Cara Spencer v Home Africa Communities Limited & Migaa Management Company Limited; Home Africa Communities Limited (Applicant); Cara Spencer (Respondent) (Arbitration Cause E059 of 2022) [2023] KEHC 1396 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E059 OF 2022

PN GICHOHI, J

FEBRUARY 28, 2023

BETWEEN

CARA SPENCER ..... APPLICANT

AND

HOME AFRICA COMMUNITIES LIMITED & MIGAA MANAGEMENT COMPANY LIMITED ..... RESPONDENT

AND

HOME AFRICA COMMUNITIES LIMITED ..... APPLICANT

AND

CARA SPENCER ..... RESPONDENT

RULING

1. Before this court are two applications that had earlier been directed to be heard together. The first one is a Chamber Summons dated 24th October 2022 Cara Spencer v Home Africa Communities Limited (1st Respondent) & Migaa Management Company Limited (2nd Respondent) filed by the firm of Litoro & Omwebu Advocates for the Applicant, under Section 36 (1) of the *Arbitration Act* No. 4 of 1995, Rule 6, 8 and 9 of the Arbitration Rules seeking orders that: -

    1. The court does recognise and adopt the Arbitral Award published on the 7th October 2022 by the Sole Arbitrator Dominic Njuguna Mbigi (MCArb) between the parties herein as a judgment and decree of this court.

    2. The Applicant be granted leave to enforce the said Award as a decree of this court.

3. The costs of this application and consequential costs of enforcement of the Decree be payable by the Respondent.

2. The grounds are on the face of the application supported by the affidavit sworn by Cara Spencer on 24th October 2022. The Applicant states that she purchased a plot from the 1st Respondent in Land LR No. 29059 situated in Kiambu on or about 2012 or 2013. That by clause 17 of the Agreement for Lease between the Claimant and the 1st Respondent dated 9th May 2012 and clause 4.4 of the Lase dated 1th November 2013 the parties herein agreed to resolve any disputes arising therefrom by an arbitrator. That a dispute arose between the Parties where the Claimant claimed a breach of contract against the Respondents and which was referred to mediation that never resolved the same leading to referral to arbitration by the Sole Arbitrator one Dominic Njuguna Mbigi (MCArb appointed by the Chattered Institute of Arbitrators.

3. That the Arbitrator determined the dispute between the parties and rendered a Final Award published on 7th October 2022 as between the parties following a hearing of all parties. However, there is no plausible challenge against the Final Award under the *Arbitration Act* and the Applicant is desirous to enforce the Award. He therefore urged court to grant the orders.

4. In reply to that Application is an affidavit sworn on 19th January 2023 by Sally Ireri, the Legal Officer of the Respondents herein. She states that indeed both parties submitted to the jurisdiction of the Arbitral Tribunal but the Respondent wrote to the Arbitrator in the matter seeking stay of the arbitral proceedings for a period of 14 days as the Applicant felt that the matter could be resolved amicably without the need for the parties to have thee tribunal and this request was acceded to by the Arbitral Tribunal.

5. She states that negotiations between the parties culminated into a draft consent to be executed and filed before the Arbitral Tribunal. However, counsel for the Applicant requested that before parties could execute it, there was need for a written authority from the Directors of the Claimant for reasons that he person executing the consent was not a director of the Claimant.

6. She states that surprisingly, when the matter came for hearing and recording of a consent, the Arbitrator denied the Advocate for the Respondent audience. Her request for a final adjournment to have the consent executed by both parties was denied and this caught her and the 1st Respondent flat footed as they had not filed their documents in response they had anticipated the possibility of settling the dispute.

7. She states that the insistence by the Arbitrator on setting the matter down for hearing without the Respondent's mounting its defence is a violation of the 1st Respondent's constitutional right to be heard. Further, she states that earlier attempts through an application by the 2nd Respondent who had not been served to have the arbitration re-opened and be allowed participate were dismissed by the Arbitrator .

8. She contends that the Arbitrator's Award was against the rules of natural justice as the Arbitrator had an opportunity to allow effective participation in the proceedings but opted to violate the Respondents' right to be heard. She therefore contends that unless the court intervenes and sets aside the Arbitral Award, a dangerous precedent shall be set denying parties the right to settle matters without necessarily going through litigation.

