



AFAA Blog Post April 2022

Court Intervention in Arbitration in Kenya; Easy Properties Limited v. Express Connections Limited Case Brief.

The Commercial and Tax Division of the High Court of Kenya (“Court”) has recently pronounced itself in the case of *Easy Properties Limited v Express Connections Limited (Hccmisc /E007/2020)* (hereinafter referred to as the 1st application) consolidated with *Express Connections Limited v Easy Properties Limited (Hccmisc /E003/2020)* (hereinafter referred to as the 2nd application)¹ explained the instances which the court can interfere with arbitral decisions.

Facts

The two applications arose from the same arbitral proceedings which culminated in the final arbitral award dated 22nd October 2019 and the award on costs dated 5th October 2020 rendered by the Arbitrator, Mr. Allen Waiyaki Gichuhi. This was an *Ad Hoc* Arbitration, the sole arbitrator having been appointed by the Chartered Institute of Arbitrators, Kenya Branch². The point of divergence in the two applications was that *HCC ARB/E003/2020* sought an order that the said award be recognized, adopted, and enforced as a judgment of the court, while *HCC ARB/E007/2020*, sought a raft of prayers among them, an order that the said awards be set aside in their entirety. The 1st Applicant no. (*M/s Easy Properties Limited*) sought orders that the Final Award and the Award on Costs be set aside in their entirety. It also prayed for an order that the court certifies under Article 165 (4) of the Constitution that the application raised substantial questions of law and refer the matter to his Lordship the Chief Justice to empanel a bench of an uneven number of not less than three judges to hear the matter. Additionally, it prayed for an order that the matter or the relevant parts thereof be heard *de- novo* before the Environment and Land Court. Lastly, it prayed for orders that the court grants any other or further relief as this court may deem fit to preserve the integrity of law and due process in the Final Award. The thrust of the application was that; (i) the issues submitted to arbitration being too complex thus incapable of being handled by a sole arbitrator and that the arbitrator exceeded his jurisdiction; (ii) that the process was unduly influenced because there existed conflict of interest between the representative of the Respondent and an

¹ *Easy Properties Limited & another v Express Connections Limited & another (Civil Miscellaneous E007 & E003 (Consolidated) of 2020) [2021] KEHC 39 (KLR) (Commercial and Tax) (7 September 2021) (Ruling)*, [Civil Miscellaneous E007 & E003 \(Consolidated\) of 2020 - Kenya Law](#), (accessed on 1st April 2022)

² *Id*

expert relied upon by the Tribunal; (iii) that the Arbitral proceedings were conducted in a manner that did not conform to fundamental concepts of fair hearing, justice and equality; (iv) that the Arbitrator went against public policy as the decision did not take into account various legal and financial obligations on the subject property by the respondent; and (v) that the award affected rights, obligations and duties of persons and or entities who were not party to the arbitration proceedings.

The 2nd Applicant (*M/s Express Connections Limited*) filed a Notice of Preliminary objection³ on the following grounds;

- (i) that the application was filed outside the three (3) months limit contrary to Section 35(3) of the Arbitration Act⁴;
- (ii) that the court's jurisdiction to set aside an award is limited to matters provided under Section 35 of the Arbitration Act and any other intervention by the court is expressly prohibited by Section 10 of the Act;⁵
- (iii) that the application offended Section 5⁶ of the Act to the extent that the applicant proceeded with the arbitration without stating his objection and is therefore deemed to have waived the right to object; and
- (iv) that the application offends Rule 36(1) of the Arbitration Rules, 2015.⁷

The 2nd Applicant further stated that the application offended Section 17(2) of the Arbitration Act;⁸ that the suit was barred by the *doctrine of res judicata* as the applicant cited issues which were raised by the applicant in *Easy Properties Limited v Express Connections Limited*. Additionally, that the applicant had not sought

³A legal issue based on a point of law raised by any party in a civil case that requires court determination before proceeding to the main case.

⁴ Section 35(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."

⁵ Section 10, "Except as provided in the Act, no court shall intervene in matters governed by the Act."

⁶Section 5, "A party who knows that any provision of the 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 without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object."

⁷Rule 36(1), "if, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."

⁸ Section 17 (2), "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator."

extension of time, hence, the application offended Sections 35 and 32A of the Arbitration Act.⁹ Lastly, that the application was bad in law, fatally and incurably defective and amounted to an abuse of the court process.

