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Kenya Branch

CASE LAW SUMMARY

COACA/8/2009
ANNE MUMBI HINGA VS. VICTORIA NJOKI GATHARA

Court: Court of Appeal at Nairobi
Ruling Date: 13th November 2009

SUMMARY OF FACTS

The parties contracted for the sale of land. The appellant in this court (Miss Anne) was the vendor while the buyer was the respondent (Miss Victoria). They agreed that Miss Victoria would pay a consideration of 1,500,000 Kenyan shillings, with 230,000 Kenyan shillings as the deposit. They later disagreed as to the mode of payment of the balance, which was 1,270,000 Kenyan shillings, leading them to refer the dispute to arbitration as per their agreement. While the respondent attended the arbitral award hearing, the appellant and her advocate failed to do so. Notably, the arbitrator had sent a notification of the arbitral award hearing to both parties. The notice of the publication of the award was equally sent to both parties after it was rendered. The respondent then went head to enforce the award in court. Prior to this, she served upon the appellant a copy of her application to enforce the award.

Nonetheless, the appellant at the High Court strongly averred that neither her nor her advocate had been served with the said documents. On this basis, she sought a refusal of enforcement of the award. From the written submissions of the parties, the High Court concluded that the appellant had sufficient notice of the arbitral award hearing. It was also proved that Miss Victoria sent a copy of the arbitral award to Miss Anne. She also sent a notice of the application to enforce the award, and the court had an affidavit of service from Miss Victoria to prove the same. The appellant's application against the respondent thus failed at the High Court.

In the Court of Appeal, it was noted that the heart of the appeal rested on the appellant's claim that she and her advocate received no documents indicating the notice of the arbitral award hearing as well as the intention of the respondent to enforce the award in court. Notwithstanding her claims, the respondent tendered proof of service of a copy of the award and the notice to enforce the award through affidavits of the court servers. This was later corroborated by the appellant's affidavit which stated that she had received a letter from the arbitrator with a copy of the award together with a copy of the award from the respondent's advocates.

ISSUES

1. Whether the notice of publication or the making of the award had been served and the effect of failure to serve.
2. Whether the award was served
3. Whether the application to enforce the award was served.
4. Whether there was a right of recourse to the superior court or this court

ANALYSIS AND DETERMINATION

On the issue of service, the court held that service had been duly effected. Whilst the appellant and her advocate failed to attend the hearing of the arbitral award, it is uncontested that they received service of the documents as per the affidavits produced in court. Further evidence of such service could be seen in the appellant instructing her advocate to make an appeal against the award, which shows that she was aware of the arbitral award hearings.

The court also held that the appellant's application was unmerited. This was because it alleged that documents were not served upon her after the award was already rendered. Any claim for due process had to be made before the award was rendered. Further, the grounds of appeal did not disclose any of the grounds for setting aside an award under section 35 (2) or the grounds for refusal of enforcement or recognition of an award under section 37 (1).

Additionally, the court held that the High Court lacked the jurisdiction to interfere with the enforcement of the award. As per section 10 of the act, courts are barred from interfering with the matters governed by the act unless otherwise provided. Because of the intervention of the superior court, the award was yet to be enforced ten years later. Thus, in light of the objectives of arbitration, which include finality of the award and speedy enforcement, the superior court ought not to have entertained the application. The Court of Appeal also asserted that the applications brought before the High Court with regards to the award were incompetent because they all occurred years after the arbitral award had been issued. This was contrary to section 35 (3) which mandated all parties to file their setting aside applications 3 months after the delivery of the arbitral award.

Concerning the issue of whether the appellant had a right to recourse in the superior courts, it was held that the appellant had no right of recourse to bring her matters before them. This decision was based on section 39 of the act, which requires the prior consent of both parties before the intervention of the court. Moreover, the court, under section 39 (2) may only consider issues of law and not of fact. Since the application before it did not meet these requirements, the court averred that the appellant had no right to bring her case before it. One of the reasons why the High Court failed to enforce the award was owing to reasons of public policy. However, the Court of Appeal stated that it was also against public policy to fail to recognize the finality of arbitral awards and their subsequent enforcement. It also clarified that issues of public policy only arise where there is illegality that would be inimical to the public good or offensive to an ordinary, reasonable, and fully informed member of the public.

Finally, the court reiterated that the finality of arbitral awards and a pro-arbitration policy was the golden thread that run across all arbitration acts of states, many of which were modelled upon the UNCITRAL Model Law on International Commercial Arbitration. Owing to these principles, courts are restricted from judicial review of arbitral awards unless otherwise permitted by the arbitration act in question. Hence, it is in the public interest to safeguard the expediency of arbitration by keeping judicial intervention to a strict minimum.

HOLDING

The court found that the appellant's application was unmerited based on non-compliance with the Arbitration Act, specifically section 35 (3) which sets the time limitation to three months, and

section 39 which outlines the requirements for adjudication over a matter that was previously referred to arbitration.

RATIONALE

The court's finding was based upon the principle of finality of awards and their subsequent enforcement. Relying on American jurisprudence, the court was of the view that the finality of arbitral awards and their subsequent enforcement ought to be respected. Otherwise, arbitration would lose its core appeal of expediency and timeliness. The court's reasoning was also based upon the role of courts in arbitration, which was unnecessary unless they were invited to intervene by the arbitration act in question. Thus, judicial review of arbitral decisions had to be very minimal.

CASE RELEVANCE

Under section 35 (3) of the Act, parties are not allowed to make applications to set aside an arbitral award after 3 months. These timelines should be strictly enforced to ensure that arbitration achieves its core value of expediency and timeliness. Courts should therefore embrace a pro-arbitration policy and refrain from judicial review of arbitral matters especially where the timelines for raising complaints have elapsed.

