

UGANDA / JUDGMENT

Kinyara Sugar Works v Hajji Kasimbiraine (Miscellaneous Application No. 151 of 2017) [2017] UGCommC 63 (6 July 2017) [2017] UGCommC 63

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 151 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO.151 OF 2017

(Arising from HCCA No. 02 of 2016)

KINYARA SUGAR WORKS LTD ::::::::::::::::::::::::::: APPLICANT

VERSUS

HAJJI KASIMBIRAINÉ MOHAMOUD ::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. MR. JUSTICE DAVID K. WANGUTUSI

R U L I N G:

Kinyara Sugar Limited hereinafter called the Applicant filed this application against Hajji Kazimbiraine Mohamoud and others collectively referred to as the respondents, seeking orders that

1. The arbitral awards dated 2nd February 2017 made by Arbitrator Wilson Keezi be set aside;
2. That the applicant be allowed to appeal against the award on questions of law;
3. Costs here and those incurred in the Arbitral Proceedings be met by the Respondents.

The application is grounded on the following:

1. That the Arbitral Award dealt with a dispute that was not contemplated by the parties.

2. That ordering an Amendment and actually amending the Cane Production Contract by an arbitrator was not capable of settlement by arbitration.
3. That composition of the Arbitral Tribunal was not in accordance with the agreement of the parties in as much as the President of the Law Society was not involved.
4. That there was evident partiality exhibited by Arbitrator Keezi firstly that he worked with Out-growers in the Tea and Coffee Industry which was a genera of the class of Respondent also an out-grower and that there was obvious partiality in the proceedings and award.
5. That the award was not in accordance with the Arbitration and Conciliation Act.
6. That the award is contrary to the Sugar Policy of Uganda which provides for the payment formula for sugarcane process negotiated between milters, respective sugarcane out-growers Associations and Government, a practice followed by the applicant.

The grounds of appeal formulated by the applicants were as follows;

1. The arbitrator erred in holding that the parties did not adopt the Civil Procedure Rules and hence his amendment of the title of dispute selectively to include names of persons who were not parties to the claim to claim before him constituted an error of law.
2. The arbitrator erred in law in deviating from a crucial issue framed before him for determination, to wit;

Whether the Tribunal can order parties to agree to inclusion of any term in the cane production contract not reached by consensus of the parties and hence award in law in ordering the Respondent to allegedly compensate the Respondents for an alleged benefit derived out of Molasses and bagasse on a misapplied principle of quantion merit.

1. The arbitrator misinterpreted and misapplied the principles of law he quoted and hence award in law in holding that
2. The price of negotiating can price between the Respondent and Kinyara Sugarcane Growers Limited (KSGL) and subsequently Masindi Sugarcane Growers Association Limited (MASGAL) was not an established custom and usage governing determination of Sugarcane price between the Applicant and its out-growers.
3. The practice had not rendered the claim overtaken by events.
4. The Arbitrator erred in holding that the doctrine of equitable estoppel did not apply to defeat the Respondent's claim.

Wherein the applicant sought the following orders;

1. The application as so far as it seeks to set aside the award be allowed and court sets aside the Arbitral award made in Arbitration file *CAD/ARB/2/2016*.
2. Appeal be allowed and the award made in Arbitral File No CAD/ARB/2/2016 be set aside.

3. Costs of the proceedings both here and below.

The application was supported by the affidavit of Russel Moro.

In the affidavit he deposes that he was the Company secretary of the Applicant. That Arbitrator Wilson Keezi had presided over the arbitration, delivering a partial award on the 30th January 2017.

He deposed that the application to set aside the arbitral was necessitated by the fact that the arbitral award dealt with a dispute that was not contemplated by the parties because the arbitrator amended the subject contract as the instance of the Respondent without the consent of the applicant. He contended that this was in breach of Article 10 of the Cane Production Contract that governed the parties' relationship.

Further that the Cane Production Contract (CPC) clearly provided for amendment of the contract with the consent of both parties and where there was a promulgation of new regulations which would legally affect the existing contract. That even in that case, if the parties failed to agree to the amendment of their contract, an arbitrator would be appointed in the manner provided for.

That in this case the appointment of the arbitrator was not done in accordance with the agreement. The President of the Law Society who was supposed to be involved if the parties were not in agreement, was never consulted.

He further deposed that the arbitrator exhibited partiality in the proceedings by showing a lot of hostility.

That he had linked with Out-growers before but when asked in what capacity he had worked with them, he refused to disclose contending that he was not undercrosss examination.