The 1st Applicant filed the Replying affidavit in response to the Notice of Preliminary Objection. The affidavit stated that the final award was delivered to its advocates on 17th July 2020, while the award on costs dated 5th October 2020 was delivered on to its advocates on record in October 2020, hence time began to run from the said date. Additionally, that the two awards constitute the final award; hence, the application complies with section 35 of the Arbitration Act. Further, that the Arbitrator compelled them to proceed with the arbitration without their engineer's witness evidence; and that the award went beyond the scope of the arbitration agreement.

The 2nd Application by M/s Express Connections Limited, dated 4th November 2020 prayed that the Final Award delivered by the Arbitrator on 22nd October 2019 be recognized and adopted as a judgment of the court. It also prayed that this court recognizes and adopts the award on costs award made by the Arbitrator, on 5th October 2020. Further, it prayed for leave to enforce the Final Award as a decree of this court and lastly that the costs of the application be borne by the 1st Applicant.

Ruling

The court dismissed the 1st application and allowed the 2nd application. The court ruled that the Arbitration Act confers the Arbitrator exclusive jurisdiction over questions of fact and law which excludes appeals and limits reviews. The court may only be approached as provided by the Act. The Court found that the 1st Applicant had failed to demonstrate any of the grounds provided in Section 35 of the Arbitration Act to enable the court to set aside the arbitral award.

On the Issue of the application being barred by time, the Court reiterated the time limit for initiating setting-aside proceedings of three (3) months 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. It follows that the 1st application was filed outside the

⁹ Section 35 on Application to Set aside an Award and Section 32A on the finality of an Award. See, [Microsoft Word - Paged Arbitration Act No. 4 of 1995 .doc \(kenyalaw.org\)](#) at Pages 18 and 20, (accessed on 1st April 2022)

stipulated period of three (3) months. Further, the Court concurred with the 2nd Applicant that the suit raised issues that were *res judicata* having been adjudicated and dismissed in the earlier case contrary to Section 7 of the Civil Procedure Act. For the 2nd Application, the court found no impediment to the application and therefore was merited. It allowed the said application, and the final orders of the court were: -

- (i) *That the application dated 28th December 2020, filed by Easy Properties Limited, i.e., **ARB No. E007 of 2020** is hereby dismissed.*
- (ii) *That the application dated 4th November 2020, filed by Express Connections Limited, i.e. **ARB No. E003 of 2020** is hereby allowed.*
- (iii) *That Final Award delivered by Hon. Arbitrator, Advocate, Allen Waiyaki Con 22nd day of October 2019 be and is hereby recognized and adopted as a judgment of this court.*
- (iv) *That the award on costs award made by Hon. Arbitrator, Advocate, Allen Waiyaki Gichuhi on 5th day of October 2020 be and is hereby recognized and adopted as an order of this court.*
- (v) *That Express Connections Limited, be and is hereby granted leave to enforce the Final Award as a decree of this court.*
- (vi) *That Easy Properties Limited shall pay Express Connections Limited the costs of these consolidated applications.*

Analysis

Extent of Court interference in arbitration proceedings

The Court was quick to note, from the outset, that the role and extent of the Court's intervention in arbitration proceedings in Kenya is provided for by Section 10 of the Arbitration Act which provides that: "*except as provided in the Act, no court shall intervene in matters governed by the Act*". The section limits the jurisdiction of the court in absolute terms to only such matters as are provided for by the Act and embodies the recognition of the policy of party's "autonomy" which underlie the arbitration generally and the Act.¹⁰

¹⁰ Section 10 Arbitration Act, No. 4 of 1995 (Revised 2012)

The Court, in relying on the *Supreme Court decision in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* pointed out that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice.¹¹ The *Nyutu Case* stated that judicial intervention can only be countenanced in exceptional instances. Even then, the Apex Court underscored the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts. Further, Section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Instances providing for judicial intervention under the Act include applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction. There is however a need for courts when considering applications for confirmation or setting aside of arbitral awards to adhere to the principle of party autonomy.

The circumstances under which the court can intervene are enumerated in section 35 and as the Supreme Court stated in the *Nyutu Case* stated in exceptional circumstances otherwise the arbitral award is final. Unless the arbitration agreement provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms.

Grounds for setting aside the arbitral award

The Court restated the provisions of Section 35 (2) of the Arbitration Act which sets out the grounds upon which the High Court can set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: (1) incapacity of one of the parties; (2) an invalid arbitration agreement; (3) Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; (4) where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; (5) where the composition of the arbitral

¹¹ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR., [Petition 12 of 2016 - Kenya Law](#) (accessed on 1st April 2022)

tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or (6) where fraud, undue influence or corruption affected the making of the award.

¹ Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR., [Petition 12 of 2016 - Kenya Law](#) (accessed on 1st April 2022)