Section 39 of the Act sets out specific requirements for the court's intervention in a matter already submitted to arbitration. The prior consent of all parties should be obtained before submitting it to the court. Further, the court may only address issues of law and not of fact. While such an intervention is originally reserved for the High Court, the parties may also submit the matter to the Court of Appeal if they agree to do so before the award was given. Alternatively, their questions of law must be of general importance in the eyes of the court to the extent that it substantially affects the rights of the parties. Failure to meet these requirements will result in the court's refusal to adjudicate the matter

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

MISCELLANEOUS CIVIL APPLICATION NO. 617 OF 2000

VICTORIA NJOKI GATHARA……..……..APPLICANT

- VERSUS –

ANNE MUMBI HINGA……..……RESPONDENT

R U L I N G

On 14th January 1998, the applicant entered into an agreement with the respondent in respect of a parcel of land known as **LR No. 18084** situate within Nairobi area *(hereinafter referred to as the suit property)*. The respondent, as the vendor, agreed to sell to the applicant, the suit property for a purchase consideration of KShs.1,500,000/=. The agreement was drawn by Messrs Salim Dhanji & Co. Advocates. On execution of the agreement, the applicant had already paid the respondent the sum of KShs.230,000/=. The balance of KSh.1,270,000/= was to be paid within sixty *(60)* days of execution of the said sale agreement. A disagreement arose between the applicant and the respondent regarding the manner of payment of the balance of purchase consideration. It appeared that there was a sum of KShs.800,000/= which was to be paid by the applicant to the respondent as a further payment to the sum of KShs.1,500,000/= disclosed in the agreement.

Since there was a clause in the agreement that provided for the resolution of any dispute regarding the construction, validity and performance of the agreement, the parties agreed to refer the dispute to arbitration. They were however unable to agree on an arbitrator. In accordance with Clause 11 of the agreement, the Chairman of the Law Society of Kenya appointed E. N. K. Wanjama as the sole arbitrator. The applicant and the respondent, together with their respective counsels appeared before the said arbitrator. After hearing the parties, the arbitrator made his award on 19th October 1999 in the presence of the applicant and her advocate and in the absence of the respondent. The arbitrator found in favour of the applicant and ruled that the applicant had fully complied with the terms of the agreement of sale and therefore entitled to specific performance of the agreement. He ruled that it was the respondent who had infact breached the agreement.

The arbitrator notified the respective advocates of the applicant and the respondent to be present during the making of the award. The arbitrator, after the making of the said award, forwarded copies of the award to the said advocates. Upon the receipt of the award, the applicant filed the award in court. She served upon the respondent the notice of filing of the award in court. An affidavit of service was duly filed in court. Subsequently thereafter, pursuant to **Section 36** of the **Arbitration Act 1995**, the applicant sought leave of the court to enforce the award made in her favour. Leave to enforce the award was allowed by this court on 17th January 2002.

The respondent was aggrieved by the said order of the court allowing the applicant to enforce the award of the arbitrator. By an application dated 25th April 2008, the applicant sought an order to set aside the decree issued pursuant to the order of the court of 17th January 2002. The respondent further sought a declaration of the court that the arbitrator had made his award on 19th October 1999 before complying with the law that required him to serve the respondent with notice before the making of the said award. The respondent insisted that she was not served with the notice of the making of the award. She contended that she was neither served with the notice of the filing of the award in court. She reiterated that her advocate at the time was not served with any notice before proceedings took place subsequent to the making of the award. The respondent therefore sought orders of the court seeking the setting aside of the adoption of the award of the arbitrator as the judgment of the court. The applicant opposed the respondent's application. Similarly, the arbitrator filed a replying affidavit controverting the averments made by the respondent touching on his conduct during the making of the award.

The parties to these proceedings agreed by consent to file written submissions for consideration by court. I have carefully considered the said written submissions. I have also considered the pleadings filed by the parties in support of their respective cases. The issue for determination by this court is whether the respondent established failure by the arbitrator to notify of the date of the making of the award. The second issue for determination is whether the applicant served the respondent with notice before the leave of the court to enforce the award made by the arbitrator was sought. As regard the first issue, it was evident that the respondent was notified of the date when the award was scheduled to be made. At the time the dispute was being considered by the arbitrator, the respondent's advocate was a Mr. Mutinda. The respondent then appointed a Mr. Ouna advocate to act on her behalf. She notified the arbitrator of her decision to change advocates.

The arbitrator, in accordance with the law, was thus required to give notice to the new advocate who had been appointed by the respondent. The new advocate did not however appear before the arbitrator on the date that was fixed for the making of the award. He acknowledged receipt of the notice but complained it was too short. I perused the affidavit of service filed in court. I am satisfied that the respondent was duly notified of the date of the making of the award. In further support of this court's finding on this issue, there was sufficient evidence that after the making of the said award, a copy of the award was availed by post to the respondent by the arbitrator. The respondent cannot therefore claim that she was unaware of the date that the award was made. The respondent participated in the proceedings before the arbitrator. It is therefore inconceivable for the respondent to expect that no award was made even after the expiry of eight (8) years.

As regard whether the respondent was served before the applicant moved the court to enforce the award, it was clear from the evidence on record that the respondent was personally served with notice at the time the award was filed in court. An affidavit of service was filed in court which confirmed that the respondent was served at her business premises with the notice. In any event, it is now over six *(6)* years since the said award of the arbitrator was adopted as judgment of this court. I think the respondent's application is rather belated. The respondent has been guilty of laches.

I find no merit with the respondent's application dated 25th April 2008. The same is hereby dismissed with costs. The interim orders which were granted by this court are hereby set aside.

It is so ordered.

DATED at **NAIROBI** this **24th** day of **SEPTEMBER, 2008.**

L. KIMARU

JUDGE