



**Cyclo Systems Kenya Limited v Kibuwa Enterprises Limited (Miscellaneous Application E151 of 2021) [2023] KEHC 19882 (KLR) (Commercial and Tax) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E151 OF 2021**

**JWW MONG'ARE, J**

**JUNE 30, 2023**

**BETWEEN**

**CYCLO SYSTEMS KENYA LIMITED ..... APPELLANT**

**AND**

**KIBUWA ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Appellant has moved this court vide a Memorandum of Appeal dated 26<sup>th</sup> February 2021 seeking to set aside part of the Arbitral Award issued by Rtd. Hon Justice J B Havelock, sole Arbitrator, delivered on 1<sup>st</sup> February 2021 on the following grounds:-
  - a. The Arbitrator erred in law, by finding that the Appellant was in breach of the Agreement dated 4<sup>th</sup> March 2011 as well as clause 4(2) of the Law Society Conditions of Sale.
  - b. The Arbitrator erred in law and principle regarding a constructive trust, by failing to find that a Constructive Trust had been created between the Respondent and the Appellant whereby the Respondent was, in essence, holding the rental income in trust for the claimant pending the transfer.
  - c. The Arbitrator erred in law, misapprehended and misunderstood the principles governing specific performance by failing to consider the breach by the Respondent that hindered the claimant from paying the balance of the purchase price, in concluding and finding that an order for specific performance in favour of the Appellant is not appropriate.
  - d. That having concluded that the purported completion notice was null and void, the Arbitrator erred in law by coming to a determination that the contract had been determined and incapable of performance.



- e. The Arbitrator erred in law by misconstruing the terms of the Sale Agreement, the Law Society Conditions of Sale, the Capital Gains Tax and the Land Act.
  - f. The Arbitrator erred in law by not finding that it is the Respondent that had breached the Agreement for sale by entering into several agreements of Sale over the same property.
  - g. The Arbitrator erred in law by failing to determine the conduct of the Respondent in the entire transaction.
  - h. The Arbitrator erred in law and in fact by finding that the Appellant was not in a position to complete.
    - i. The Arbitrator erred in law, fact and principle by finding that the balance of the purchase price should have been paid prior to the payment of Capital Gains tax.
  - j. The Arbitrator erred in law and in fact by finding that the appellant was not entitled to aggravated damages.
  - k. The Arbitrator erred in law and in fact by finding that general damages alone was adequate remedy in the circumstances surrounding the Arbitration, and further the rate of interest awarded was 12%.
2. The Appeal is opposed both the Appellant and the Respondent has filed its written submissions and list and bundle of authorities it wished to rely on. The Appellant also filed its written submissions and both parties appeared before me and orally highlighted their respective written submissions.

**The Appellant's Case: -**

- 3. The Appellant despite having filed 11 grounds of appeal during submissions narrowed the issues in dispute to three to wit;
  - i. Constructive trust; whether the Respondent held the rental income in trust for the appellant;
  - ii. Whether the Appellant was entitled to an order for specific performance;
  - iii. Whether the appellant was entitled to an order for aggravated damages.
- 4. It is the Appellant's position that the Arbitrator was wrong in failing to find that there existed a constructive trust created between the Appellant and the Respondent as a result of the failure to complete the Sale agreement dated 3/5/2011. Subsequently, the Appellant argues that any rental income generated from the suit premises was collected by the Respondent in trust for the Appellant and that the Arbitrator ought to have held as such and ordered a remittance of the same as damages.
- 5. The Appellant further faults the Arbitrator's determination and argues that the Arbitrator found that the Respondent had indeed breached the agreement by entering into two sale agreements for the same property. The Appellant reiterated that the best and most appropriate remedy that the Arbitrator should have granted was one for specific performance since the Appellant insisted that it had always been ready to complete its part of the agreement save for the fact the Respondent entered into two contracts which led to a protracted legal challenge by the other buyer hence denying the Appellant the opportunity to complete its part of the bargain.
- 6. Further and in addition to the above arguments, the Appellant submitted that the Award by the Arbitrator violated public policy in that part of the reasons for failing to comply with its part of the agreement was failure by the Respondents to pay Capital Gains Tax, a public tax that was introduced in 2015 while the application was still subsisting and hence frustrating the agreement.



