



**CM Construction (EA) Limited & another v Junction Apartments Limited & 2 others
 (Miscellaneous Civil Application E019 of 2022 & Commercial Case E030 of 2021
 (Consolidated)) [2023] KEHC 1403 (KLR) (Commercial and Tax) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1403 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
 COMMERCIAL AND TAX**

**MISCELLANEOUS CIVIL APPLICATION E019 OF 2022 &
 COMMERCIAL CASE E030 OF 2021 (CONSOLIDATED)**

**DO CHEPKWONY, J
 FEBRUARY 27, 2023**

BETWEEN

CM CONSTRUCTION (EA) LIMITED APPLICANT

AND

JUNCTION APARTMENTS LIMITED RESPONDENT

**AS CONSOLIDATED WITH
 COMMERCIAL CASE E030 OF 2021**

BETWEEN

JUNCTION APARTMENTS LIMITED APPLICANT

AND

CM CONSTRUCTION (EA) LIMITED 1ST RESPONDENT

STEVE OUNDO 2ND RESPONDENT

RULING

1. This Ruling relates to the Notice of Motion Application dated January 13, 2021 filed in HCCOMMMISC E030 OF 2021 'Junction Apartments Application' and the Chamber Summons application dated February 23, 2022 in HCOMMARB E019 OF 2022 'CM Construction Ltd Application' pursuant to the court directions of October 5, 2022.



2. Junction Apartment's Application is supported by the Affidavit of Sharon Wanyee sworn on January 13, 2021. It seeks stay of execution and to set aside the arbitral award published on December 14, 2020 ('the Arbitral award') and for the appointment of a different arbitrator to determine the dispute.
3. On the other hand, the CM Construction Ltd application dated February 23, 2022 is supported by the Affidavit of Manji Ravji Vekariya sworn on February 23, 2022 and seeks Judgment to be entered and decree be issued in terms of the arbitral award. It has annexed a copy of the contract between the parties and the arbitral award.
4. On October 5, 2022, this court directed the parties to file submissions on the two applications on the following three issues: whether the arbitral award should be set aside, whether the parties be ordered to commence the arbitration before a different arbitrator appointed in consensus of the parties and whether the Judgment should be entered in terms of Arbitral Tribunal's award.

Brief facts of the Dispute

5. CM Construction(EA) Limited and Junction Apartments entered into building contract agreement on October 22, 2012 for construction and completion of Riara Junction Apartments. A dispute arose and a Sole Arbitrator was appointed to determine the same. Eventually, the Arbitrator issued a final award on December 14, 2020 dismissing Junction Apartment's claim. It is this award that the parties are seeking to either set it aside or to enforce it. The Final award was in the following terms;

' Accordingly, I award and direct in full and final settlement of the matters in issue in this reference that:

- a. The Claimant's claim is dismissed in its entirety;
- b. The Respondent's Counterclaim is partially allowed in that an order for specific performance of the Sale Agreements dated November 14, 2016 and June 22, 2017 respectively is hereby issued against the Claimant.
- c. That the Final Accounts be prepared in accordance with Clause 34.20 of the Agreement and the sums accruing thereof be satisfied within 6 months at a simple interest rate of 14% p.a.
- d. In the spirit of my order for directions number 1 and the effect of my order in paragraph 3.2.16 above, I order that parties address their differences on their respective defects lists even as re-measurement of work is undertaken. Once concurrence is arrived at on the outstanding defects, the Respondent is mandated to make them good pursuant to the provisions of the Agreement.
- e. Each party to bear the cost of this Arbitration equally.
- f. The amount due as arbitrator's costs is Kshs 3,091,149.90 (Kenya Shillings Three Million Ninety One Thousand One Hundred Forty Nine Cents Ninety Only) which each party must settle its half share thereof before the collection of this Award.
- g. If any one party shall have paid more than its share of the arbitrators costs as directed in paragraph (f) above then the other party shall within (thirty) 30 days of collection of this Final Award reimburse the party that has paid more



than its share of the arbitrator's costs so paid. Simple interest calculated at 14% per annum shall be charged on any amount outstanding thereafter until the same is paid in full.

6. I have read through the submissions filed by the parties as well as the authorities relied on. I will address them in my analysis and determination. In that regard the court had previously directed the issues for determination as follows:-
 - a. Whether the arbitral award should be set aside.
 - b. Whether the parties be ordered to commence the arbitration before a different arbitrator appointed in consensus of the parties.
 - c. Whether the Judgment should be entered in terms of Arbitral award.

Analysis and Determination

7. The starting point in any court is to establish whether or not it has jurisdiction since without it, the court has to down its tools. This was stated in the classic case of *The Owners of the Motor Vessel 'Lillian S' -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1*, where Nyarangi JA held as follows:

' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'
8. A court derives its jurisdiction either from the Constitution or statute or both as was held by the Supreme Court of Kenya in the case of Samuel Kamau Macharia -vs- KCB & 2 Others, Civil Application No 2 of 2011 stated thus:

' A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law'
9. In arbitration matters, a court expressly derives its jurisdiction through the Arbitration Act. However, the general position under Section 10 of the Act is that courts should not intervene with matters governed by the Arbitration Act except where it is provided to the contrary by the Act. Section 32A of the Act goes on to state:-

' except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.'
10. The Applicant, Junction Apartments Limited, has invoked Section 35 of the Arbitration Act which gives this court jurisdiction to hear the matter as far as setting aside the award is concerned. Section 35 of the Act states,



- (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 in conflict with the public policy of Kenya.

