MISCELLANEOUS CASE NO. E465 OF 2019
MATRIX BUSINESS CONSULTANTS LIMITED & 4 OTHERS –VS- SAFARICOM LIMITED

- Applicant – Matrix Business Consultants Limited, Pemocom Communications Limited, Saniwalo Communications Limited, Rozacom Communications Limited and Daco Communications Limited
- Respondent – Safaricom Limited
- Judge(s) – David Shikomera Majanja
- Date of delivery of the Ruling: 14th February 2020 in Nairobi
- Court: High Court at Nairobi (Milimani Law Courts); Commercial, Tax & Admiralty Division

SUMMARY OF FACTS

This matter arose from a disputed Arbitral Award that was published by Arthur Igeria (hereinafter, the "Arbitrator") on 10th July 2019, who had been appointed as the arbitrator to handle the dispute between the Applicants and the Respondent.

The background of the matter is that the Applicants had entered into separate ***"Mpesa Cash Merchant Agreements"*** contracts with the Respondent. According to the contract, the Applicants would act as cash merchants within the Respondent's electronic money transfer system. The contract would be renewed annually on 31st December of each year upon proof of satisfactory performance. The dispute specifically arose on 16th January 2013 where the Respondent issued notices to terminate the respective agreements/contracts made with the Applicants but backdated the notices to 2nd January 2013 so that the agreements would terminate on 31st January 2013. The Arbitrator found and held that the notices were good and proper as per the contract and thus dismissed the prayers of the Applicants in the award he published.

The Applicants then applied to the High Court to set aside the award published on the basis of public policy in that, the award violated the Applicant's right to have the dispute determined by application of the law and that the arbitrator exhibited bias in favour of the Respondent. Moreover, the Applicant submitted that the award was contrary to public policy to the extent that it promoted unjust enrichment by allowing the Respondent to withhold the Applicant's profits due to them for work done pursuant to the contracts. The Respondent on the other hand submitted that the Applicants had not satisfied the conditions for setting aside an arbitral award under Section 35(2) of the Arbitration Act to warrant the court to set aside the award. Specifically, the Respondent averred that the Applicants did not establish that the award was against public policy. Regarding the averment of bias on the part of the Arbitrator, the Respondents submitted that the Applicants bore the burden of proof to establish their case and that the issues raised by the Applicants including the backdating of the notices and breach of contract were not proved.

ISSUES

The following issue arose for determination by the Judge:
"Whether the standard of proof was met to meet the grounds for setting aside an award pursuant to Section 35 of the Arbitration Act?"

HOLDING

The Judge held that when parties agree to have an arbitrator to determine a dispute between them, pursuant to an arbitration clause, they must take the consequences that the decisions may be or for against one of the parties to the dispute. He further stated that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award.

In a nutshell, the Judge put emphasis on the finality of an Arbitral Award. According to the Judge, the court should not interfere with the decision of an arbitrator even if it is apparently a misinterpretation of a contract, as such interference would place the court in the position of a Court of Appeal, which the whole intent of the Arbitration Act is to avoid.

Therefore, the Judge dismissed the application put forward by the Applicants.

RATIONALE

The *ratio decidendi* applied by the Judge is that the grounds for setting aside an arbitral award should be interpreted narrowly, with specific emphasis on the public policy ground. According to the Judge, Applicants must be put to strict proof in order to satisfy any of the grounds. In the absence of that, then the finality of an arbitral awards should be respected and courts should not interfere.

CASE RELEVANCE

- • Section 35 of the Arbitration Act 1995 speaks to the finality of Arbitral Awards.
- • The decision(s) arrived upon by an Arbitral Tribunal are final and binding. Parties who forward a dispute to an arbitration ought to anticipate the final and binding nature of arbitral awards.
- • The public policy ground for setting aside an Arbitral Awards ought to be interpreted narrowly(strictly) according to the current jurisprudence.

