



Soil Merchants Kenya Limited v Kamimi Company (1976) Limited (Miscellaneous Application E385 of 2022) [2023] KEHC 22005 (KLR) (Commercial and Tax) (25 August 2023) (Ruling)

Neutral citation: [2023] KEHC 22005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E385 OF 2022**

**DAS MAJANJA, J
AUGUST 25, 2023**

BETWEEN

SOIL MERCHANTS KENYA LIMITED APPLICANT

AND

KAMIMI COMPANY (1976) LIMITED RESPONDENT

RULING

Introduction and Background

1. It is common cause that on 29.09.2017, the parties entered into an agreement for sale wherein the Respondent agreed to sell to the Applicant the property known as Title Number Donyo Sabuk Koma Rock 1/8664 for Kshs. 80,000,000.00 (“the Agreement”). Pursuant to the Agreement and subsequent addendums to it, the Applicant paid a 10% deposit of Kshs. 8,000,000.00. In 2018, a dispute arose over the performance and completion of the Agreement which was referred to arbitration for resolution. After considering the pleadings and documents filed by the parties together with their respective testimonies, the Arbitrator published an Award on 17.12.2020 where he found in favour of the Applicant and directed inter alia that the Respondent refund the Applicant Kshs. 8,000,000.00 deposit together with interest (“the Award”).
2. The Applicant has now filed the Chamber Summons dated 16.05.2022 section 36(1) of the *Arbitration Act* seeking recognition and enforcement of the Award. It is supported by the grounds on its face and the supporting affidavit of the Applicant’s director, George Gacheru Mungai sworn on 16.05.2023. It is opposed by the Respondent through the replying affidavit of its director, Elizabeth Waiyaki, sworn on 15.08.2023. The respective advocates made brief oral submissions in support of their respective positions.



Analysis and Determination

3. 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 *Arbitration Act*. This court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards in the following terms:

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- (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)
4. The fact of the arbitration agreement and arbitral award are not disputed. In fact, the Respondent's application seeking to set aside the award was struck out by a ruling dated 05.05.2022 in ML HC COMM MISC. No. E277 of 2021, Kamimi Company (1976) Ltd v Soil Merchants Kenya Limited setting the stage for this application.
5. Despite compliance with the formal requirements, the court may still refuse to recognise and enforce an award based on the grounds set out in section 37 of the *Arbitration Act* sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award as follows:

37. Grounds for refusal of recognition or enforcement

- (1) 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 to 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 decisions 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 recognised and enforced; or

(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 award 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.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming



recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

6. The Respondent argues that the Award should not be recognized and enforced for the reasons that the impugned orders do not mirror the parties' contract as set out in the Agreement and actually ran afoul of the provisions of the Agreement at Clause 15.2.2 contrary to the rule at section 29 (5) of the *Arbitration Act* which provides that, "In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction." That the impugned orders amount to a rewriting of the unequivocal agreement of the parties as set out at Clause 15.2.2 of the Agreement and that this is best demonstrated by the Arbitrator's express substitution of his own notions of practicability, fairness and equity for the express provisions of the Agreement and consideration of extrinsic evidence.
7. The Respondent further states that the impugned orders contravene the express provisions of a binding contract duly executed by the parties where both company's directors had the authority to enter into the Agreement and that no rational interpretation of the Agreement would uphold the portion of the Award requiring the refund of the deposit and account interest thereon. That the impugned orders were neither issued pursuant to the parties' issues for determination as placed before the Arbitrator, nor the abridged issues highlighted for determination at para. 254 of Award and therefore fell outside the scope of the Arbitrator's mandate.
8. The Respondent further contends that the Arbitrator issued orders which were not sought by either party and were not based on the issues raised for determination by the parties and that both parties were deprived of the opportunity to be heard on the issue through testimony, or presentation of evidence otherwise, or through submissions in breach of the laws on fair process and substantive justice.
9. The Respondent points out that Clause 15.2.2 of the Agreement provides for forfeiture of the deposit and interest as the consequence of the failure to complete the transaction by the Applicant. That is was not open to the Arbitrator to come any other conclusion having found that the Respondent had complied with the terms of the Addendum, that the Applicant should have validated the completion documents sent to it by the Respondent and that the Agreement was validly terminated. The Respondent submits that by making an order beyond what was contemplated by the parties in the Agreement amount to exceeding the scope of the matters referred to the Arbitrator for determination.
10. Based on the grounds outlined above, the Respondent avers that the Award is contrary to the public policy of Kenya and urges the court to refuse to recognize and enforce the Final Award.
11. Before I proceed to consider the grounds proffered by the Respondent in opposition to the application for recognition and enforcement, I must point out that the jurisdiction of the court is limited to considering whether those grounds fall within the strictures of the statute. This court is not an appellate court and in exercise of its powers under the *Arbitration Act*, the court cannot interfere with an arbitrator's interpretation of the contract and/or the law applicable. The court cannot upset the factual or legal findings of the arbitral tribunal even it takes a different view of the matter unless those findings come within the grounds in section 37 of the *Arbitration Act*. In this regard, the Court of Appeal in *Kenya Oil Company Limited and Another v Kenya Pipeline Company* NRB CA Civil Appeal No. 102 of 2012 [2014]eKLR cited with approval the decision in *Geogas S. A. v Trammo Gas Ltd* ("the Baleares") [1993] 1 Lloyds LR 215 as follows;

