

MISC CIVIL APPL NO 26 OF 2013

MALL DEVELOPERS LIMITED VS POSTAL CORPORATION OF KENYA [2014] eKLR

Date of delivery of the Ruling: 30th October 2014

### SUMMARY OF FACTS

The Claimant herein filed a Notice of Motion Application under the provisions of Section 35(2)(a)(iv) and (b)(ii) of the Arbitration Act No.4 of 1995, Rule 4(1) of the Arbitration Rules 1997, and Sections 1A and 3A of the Civil Procedure Act seeking the setting aside of an arbitral award. The Application was based on the grounds that: the Award was in conflict with the public policy of Kenya; the Arbitrator failed to deal with all the issues that constituted his terms of the reference; the Arbitrator was guilty for misconduct for causing delay in publishing and delivery of the Award and; the Arbitral Award was a nullity *ab initio* in law.

In response, the Respondent filed a Grounds of Opposition stating that: the attack on the Award fell short of then “public policy” threshold set out in law; the attack of the Award amounted to an appeal or review of the Arbitrator’s Award which was not permissible under the law; the Arbitrator’s findings on fact and law were not appealable or capable of being challenged and; the Application was predicated upon an illegality and ought to be dismissed.

The Respondent further filed a Notice of Motion Application seeking to strike out the Claimant’s Application for being in violation of the law and contrary to public policy.

### ISSUES

Whether or not the Claimant had demonstrated that it was entitled to the orders that it sought under the Arbitration Act in respect of the setting aside of the Award?

### ANALYSIS/DETERMINATION

The Judge was of the view that from the evidence that was placed before the court, the Claimant did not demonstrate that the arbitral award was inconsistent with the Constitution or other laws of Kenya, or inimical to the national interest of Kenya or contrary to justice and morality. He was of the opinion that the Claimant’s arguments did not reveal that there was a violation of public policy.

Moreover, the Judge held that both the Claimant’s and the Respondent’s arguments were not relevant or cogent at all to persuade the court to set aside the Award and the Claimant’s Application respectively on the grounds of the decision or proceedings by the Arbitrator were in conflict with public policy.

The Judge also held that the Claimant did not show that the Arbitral Tribunal determined matters that were outside the scope of the reference to arbitration.

Tus, the Judge held that the court did not have any basis for making a finding contrary to what the Arbitrator found. In holding so, the Judge opined that the court had no jurisdiction or power to determine the legality or otherwise the Arbitrator’s finding as doing so would be tantamount to re-opening the challenge that ought to have been canvassed before the Arbitral Tribunal.

## **RULING/HOLDING**

Consequently, the court dismissed both the Claimant's and Respondent's Applications as both their respective arguments failed to satisfy the public policy ground. Thus, the Award was upheld.

## **RATIONALE**

The Judge was of the school of thought that public policy must have a connotation of national interest in that, it cannot mean fairness and justice. According to the Judge, both parties did not demonstrate to the court how the decision by the Arbitrator and how the Claimant's Application would negatively affect, impact or infringe the rights of 3rd parties and thus offend public policy.

Regarding the decision that the court had no basis for making a finding contrary to what the Arbitrator found, the Judge placed reliance on the school of thought that while the Constitution of Kenya 2010 empowers the High Court to supervise tribunals, it could only do so within the limits of the law provided and it cannot clothe itself with jurisdiction that it does not possess at all.

## **CASE RELEVANCE**

Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice.

The court can only intervene in arbitral proceedings within the parameters envisaged by Section 10 of the Arbitration Act.

A court will only set aside a final award delivered by an arbitrator if it is satisfied that the grounds under Section 35 of the Act exist.

Section 35 of the Arbitration Act gives the court jurisdiction and power to go beyond glossing over the said arbitral award as it is bound to ask itself whether the conclusions reached by the arbitral tribunal would have been consistent with the decision of the court had the court had the same facts for the underlying dispute been placed before the court for determination.

Under Section 39 of the Act, the court can only consider questions of law arising in the course of the arbitral proceedings and only if the parties have consented to lodging of appeals or the Court of Appeal is of the opinion that a point of law is of general importance, due to the final and binding nature of arbitrations.

Setting aside of an arbitral award becomes operational only after the matter has been heard and determined on merit. Section 35 and Section 37 of the Act are limited to a final award.

While the Constitution of Kenya, 2010 empowers the High Court to supervise tribunals, it can only do so within the limits of the law provided. It cannot clothe itself with jurisdiction that it does not possess at all.