11. Junction Apartment wishes to have the arbitral award set aside on the basis that the arbitral Tribunal did not consider all issues in dispute that the award was in conflict of interest and in breach of public policy. It is further the Applicants case that the arbitrator failed to constrain himself to the issues presented to him by the parties but instead went ahead to consider extraneous factors and issues and indeed render a reasoned award. The Applicant therefore thinks the awards are not legally enforceable and deals with issues not contemplated in the arbitration agreement. It is the Applicant's case that ; the Arbitrator was affected by fraud was unduly influenced and corrupted in making the Award and eventually prevented the parties from fully presenting their case. However, to the Respondent, CM Construction all these allegations have not been proved and seeks the court to dismiss the application for setting aside with costs.

12. In my view, it is not open for the court to consider whether the Arbitral Tribunal was correct analyzing all the issues raised by the parties since in doing so, the court will be sitting on appeal which it does not have the mandate to. This was the position of *Geo Chem Middle East -vs- Kenya Bureau of Standards*



[\[2020\]eKLR](#), where the Supreme Court of Kenya quoted with approval Ochieng J's holding in the High Court that: -

' It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal'.

13. However, in addressing whether the arbitral award contravenes public policy, I associate with the finding of the court in the case of *Christ for All Nations –vs- Apollo Insurance Co Ltd [2002] 2 EA 366* discussed public policy and held: -

' 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'.

14. In this case, I am persuaded that this aspect of public policy does not arise since it has not been shown that the award contravenes the [Constitution](#) or any other law, there is also no aspect of national interest in the award given the dispute is between the parties over the construction of private apartments. Therefore, considering the provisions of Section 35(2) above, I find no substantial reason that has been advanced to warrant setting aside the arbitral award. Consequently, the Application dated January 13, 2021 fails and the same is hereby dismissed with costs.

Whether the court should order appointment of new arbitrator.

15. Junction Apartments is of the view that the Arbitral Tribunal was biased in that he failed to disclose that he schooled with and had worked with or was a close friend to Architect Manduku, an officer and or proxy of the Respondent. It thinks that the relationship had a bearing on the award and finally entered on basis of conflicting interest. CM Construction on its part holds that this appointment of new Arbitral Tribunal will depend on whether Junction Apartments succeeds in convincing the court to set aside the Arbitral Award. It holds that if the court does not set it aside, then there will be no need of appointing a new Arbitral Tribunal.
16. In my view, I agree with the Respondent's submission. The applicant having failed to establish a viable ground for setting aside the award likewise there would be no viable ground to order the arbitrator to proceed afresh before another Arbitrator. The Applicant has merely casted aspersions on the Arbitrator without showing that his relationship with an officer associated with the Respondent actually influenced the final award.

Whether the arbitral award should be enforced.

17. On the other hand, CM Construction (EA) Limited seek adoption of the award as Judgment of the court. The application contains a copy of the Contract between the parties and the arbitral award which is annexed in the Supporting Affidavit. It seeks to have the Arbitral Award enforced as Judgment of the court under Section 36 and 37 of the [Arbitration Act](#) and urges the court to grant the application adopting the award as the Judgment.



18. Junction Apartments in opposing the application holds that the Arbitral Award is incapable of being enforced. It submits that the grounds for refusal to enforce an award are similar to those for setting aside an award. In that regard, it reiterates that the Arbitral award contravenes public policy and not binding so as to be enforceable in the circumstances.
19. I have considered contentions by both parties and in my view, CM Constructions has complied with the provisions of Section 36 (3) of the Arbitration Act which states;
- ' 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.'
20. The Applicant, Junction Apartments failed to establish grounds under which the award should be set aside. The Respondent on the other hand has established a case to adopt the award. It has annexed the requisite annexures in line with Section 36(3) of the Arbitration Act and I find the plead to adopt the award as the court's Judgment merited.
21. Consequently, in the end do make the following orders:-
- a. The Notice of Motion Application dated January 13, 2021 is dismissed with costs.
- b. The Chamber Summons Application dated February 23, 2022 has merit and is allowed as prayed.
- c. Judgment is hereby entered in terms of the final Arbitral Award dated December 14, 2020.
- d. The costs of the application dated February 23, 2023 are awarded CM Construction Limited.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ochwo counsel for Applicant in HCCOMMARB NO.E019 of 2022 and Respondent in HCCOMMISC NO.E030 of 2021

M/S Diero holding brief for Mr. Lumallas for Applicant in HCCOMMISC NO.E030 of 2021 and Respondent in HCCOMMARB NO.E019 of 2022.

Court Assistant - Sakina