[40] The court in that case was dealing with an appeal under section 1 of the English *Arbitration Act*, 1979. It is necessary to quote at length the words of Lord



Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:

The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.....

[41] ----- Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.

12. The Respondent contends that it was not given a fair hearing during the arbitration process and that the Award was in breach of the laws on fair process and substantive justice. Based on the transcript of the hearing produced by the Respondent, I am unable to conclude that the Respondent was denied a fair hearing as claimed. First, the Respondent admits it filed pleadings in response to the Applicant's claim. Second, during the arbitration proceedings, the Respondent were given an opportunity to present their witnesses who were examined and cross-examined by either side. Third, from the record, it is apparent that Arbitrator granted the parties maximum latitude to the parties in presenting their cases without unnecessary interjections, restriction or limitation to the extent that it cannot be said the Respondent right to a fair hearing was violated. This ground by the Respondent is therefore not merited and is dismissed.
13. Therefore, the court rejects any invitation for it to interrogate the Arbitrator's factual findings and his interpretation of the Agreement, unless the same satisfies the grounds set out in section 37 of the *Arbitration Act* and the Respondent's opposition will thus be limited to the grounds available therein. In essence, I can deduce that the Respondent opposes the application on the grounds that the Award is in conflict with the public policy of Kenya and that it dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration or contained decisions on matters beyond the scope of the reference to arbitration.
14. As to whether the Award deals with a dispute not contemplated by and falling beyond the scope of the reference to arbitration, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR observed as follows:

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct



in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

15. As stated in the aforesaid decision, the remit of the arbitrator is governed by the arbitration clause in the Agreement which in this case provides as follows:

16.7 Any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether as to its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the parties.

Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved amicably, the dispute, controversy or claim shall (provided that such dispute, controversy or claim is not required to be adjudicated by the Environment and Land Court pursuant to the Land Laws) be submitted to arbitration in accordance with clause 16.9.

16. The wording of the aforementioned Clause is wide and elastic and does not seem to restrict any dispute between the parties concerning the interpretation, application or implementation or termination of the Agreement. The Respondent does not dispute the fact that the arbitration involved the termination of the Agreement and interpretation of the consequences thereof, which places the matter within a dispute subject to arbitration as per the arbitration clause above.

17. According to the Respondent, the Arbitrator published the Award that amounted to rewriting the parties' bargain and that it was neither issued pursuant to the parties' issues for determination as placed before the Arbitrator, nor the abridged issues highlighted for determination in the Award. Further, that the Award was not issued pursuant to a relief sought by either party.

18. In its Statement of Claim, the Applicant sought the following prayers:

- a. Declaration that the vendor has not complied with its obligations in the agreement and the addendum dated 6.8.2018.
- b. An order compelling the vendor to avail either a confirmation of grant of letters of administration in relation to Succession Cause Number 7 of 2018; or
- c. An order from a court of competent jurisdiction authorizing the Vendor to dispose of the Property to the Purchaser in the manner contemplated under the Agreement.
- d. An order compelling the vendor to cause its advocates to open an escrow account with the purchaser's advocates and give an undertaking as provided by clause 4.5 after all the completion documents are availed and confirmed by the purchasers advocate.
- e. Costs and interest



