Runda Royal Limited v Defo (Suing through her Power of Attorney – Eugenie Nouala) (Miscellaneous Application E239 of 2021) [2022] KEHC 63 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation: [2022] KEHC 63 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E239 OF 2021

DAS MAJANJA, J

JANUARY 31, 2022

BETWEEN

RUNDA ROYAL LIMITED ..... APPLICANT

AND

NELLY ELZA DEFO (SUING THROUGH HER POWER OF ATTORNEY – EUGENIE NOUALA) ..... RESPONDENT

RULING

1. On 11th June 2015, the parties herein entered into a sale agreement ("the Agreement") where the Applicant agreed to sell to the Respondent a 3-bedroom apartment no. E13 on the 5th Floor of Block E to be constructed by the Applicant on LR No. 20610/4 in Thindigua within Kiambu County ("the Property") at a purchase price of KES 9,500,000.00. Under the Agreement, the purchase price was to be paid in installments; KES 4,750,000.00 being paid on or before the execution of the Agreement and the final KES 4,750,000.00 upon completion of the construction. It was also agreed that the construction would be completed 24 months from the commencement date or 30 days from the date when the Architect issues a certificate of practical completion, whichever is later.

2. A dispute arose in respect of the performance of the Agreement. The Respondent alleged breach and after issuing demands to the Applicant, the dispute was referred to arbitration adjudicated by A. G. Kimani, FCIArb as the sole arbitrator on 14th February 2020.

3. In her Statement of Claim dated 6th April 2020, the Respondent alleged that the Applicant had failed to complete the construction and delivery of the Property. She prayed for a declaration that the Applicant was in breach of the Agreement, judgment for KES 4,750,000.00 being the 50% deposit of the purchase

price and KES 2,160,000.00 being anticipated rental income, general damages, costs of the arbitration and interest.

4. The Applicant responded to the claim by filing a Statement of Defence dated 27th May 2020 which was responded to by the Respondent through the Reply dated 31st August 2020. The Respondent filed a list of issues dated 26th October 2020 which included whether the Applicant was in breach of the Agreement and whether the Respondent was entitled to the reliefs sought. The Applicant also filed a list of issues dated 20th November 2020 which included; what was the Completion Date as stipulated in the Agreement, whether it was in the contemplation of the Parties at the point of entering into the Agreement that there may be delays in construction, whether the Applicant was in breach of contract, whether the Respondent's Withdrawal Notices were premature, fatally defective and in breach of contract, whether the Respondent's claim for loss of anticipated rental income fell outside the scope of the reference to arbitration, whether the Respondent was entitled to the reliefs sought and who was to meet the costs of the arbitration.

5. The matter was set down for hearing and after the considering the parties' pleadings, evidence and submissions, the Arbitrator published the award on 19th April 2021 ("the Award"). The Arbitrator first determined the preliminary issue of whether the Respondent's claim for loss of anticipated rental income fell outside the scope of the reference to arbitration and answered the same in the affirmative opining that it was within the contemplation of the parties that a delay in completion of the construction of the Property would result in the Respondent foregoing rental income or other benefit during the period of delay of completion of the Property. However, the Arbitrator maintained that the burden was on the Respondent to demonstrate on a balance of probability the necessary elements of the claim.

6. On the other substantive issues, the Arbitrator held that the completion date was not varied by written agreement between the parties and that the completion date of the Property was 30 days after the Architect issued the certificate of practical completion and it was to be issued after completion. Further, that the Property was to be constructed and completed by the Applicant 24 months from the commencement date. Thus, the Arbitrator held that the agreed completion was agreed as the 10th June 2017, that is, 24 months from the Commencement date of 11th June 2015 and that the Certificate of Practical Completion was due to be issued on 10th June 2017 and 30 days thereafter on 10th July 2017 was the completion date. The Arbitrator further held that the Agreement contemplated certain specific delays to the completion date at sub clause 5.4 which were those caused by factors beyond the Applicant's control and those that were due to no fault of the Applicant and that the parties were required to agree a reasonable period during which the Agreement would continue in force. The Arbitrator held that the Applicant did not advance proper reasons for the delay in completing the property or that the delay was beyond its control and not its fault therefore, the Applicant was in breach of contract.

7. On the reliefs sought by the Respondent, the Arbitrator partly found in the Respondent's favour by holding that under sub clause 5.6, the Applicant shall pay to the Respondent the deposit paid towards the purchase of the Property being KES 4,750,000.00. The Arbitrator also awarded the Respondent the arbitrator's fees, cost of hiring the hearing room, half the costs of the stenographer and 90% of the legal costs. However, the Arbitrator dismissed the Respondent's claim for anticipated rental income, general damages and interest for want of proof.