He further deposed that the arbitrator was working with the Respondent in the absence of the applicant because the Respondent even got to know the content of the award before it was delivered. That the Applicant detected this in letter dated 30.01.2017 discussing some of the contents of the award which was accessed on 01.02.2017. This he said was proof that the Respondent was working together with the Arbitrator in writing the award. That attempts to have him recuse himself bore no fruits.

That the arbitral award was not in accordance with Arbitration and Conciliation Act because after the Arbitrator had made a partial award, he reopened the proceedings and chose witnesses whom he summoned after the parties had closed their cases. That he must have done so because he wanted to build the Respondents case.

That the award was contrary to the agreed procedure and formula of payment of sugarcane.

Lastly, he deposed that the advocate of the Responded acted and represented them without a valid practice certificate.

In reply to the applicants claims Hajji Kazimbiraine Mohamoud one of the Responds deposed that the affidavit supporting the application was riddled with falsehoods because the Arbitrator carried out his duly professionally and ethically. That he had explained his role and dealings with the Tea Out-growers and in any case he was not one of them. He said his assignment as an Accountant is what led to his interaction with them. That he had only hoped that he was not under cross examination during the preliminary hearing.

That he had sent draft documents of the preliminary meeting but the applicants advocates had opposed that the letter of 30th January 2017, annexure K32 was not meant for the applicant and they were just copied to him.

That the award was delivered on the 1st February 2017 as clearly shown in the notice of enlargement.

That why the Respondent did not attend the hearing on 10.05.2016 was because of a letter from the applicant dated 9th May 2016 which sought a stay of proceedings.

That the applicant's intention was just to tarnish the name of the Arbitrator.

This affidavit received support from that of Lawrence Tumwesigye an advocate with the Respondents advocates. It faulted paragraph 7 of the affidavit in support of the application and declared it false.

He deposed that the application for recusal could not operate as a stay of the arbitral proceedings. That the partial award was lawful and that even after it is delivered the arbitrator could call expert witness to help in reaching a just decision in the rest of the award.

He insisted that the award was within the Sugar Policy of Uganda and fell squarely in the Cane Production Agreement.

The Law

The question before this court for resolution can best be served under Sections 34 of the Arbitration and Conciliation Act of the laws of Uganda.

For ease of reference, I take liberty to reproduce the same. It provides;

34. Application for setting aside arbitral award.

- (1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) or (3).
- (2) An arbitral award may be set aside by the court only if-
 - (a) the part making the application furnishes proof that –
 - (i) a party to the arbitration agreement was under some incapacity.

- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;
 - (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; except 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 decision on matters not referred to arbitration may be set aside;
 - (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 in the absence of an agreement, was not in accordance with this Act;
 - (vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators;
 - (vii) the arbitral award is not in accordance with the Act;
- (b) the court finds that –
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or
 - (ii) the award is in conflict with the public policy of Uganda.
- (3) An application for setting aside the arbitral award may not be made after one month has 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 33, from the date on which that request had been disposed of by the arbitral award.

The first ground was that the Arbitrator amended the subject contract at the instance of the Respondents and without the consensus of the Applicant in breach of Article 10 of the Cane Production Contract. That in so doing the Arbitrator delved into a dispute which was not contemplated by the parties. That in doing this he acted contrary to Section 34 (2) (a) (iv) which provides that an arbitral award

“may be set aside by the court of it 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.”

It was submitted by Counsel for the Applicants that in the course of the hearing the Arbitrator amended the subject matter of the dispute and thus came up with a dispute that was not contemplated by the parties. He further submitted that such decision was in complete breach of Article 10 of the Cane Production Contract.

Counsel for the Respondent submitted that the issue was not a subject of Article 10 but that of Article 13. Article 13 provides as follow;

“All questions or differences which at any time hereinafter arise between the parties hereto touching or concerning the contract or the construction hereof or as the rights or duties or obligations of either party thereto or of any other matter in any way arising out of or concerned with the subject matter hereof shall be referred to the arbitration of some competent arbitrator to be nominated by agreement between the parties or failing such agreement by the President for the time being of the Law Society of Uganda and such arbitrator shall have all the rights and powers conferred in arbitration by the Arbitration Act or any Statutory re-enactment or modification thereof for the time being in force.”

Counsel for the Respondents submitted that issues reviewing the Cane Production Contract such matter like molasses and bagasses fell under this provision as “*any other matter in any way arising out of or connected with the subject matter*” as one of those things contemplated under Article 13.