19. The Applicant then listed the following issues for determination:

1. Who were the Directors and Shareholders of the Respondent as at 25.9.2017? Was Momux Investments Ltd the majority shareholder? If so with how many shares
2. Who were the Directors and Shareholders of Momux Investments Ltd as at 27.9.2017? Was the late Fredrick Munyua Waiyaki the majority shareholder? If so with how many shares?
3. Did the Respondent disclose to the Claimant that a restriction against dealings with the land the subject of the sale agreement had been registered?
4. Did the Respondent on 17.1.2018 mislead the Claimant that the restriction had been lifted and that the title was free of any encumbrances? At whose instance was the Restriction registered and whose interests was it to protect?
5. Was the Respondent ready to complete the agreement dated 29.9.2017 on the completion date provided Clause 2.2 of the Addendum dated 23.2.2018?
6. Did the Claimant's Advocates serve the Respondent with completion notice dated 4.5.2018 for failure to complete?
7. Did the Claimant's Advocate on 9.5.2018 demand refund of deposit paid to the Respondents' Advocates?
8. Did the Respondent through its Advocates on 28.5.2018 request time to resolve the impasse that the Deputy County Commissioner of Matungulu had requested Grant of Probate and had rejected Application for Grant of Probate and had rejected Application for LCB Consent as there was a restriction registered against the title?
9. What were the specific terms agreed by the parties in the 2nd Addendum dated 6.8.2018? Who drew the addendum? Was comfort a term of the agreement? Did the respondent's Advocates furnish the Claimant's Advocates with either of the documents provided at Clause 2.1? if not, was the claimant under any obligation to perform its party of the agreement?
10. Is the order issued on 19.9.2018 the order the parties agreed on in the 2nd Addendum dated 6.8.2018? is it the order the Respondents' Advocates furnished the Claimant's Advocates with? Is it a negative order?
11. Did the Respondent's advocates furnish the Claimant's advocates with any other order other than the order issued on 19.9.2018? Did the Respondent file any application in court?
12. Did the Claimant's Advocates write to the Respondent's Advocates on 8.10.2018 demanding compliance by the Respondent?
13. Was the Respondent ready to complete as at 9.10.2018 when its Advocate wrote to the Claimant's Advocate demanding completion?



14. According to the agreement, on whom was the completion notice to be served and how was it to be served? Was service of the notice dated 9.10.2018 on the claimant's Advocate proper
 15. Did the Claimant through its advocates serve the Respondent with notice dated 17.10.2018 specifying the Respondent's default and requiring it to make good the default as provided in the agreement? Was the notice hand delivered and received by the Respondent? If so, when was it received? Was the notice also sent by registered post to the Respondent's address in the agreement? Was the notice served and as provided in the agreement? Did the Respondent make good its default on receipt of the notice?
 16. Did the Respondent's Advocates in their letter dated 17.10.2018 enclose copies of either document agreed upon in the 2nd Addendum dated 6.8.2018? Was enclosure No. 1.1.6 in compliance with Clause 2.1 of the 2nd Addendum dated 6.8.2018?
 17. Was the Respondent's notice dated 20.11.2018 of any consequence having been served with notice dated 17.10.2018? can a party in breach legally terminate a transaction or serve notice to complete as the Respondent purported to do?
 18. Did time crystallize and has time crystallized for the Claimant to meet its obligation to pay the balance of the purchase price?
 19. Is the Respondent guilty of Breach as Particularized at Paragraph 25 of the statement of claim?
 20. Did the agreement provide for inspection of documents?
 21. Was the copy of Certificate of Confirmation of Grant enclosed in the respondent's Advocates letter dated 23.9.2019 complete? Has the Respondent or its Advocate to date availed a complete Certificate of Confirmation of Grant?
 22. Is the Claimant in breach? Is registration of a Caution to Protect its interest as purchaser a violation of the Respondent's right to ownership of the Property?
 23. Is the claimant entitled to the reliefs it seeks?
 24. Is the Respondent entitled to the reliefs it sought?
 25. Who should bear the costs of this Arbitration?
20. On its part, the Respondent filed the following list of issues:
1. Whether the subject property forms part of the estate of Late Fredrick Munyua Waiyaki;
 2. Whether the Respondent has provided/made available all Completion Documents legally required to transfer the suit property to the Claimant;
 3. Whether the Respondent was justified in terminating due the Sale Agreement to the Claimant's failure to Complete;



4. Whether the termination of the Sale Agreement by the Respondent was carried out procedurally;
 5. Whether the Claimant has violated the Respondent's right to ownership by registering and maintaining a caution on the Respondent's property despite the Sale Agreement having been lawfully and procedurally terminated;
 6. Whether the Claimant's Claim is bad in law and does not disclose any reasonable cause of action;
 7. Whether the Claimant is entitled to reliefs sought in the Statement of Claim; and
 8. Whether the Respondent is entitled to the reliefs sought in their Counter Claim?
21. In the Award, the Arbitrator acknowledged and reproduced the aforementioned issues and further listed other issues that the Respondent raised in its submissions including:
1. Whether the Respondent complied with their requirements as Vendor under the Sale Agreement
 2. Whether the concerns of the Applicant caused the parties to execute Second Addendum have been addressed
22. At paras. 253 and 254 of the Award, the Arbitrator stated that the parties had asked to determine:
1. Whether the Respondent or Claimant breached the provision of the 2nd Addendum
 2. Whether the Claimant is entitled to the relief of Specific Performance
 3. Whether Respondent's Counterclaim is valid
 4. Costs
23. Between Paras. 372 and 383 of the Award, the Arbitrator summarised his findings and orders as follows:
373. As per paragraph 323: The Arbitral Tribunal finds and holds that the Claimant is not entitled to the equitable and discretionary remedy of specific performance, and the Arbitral Tribunal hereby rejects the Claimant's request for specific performance
 374. As per paragraph 335: The Arbitral Tribunal finds and holds and hereby directs the Respondent to return the deposit of Kenya Shillings Eight Million [Kshs.8,000,000.00] to the Claimant within 30 days of taking up this Award.
 375. As per paragraph 338: The Arbitral Tribunal finds and holds and hereby directs that the Vendor do remit to the Claimant the account interest within 30 days of taking up this Award.
 376. The Arbitral Tribunal hereby directs that in the event of default in complying with paragraphs 374 and 375, the Respondent to pay simple interest at 12% per annum on the amounts outstanding until payment in full.
 377. As per paragraph 340: The Arbitral Tribunal finds and holds and is of the considered view that given the circumstances of this case, the Arbitral Tribunal