8. The Applicant has now moved the court to set aside the Award by the Notice of Motion dated 16th July 2021 made, inter alia, under 35(1)(2)(a)(iv), 35(2)(b)(ii) and 35(3) of the *Arbitration Act*, 1995 ("the *Arbitration Act*"). The application is supported by the affidavit of the Applicant's director Joshua

Ng'ang'a Njeri sworn on 16th July 2021. It is opposed by the Respondent through the replying affidavit of her duly appointed attorney, Eugenie Nouala, sworn on 21st August 2021. The parties have also filed written submissions in support of their respective positions.

The Application

9. The Applicant's application to set aside is grounded on the argument that the Award was made in excess of the Arbitrator's scope of reference and was against public policy. It contends that the Arbitrator's findings were factually incorrect, legally unsound, fraudulent and against public policy for reasons that he made certain findings that were contrary to the evidence before him, that there were also instances when the Arbitrator declined the invitation of the parties to rule on matters where the parties had already agreed a decision would be made, that the Arbitrator found that the Respondent's witness confirmed that it was a term of the Agreement that the construction of the property was to be completed within 24 months from the commencement date or 30 days from the date when the Architect issued a certificate of practical completion whichever shall be later and that the Arbitrator, in clear disregard of unequivocal terms of the Agreement, arrived at his own computation of the completion date contrary to the evidence on record that based on the completion period of 24 months, the construction completion date was expected to be 24 months later, that is 10th June 2017.

10. The Applicant further faults the Arbitrator's finding that the Applicant was in breach of the Agreement because construction took 3 years beyond the 24 months allegedly set out in the Agreement and that this finding was made in spite of the fact that the purchase was off-plan and the Arbitrator had just found that the parties had contemplated delay. That in running away from the issue at hand, the Arbitrator supplied a finding that the construction should have been completed and a certificate of practical completion issued by 10th July 2017.

11. On the issue of whether the Respondent's withdrawal notices were defective, the Applicant contends that the Arbitrator failed to find that the Respondent admitted the Notice of Withdrawal was premature having been issued before the completion of the Property and was defective because it was not predicated on the provisions of the Agreement between the parties and not in law. Further, that the Arbitrator noted that the Respondent submitted that the 21-day Completion Notice was not served upon the Applicant as required by the Law Society of Kenya Conditions of Sale 1989 seeking to complete the transaction within 21 days and the Arbitrator did not consider the judicial pronouncement supplied by the Applicant on the issue of the need to serve a 21-day written notice.

12. The Applicant claims that the Arbitrator was fixated on the Notification of Withdrawal through a letter dated 2nd January 2018, which was not a completion notice and that he agreed with the Respondent that it was necessary that the events cited in the Agreement as leading to completion do take place first before the notice of completion is provided as completion could not take place if the events have not taken place. That the Arbitrator rightly found that completion has not occurred to date and therefore no notice of completion was due and that despite finding that the events leading to issuance of a completion notice having not accrued and the notice not being as prescribed by the Law Society Conditions of Sale the Arbitrator held that the Respondent's withdrawal notice was not premature, not fatally defective and was not in breach of the contract. The Applicant avers that the Arbitrator accordingly held that the Award is made pursuant to the election of the Respondent to rescind the Agreement after the enormous delay.

13. The Applicant submits that the Arbitrator did not rule on the quantum of costs he had awarded and that the Award as a whole runs contrary to the evidence, departs from the law, overlooks strict terms of the Agreement and there was a failure to rule properly on matters placed before the Arbitrator to adjudicate. It further submits that even though the Arbitrator had jurisdiction to decide the issue of the

Respondent's loss of anticipated rental income, that claim did not fall within the scope of the reference to Arbitration and was clear proof that the Arbitrator did not appreciate the distinction between the two issues.

14. The Applicant accuses the Arbitrator of predisposing his mind to a position favorable to the Respondent which demonstrated outright bias and impartiality in favour of the Respondent and that as a consequence, the Arbitrator failed to accord the Applicant the right to be heard by and impartial tribunal as required by Article 50 of the Constitution. The Applicant maintains that the Award is contrary to public policy and contrary to the Constitution, the *Arbitration Act* and other written and unwritten laws and was in excess of the Arbitrator's scope of reference. The Applicant further stresses that the Arbitrator, in resolving the dispute, went outside the scope of reference to arbitration and thereby acted without jurisdiction and effectively re-wrote the Agreement contrary to public policy.

15. The Applicant further contends that the Award is irregular and unenforceable as it omitted issues that had been referred to the Arbitrator for determination, that is, a determination on the Applicant's counterclaim as well as an explanation as to why the same was dismissed and for which reasons. It is also the Applicant's position that the Arbitrator's fees were exorbitant. In sum, the Applicant depones that it is necessary for the court to interpret what constitutes contrary to public policy as a ground for setting aside an arbitral award and that its application is generally merited and deserves the orders sought.