The Cane Production Contract in my view provided for the purchase of cane sugar, its growth, maintenance and quality. In my view the things that were contemplated were those that arose out of those. To introduce purchase of molasses and bagasses was in my view out and beyond the contemplation of the Can Production Contract. To bring those into the sphere of the Cane Production Contract required an amendment of the dealership agreement which in this case was provided for under Article 10 of the Cane Production Contract.

Since the Cane Production Contract expressly provided for amendments, the parties could not without consensus of each of them or occasioned by promulgation of regulations that affected the provisions of the Cane Production Contract.

That notwithstanding even if the matter was handled under Article 13, it would require an Arbitrator appointed in accordance with the provision.

This arbitrator would be a person “nominated by agreement between the parties failing such agreement by the President for the time being of Law Society.”

The issue of irregular appointment of Arbitrator was alluded to by Moro in the affidavit in support to the application in paragraph 7

“That the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. Under the Cane Production Contract, a competent Arbitrator has to be nominated by agreement of the parties failing of such agreement, by the President of Uganda Law Society. At no time was the President of Uganda Law Society involved in nominating the Arbitrator.”

The response to the foregoing is found in paragraph 4 of Lawrence Tumwesigye in these words –

“That paragraph 7 is false and would be applicable only when parties agree to arbitration but not when one of the parties become adamant as was the case in the Arbitration.”

By this he could only have meant that the applicant was not corporative and so the possibility of agreeing to an Arbitrator was impossible.

To buttress the foregoing Counsel submitted that the circumstances led the Respondent to proceed under Section 11 of the Arbitration and Conciliation Act.

Section 11 (4)(c) is in my view the one that fits the context of this matter. It provides;

“Where under a procedure agreed upon by the parties for the appointment of an arbitrator or arbitrators-

1. *A party fails to act as required under that procedure;*
2. *The parties or two arbitrators fail to reach the agreement expected of them under that procedure or*
3. *A third party including an institution, fails to perform any function entrusted to it under that procedure, any party may apply to the appointing authority to take the necessary measures, unless the agreement otherwise provides, for securing compliance with the procedure agreed upon by the parties.”*

Section 11 in my view provides for a situation such as the one that arose in the instant matter.

The Respondent contended that the applicant was not corporative, but such a situation had been envisaged and Article 13 had put in place a provision namely that the President of the Law Society would nominate the Arbitrator and that such person as nominated would have all the rights and powers by the arbitration Act. Furthermore, it would have secured compliance with the procedure the parties had agreed upon in the Cane Production Contract.

In failing to adhere to the procedure provided for in the agreement, the Respondents breached Section 34(2) (v). It reads

An arbitral award may be set aside by the court only if,

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

It is clear on the record that the applicant resisted the appointment of the Arbitrator that CADER nominated. This resistance was not appropriately addressed by the Arbitrator. The provision for appointment in the dealership agreement was therefore not complied with and I so hold.

The issue in question was

“Whether the tribunal can order the parties to agree to inclusion any term in the Cane Production Contract not reached by consensus of the parties.”

It is this issue that the was reframed in the following words;

“Whether the tribunal can order compensation for contentions subject matter of molasses and bagasse which are not taken into account when paying out-growers.”

The Cane Production Agreement seems to have provided for sugarcane thus;

1. “The miller owns and operates a sugar mill at Kinyara aforesaid and desirous to purchase from the farmer from time to time sugarcane for the purpose of manufacturing sugar and by-products there from for commercial sale
2. The farmer has agreed to produce such sugarcane for sale to the miller upon and subject to the terms and conditions set forth below.”

From the foregoing, it was clear that the Applicant would produce sugar and in the course of it get by-products. The wording of the agreement is such as to say that the relationship between the parties was in the selling and buying sugarcane and not the by-products. In the CPC the byproducts were a concern of only the Applicant. It is also clear that the price agreed was for the purchase of sugarcane in its raw form and was never pegged on the by-products. The issue of the byproducts and the returns thereof would in my view be a subject of another agreement or addendum to the Cane Production Contract. Ultimately this called for an amendment of the agreement.

The question is did the arbitrator have the authority to amend the Cane Production Contract even with the consent of the Respondent but without the consensus of the Applicant.

The Cane Production Contract provided for amendment in article 10. It provided;

10.1 The contract may be amended at any time by agreement in writing between the parties.

In my view the foregoing was one of the ways that the Cane Production Contract could be amended. The other way it could be amended would be occasioned by situations beyond the control of the parties under 10.2 which provided as follows;

“Should at any time regulations having the force of law be promulgated by the Government of Uganda, which regulations are inconsistent with the terms of the Contract, then those terms shall be modified in such manner as the parties may agree, or failing such agreement, in such manner as shall be determined by an arbitrator under Article 13.”