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISCELLANEOUS CASE NO. E465 OF 2019

BETWEEN

MATRIX BUSINESS CONSULTANTS LIMITED ..... 1ST APPLICANT

PEMOCOM COMMUNICATIONS LIMITED ..... 2ND APPLICANT

SANIWALO COMMUNICATIONS LIMITED ..... 3RD APPLICANT

ROZACOM COMMUNICATIONS LIMITED ..... 4TH APPLICANT

DACO COMMUNICATIONS LIMITED ..... 5TH APPLICANT

AND

SAFARICOM LIMITED ..... RESPONDENT

RULING

Introduction

1. The applicants have moved the court by a Notice of Motion dated 15th October 2019 under the provisions of **section 35(1), (2)(a)(iv)** and **2(b)(ii)** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking an order that, *"the Arbitral Award dated 10th July 2019, made by Arthur Igeria in the arbitration between the Applicants and the Respondents be set aside."*

Background

2. Before I deal with grounds of the application and arguments by parties, a background of the matter at this stage would be appropriate. The applicants entered into separate *"Mpesa Cash Merchant Agreements"* with the respondent in which they would act as cash merchants within the respondent's electronic money transfer system. The agreements would remain in force every year until 31st December of that year and would be renewed upon satisfactory performance. The gravamen of the applicants' case was that on 16th January 2013, the respondent issued notices terminating the agreements but backdated them to 2nd January 2013 so that the agreements would terminate on 31st January 2013.

3. The applicants moved the court in ***Milimani Magistrates Court Civil Case No. 312 of 2013*** for an interim injunction restraining the respondent from terminating the agreements. On 31st January 2013, the court issued an order maintaining the status quo pending determination of the dispute before the arbitrator. Despite the order, the applicants complained that the respondent suspended the operations of the applicants' head office and migrated their till accounts to its aggregate account. As a result, the applicant lost income/commissions from the use of tills in the names but operated by the respondent. Due to the dispute resolution process in court and before the arbitrator, the respondent continued to withhold commissions due to the applicant. The applicants complained the termination of the agreements was arbitrary and illegal. They prayed for a finding that the respondent's actions were illegal and the termination unfair, unprocedural and inconsistent with the agreement. They also sought a permanent injunction restraining the respondent from terminating the agreements and a mandatory order compelling the respondent to reinstate the applicants' operations and to release all commissions withheld.

4. The respondent denied that it terminated the agreement illegally. It asserted that termination was done in accordance with the agreement. It stated that while the court did order that the status quo be maintained on 31st January 2013, the effective date of termination of the agreements, the court did not stay the termination. It added that it was not served with the order to requiring it to comply. The respondent further averred that the operations of the tills was suspended on 29th May 2012 and the applicants were duly informed. The respondent further stated that the applicants were invited for a meeting to investigate fraud allegations but they were uncooperative. Thereafter it took the decision to terminate the agreements on 10th December 2012 and conveyed the decision through termination notices dated 2nd January 2013.

5. The Arbitrator framed issues for determination, took the parties submissions and reached a finding on each issue. The first issue was what were the terms of the *Mpesa Merchant Agreement* as the regards renewal and termination. He found that the although the agreements were renewable every year subject to satisfactory performance, they could still be terminated by either party giving a 30-day notice. The second issue was whether the respondent's act of terminating the agreements

was in breach thereof. On this issue the Arbitrator resolved that the termination notices issued on 2nd January 2013 were within the scope of the agreement. On the third issue regarding the effect of the orders of status granted on 31st January 2013, the Arbitrator held that the orders granted meant that the agreement remained in force pending determination of the dispute and since the termination notice took effect on 31st January 2013, the contracts stood terminated on that date. In his view, the status quo order could not take the form of an injunctive order. On the last issue as to whether the applicants were entitled to the reliefs sought, the arbitrator dismissed the claim in view of the findings on the other issues.

6. The application is supported by the affidavit of Nicodemus Munywoki, a director of the 4th applicant, sworn on 15th October 2019. The respondent opposed the application through the affidavit of Daniel Ndaba sworn on 8th March 2019. Both parties filed written submissions and made brief oral arguments to support their respective positions.

Applicants' Case

7. The applicants' case was the award was against the public policy of Kenya. That the award violated the applicants' right to have the dispute determined by application of the law and that the arbitrator exhibited bias in favour of the respondent.