9. Oscar Litoro Advocate of the firm of Litoro Omwebu & Co Advocates for the Claimant swore a supplementary affidavit on 20th January 2023 to the 1st Respondent's replying affidavit dated 19th

January 2023 and adopted the Claimant's replying affidavit sworn on 16th November 2022. He sought that the Respondent's application be dismissed and the Claimant's application be allowed.

10. The second application is a Chamber Summons dated 9th November 2022 Home Africa Communities Limited v Cara Spencer filed by the firm of Alakonya & Associates for the Applicant under a certificate of urgency under Section 35 2 (i) and b(ii) of the *Arbitration Act* and Rule 7 of the Arbitration Rules and Order 5 Rule 21 of the Civil Procedure Code. The Applicant seeks orders that: -

    1. Spent

    2. Spent

    3. Spent

    4. The arbitral Award dated 7th October 2022 delivered by Dominic Njuguna Mbigi in the arbitral proceedings between the parties herein be held in Nairobi , Kenya be set aside.

    5. The Respondent bears the costs of the application.

11. The grounds thereof and the contents affidavit in support sworn by Sally Ireri on 9th November 2022 are basically what is contained in her relying affidavit to the Application dated 24th October 2022. While attaching documents The Applicant states that the dispute is premised on an alleged agreement between parties on 9th May 2012 and a deed of variation dated 12th Augusts 2012 where the Applicant was to sell to the Respondent a parcel of Land known as Plot No. G7229 or Ksh. 6,000,000/-. The Applicant was in turn to create infrastructure on the suit property as per the agreement signed by the parties.

12. The Respondent then alleged that the Applicant had breach of that agreement by defaulting to complete infrastructural works as agreed in the contract thus making it difficult for the Respondent to complete her residential unit thus causing the Respondent to suffer loss inter alia; penalties for early termination of construction contract, costs of securing alternative storage for construction materials and depreciation of the structure. This dispute was referred to arbitration pursuant to the arbitration clause and both parties submitted to the jurisdiction of the Arbitral Tribunal which lead to Arbitral Award the subject of this application.

13. The Applicant contends that the Arbitral Award is against the rules of natural justice and hence flawed as the surrounding circumstances render it unjust and in conflict with public interest and policy contrary to 35 of the *Arbitration Act* as parties were denied an opportunity to settle the matter outside the premises of the Arbitral Tribunal

14. As a consequence, the Applicant states that enforcement of that Award is contrary to the rules of natural justice , repugnant to justice and morality and flies in the face of public interest and therefore, the Award should be set aside.

15. In reply to that application the Claimant filed an affidavit sworn by Cara Spencer on 16th November 2022 and opposed this application. While attaching documents the Claimant seeks that the Respondent's application dated 9th November 2022 be dismissed with costs and the claimant's application for enforcement of the Final Award be allowed for reasons that the application for injunction is misconceived and baseless in law and not even available under Sec. 10 of the *Arbitration Act*.

16. She depones that the application for setting aside is based in misrepresentation of material facts in that on 21st March 2022 during virtual hearing she was present with her advocate ready to proceed with the case. That the Respondent's counsel one Sally Njoki was also present and was given audience which

she utilised to make an oral application for an adjournment to allow the Respondent's to file a defence and defence documents on the grounds that failure to file the same on time was that the Respondents were engaged in negotiations with the Claimant's advocates .

17. She further states that through her advocate, she strongly objected to the belated application for adjournment of the arbitral hearing on the grounds that the Respondents had previously requested and granted by the Sole Arbitrator's Order of Directions No. 1,2,3 and 4, an opportunity to file and serve defence documents within specified timelines in the event that the negations did not arrive at any settlement by consent of the parties but chose to default in filing or to execute a consent with her advocates. See the order

18. She sates that as a result, the Arbitrator ordered that the matter proceed for hearing. The Respondents' counsel was given an opportunity to cross examine the Claimant and her witnesses and at the close of the Claimant's case, the Respondents' counsel stated that she had no defence and therefore closed her case.

19. Ultimately, parties were given directions on filing of submissions but even after the closure of the hearing on 21st March 2022, the Respondents again wrote to counsel for the Claimant seeking to revise or amend the 2nd draft consent in a third attempt to delay the finalisation of the case but the Claimant through her advocates rejected the offer and in writing on 22nd March 2022.

