenges the award on the grounds that it is a flagrant disregard of the law of contract; that it is oppressive and designed to unjustly enrich the Respondent and that the Arbitrator went beyond the scope of her jurisdiction and purported to rewrite the contract. Further that she acted contrary to the established principles of law and that she considered extraneous matters that were not pleaded. Lastly, she is accused of bias against the Applicant.

4. In an affidavit sworn in support of the summons the Applicant picks out the following observations made by the Arbitrator:-

[13]

a) At page 26, Paragraph 79 of the final award- “I find that the Claimant has not proven that it fulfilled its obligation to place 4 advertisements of the property with details of the Project in the Standard and Daily Newspapers”.

b) At Page 27, paragraph 81 of the final award- “The Claimant did not provide any evidence that it informed the Respondent when it put up the signboard or when it placed an Advertisement in the Daily Nation. I find that the Claimant has not proven that it fulfilled its obligations to give regular progress reports and evaluations of its marketing activities to the Respondent”.

c) At Page 27, paragraph 84 of the final award – “The Claimant did not provide proof of use of its database or placement of the property in its magazine “Homes Kenya”. The Claimant did not fulfil these obligations as provided for in the Agreement”.

d) At page 30, Paragraph 90 of the final award- “Though the Claimant submitted that the period of the contract was only two months, I reiterate my findings above that the Claimant did not fulfill all of its obligations under the Agreement.

5. It is then argued that the overall finding of the Arbitrator is that the Respondent was at fault and so the Arbitrator could not base her decision on clause 4 (IV) of the service Agreement which provided as follows:

“Without prejudice to all of the foregoing terms and conditions, and particularly in the instance where the principal obtains a purchaser for itself or terminates this agreement due to no fault of the Agent, the principal shall be obligated to forthright pay to the Agent an equivalent of 50% of the commission due as expressly provided by this contract, to cover for marketing expenses”.

6. This Court has considered the arguments made for and against the setting aside of the award. I have understood the Applicant to be arguing that the Arbitrator misconstrued the evidence and law before her. That is an argument that would typically be an argument made on an appeal.

7. The jurisdiction of a Court in a Section 35 application is one that is circumscribed. Parties to an Arbitral agreement elect to refer their disputes or differences to a particular mode of dispute resolution. They should not be permitted to resile from that arrangement by attempting to set aside an award simply because the outcome is not in their favour. A party seeking to benefit from Section 35 must demonstrate that the grounds set out under those provisions truly exist.

8. One of the grounds that is most abused is that an award is against public policy.A misunderstanding or misspeak of the law by an arbitrator, without more, does not make an award counter to public policy. To accept otherwise is to accept that an award can be challenged on public policy consideration every time an arbitrator misconstrues the law and evidence. It cannot be so because it would be to allow parties to challenge an arbitration award as though it was an appeal against the decision. No wonder a warning had been sounded that the public policy ground, if unguarded, could be an unruly horse (Christ **For all Nations vs Apollo insurance company limited [2002] EA 366)**.

9. It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them .It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act.

10. Further this Court is not persuaded that by purportedly misapplying clause VI of the contract, the Arbitral tribunal dealt with a dispute beyond the scope of reference or not contemplated by the parties. The Arbitrator gave reasons for applying clause VI as follows:-

Clause 4(iv) of the agreement was worded in such a way that regardless of how much services had been provided and costs incurred under the Agreement, if termination was through no fault of the Claimant or if the Respondent found itself another purchaser, the Claimant would be paid 50% of the defined commission under the Agreement.

Under the principles of the law of contract a party is bound by the terms of the contract and the Arbitral Tribunal cannot rewrite the Agreement. Damages payable to the Claimant under this clause were conditional either on sale of the property or termination without fault of the Claimant. The Agreement was terminated through no fault of the Claimant. Proof of sale by the Claimant was therefore unnecessary for the Claimant to succeed in its claim.

11. And is there evidence that the making of the award was induced by bias or undue influence" This is a serious allegation which required evidence to be put forward and the Arbitrator to be invited to react. Neither the evidence nor the invitation was forthcoming. What the Applicant says is that after keeping the award for 6 months after the confirming its readiness, the Arbitrator concluded and delivered the final award within a period of one week. This, it is argued, demonstrates bias and lack of consideration. This in my view is not sufficient evidence. The Applicant ought to have pointed out instances in the conduct of the Arbitrator that showed that she was not impartial. Again mere misconstruction of the law and evidence is not evidence of bias.

12. This Court is not persuaded that this is a suitable case for setting aside of the award. The chamber summons of 2nd May 2018 is declined with costs. In the same breath I allow the Chamber Summons of 9th October 2018 with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of November 2019

F. TUIYOTT

JUDGE

PRESENT;

Gachungi for the Villa Care (Respondent)

Kimani holding brief Muhindi for Mahan (Applicant)

Court Assistant: Nixon