



Kimaryo v First Riverside Acres Limited & another (Miscellaneous Application E1283 of 2020) [2022] KEHC 299 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1283 OF 2020**

DAS MAJANJA, J

APRIL 28, 2022

BETWEEN

CATHERINE NCHANASSA NKAKYARO KIMARYO APPLICANT

AND

FIRST RIVERSIDE ACRES LIMITED 1ST RESPONDENT

ACRES INVESTMENT LIMITED 2ND RESPONDENT

RULING

1. The 1st Respondent (“First Riverside”) is a company in the business of real estate purchase, construction and development. It was in the process of purchasing, constructing and developing 38 apartments, staff quarters parking and other related amenities on a property known as LR No. 4275/64 located on Garden Road off Riverside Drive in Nairobi (“the Project”) when the Applicant expressed her intention and wish to participate in the Project as an investor and thereafter development of a three bedroom duplex apartment known as apartment number C13 in the Project (“the Apartment”).
2. The parties’ intention to contract was consummated by an Investment and Development Agreement dated 2nd May 2014 (“the Agreement”) where the Applicant was to pay an investment sum of KES 22,500,000.00 for the Apartment and the 2nd Respondent (“Acres Investment”) was engaged to assist and coordinate in the purchase of the Project property and manage and supervise development of the Project from commencement to completion.
3. By a letter dated 10th July 2019, the firm of Emsi & Associates, representing the Applicant, wrote to the Chairman of the Law Society of Kenya declaring a dispute on behalf of the Applicant and seeking the appointment of an arbitrator under the Agreement. In due course, Samuel Mbiriri Nderitu, FCI Arb was appointed as the Sole Arbitrator (“the Arbitrator”) to hear and determine the dispute. Upon conclusion and consideration of the oral hearing and the parties’ written submissions, the Arbitrator



published an award titled “Final Award (Save as to Costs)” and dated 10th August 2020 (“the Initial Award”) where the Respondents were directed to pay the Applicant KES 40,393,917.60 in respect of her claim and KES 756,530.00 as her recoverable costs and expenses of the arbitration. The Respondents were also ordered to pay the Applicant’s legal costs and other necessary expenses incurred in the arbitration and the parties were granted 30 days from the date of the Initial Award, or such other period as they may agree upon receiving the Initial Award, within which to agree on those costs and failing such agreement, either party was at liberty to apply to the Arbitrator for determination of the costs in an additional award on costs. The Applicant was also awarded simple interest of 7% per annum on the amounts awarded under above, to run from 10th November 2020 on any amounts outstanding then if any, until payment in full.

4. The Applicant then approached the court with an application dated 3rd December 2020 and made under sections 36 and 37 of the Arbitration Act seeking recognition and enforcement of the Initial Award. In its ruling dated 11th February 2021, the court noted that the application was not opposed and that the time for setting aside the award had since lapsed. In the circumstances, the court allowed the application and ordered that the Initial Award be recognized and entered as a judgment of the court, leave was granted to the Applicant to enforce the Initial Award and the Respondents were ordered to bear the costs of that application.
5. In the intervening period, it seemed the parties could not agree on the issue of costs as directed by the Arbitrator and this prompted the Applicant to write a letter to the Arbitrator dated 14th December 2020 where the Arbitrator was asked to make a determination on the same. After considering the parties’ submissions, the Arbitrator published an additional award on costs dated 29th March 2021 (“the Additional Award”) where the Respondents were ordered to pay the Applicant KES 2,217,895.00 as her total recoverable costs of the arbitration.
6. The Applicant has now filed a Chamber Summons dated 5th May 2021 made under sections 36 and 37 of the Arbitration Act and Rules 6 and 9 of the Arbitration Rules, 1997 seeking, inter alia, that the Additional Award be recognized and adopted as an Order of this Court and leave be granted to her to enforce the Additional Award as a decree of this Court. In response and in opposition, the Respondents have filed a Notice of Preliminary Objection dated 4th June 2021.
7. The Respondents have also filed a Notice of Motion dated 22nd March 2021 and made under Order 12 Rule 7, Order 22 Rules 22 and 25 and Order 51 Rule 1 of the Civil Procedure Rules, sections 3A, 63(e) and 94 & 95 of the Civil Procedure Act and Articles 48, 50 and 159 of the Constitution principally seeking to vary and/or set aside the proceedings and orders made on 11th February 2021 and that the court enlarges time and allow the Respondents to respond to the Chamber Summons dated 3rd December 2020 by filing a replying affidavit out of time. The application is supported by the affidavits of Crispin Okoko, a director of the Respondents and Lincoln Ouma, an advocate practicing in the firm of Ngetich, Chiira & Associates Advocates, all sworn on 22nd March 2021. The application is opposed by the Applicant through her Replying Affidavit sworn on 15th April 2021.
8. The parties have also filed written submissions in support of their respective positions. I propose to deal with the Respondents’ application first since they seek to set aside the order recognizing the Initial Award.