From the foregoing, the only window open for the arbitrator to play a role in any amendment, was if the government made an amendment that affected any of the provisions of the Cane Production Contract. In the absence of that, the arbitrator had to respect the parties’ agreement as it was even if it seemed oppressive to one or both of them. In that way, he would have

remained in step with the clear principle that mature people knew what they wanted if they agreed without duress as enunciated in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 462 per Sir George Jessel;

If there one thing more than another which public policy requires, it is that men of full age and competent understanding shall have utmost liberty in contracting and then contracts when entered freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.”

There is nothing to show that the parties did not enter into the Cane Production Contract freely or that they were incompetent. In the absence of anything pointing to incompetence, the only conclusion is that they knew and liked what they were doing. They locked out all other methods and instances of amendment save the two provided in Article 10.

Having done so, they did not contemplate any other matter, not even the by-products except the sugarcane in its raw form, arising in dispute. What was added by the Arbitrator was not contemplated and therefore not capable of settlement in the dealership agreement namely the Cane Production Contract.

In conclusion the act by the Arbitrator breached Section 34 (2) (a) (iv) of the Arbitration and Conciliation Act.

At this stage I may as well deal with the issue of Biasness that was raised by the Applicant.

Counsel for the applicants submitted that because the Arbitrator had worked with out-growers before, he had traits of partiality.

That during his introduction when asked about his background he was not clear and this was aggravated by Counsel for the Respondents saying the investigation was not necessary since he had been appointed by CADER.

Counsel for the Applicant further submitted that the conduct of the Arbitrator and Counsel for the Respondent showed that the two were working together for the benefit of the Respondents. He cited an example and said the Respondent got to know of the award before it was delivered. And that amending issues in favour of one of the parties amounted to partiality and biasness.

In reply Counsel for the Respondent submitted that there was no coherent evidence on the face of the record to show that the Arbitrator was partial. He submitted that bias must be actual and not apprehended bias. That actual bias only existed where the decision maker has prejudged a case against a party or acted with such partisanship or hostility as to show that the decision maker had his/her mind made up against a party.

In this he relied on *Michell Lease v Shooting Australia* CAS A1 2016

Impartiality is key in arbitration processes. For arbitration to be a place for disputants, it must have public confidence and truth. The arbitrators must be people of integrity. It is for those reasons that the Arbitration and Conciliation Act provides S. 34(2) (vi) as one of the grounds for setting aside an arbitral award.

Constantly vacating awards because of evident partiality reduces the integrity of the process. Because of that, it is important that parties be given ample opportunity to investigate an arbitrator who is about to arbitrate in their matter. Infact the arbitrator is expected to run a conflict check upon himself prior to the commencement of the arbitration and on his own disclose it to the parties who will then be able to make an informed decision in his impartiality.

While many of the arbitrators are part of the business world, they still hold a special position in a disputed matter since they have authority to decide matters and offer decisions almost free from appellate review. For those reasons a high standard of impartiality is called for.

It is also because of the foregoing that the parties in a dispute have the right to ask them questions to establish their impartiality. These questions must be answered fully and truthfully so as to free the parties of any fear of partiality.

The need for full disclosure is also evident in Article 9 of UNCITRAL Rules which says that a prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. A similar provision is found in ICC Article 2(7) para 2 of the Arbitration Rules.

In *Jivra J* [2011] UKSC 41

“The arbitrator is in critical respects independent of the parties. His duties and functions require him to rise above the partisan interests of the parties and not to act in, or so as to further the particular interest of either party.”

It should therefore be understood that arbitrators are appointed under a contract and their services are rendered pursuant to that contract. Their appointments are not unilateral, even when initiated by one party alone.

In the instant case the very appointment of the arbitrator was questioned since it was done contrary to the dealership agreement. It was even made worse when the parties learnt that he had worked with out-growers.

It was therefore incumbent upon the arbitrator to rid the parties of their suspicion of partiality.

During the second preliminary meeting, Counsel for the Applicant demanded that the parties get to know the arbitrator and this met with resistance from Counsel for the Respondent. He said “*Arbitrator has been appointed by CADER so knowing the Arbitrator does not arise.”*

When the Applicants Counsel got to know that the Arbitrator had worked with out-growers before and sought to know in what capacity, the Respondents advocate interjected and said “*Let us proceed with the arbitration. The Arbitrator signed an impartiality undertaking.”*

Counsel for the Applicant then expressed the discomfort with an arbitrator who had worked with out-growers before.

The refusal to disclose the capacity in which he had worked with the out-growers was on its own a thing that must have affected the Applicant giving rise to justifiable doubts as to his impartiality.

