



THE JUDICIARY



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMARB/E006/2020

CITATION: ASSA ABLOY (EA) LIMITED VS TOP SECURITY SYSYEMS LIMITED

RULING

Introduction and Background

1. On 24th August 2011, the parties herein entered into an Asset Transfer Agreement (“the Agreement”) where the Respondent, who was engaged in inter alia importation, sale, installation and service of Mul-T-Lock products agreed to transfer its business to the Applicant. The parties also entered into a sub-lease agreement dated 2nd August 2011 (“the Sub Lease”) under which the Respondent sub-let its premises with effect from 1st September 2011 to the Applicant at a monthly rent of KES 100,000.00 and allowed the Applicant’s use of listed accessories and facilities with an equal share expense.

2. The Respondent raised a claim of KES 5,887,600.27 against the Applicant under the Sub-Lease and proceeded to invoke arbitral proceedings as the preferred mode of dispute resolution pursuant to clause 23 of the Agreement. By a letter dated 1st October 2019, the Chairman of the Chartered Institute of Arbitrators appointed Mr Cecil Kuyo as the sole arbitrator (“the Arbitrator”) to hear and determine the dispute.

3. The Arbitrator heard the parties’ arguments and thereafter published the Final Award dated 4th November 2020 (“the Award”). The Arbitrator found that the Applicant owed the Respondent KES 5,887,600.27 under the terms of the Sub Lease. He also published a Costs Award dated 6th March 2021 where he awarded the Respondent of KES 431,636 (“the Costs Award”).

4. The Applicant has now filed the Originating Notice of Motion dated 22nd December 2020 seeking to set aside the Award under section 35 of the Arbitration Act, 1995 (“the Arbitration Act”). The application is supported by the affidavit of the Applicant’s Chief Finance Officer, Robert Njombai, sworn on 22nd December 2020. It is opposed by the Respondent through the replying affidavit of Nelson Odongo, an advocate in the firm of Kerandi Manduku & Co Advocates, who has conduct of this matter on behalf of the Respondent, sworn on 10th May 2021.

5. The Respondent has also filed the Chamber Summons dated 6th May 2021 under section 36 of the Arbitration Act seeking recognition, adoption and enforcement of the Award. It is supported by the affidavit of Nelson Odongo sworn on 10th May 2021.



6. The two applications were canvassed by way of written submissions with the parties advancing their respective positions.

The Applicant's Case

7. The Applicant attacks the Award on three main grounds. First, that the Award was made without jurisdiction and is thus a nullity ab initio. Second, that the Arbitrator was biased against it and third, that the Award is against Kenya law.

8. The Applicant avers that in response to Respondent's Statement of Claim before the Arbitrator, it filed its Statement of Defence in which it specifically contested the jurisdiction of the Arbitrator to determine the reference. At the inaugural meeting held on 22nd October 2019, the Applicant indicated that it would be raising a preliminary objection contesting jurisdiction. When the Respondent filed its list of documents, it contained the two agreements; the Agreement, which contained an arbitration clause and the Sub Lease, which did not contain an arbitration clause.

9. In the Applicant's view, the issue of jurisdiction ceased being a preliminary issue but one to be determined after full hearing and as such, in its submissions, it maintained that the Arbitrator did not have jurisdiction. The Applicant therefore submits that the issue of jurisdiction remained a live issue and could be determined either as a preliminary issue or at the award stage under section 17(2) of the Arbitration Act.

10. The Applicant submits that the Arbitrator determined he had jurisdiction although the Sub Lease did not contain an arbitration agreement but in his words "there was an impression that the two agreements were to be read together" yet the Agreement and Sub Lease did not state so. It submits that throughout the Award, the Arbitrator displayed extreme bias against the Applicant. The Applicant accuses the Arbitrator of acquiring jurisdiction by blaming the Applicant's advocates for procedural omissions. It adds that the bias was exemplified by the fact that the Arbitrator would always communicate to the parties by email at night outside office hours. It states that the email communicating the date of hearing was sent on the eve of the hearing which led to the Applicant's junior advocate attending on behalf of the Applicant as the lead advocate was engaged on prior matters that were fixed for hearing on the same day.

The Respondent's Reply

11. The Respondent opposes the application on the ground that the Applicant has not made full, frank and candid disclosure of material facts. It also accuses the Applicant of withholding material facts and of making false and misleading statements. The Respondent avers that the Applicant failed to comply with its obligations under the Sub Lease by failing to remit KES 5,887,600.37 on account of office rent, shared expenses and other items supplied and interest.