8. The first grounds of attack against the award was that it was against to the public policy of Kenya as it was self-contradicting. The applicants submitted that the holding by the arbitrator that the order of status quo meant that the agreement remained in force pending determination of the dispute by the arbitral tribunal was in direct conflict with the finding that in effect the agreements stood terminated as of the end of the day of 31st January 2013. Counsel submitted that such a finding could not be considered sound in law and that arbitrator gave an interpretation of status quo without laying any basis for his interpretation thus making the finding unsound and unreliable. He further urged that by holding the status quo did not prevent the termination of the contract, the arbitrator gave a decision that inconsistent with and alien to the law and established judicial findings on the matter thus promoting unpredictability in the law contrary to a fundamental principle of the rule of law that law should be predictable as was held in the ***Mureithi and 2 Others (for Mbari ya Murathimi Clan) v Attorney General*** **[2006] 1 KLR**. Counsel cited the ***Priscilla Wanja Kibui v James Kiongo Kibui and Another*** **[2014] eKLR** to support the

argument that an order of status quo had the same effect as a restraining order hence the arbitrator was acted contract to established principle by holding otherwise.

9. The applicants also submitted that the award was contrary to public policy to the extent that it promoted unjust enrichment by allowing the respondent to withhold the applicants' profits due to them for work done pursuant to the agreements. That the award denied the applicants profits made from use of their trading names, networks and MPESA accounts thus unjustly enriching the respondent to their detriment. They urged that unjust enrichment obtained through deliberate violation of court orders, is contrary to the public policy of Kenya and promotes unfair and unconscionable commercial practices.

10. The applicants complained that the arbitrator re-wrote the agreement between the parties by shortening the termination period from 30 days to 29 days. They contended that applicants provided copies of the termination notices which were dated 2nd January 2013 and which stated that termination would be effective on 31st January 2013 hence the if the same were served on that date of the notice, the same would be effect on the 30th day which would be 1st February 2013. Further, by accepting email a mode of service contrary to the agreement, the arbitrator re-wrote the contract. In their view by upholding the notices, the arbitrator re-wrote the contract contrary to the public policy of Kenya as was stated by the Court of Appeal in ***National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another [2001] eKLR*** where it observed that the court cannot re-write a contract between the parties.

11. The second ground of attack against the award was that the award was induced by bias and undue influence. The applicants argued that the arbitrator manifested extreme bias in favour of the respondent by finding that the date of issue of the termination notice was tantamount to the date of termination despite there being no evidence that adduced by the respondent to prove service. That the arbitrator showed bias by holding that service was an essential ingredient of effective termination then proceeding to hold that the service had been effected in a manner that was contrary to the agreement. The applicants also complained that the arbitrator was biased as he found that the respondent's evidence that the

applicant's MPESA till numbers were suspended when the issue was traversed and contradicted by the applicants' documentary evidence. The applicants stated that the arbitrator abdicated his responsibility to weigh the evidence by choosing to ignore evidence provided by the applicants and instead wholly accepted the respondent's evidence without weighing it against the relevant and related evidence presented by the applicants and without giving reasons why. Counsel cited the case of ***Kenya Ports Authority v Modern Holdings (EA) Limited*** **[2017] eKLR** where the Court of Appeal held that a court must give reasons why it preferred the evidence of one party over the other.

Respondent's Case

12. Counsel for the respondent supported the award and submitted that the applicants had not satisfied the conditions for setting aside an arbitral award under **section 35(2)** of the ***Arbitration Act*** to warrant the court setting aside the award. The respondent was of the view that the applicant did not establish that the award was against public policy.

13. As regards the orders of status quo, the respondent submitted the arbitrator rightly pronounced himself on the matters in light of the evidence. Counsel called in aid the decisions in ***Priscilla Wanja Kibui v James Kiongo Kibui and Another*** **[2014] eKLR** and ***Housing Finance Company of Kenya Limited v Ngige Kistson Mondo*** **[2006] eKLR** where the court have held that an order of status quo does not import an injunction.

14. As regards the issue of bias, the respondent submitted that applicants bore the burden of proof to establish their case and that the issues raised by the applicants including the back dating of the notices and breach of contract, though pleaded in the statement of claim, were not proved. The respondents urged that the arbitrator weighed all the evidence and came to the correct conclusions.

Determination

15. The Court will only set aside an arbitral award if the applicants furnish proof that the grounds for setting aside exist as provided in **section 35(1)** and **(2)** of the ***Act*** which states as follows:

35 (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 conflict with the public policy of Kenya:

16. The applicants invoked **section 35(2)(a)(vi)** aforesaid in the Notice of Motion before the court. That provisions empowers the court to set aside an award if it was induced or affected by fraud, bribery, undue influence or corruption. The applicants did not furnish any proof in the supporting deposition in support of that provision. I will say no more.