The Respondents’ application

9. The Respondents’ application dated 22nd March 2021 seeks to set aside the orders of 11th February 2021 which effectively allowed the Applicant’s application dated 3rd December 2020 and thus recognizing and enforcing the Initial Award. The thrust of the application is that there was pending before the



- Arbitrator, proceedings on the costs payable to the Applicant and other outstanding issues, hence adoption and enforcement of the Initial Award was premature and the application was incompetent.
10. The Respondents also state that their advocates on record did not have notice of the application and as such were unable to prepare for the hearing and attend court on 11th February 2021. They contend that due to challenges of navigating the e-filing system, they were unable to attend court on the material day and as such they were denied the opportunity to present their case contrary to the rules of natural justice. They aver that they have legitimate grounds to challenge the Initial Award including the fact that the Arbitrator rendered himself on matters beyond the scope of the dispute before him, that the amount awarded against First Riverside was colossal, way beyond what was pleaded and an affront to public policy requirements and that Acres Investment was never a proper party to the dispute between the Applicant and First Riverside.
 11. The Respondents submit that the court, in making the orders of 11th February 2021, proceeded on the mistaken belief that the dispute before the Arbitrator was complete and application for adoption before Court was unopposed yet the same was vigorously opposed and that no prejudice which cannot be remedied by way of damages, will be suffered by the Applicant if the orders sought are granted.
 12. The Respondents maintain that they had made the application promptly without delay and it is in the interest of justice that their application be granted, to pave way for the hearing of the Applicant's Chamber Summons dated 3rd December, 2020 on its merits. The Respondents aver that the mistake and negligence of counsel should not be visited upon them as the client.
 13. The Applicant opposes the application and avers that her advocates served the Respondents' advocates on record with the application dated 3rd December 2020 as evidenced by an Affidavit of Service filed in court on 10th February 2021. It points out that Respondents' director instructed the current advocates on record, Messrs Ng'etich, Chiira & Associates to defend the application dated 3rd December 2020 on 8th February 2021, but the advocates only filed the Notice of Appointment dated 11th February on 23rd March 2021 which was approximately forty four days after receiving the instructions from their client and that the said Notice of Appointment was only served upon the Applicant by Messrs Ng'etich, Chiira & Associates on 13th April 2021.
 14. The Applicant avers that the parties were notified of the readiness of the Initial Award on 10th August 2020 and the Award was released to the parties on 9th October 2020 after the Applicant settled in full the final invoice of the Arbitrator's in the sum of KES. 698, 530.00 which was to be split equally between the parties. That despite frequent follow ups with the Respondents, they have failed and/or refused to settle their portion of the Arbitrator's fees forcing the Applicant to effect payment of the entire fees.
 15. The Applicant contends that the Initial Award was a final award on the issues for determination save as to costs of the arbitration and the Court had the requisite jurisdiction to enforce the Initial Award under section 36 of the *Arbitration Act*. The Applicant further states that the Initial Award awarded her costs of the arbitration and further provided that the parties were free to agree on the legal fees and other recoverable expenses incurred by her in the arbitration within 60 days of the date of the Initial Award and failing such agreement, either party would apply to the Arbitrator to make a determination and issue a further award on cost. Since the parties failed to agree on costs, the Arbitrator proceeded to make the Additional Award which was notified to the parties on 29th March 2021.
 16. The Applicant avers that the application dated 3rd December 2020 was for the enforcement of the Initial Award as far as the matters in dispute were concerned and that the Additional Award as to costs was an additional award and does not affect the Initial Award in the main dispute.