12. The Respondent states that when the dispute arose, it commenced the arbitration proceedings but upon an application made by both parties to appoint an Arbitrator. It further states that at the preliminary meeting before the Arbitrator, the parties agreed by consent to have the matter referred to arbitration but the Applicant indicated that it would raise the preliminary point on the jurisdiction of the Arbitrator. The Respondent avers that the Sub Lease was an addendum to the Agreement and it is on that basis that the dispute was properly before the Arbitrator as provided for under clause 23 of the Agreement which it properly invoked.

13. The Respondent states that at the first meeting to set the agenda of the arbitration proceedings, the Applicant raised an issue on jurisdiction and the Arbitrator issued directions. At the meeting held on 6th December 2019, parties agreed amongst other matters that the issue of jurisdiction be determined first and Arbitrator issued directions in regard to the preliminary objection on

jurisdiction. The Respondent states that the Applicant failed to comply with these directions and has failed to attach them to the application with the intention of misleading the court.

14. The Respondent reiterates that the Applicant failed to comply with the said directions and did not object to the matter proceeding to the main hearing. It submits that nonetheless, the Arbitrator in the Award determined the issue of jurisdiction which was not necessary in line with section 17(2) of the Arbitration Act and that the Applicant has clearly misinterpreted the said provision with regard to when a preliminary objection should be heard and or dealt with and therefore the Applicant has arrived at a wholly erroneous conclusion.

15. The Respondent submits that the Applicant was at all times properly represented and at no time did it object to the matter proceeding due to an issue of representation and that it did not raise an issue regarding the Advocate who would be attending the matter on its behalf. It urges that that the junior advocate who represented the Applicant at all times in the matter gave the impression that she was well versed with the matter as evidenced by the Arbitrator's record. The Respondent denies the allegations that hearing dates were given arbitrarily and that the Arbitrator communicated to the parties outside office hours. It states that that the hearing dates were given by consent and that the hearing date of 20th August 2020 was given by Order of Directions No. 4 by consent. It adds that the email sent to the parties was a polite reminder by the Arbitrator to the parties which in any event was not necessary as parties were aware of the hearing date.

16. The Respondent submits that the Applicant does not have an issue with the Award other than with the issue of jurisdiction which was determined by the Arbitrator at the preliminary stage as provided by section 17(2) of the Arbitration Act and even further when the Arbitrator published the Award. It urges the court to uphold the award.

Analysis and Determination

17. From the parties' pleadings and submissions, the main issues for determination of the Applicant's application are whether the Arbitrator had jurisdiction to determine the parties' dispute and whether the Award ought to be set aside. It is common ground that the court's jurisdiction in determining whether an award should be set aside is circumscribed by section 35 of the Arbitration Act. The Applicant submits that its application falls within the ambit of section 35(2)(a)(ii), (iv) and (vi) and Section 35(b) of the Arbitration Act which provides as follows:

35. Application for setting aside arbitral award

(1).....

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

(a) *the party making the application furnishes proof—*

(i).....

(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).....

(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).....

(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* 5/6



Kenya; or

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

18. It is not in dispute that before the hearing of the Respondent's dispute before the Arbitrator, the Applicant evinced its intention to challenge the Arbitrator's jurisdiction. This is captured in the Arbitrator's Order for Directions No. 1 after the preliminary meeting held on 22nd October 2019 where it was agreed and the Arbitrator directed that the said objection was to be raised after being served with the Respondent's Statement of Claim.

19. When the matter came up for a pre-hearing review on 6th December 2019, under Order for Directions No. 2, it was agreed and directed, inter alia, that "Once the submissions are provided, the Interim Award on jurisdiction to be issued on notice". The matter then came up for mention on 4th March 2020 where under Order for Directions No. 3, it was agreed and directed inter alia that, "The parties shall exchange submissions on the matter of the Arbitrator's jurisdiction as well as the objection to the Claimant's further list of documents dated 16th December 2019 with the Respondent filing its set of submissions within ten (10) days and the Claimant to file its submissions in reply within ten (10) days of being served".

20. It is apparent that the Applicant did not comply with the Order for Directions No. 3 so that the Arbitrator deemed the objection as abandoned in his order dated 6th May 2020 and directed that the Applicant was at liberty to raise the objection in its pleadings.

21. In the Award, the Arbitrator lamented that the Applicant did not comply with the orders and directions on the issue of jurisdiction and that at the oral hearing on 20th August 2020, the Applicant did not raise the issue of jurisdiction. The Arbitrator held that since the hearing was concluded without raising the issue of jurisdiction being raised, the objection was deemed as having been abandoned.