**THE REPUBLIC OF KENYA**

**THE HIGH COURT AT NAIROBI**

**MILIMAN COMMERCIAL COURTS**

**MISC CIVIL APPL NO 26 OF 2013**

**IN THE MATTER OF: THE ARBITRATION ACT, NO 4 OF 1995**

**AND THE ARBITRATION RULES, 1997**

**AND**

**IN THE MATTER OF AN ARBTRATION AWARD**

**BETWEEN**

**MALL DEVELOPERS LIMITED.....CLAIMANT**

**VERSUS**

**POSTAL CORPORATION OF KENYA.....RESPONDENT**

**IN THE MATTER OF AN APPLICATION TO THE HIGH COURT OF KENYA FOR SETTING ASIDE  
THE ORDER BY THE ARBITRATOR, JUSTICE (RTD) KASANGA MULWA DATED 13<sup>TH</sup> NOVEMBER  
2011**

**BETWEEN**

**MALL DEVELOPERS LIMITED.....CLAIMANT**

**VERSUS**

**POSTAL CORPORATION OF KENYA.....RESPONDENT**

**RULING**

1. This is a consolidated ruling in respect of the Claimant's Notice of Motion application dated 22<sup>nd</sup> January 2013 and filed on 24<sup>th</sup> January 2013 and the Respondent's Notice of Motion application dated 6<sup>th</sup> March 2013 and filed on 8<sup>th</sup> March 2013 as parties agreed that the same could be heard together and one ruling delivered.
2. The Claimant's Notice of Motion application was brought under the provisions of Section 35(2) (a) (iv) & (b) (ii) of the Arbitration Act No 4 of 1995 and Rule 4 (1) of the Arbitration Rules, 1997,

Sections 1A and 3A of the Civil Procedure Act and all the enabling provisions of the law. The application sought the following remaining prayers:-

- a. **This Honourable Court be pleased to set aside the ruling and Order dated 13<sup>th</sup> November 2011 and received by the Applicant on 27<sup>th</sup> November 2012 to the extent of terminating the Applicant's claim with immediate effect and order that the Arbitration do proceed to full hearing on its merits before another Arbitrator from where it reached.**
- b. **The Honourable Court be pleased to make further or other orders as it may deem necessary in the interest of justice.**
- c. **Any other order that this Honourable Court may deem fit to grant.**
- d. **The costs of the application be provided for.**

3. The said application was based on several grounds, amongst them **THAT:-**

- a. **The order made on 13<sup>th</sup> November 2011 was in conflict with the public policy of Kenya.**
- b. **The Arbitrator terminated the arbitral proceedings on the basis that the Statement of Claim had not been served.**
- c. **The Arbitrator failed to deal with all the issues that constituted his terms of the reference.**
- d. **The Arbitrator was guilty for misconduct for writing his ruling on 13<sup>th</sup> November 2011 and delivering the same on 27<sup>th</sup> November 2012 without giving any justifiable reason for the inordinate delay.**
- e. **The Arbitral Award was a nullity *ab initio* in law.**

4. Its application was supported by the Affidavit of Joseph Muturi Kamau that was sworn on 22<sup>nd</sup> January 2013. It reiterated the grounds on the face of its application and added that its case was a matter of public policy as the claim was for a colossal sum of Kshs 1,600,000,000/=. It was also his contention that the Process server who served the Statement of Claim was not cross-examined. He also set out the details surrounding the contract between the parties.

5. In response thereto, the Respondent filed Grounds of Opposition dated 6<sup>th</sup> March 2013 and filed on 8<sup>th</sup> March 2013. The grounds were generally as follows:-

- a. **The attack on the Arbitral Award fell short of the "public policy" threshold set out in law.**
- b. **The attack of the Arbitral Award amounted to an appeal or review of the Arbitrator's Arbitral Award which was not permissible under the law.**
- c. **The Arbitrator's findings on fact and law were not appealable or capable of being challenged.**
- d. **The Application was predicated upon an illegality and ought to be dismissed.**

6. The Respondent also filed a Notice of Motion application dated 6<sup>th</sup> March 2013 and filed on 8<sup>th</sup> March 2013. It sought for the striking out of the Claimant's Notice of Motion application dated 22<sup>nd</sup> January 2013 and all related proceedings. Its application was supported by the Affidavit of Jane Otieno that was sworn on 6<sup>th</sup> March 2013.

7. The gist of the Respondent's case was that the application and proceedings ought to be struck out as one Newton Omondi Osiemo was at all material times a co-director of the Claimant company and that his participation in the selection, evaluation and award of the contract between the Claimant and the Respondent was a violation of the law and against public policy. The said Jane Otieno set out in great detail how the Claimant participated in the arbitral proceedings leading to the termination of its claim.