17. The Applicant denies that the Respondents have established any grounds for setting aside the Initial Award and that the application has, in any event been brought after undue and unreasonable delay. She concludes that the application is incompetent, frivolous and misconceived and should be dismissed.

Determination

18. In resolving the issue whether I should set aside the Initial Award on the grounds proffered by the Respondents, I am mindful of the fact that proceedings are governed by the *Arbitration Act*. It is not in dispute that the Arbitrator notified the parties that the Initial Award was ready for collection on 10th August 2020 and was released to the parties on 9th October 2020 after the Applicant paid the full fees. Under section 35(3) of the *Arbitration Act*, a party who wishes to set aside an arbitral award must make the application for before 3 months have elapsed from the date on which the party making that application had received the arbitral award. For purposes of section 35(3), the award is received when the parties are notified by the arbitrator that it is ready for collection (see *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR and *National Housing Corporation v Custom General Construction Limited* [2021] eKLR). Whether the Initial Award was received on 10th August 2020 or 9th October 2020, it is clear that the time for setting aside the Award had elapsed by the time the Applicant's application to enforce the Initial Award was heard on 11th February 2020.
19. Further, I disagree with the Respondents that since the proceedings were not complete, the Applicant's application for recognition and enforcement was premature. Under section 3(1) of the *Arbitration Act*, "arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award." This means that any award whether interim or otherwise is an award and may be enforced as it is an award under section 36(1) of the *Arbitration Act*. Section 36 does not qualify what kind of award may or may not be enforced (see *Dinesh Construction Limited and Another v Aircon Electra Services (Nairobi) Limited* [2021] eKLR). I therefore find and hold that the Applicant's application to enforce the Initial Award was not premature.
20. The Respondents complain that they were denied the opportunity to oppose the application for recognition and enforcement. Rule 6 of the Arbitration Rules, 1997 allows the court to hear the summons for enforcement ex-parte on the following terms, "If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree." In this case though, the Respondents do not deny that their advocate on record were served with court process as evidenced by the affidavit of service filed in court hence the contention that the application was heard without giving the Respondents an opportunity to be heard is neither factual nor merited.
21. The question then is whether the court should set aside the orders of 11th February 2021. The jurisdiction of this court under the *Arbitration Act* is circumscribed. Section 10 of the *Arbitration Act* provides that 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. As I have set out above, the Respondent have invoked the provisions of the Civil Procedure Rules and the *Civil Procedure Act* as a basis for setting aside the proceedings of 11th February 2021. It is now settled that the *Arbitration Act* is a complete code on matters arbitration and this court can only act in accordance with its provisions and not those of the Civil Procedure Code which are not applicable. This is what the Court of Appeal stated in *Ann Mumbi Hinga v Victoria Njoki Gathara* NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR that:

A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the



Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: “Except as provided in this Act no court shall intervene in matters governed by this Act”. [Emphasis mine]

22. The reason for this approach was summarized by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* SCK Petition No. 12 of 2016 [2019] eKLR as follows:

[T]he Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, “the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process.” It was also reiterated that the limitation of the extent of the Courts’ interference was to ensure an, “expeditious and efficient way of handling commercial disputes.”