22. The Applicant does not deny that it failed to follow the directions and orders of the Arbitrator on the issue of jurisdiction. The Arbitrator ruled that the issue of jurisdiction has been waived but nevertheless granted the Applicant leave to amend its pleadings in order to raise the issue again but it did not do so. This means that it acquiesced to the Arbitrator's jurisdiction and thus waived its right to challenge his jurisdiction. This is in line with section 5 of the Arbitration Act provides that:
5. A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance with undue delay or, if a time limit is prescribed, with such period of time, is deemed to have waived the right to object.

23. In light of the circumstances of this case detailed above, I do not fault with the Arbitrator's finding that the Applicant had abandoned its objection when it elected to oppose the substance of the Respondent's claim and failed to prosecute its objection as had been earlier directed. Further, the Arbitrator stated in the Award that the issue had already been determined in his order of 6th May 2020 that the objection had been abandoned. The Applicant did not apply to this court against this ruling if at all it was dissatisfied as provided for by section 17(6) of the Arbitration Act that:
6. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

24. The Arbitrator still determined the issue of his jurisdiction by going through the Sub Lease and the Agreement and satisfied himself that he indeed had jurisdiction based on the terms contained therein. Since I have already found that the Applicant waived its right and acquiesced to the
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Arbitrator's jurisdiction, this court cannot now reopen the same issue.

25. I also find that the other grounds advanced by the Applicant seeking to set aside the Award are generalized and without proof or evidence. For instance, the Applicant has not identified the public policy of Kenya which the Award allegedly breaches or shown which part of the Award conflicts with that public policy. It has also not proved its claim that the Award was induced or affected by fraud, bribery, undue influence or corruption.

26. The Respondent has filed an application for recognition and enforcement of the Award. Section 36 of the Arbitration Act confirms the binding nature of domestic arbitral awards and unless the court orders otherwise, the party seeking enforcement of such awards should furnish to the court the original arbitral award and the original arbitration agreement or their certified copies thereof. Section 37 of the Arbitration Act sets out the grounds upon which this may refuse to recognize or to enforce an arbitral award. These grounds mirror those for setting aside of arbitral award under section 35(2) of the Arbitration Act. Under section 37 of the Arbitration Act, the court may refuse to recognize or enforce an award if the conditions stated therein are shown to be present.

27. The Applicant commenced these proceedings by filing the application to set aside the judgment. It filed the Asset Transfer Agreement dated 2nd August 2011 which contains the arbitration clause relied on by the Applicant and which the Arbitrator accepted was applicable in resolving the dispute. The Applicant also annexed the Award and the Costs Award. These were neither original nor certified. In its application, the Respondent did not furnish these documents in line with section 36(3) of Arbitration Act. However, I find that failure to furnish the court with certified copies or originals of the Award and the arbitration agreement is not one of the grounds provided in section 37 in which the court may decline to recognize or to enforce an arbitral award.

28. Section 36(3) of the Arbitration Act which state as follows;

36. Recognition and enforcement of awards

(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—

(a) the original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

29. Under Rule 6 of the Arbitration Rules, 1997, if no application to set aside the arbitral award is made under section 35 of the Arbitration Act, the party seeking to enforce the arbitral award may apply ex-parte by summons for leave to enforce such an award. In this respect, therefore, the need for the original or certified copy of the award and arbitration agreement is necessary for the court to satisfy itself of the authenticity of the arbitral proceedings. By use of the phrase, "Unless the High Court otherwise orders", section 36(3) aforesaid imports discretion to allow the application despite failure to provide the original or certified copies of the arbitral award and arbitration agreement. Since the substance of the Award and the arbitration agreement are admitted, and the Respondent's application for enforcement is not opposed on substantive grounds, I do not see any reason why I should not allow the application.

Disposition

30. For the reasons I have set out, I now make the following orders:

(a) The Applicant's Originating Notice of Motion dated 22nd December 2020 is dismissed.

(b) The Respondent's Chamber Summons dated 6th May 2021 is allowed on terms that the Final Arbitral Award by Mr Cecil Kuyo, Sole Arbitrator, dated 4th November 2020 and the Costs Award dated 8th March 2020 be and are hereby recognised as a judgment of this court and leave is granted to the Respondent to enforce Final Award together with the

taxed costs as a decree of this court.

(c) The Applicant shall pay the costs of both applications.

DATED and DELIVERED at NAIROBI this 3RD day of NOVEMBER 2021.

D. S. MAJANJA
JUDGE

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



THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT COMMERCIAL AND TAX
DATE: 2021-11-03 20:28:16+03