8. Owino Opiyo, an advocate who said he drew the Memorandum of Claim and the Witness Statements, swore a Replying Affidavit on 26<sup>th</sup> March 2013 in response to the Respondent's

application. He denied that the said Newton Omondi Osiemo was a co-director of the Claimant and that he only noticed the inclusion of the said name when he filed the witness statements before the Arbitral Tribunal.

9. In his Supplementary Affidavit that was sworn on 11<sup>th</sup> April 2013 and filed on 12<sup>th</sup> April 2013, Kenneth Kiplagat, a partner in the firm of M/S Okoth & Kiplagat that was acting for the Respondent stated that the Arbitration Act did not contemplate the rectification, addition or amendment of the arbitral record. He was categorical that the said Newton Omondi Osiemo was at all material times related to the Claimant.
10. The Claimant's written submissions and List of Authorities were both dated 3<sup>rd</sup> April 2013 and filed on 4<sup>th</sup> April 2013 while those of the Respondent were dated 17<sup>th</sup> April 2013 and filed on 18<sup>th</sup> April 2013. Both the Claimant's and Respondent's counsel further orally highlighted their respective written submissions.

## **LEGAL ANALYSIS**

11. The Arbitration Act is a complete code for resolution and determination of disputes and the provisions of Civil Procedure Act are limited in so far as they are appropriate as is envisaged in Rule 11 of the Arbitration Rules, 1997. Reliance of Sections 1A and 3A of the Civil Procedure Act Cap 21 (laws of Kenya) would not assist the Claimant as the said provisions of the Civil Procedure Act are not applicable in arbitral proceedings. However, the court will only have regard to the same in so far as the purpose is to facilitate the just, expeditious, proportionate and affordable resolution of the applications before the court.
12. The court also wishes to state right at the outset that the questions of limitation of the Claimant's claim, its illegality or otherwise on the ground that the said Newton Omondi Osiemo was a co-director of the Claimant company, the conflict of interest as he sat in the selection, evaluation and award of the contract to the Claimant would not be within the purview of this ruling as those were matters that would have been canvassed before the Arbitral Tribunal.
13. What is of concern to this court is whether or not the Claimant had demonstrated that it was entitled to the orders that it sought under the Arbitration Act as was rightly pointed out by the Respondent's counsel and admitted by the Claimant's counsel.
14. Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice and it would therefore be in order for this court to interrogate the whole proceedings and evidence to ensure that justice was done.
15. However, the court recognises that it can only intervene in arbitral proceedings within the parameters envisaged by Section 10 of the Arbitration Act which provides as follows:-

**“Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

16. Under Rule 7 of the Arbitration Rules, 1997 it is provided as follows:-

**“ An application under Section 35 of the Act shall be supported by an affidavit specifying grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator.”**

17. A court will only set aside a Final Award delivered by an Arbitrator is if it is satisfied that grounds under Section 35 of the Arbitration Act exist. In its application to set aside the Arbitral Award herein, the Applicant relied on Section 35(2)(a)(iv) and Section 35 (2)(b)(ii) of the Arbitration Act which stipulates follows:-

**35(2)An arbitral award may be set aside by the High Court only**

**(a)(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 matters referred to arbitration, provided that if the decision 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...**

**(b) The High Court finds that-**

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

18. Section 35 of the Arbitration Act gives the court jurisdiction and power to go beyond glossing over the said Arbitral Award as it is bound to ask itself whether the conclusions reached by the arbitral tribunal would have been consistent with the decision of the court had the court had the same facts for the underlying dispute been placed before the court for determination.

19. In considering the question of the grounds under which an Arbitral Award can be set aside, in the case of **HC Misc Appl No 241 of 2005 APA Insurance Co Ltd vs Hon Chrysanthus Barnabas Okemo**(unreported) Ringera J (as he then was) held that:-

**“ ...an Award could be set side under Section 35 (2)(b)(ii) of the Arbitration Act as being (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.”**

20. 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 who were 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.

21. The Claimant submitted that the colossal sum it was claiming would bring the decision by the Arbitrator within the ambit of public policy. On its part, the Respondent argued that the participation of the said Newton Omondi Osiemo as regards the awarding of the contract was against public policy. The court will consider these arguments in view of the fact that under Section 35 (2)(b) (ii) of the Arbitration Act, an award that is in conflict with public policy is a ground for setting aside an Arbitral Award.