### **The Respondents Case: -**

7. The Respondent opposed the Appeal. The Respondents contended that in its claim for rental income the Respondent was purporting to rewrite the contract between the parties as no such clause existed in the agreement between the parties. The Respondent therefore argued that the Arbitrator was correct in failing to find that a constructive trust existed and that the Appellant was entitled to the rental income from the date of the agreement especially since he had paid 30,000,000 as deposit towards the purchase of the property. In any event, the Respondent argued that the Appellant had not fully paid the purchase price and therefore could not purport to be treated as a beneficiary of the suit property.
8. As regards the claim for specific performance, the Respondent argues that this is an equitable remedy available at the discretion of the Arbitrator or the court and is not available as a matter of right. The Respondent argued that this remedy could only be available to the Appellant if they had fully performed their obligations under the contract. Accordingly, the Respondent argued that the Appellant having not paid the balance of the Kshs.20,000,000/- under the agreement, the Appellant was not entitled the order for specific performance as alleged and therefore the Arbitrator was right in not granting the same to the Appellant.
9. The Appellant argued that it was entitled to aggravated damages for breach of contract and faulted the Arbitrator in failing to award the same. In response, the Respondent contended that the Arbitrator was right in its decision not to award the same as there was no basis to award them to the Appellant. The Respondent argued that the Appellant had not proved how it was entitled to damages because having failed and or refused to remit the balance of the purchase price despite demand of the same by the Respondent, the Appellant was in breach of the said contract and could not therefore expect to benefit from the same. Similarly, the Respondent argued that the Appellant having been awarded interest at the discretion of the Arbitrator could not purport to claim for more as the same was not justifiable nor warranted. Further, the issue of interest on the deposit was not one envisioned by the agreement and there was no term or condition in the agreement to sustain the same. The Respondent therefore argued that the finding by the Arbitrator on the issue of further interest on the deposit held was a correct finding in the circumstances.
10. The Appellant faulted the Arbitrator for failing to find that the Respondent had failed and or refused to pay the Capital gains Tax, a public tax and argued that failure to do so was against public policy. In its response, the Respondent submitted that nowhere in the agreement for sale entered into by the parties was a requirement that a receipt for Capital Gains Tax was to be availed as part of the completion documents. The Arbitrator held that the Appellant, having not paid the balance of the purchase price as per the sale agreement, could not demand a payment of the Capital Gains Tax as this was only payable at the production of a transfer document which did not happen in the present case and as such, the demand for the same was premature. The Respondent agreed with the finding of the Arbitrator and submitted that the Award did not go against public policy.

### **Analysis and Determination : -**

11. I have considered the pleadings by the parties in this matter and the written and oral submissions and the respective list and bundle of documents filed by the parties. I note from the outset that there is no dispute to the existence of an arbitration clause in this matter. I further note that both parties submitted themselves voluntarily to the arbitration process in the sale agreement dated 30/3/2011. Under Section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the said Act. The High Court



under Section 36 of the *Arbitration Act*, has the power to recognize and enforce domestic arbitral award on the following terms:

“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.

(4) .....

(5) .....

12. Section 37 of the of the *Arbitration Act*, on the other hand, provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows;

‘S. 37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) At the request of the party against whom it is invoked, if that party furnishes the High Court proof that;

(i) 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, under the law of the state where the arbitral award was made;

(iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or



- (vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or
- (vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;
- (b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.”

13. The Appellant has faulted the award on several grounds. I note however the issues that the Appeal is brought were fully canvassed at the arbitral proceedings and that the Arbitrator pronounced himself fully on the same. The issue of whether damages were payable or whether the Appellant was entitled to an order of Specific Performance to my mind were issues related to the interpretation of the Sale Agreement entered into by the parties. These issues were proved and evidence availed before the Arbitrator and the same cannot be opened in Court on Appeal. These are issues not contemplated by the *Arbitration Act* to be dealt with by the High Court even on Appeal. Section 32 considers matters relating to the issues placed before the Arbitrator as conclusively decided unless it can be shown that factors prevailing during the Arbitration as envisioned under Section 37 of the *Arbitration Act*, existed to warrant a review of the same by the High Court.

14. On the Issue of public policy, the Appellant has argued that the Arbitrator failed to consider that failure to determine that the Respondent had not provided a Capital Gains Receipt was a public policy issue and that the Court should interfere with the Award on those grounds. The Arbitrator in my view, properly determined that the Capital Gains Tax was not a document contemplated by the Agreement between the parties and that it was only necessary because of the changes in the Tax laws and would have been required had the parties concluded the agreement and prepared a transfer for registration in favour of the Purchaser. Since no transfer was done on account of failure to pay the balance of the Purchase price by the Appellant, to my mind the issue was not ripe for determination. In any event and as held by Justice Ringera in the *Christ for All Nations v. Apollo Insurance Company Limited* case,

“That public policy is a most broad concept incapable of precise definition’, and he likened it to ‘an unruly horse’ that ‘once one got astride of it you never know where it will carry you’. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with *the Constitution* or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals)”.

To my mind, the Award by the Arbitrator did not violate the *constitution* or any written law and cannot be said to be against public policy as envisioned by Section 37 of the *Arbitration Act*.

15. In conclusion therefore and flowing from the above analysis I find and hold that the Arbitrator properly considered all relevant facts and provisions in the Award dated 1/2/202 and will therefore not set aside the Arbitral Award. The court therefore finds that the Appeal filed herein is not merited and the same is dismissed with costs to the Respondent. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Dave for the Applicant.

Mr. Nyboma for the Respondent.

Sylvia- Court Assistant