20. She denied that there was any settlement or draft consent between the parties on 21st March 2022 or at any time executed by the parties or the Respondents alone. While giving a history of the said negotiations before the hearing on 21st March 2022, she depones that there was no final draft but a second draft without prejudice consent of original draft offered for acceptance on 13th January 2022 from an original without prejudice draft consent negotiated on 22nd December 2022 which parties were to sign by 19th January 2022 during the mention before the Sole Arbitrator.

21. She further depones that on 18th January 2022, the Respondent sought to amend the said consent to avoid or defer execution ., filing or adoption before the Sole Arbitrator thus causing adjournments of arbitration mentions on at the request of the Respondent to 28th January 2022, 2nd February 2022 and later on 21st February 2022 but without reasonable excuse, the Respondents had neither signed a consent or delivered a signed one with requisite authority prompting the Claimant's objection to their application for further objection leading Order of Directions 4.

22. Terming the application res judicata, she depones that the 2nd Respondent had lodged an application dated 5th May 2022 seeking to reopen the arbitral proceedings alleging that he was not served with the notices or pleadings. That the 1st Respondent also filed an application dated 26th May 2022 under certificate of urgency seeking a say of proceedings on similar grounds and facts as the application now before this court. The Claimant responded to the same and the Sole Arbitrator determined the same vide ruling dated 22nd August 2022. However, there has been no appeal or challenge to the said ruling since then and hence the same remains final and binding.

23. Lastly , she states that the Respondent's application dated 9th November 2022 is devoid of merit and is one of the many tactics employed by the 1st Respondent to obstruct the finality of the dispute contrary to the Arbitration agreement between the parties and the *Arbitration Act*.

Submissions

24. At the time of directions before this court on 20th January 2023 as earlier directed on 13th December 2022 in the presence of both parties, the Respondents were absent and had not filed submissions

and none were served on the Claimant in respect of both applications. Counsel for the Claimant was present and had even filed an affidavit of service. His submissions are on record in respect of both applications and the same is dated 23rd January 2023.

25. In his submissions, counsel broadly lists two issues for determination that is whether the two applications are merited. On whether the 1st Respondent's application dated 9th November 2022 is merited, counsel emphasis the facts leading to the Final Award as well as the affidavits herein and while citing the case of Republic v Communications Commission of Kenya & 2 others [2005]eKLR, counsel submits that court orders must be obeyed.

26. Further, counsel submits that litigation must come to an end. While citing the case of Kenya Bankers Association v Kenya Revenue Authority [2019]eKLR, he submits that the issues raised in the Respondent's application are res judicata and that the application is a disguised appeal against the Arbitrator's ruling.

27. On the issue of setting aside of the Arbitral Award, counsel submits that the allegation that the Award is unjust , against public interest and policy contrary to Sec. 35 of the *Arbitration Act* is not backed by any tangible evidence but deliberate misrepresentation that cannot convince the court that there is any violation of public policy to warrant setting aside of the Award. While citing the case of Villa Care Management Limited v Kengen R Retirement Benefits Scheme [2021]eKLR , counsel submits that when dealing with arbitration matters, the interference by court is in very limited circumstances otherwise any more leeway would result in the court directly dealing with the issues before Arbitral Tribunal which is frowned upon by Art 159 (2) (c) of *the Constitution*.

28. On whether the Claimant's application is merited, counsel submits that the Respondents application dated 9th November 2022 does not offer any reasonable challenge in law and evidence against the Final Award and therefore, the Claimant's application dated 24th October 2022 should be allowed so as to allow the Claimant to enjoy his fruits of the Final Award.

Determination

29. Having considered the two applications, affidavits in support and annextures thereto together with the submission, I find it fair to determine the Application dated 9th November 2022 first in the circumstances as it seeks the setting aside of the Award. For such an application, I am minded that this is not an appeal where I am required to evaluate the evidence. Indeed ,while considering an application to set aside an arbitral award under section 35 of the Act, Ochieng, J (as he then was) had this to say in the case of Apa Insurance Co. Ltd v Chrysanthus Barnabas Okemo [2005] eKLR:

> " In looking at this issue, I must remind myself that it is not for me to re-evaluate the evidence, as if it were an appeal. This is certainly not an appeal from the decision by the arbitrator. My role is to ascertain if the applicant had made out a case to warrant the setting aside of the arbitral award."

30. Setting aside of a Final Arbitral Award is governed by Section 35 (2) of the *Arbitration Act* as follows:-

> " (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) ....