22. The fact that there was a colossal amount of money as the Claimant contended or that the subject contract ought to have been nullified as the Newton Omondi Osiemo did not disclose his interest during the awarding of the contract as was alleged by the Respondent were not matters that would have fallen within the domain of what would be considered to have been contrary to public policy as has been envisaged in the Arbitration Act.

23. From the evidence that was placed before the court, the Claimant did not demonstrate that the Arbitral Award was inconsistent with the Constitution or other laws of Kenya, or inimical to the national interest of Kenya or contrary to justice and morality. Their arguments did not reveal that there was a violation of public policy herein.

24. The importance of finality of arbitral awards was addressed in the case **Christ for All Nations vs Apollo Insurance Co Ltd [ 2002] 2 E.A. 366**, where Ringera J (as he then was) stated thus:-

**“ ...the public policy in 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.”**

25. Accordingly, the Claimant's and the Respondent's arguments were not relevant or cogent at all to persuade the court to set aside the Arbitrator's decision or the Claimant's application on the grounds of the decision or proceedings by the Arbitrator were in conflict with public policy.
26. The Claimant did not also show that the Arbitral Tribunal determined matters that were outside the scope of the reference to arbitration. As a result, the court would not have deemed the case herein to have been suitable for one it would have disturbed the Arbitral Award.
27. Further, the Claimant also argued that the Arbitrator did not decide the dispute based on the evidence that was placed before him because he failed to order the cross-examination of the Process Server who purportedly served its Statement of Claim and that he terminated the arbitral proceedings prematurely. As was rightly submitted by the Respondent, this was a finding of fact and for which this court would have no jurisdiction or power to interrogate. The court can only consider questions of law as contemplated under Section 39 of the Arbitration Act.
28. It is important to note that under Section 39 of the Arbitration Act, the court can only consider questions of law arising in the course of the arbitral proceedings and only if the parties have consented to lodging of appeals or the Court of Appeal is of the opinion that a point of law of general importance due to the final and binding nature of arbitrations. The issue of whether or not the Process Server served the Claimant's Statement of Claim was a finding of fact for which this court cannot interrogate.
29. Having said the above, setting aside of an arbitral award becomes operational only after the matter has been heard and determined on merit. Section 35 and Section 37 of the Act are limited to a final award. That was not the case here. The facts of this case show that the arbitral proceedings were terminated under Section 26(a) of the Arbitration Act. The said Section provides as follows:- **"Unless otherwise agreed by the parties, if without showing sufficient cause-**

**the Claimant fails to communicate his statement of claim in accordance with Section 24 (1), the arbitral tribunal shall terminate the arbitral proceedings..."**

30. Section 24 (1) of the Arbitration Act states as follows:-

**" Within the time of period agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought..."**

31. The Claimant did not place any evidence before this court to show that it had been agreed that the Arbitral Tribunal could not invoke Section 26 (1) of the Arbitration Act. In fact, the decision that was rendered by the Arbitrator was a ruling. There is no provision under Section 26 of the Arbitration Act or indeed anywhere in the said Act which that permit this court to interfere with the finding of an arbitral tribunal delivered under Section 26 of the said Act.
32. While the Constitution of Kenya, 2010 empowers the High Court to supervise tribunals, it can only do so within the limits of the law provided. It cannot clothe itself with jurisdiction that it does not possess at all. For that reason, the court had no basis for making a finding contrary to what the Arbitrator found.
33. Having considered the pleadings, the affidavits, the oral and written submissions, the court is more persuaded by the Respondent's arguments that the court had no jurisdiction or power to determine the legality or otherwise of the Arbitrator's finding as doing so would be tantamount to re-opening the challenge that ought to have been canvassed before the Arbitral tribunal. However, the court was not persuaded that the Claimant's application could be struck out on the grounds that were relied upon by the Respondent. The parties' arguments that either the Final Award or the proceedings herein were in conflict with the public policy of Kenya were immaterial.

## **DISPOSITION**

34. For the foregoing reasons, this court hereby declines to grant the orders that had been sought in the Claimant's Notice of Motion application dated 22<sup>nd</sup> January 2013 and filed on 24<sup>th</sup> January 2013 or those in the Respondent's Notice of Motion application dated 6<sup>th</sup> March 2013 and filed on 8<sup>th</sup> March 2013 as the same were not merited. The court hereby dismisses the said applications.
35. In view of the fact that both the Claimant and the Respondent were not successful in their respective applications, this court hereby directs that each party will bear its own costs.
36. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of October 2014

**J. KAMAU**

**JUDGE**



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