is unable to make a finding in respect of the Notice of Termination issued by the Respondent on 20th November 2018.

378. As per paragraph 344: The Arbitral Tribunal finds and holds and directs the Claimant to remove the Caution it registered on 17th October 2018 within 30 days of taking up this Award.

379. As per paragraph 350: The Arbitral Tribunal finds and holds that the Respondent is not entitled to any punitive or exemplary damages.

380. The Arbitrator's final fees payable is therefore:

.....

Fees payable Kshs. 1,338,000.00

Therefore,

Claimant's Half-Share is Kshs. 669,000.00

Respondent's Half-Share is Kshs. 669,000.00

381. The Arbitral Tribunal finds and holds and directs that the Claimant and the Respondent shall pay the Arbitrator's fees and expenses in equal half-shares — as determined hereinabove.

382. I further Award and direct that each party shall bear their own costs of the reference

383. That this Award is as Full and Final Settlement of all Claims in this Arbitration including Costs

24. I have gone through the Award and juxtaposed the same with the aforementioned issues by the parties and I am unable to agree with the Respondent that the Arbitrator failed to make a determination that was presented by the parties or that he went on a frolic of his own to a point that he determined issues beyond the scope of the reference. The Arbitrator made a determination on whether the subject property formed part of the estate of the late Fredrick Munyua Waiyaki, whether the completion notice was properly served, whether the Respondent breached the 2nd Addendum, whether the Applicant was entitled to specific performance, whether the Respondent was entitled to its counterclaim and who was to bear the costs of the reference. These were issues that were presented by the parties and the Arbitrator made a determination on the same and a look at the Award indicates that these determinations dovetailed all the issues fronted by the parties.

25. The Arbitrator, in making a determination whether the Applicant was entitled to specific performance found in the negative and instead ordered that it was only practical if the Respondent refunds the Kshs. 8,000,000.00 deposit paid to it by the Applicant. Even though the Respondent states that this was an instance of the Arbitrator going beyond his scope of reference, it should not be lost that the Arbitrator, sitting as a tribunal had the authority to interpret the Agreement and the law gave him sufficient latitude to interpret the Agreement and apply the law in a manner which makes the Agreement more effective, without re-writing the Agreement (see *Equity Bank Limited v Adopt a Light Limited* ML HC Misc. Application 435 of 2013 [2014] eKLR). In arriving at the decision to deny the Appellant the equitable remedy of specific performance and substitute it with that of a refund of the deposit, I note that the Arbitrator was aware of the Agreement's insistence of time being of the essence and the effluxion of time ever since the parties were meant to complete the transaction. The Arbitrator was guided by the court's decisions where it has been held that even where a contract is valid and



enforceable, specific performance will however not be ordered where there is an equitable alternative remedy. I therefore find that the Arbitrator's decision was not beyond the scope of the parties' reference to arbitration but was meant to give better practical effect to the Agreement and for the benefit of the parties. This ground by the Respondent fails.

26. As I understand, the Respondent case is that from a totality of the grounds advances for attacking Award, the court out to refuse recognition on the ground that it conflicts with public policy. In the oft cited case of *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366 Ringera J. stated as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the *constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.....

27. In the same case, the learned Judge cautioned a party seeking to set aside an award on the grounds of violation of the public policy of Kenya. He observed as follows:

He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the *Arbitration Act*.

28. In addition, the public policy exception must amount to more than a mere error of fact or law. It must mean something more as was held by the court in *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR:

Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.

29. From the totality of the case place before the court for consideration, I find and hold that the Respondent has failed to demonstrate and satisfy the court as to why the court should refuse to recognize and enforce the Award.

Disposition

30. Having rejected the grounds set out by the Respondent, I allow the Applicant's application dated 16.05.2022 on terms that the Award published on 20.01.2021 is duly recognised as a judgment of this court and leave is granted to the Applicant to enforce it as a decree of the court. The Applicant's shall pay costs to the Respondent assessed at Kshs. 150,000.00

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