17. The applicants relied on the ground of public policy under **section 35(2)(b)(ii)** of the ***Act***. The subject and scope of public policy as a ground of setting aside an arbitral award has been a subject of various decisions which had been cited by the parties. In ***Christ for all Nations v Apollo Insurance Co. Ltd*** **[2002] EA 366**, which was quoted with approval by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR**, Ringera, J., (as he then was) elucidated the meaning of public policy under **section 35** of the ***Act*** as follows:

> *An award could be set aside under page 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.*

18. Public policy, as defined above, is a broad, infinite and malleable concept and when considering it, the salutary warning of Burrough J., in ***Richardson v. Mellish*** **[1824] 2 Bing 228** that, *"Public policy is a very unruly horse, and when you get astride, you never know where it will carry you"* must be kept in mind. It must be considered alongside the principle that parties who enter into an arbitration agreement expect a level of finality. Ringera J., in the ***Christ for All Nations Case*** **(Supra)** further stated that:

> *[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of 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.*

19. Even the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **(Supra)** held upheld the principle of finality of arbitral awards:

> *We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy.*

20. It must also be recalled that the when parties agree to have an arbitrator determined a dispute within the arbitration clause, they must take the consequences that the decisions may be for or against one of the parties and that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. The court, under **section 35** of the ***Act***, does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish. As Tuiyott J., held in ***Mahan Limited v Villa Care*** **ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR**:

> *[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.*

21. It is in the shadow of the principles I have cited that I now proceed to consider the grounds put forward by the applicants to set aside the award. The applicants laid much emphasis on the meaning of status quo and the arbitrators findings in respect thereof. Both parties relied on the dicta of Muriithi J., in ***The Chairman Business Premises Rent Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd*** **MSA HC Misc. Application (JR) No. 26 of 2010 (UR)** where he took the following position:

> *In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of right, or, at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the*

hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.

22. What constitutes status quo is in my view a question of fact dependent on the circumstances of the case. That is why the arbitrator was called upon to determine the effect of the order of status quo issued on 31st January 2013 on the contractual relations between the parties. In doing so, the arbitrator considered the facts before him and whether he came to the right or wrong decision is not a matter for this court to weigh in merely because it would have come to a different conclusion on the grounds of public policy. It must be recalled that the arbitrator is master of facts and unless the decisions violates public policy, the court cannot intervene.

23. The other ground is that the arbitrator proceeded to re-write the provisions of the contract by misconstruing the provisions of the notice period., the date of termination and the manner of delivery of the notice which the applicants argued were contrary to the contract. The applicants argued that the arbitrator acted outside the bounds of his role as arbitrator thus vitiating the award in its entirety. The applicants relied on the ***Kenya Sugar Research Foundation v Kenchuran Architects Limited*** **HCCC No. 695 of 2012 [2013] eKLR** where the court adopted what the Supreme Court of India stated in ***Associated Engineering Co v Government of Andhra Pradesh*** **[1991] 4 SCC 93 (AIR 1992 Sc. 232)** as follows:

> *An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part but it may be tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiated the award.*

24. In my view, the issue of the termination notices, the manner of service and whether the termination was valid were matters entirely within the purview of the matters framed for determination by the arbitrator and whether the arbitrator misconstrued the provisions of agreements were matters for him to decide. In this respect, I agree

with the observation of Ransley J., in ***Mahican Investments Limited and 3 others vs Giovanni Gaida & Others*** **NRB HC Misc. Civil Application No. 792 of 2004 [2005] eKLR** where he held that:

> *A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.*

25. It is also in light of the aforesaid decisions that I reject the contention that the award was tainted with bias as the arbitrator weighed all the facts and came to his conclusion on the matters that were framed for determination following termination of the agreements.

Disposition

26. For reasons that I have set out, the Notice of Motion dated 11th October 2019 lacks merit. It is dismissed with costs to the respondent.

DATED and **DELIVERED** at **NAIROBI** this **14th** day of **FEBRUARY,** 2020.

D. S. MAJANJA
JUDGE

Court Assistant: Mr. M. Onyango

Mr Maina instructed by Shapley Barret and Company Advocates for the applicants.

Mr Ibrahim instructed by Kilukumi and Company Advocates for the respondent.