In *Societe Nykcool v Societe Dole France et al* Rev Arb 2011/732 where all members of a tribunal refused to make statements as to their independence, the court annulled the awards and held that the arbitrators refusal to disclose their relationships raised a reasonable doubt about their independence and impartiality.

In all what is intended is what Lord Hewart CJ said in *R v Sussex Justices ex parte Mc Carthy*[1924] IKB 256 that;

“It is of fundamental importance that justice not only be done, but should be manifestly and undoubtedly be seen to be done.”

Now as to whether the Arbitrator was in cohort with the Respondent the applicant relied on the dates of a letter written by counsel of the Respondents to the Directors of Masindi Sugarcane Out-growers. It in part reads;

*“*You, by now know that in Arbitration No.2 of 2016 your propriety or indeed legal mandate to represent outgrowers in matters with miller (Kinyara Sugar Ltd) was vehemently rejected. Your actions were deemed illegal considering that each Outgrower has a standard form contract with the matter.”**

Counsel for the Applicant submitted that the wording of the letter indicated that while the award had not yet been released, Counsel for the Respondent already knew its contents.

In my view, the wording of the second paragraph of the letter indicated that the content of the award had dealt with the mandate of Masindi Sugarcane Out-growers a blow and that on that basis, the Respondents would take action against them if they persisted. The signatures of recipients shows that it was served upon them on 13.02. 2017, 02.02.2017 and 01.02.2017. The award was delivered on the 02.02.2017. The letter shows that by 01.02.2017 the Respondents knew the contents in sufficient amount as to threaten Masindi Sugarcane Out-growers with action.

There is no explanation as to how they got the award. It can only be concluded that they must have got it from the Arbitrators. In such a situation its difficult to convince the parties that the Arbitrator was acting independently. The circumstances point at a real likelihood of bias. The situation was sanctified by Lord Denning in *Metropolitan Properties Co (FGC) Ltd Vs Lannon and Others* (1969) KB 777 in these words;

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he is as impartial as could be, nevertheless, if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he would not sit. And if he does sit, his decision cannot stand.”

In the instant case I am of the view that where the Arbitrator prematurely released an arbitral award to one party leaving out the other before the appointed date, any right minded person would think “*that in the circumstances there was a real likelihood of bias on his part”* and should not have sat, but having sat his decision would not stand.

Lastly, counsel for the Applicant submitted that the Arbitral award was not in accordance with the Arbitration and Conciliation Act. They submitted that the Arbitration made a partial award and then ordered on re-opening of proceedings first to enable the Respondents to make out their case.

In response Counsel for the Respondent submitted that in arbitration, partial awards were normal.

That arbitrators were free to give partial awards. Section 33 of the Arbitration and Conciliation Act in 33 (4) provides

“A party may, within 30 days after receipt of the arbitral award request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.”

Under those circumstances, should the arbitrator find the request justifiable, an additional award may be made. Arbitral awards may be final or partial. If a matter is fully adjudicated a final award may be given. Where the arbitrator resolves some and leaves out others due to absence of this expert or this witness, he or she may issue a partial award and parties would then continue to arbitrate the remaining issues.

In my view, there was nothing unlawful in the instant case for the Arbitrator to have called them and continued to resolve the part of the claim that had not been resolved.

In conclusion, it's my finding that the

1. The arbitral award dealt with a dispute not contemplated by the parties when it proceeded to amend the issues and therefore contrary to the dealership agreement by including molasses and bagasse. Contrary to Section 34(2) (a) (iv).
2. That the composition of the arbitral tribunal and procedure adopted in so constituting it was not in accordance with the agreement of the parties contrary to Section 34 (2) (a) (v).

3. That there was evident partiality in the arbitrator contrary to Section 34 (2) (a) (vi).
4. The issuance of a partial award and subsequent arbitration on issues that remained was within the law.

Orders

In the final analysis as a result of the illegalities enumerated above which are in breach of the various provisions of Section 34 of the Arbitration and Conciliation Act, I find that there was a flawed and incompetent arbitration process justifying the setting aside of the Arbitral Award arising out of CAD / ARB No.02 of 2016. It is hereby set aside with orders that the President of the Law Society be involved in appointing a fresh arbitrator should the parties still wish to submit to arbitration in accordance with the Arbitration and Conciliation Act Cap 4; Laws of Uganda.

Each party shall bear own costs.

I so order.

Dated at Kampala this 6th day of July 2017

JUSTICE DAVID WANGUTUSI

JUDGE OF HIGH COURT.

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