(v) ...; or

(vi) ...;

(b) the High Court finds that—

(i) ...; or

(ii) the award is in conflict with the public policy of Kenya.

31. The Respondent/Applicant basically raises two fundamental issues in his quest for setting aside the Arbitral Award. One of them is that the Arbitrator denied him an opportunity to be heard or to present his defence which is against the rules of natural justice. The second one is that parties were denied an opportunity to settle the matter outside the premises of the Arbitral Tribunal which is contrary to public policy. He cites Sec. 35 2(i) and b (ii) as the basis for his application. However, it is clear from Section 35 that the party seeking to have the Arbitral Award set aside has to furnish proof of those allegations he has made in his application.

32. Even though this is not an appeal, the two issues raised by the Respondent herein certainly require that this court cross- checks with the arbitral proceedings. A perusal of the Final Award shows that indeed the Respondent/Applicant has misrepresented facts. The Respondent was served with notices even as to hearing dates. He never filed any response to the Claimant's claim despite being served. The fact that the parties are negotiating is not a reason for a party not to respond to the claim. It is apparent that even after the Arbitrator gave Directions/Order that the Respondent files defence within specific timelines in even that the parties failed to reach a consent so as to proceed with hearing, the Respondent/ Applicant still ignored that Order and it had become the norm. He was delaying justice. The conduct was becoming obstructive and flies in the face of the same rules of natural justice that he wishes to rely on.

33. An Arbitrator cannot be held ransom by a party or parties who are clearly not keen on recording a consent. The option would be to hear the parties and make a decision. That is what the Arbitrator did and the matter proceeded for hearing with the Claimant calling three witnesses. Counsel for the Respondent did not cross examine any of the witnesses, did not call any witness. Both parties closed their case.

34. A party who has been properly served, given an opportunity to file their defence but fails to do so within the timelines set by the rules, and is further allowed more time thereafter to file the same, but fails to do so, cannot claim to have denied a chance to be heard. Failure to file Reponses in the circumstances would be an indicator by the Respondent he had no defence in the matter anyway. The Arbitrator was perfectly correct in his decision to decline further adjournment in the matter . That decision was not at all offend the Respondent's constitutional rights as he alleges.

35. So, was that decision contrary to the public policy to warrant setting aside as claimed by the Respondent/ Applicant? And before that, what does public policy mean? The Blacks' Law Dictionary, Tenth Edition at page 1428 defines the term public policy thus:-

QUOTE{startQuote "}

1. The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regraded by the legislature or by courts as of being of fundamental concern to the sate and the whole of society <against public policy<. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy"...

2. More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large."

36. It is apparent that the term public policy has no clear definition and the courts have tried to define the term particularly when used in reference to an Arbitral Award. For example, Ringera J had this to say in the case of Christ for all Nations v Apollo Insurance Company limited [2002] EA 366 , Ringera:-

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 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 any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

37. In this case, Article 159 of *the Constitution* that is relied on by the Respondent/ Applicant recognises Arbitration as one of the alternative methods of dispute resolution. The inclusion of an arbitration clause in a contract is a conscious and deliberate choice made by both parties as they did in this case. The parties in arbitral proceedings were given a chance to negotiate but it was not fruitful. Article 159 (2) (b) of *the Constitution* provides that justice shall not be delayed. There was no consent forthcoming for adoption by the Arbitrator. There is nothing to show that parties were denied an opportunity to settle the matter outside the premises of the Arbitral Tribunal as alleged.

38. The filing of this application on the same issues when the same was raised vide an application before the arbitrator and ruled upon is clearly res judicata. There is no appeal against that ruling and the current application cannot seek determination of the same issues as it is not sitting on appeal.

39. There is nothing to show that the enforcement of that Award is contrary to the rules of natural justice, repugnant to justice and morality. There is no prove whatsoever that the Award herein is contrary to public interest and policy. In the circumstances, the Respondent's application dated 9th November 2022 is devoid of merit and therefore dismissed with costs to the Claimant Respondent.

40. On the other hand, the Claimant's application dated 24th October 2022 is merited. It is allowed with costs to the Claimant/ Applicant

DATED , SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 28TH DAY OF FEBRUARY, 2023.

PATRICIA GICHOHI

JUDGE

*In the presence of:

Mr. Orara for Applicant

Ms Kehonji for Respondent

Kevin Isindu, Court Assistant