The Respondent's Reply

16. The Respondent states that the Applicant's application falls short of the threshold laid down under section 35 of the *Arbitration Act*. She states that the application goes to the merits of the Award by contesting the findings of law and facts making it an appeal masqueraded as an application for setting aside an arbitral award.

17. The Respondent submits that the errors of law and facts set out by the Applicant do not qualify as grounds for setting aside an arbitral award and that they do not constitute a violation of public policy as alleged by the Applicant. She further submits that the Arbitrator extensively analyzed the facts, issues, evidence and the testimony of the witnesses before arriving at the Award within the confines of the dispute. She adds that the Arbitrator and clearly identified the issues raised by the parties and considered and elaborately and extensively analyzed the issues before arriving at a decision.

18. The Respondent faults the Applicant's meaning of public policy to include purported errors of law and facts whereas the same are not by any stretch of imagination, public policy grounds. In sum, the Respondent urges the court to dismiss the application with costs.

Analysis and Determination

19. From the parties' pleadings and submissions, the main issue for determination is whether the Award ought to be set aside. As stated, the Applicant's application is premised on the grounds that the Award was made in excess of the Arbitrator's scope and that it was against public policy. The court's jurisdiction in determining whether an award should be set aside is circumscribed by section 35 of the *Arbitration Act* which, at the parts material to the Applicant's case, provides as follows:

> 35. Application for setting aside arbitral award
>
> (1) .....

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

.....

(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

(b) the High Court finds that—

(i) .....

(ii) the award is in conflict with the public policy

of
Kenya.

20. On the issue of the Arbitrator going beyond the scope of reference, the Applicant takes issue with the Arbitrator determining the issue of whether the Respondent was entitled to her claim for loss of expected rental income. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 81 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. [Emphasis mine]

21. Thus, the locus for determination is the arbitration clause which is contained at Clause 13.3 of the Agreement and which states as follows:

> If any dispute, difference or questions shall arise whether during the continuance of this Agreement or upon or after its determination between the parties hereto touching or concerning this Agreement or as to any other matter of this Agreement such dispute, difference or question whatsoever Shall be referred to an arbitrator under the rules of the *Arbitration Act* No. 4 of 1995 of Kenya or any statutory modification or re - enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other on the application of any party by the Chairman of the Chartered institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto. [Emphasis mine]

22. I have considered the grounds upon which the Applicant assails the Award and which I have set out earlier in this ruling. I would be forgiven if I concluded that they sounded like grounds of appeal attacking the merits of the Award. All the issue that have been raised go the appreciation of the evidence in light of the provisions of the provisions of the Agreement. What is clear is that the totality of the claim and defence was geared towards determining whether the Agreement had been breached and if so, the reliefs to be granted. It cannot therefore be gainsaid that the matters constituted disputes, questions, differences between them arising during the Agreement and therefore fell within the scope of reference as contemplated in the arbitration agreement by the parties. I therefore reject the Applicant's argument that the Arbitrator determined an issue that was beyond the scope of reference to arbitration.

23. An arbitral tribunal has the authority to interpret an Agreement and has sufficient latitude to interpret the Agreement, the parties' arguments and evidence 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). This means that the Arbitrator was entitled to review

the evidence and come to his own conclusion and even if that conclusion was wrong as the Applicant suggests or even if this court may take a different view of his findings. It is now settled that section 35 of the *Arbitration Act* was never meant to elevate the court to sit as an appellate court in arbitration matters. The arbitrator is the master of facts and the court must resist the temptation to become an appellate court as was explained in *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited* NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR where the Court of Appeal cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd (The "Baleares")* 1 Lloyds LR 215:

> 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.

24. As to whether the Award was contrary to public policy, both parties have rightly relied on the oft cited decision of Ringera J., (as he was then) in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366, where the learned judge explained the scope of public policy as a ground for setting aside an arbitral award 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....."

25. Further, in same decision, the learned judge recognized that not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. He added that:

> [I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of 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 an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the *Arbitration Act*.

26. The court in *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR underlined the same principle where it was observed that:

> 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. [Emphasis mine]

27. I agree with the Respondent that the Applicant is using this ground of the Award being contrary to public policy to argue against the factual conclusions by the Arbitrator, which is akin to an appeal. The Arbitrator's conclusions of fact cannot be elevated to matters of public policy because the Applicant or the court could have different opinions on them. I find and hold that the Applicant has not demonstrated how the Award was inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality.

28. I find that the Arbitrator was able to consider the issues raised by the parties, analysed the arguments, submissions and evidence and came to a finding on the said issues raised based on his understanding and appreciation of the material before him.

Disposition

29. For these reasons, I find that the Applicant's Notice of Motion dated 16th July 2021 lacks merit and is now dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mulinge instructed by Komu and Kamenju Advocates for the Applicant.

Ms Bundi instructed by M. M. Gitonga Advocates LLP for the Respondent.