(53) Similarly, the Model Law also advocates for “limiting and clearly defining Court involvement” in arbitration. This reasoning is informed by the fact that “parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.” Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum. [Emphasis mine]

23. The Respondents’ reliance on the provisions of the Civil Procedure Act and the Civil Procedure Rules betrays the fact that there are no provisions in the Arbitration Act that grant the court jurisdiction to entertain an application such as the one brought by the Respondents to setting aside, vary and/or review the order recognizing and enforcing an award and granting leave to a late applicant to file a response out of time.
24. The court already made a definitive and conclusive determination that the application was unopposed and based on that, allowed the Applicant’s application. The Initial Award has now merged into an enforceable decree of this court. The court lacks jurisdiction to entertain the Respondents’ application dated 22nd March 2021 and it is accordingly struck out with costs to the Applicant.

The Applicant’s application

25. The Applicant’s Chamber Summons dated 5th May 2021 seeks recognition and enforcement of the Additional Award. The Applicant states that upon payment of the full fees due and payable to the Arbitrator by her, the Additional Award was duly served as required by law to the parties on 15th April 2021 and since then, there has not been any application by the Respondents under section 35 of the Arbitration Act challenging the Additional Award made by the Arbitrator which directed that the sum of KES. 2,217,895.00 be settled in full by the Respondents as the Applicant’s total recoverable costs of the arbitration. The Applicant avers that the Respondents have failed to settle the said amount of



KES. 2,217,895.00 and that it is in the interest of justice and expediency that this application should be allowed.

26. The Respondents oppose the Applicant's application on the preliminary grounds that at time of making the Additional Award, the Initial Award had already been adopted by this court on 11th February 2021 rendering the Arbitrator functus officio and that the Arbitrator has directed Acres Investment to bear the costs of the Arbitration yet it was never a party to the Agreement giving rise to the arbitration between the Applicant and First Riverside.
27. It is not in dispute that 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*. The High Court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards in the following terms:
- 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)
28. Section 37 of the *Arbitration Act* sets out the grounds upon which this court can 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.

29. The Respondents' Notice of Preliminary Objection does not set out any grounds upon which the court may refuse to enforce an award. The grounds that at the of making the Additional Award, the Initial Award had already been adopted by this court on 11th February 2021 rendering the Arbitrator *functus officio* lacks merit as the Initial Award left the issue of costs to be determined at a later stage. Since the issue of costs was reserved, the issue of Arbitrator being *functus officio* does not arise.
30. On the issue that the Arbitrator had directed Acres Investment to bear the costs of the Arbitration yet it was never a party to the Agreement giving rise to the arbitration between the Applicant and First Riverside, it must be recalled that the issue of who is liable and to what extent was already determined in the Initial Award. The Initial Award has now been recognized and cannot be the subject of a collateral attack. The Award on Costs is consequential upon the Initial Award as it merely determined the quantum of costs to be paid by the party adjudged liable. In the circumstances, the second ground does not fall within the recognized grounds for refusal to enforce an award.
31. I do not see any reason why the Applicant's application dated 5th May 2021 should not be allowed and the Award on Costs recognized and enforced.

Disposition

32. For the reasons I have set out above, I now issue the following orders:
- a. The Respondents' Notice of Motion dated 22nd March 2021 is dismissed.
 - b. The Applicant's Chamber Summons dated 5th May 2021 is allowed on terms that the Additional Award on Costs dated 29th March 2021 made by Mr Mbiriri Nderitu, the Sole



arbitrator, be and is hereby recognized and entered as a judgment of this court and leave be and is hereby granted to the Applicant to enforce the Additional Award as an order of this court.**

- c. The Respondents shall bear the costs of both applications assessed at KES. 50,000.00.**

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

D. S. MAJANJA

JUDGE

Ms Wachira instructed by EMSI and Associates Advocates for the Applicant.

Ng'etich Chiira and Associates Advocates for the Respondent.

