



Ederman Company (K) Limited v Devkan Enterprises Limited (Miscellaneous Civil Application 41 of 2013) [2024] KEHC 13206 (KLR) (Commercial and Tax) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION 41 OF 2013
JWW MONG'ARE, J
OCTOBER 31, 2024**

BETWEEN

EDERMAN COMPANY (K) LIMITED APPLICANT

AND

DEVKAN ENTERPRISES LIMITED RESPONDENT

RULING

1. It is common ground that the court (Kamau J.,) delivered a ruling on 12th July 2013 in which it not only declined the Landlord's application to set aside the award of the arbitral tribunal but also refused the Tenant's application to enforce the same as the Tenant had not complied with provisions for recognition and enforcement of an award ("the Ruling").
2. Both parties have now filed applications primarily seeking to review the Ruling. The Landlord's application is by way of the Notice of Motion dated 20th June 2016 made under Order 45 Rule 2 of the *Civil Procedure Rules*, section 35 and 37(2) of the *Arbitration Act* and Rule 7 of the *Arbitration Rules* and seeks to review the Ruling by urging the court to set aside the Award and that the dispute between the parties be heard afresh before a neutral arbitrator. The application is supported by the affidavits of its Managing Director, Zeyun Yang, sworn on 20th June 2016.
3. The Tenant's application is made by way of the Chamber Summons dated 11th March 2016 under section 36(1) and (3) and section 37 of the *Arbitration Act*, Rules 4(1) and 6 of the *Arbitration Rules* and Order 46 Rule 18 of the *Civil Procedure Rules* where it seeks to review the Ruling by having judgment entered and a decree issued in its favour as per the Award and that it be reimbursed the sum of Kshs. 1,218,310.00/= being the Arbitrator's costs with interest at 12%. The application is supported by the affidavit of the Tenant's advocate, James Gitau Singh.



4. The Landlord contends that it has unearthed material information which was not produced before the Arbitrator and the court which would upon consideration extinguish the Tenant's claim. The Landlord states that it has learnt that the Tenant is technically the owner of its Ruaraka plant, which it alleged to be a tenant and that it was therefore not entitled to an award for damages incurred in renovating the same, nor an award for loss incurred in relocating to the plant.
5. The Landlord asserts that the uncovered evidence has the potential of substantially altering the entire Award as it provides motive why the Tenant moved out of the demised premises. That this issue can only be addressed upon referring the matter back to arbitration and as such, it urges that it is in the interest of justice to refer the matter back to arbitration.
6. On its part, the Tenant contends that its application for enforcement of the Award was not allowed as the court held that it had not attached a certified copy of the Award. That thereafter, the Tenant on 22nd January 2014 filed and served on the Landlord's advocates the original Award together with a certified copy of the Arbitration Agreement but the file could not be traced and had to be reconstructed and replaced as evidenced by the Deputy Registrar's letter of 19th October 2015.
7. I have little doubt and the parties do not dispute that this court has the jurisdiction to review its orders under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. Under the said section of the law, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review. The Landlord's application is anchored on the ground of discovery of new information. This new information the landlord contends that was not available to it and therefore was not produced during the arbitral proceedings and therefore was not considered by the Arbitrator in making of the award herein.
8. It is not clear from the record when this information was discovered by the landlord. From the evidence availed by the landlord, I note that the said new material is a copy of records from the Registrar of Companies which is prima facie proof of ownership of a company.
9. In proving its case that the evidence sought to be relied on was unavailable as evidence to support the party's case, a party must demonstrate to the satisfaction of the court that it did indeed exercise due diligence but was not able to produce that evidence or that having exercised due diligence that evidence was not within its knowledge. The standard as to the requirement is that of a reasonable man and the court must ask itself if a reasonable litigant duly exercising its diligence could not have had the knowledge of that new evidence or could not have produced it at the time the order or decree was made (see *Furncon Limited v Kenya Commercial Bank Ltd.* [2001] KEHC 79 (KLR)).
10. Having considered that the nature of the new evidence is that of the official records held by the Companies registry and one which prima facie upon being tendered may influence the outcome of the case at hand, I am satisfied that the Landlord's application for review has merit. I also note that the landlord in this case was not the custodian of the new evidence and it is possible that at the time of the hearing of the arbitral proceedings the same was not available to the landlord. I am therefore satisfied that the application by the landlord has met the threshold set under section 80 of the *Civil Procedure Act* for review and I will allow the same.
11. Turning to the Tenant's application, the same is also an application for review grounded on a mistake or error apparent on the face of the record. The Tenant contended that it filed the Award together with the deposition of James Gitau Singh on 12th March 2013 and that it was an oversight for the court to hold that the Award was not attached in its application. For a review to be granted based on an error on



the record, the Court of Appeal in *National Bank Of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR) held as follows:

‘...The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

12. In determining this case, it is my view that the *Arbitration Act* under section 36 therein has set out the parameters upon which the court when called upon should rely on to adopt and recognize an arbitral award. I find in the present case, the tenant having failed to obtain orders of this court to adopt and recognizes the arbitral award has not placed material to explain why it did not in the first instant comply with the act.

I note that the court at the time held that t the Award was already on record but the court held that the same was not is a clear self-evident error that requires rectification and review by the court. I find that the tenant has not demonstrated why it did not at the time when it moved the court comply with requirements of the *Arbitration Act* section S.36

- (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37
 - (2) ...
 - (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.
13. All that the tenant was required to do was to comply with the above sections of the law which it did not and hence leading the court to find that the said arbitral award was not capable of being adopted and enforced as an order of this court. I find that there has not been produced before this court a valid explanation as to why the same was not done and therefore decline to allow the application by the tenant.
14. Flowering from the above findings, and having found the Landlord’s application merited, I proceed to set aside the Arbitral award issued by the sole Arbitrator, Mr. Collins Namachanja on 17th October 2012 and order that the matter between the parties should start afresh before another arbitrator as sought by the Landlord’s application, to allow the Landlord to produce the new evidence not available during the arbitral proceedings. In the interest of justice, the said arbitral proceedings shall be commenced before a different Arbitrator who shall be appointed in accordance with the agreement between the parties.
15. Costs follow the event. However, since the parties will continue to be engaged in the new arbitral process, I order that each party bear their own costs of the two applications.

Conclusion and Disposition

16. In the foregoing, I would make the following dispositive orders:
- a. The Applicant/Landlord’s application dated 20th June 2016 is allowed as prayed.



- b. The Respondent/Tenant's application dated 11th March 2016 is dismissed.
- c. The Ruling of the court dated 12th July 2013 is hereby reviewed allowing the setting aside of the Arbitral Award of Mr. Collins Namachanja published on 17th October, 2012 and order that the Arbitration proceedings to commence afresh before a different Arbitrator to be appointed in line with agreement between the parties.
- d. Each party shall bear their own costs of these applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Gichuki Kingara for the Landlord.

Mr. Ned Chemoiwa for the Tenant.

Godfrey - Court Assistant

