



**Mounts Bay Real Estate Limited v Piroli (Miscellaneous Civil Application
68 of 2021) [2022] KEHC 12747 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 12747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 68 OF 2021**

SM GITHINJI, J

MAY 24, 2022

BETWEEN

MOUNTS BAY REAL ESTATE LIMITED APPLICANT

AND

MARCO PIROLI RESPONDENT

RULING

1. For determination is the Applicant's Notice of Motion dated 14th September 2021 seeking the following orders;
 1. Spent
 2. That this Honourable court be pleased to set aside the Arbitral Interim Award No. 1 herein dated 18th August 2021 and published by the sole Arbitrator Mr. Kyalo M. Mbobu on 18th august 2021.
 3. That the arbitral proceedings and the arbitral award by the sole Arbitrator Mr. Kyalo Mbobu be declared null and void.
 4. That this Honourable court be pleased to stay proceedings in National Arbitration between Marco Piroli versus Mounts Bay Estate Limited pending interpartes hearing of this application.
2. The application is premised on the sworn affidavit of Rugerro Sciomeri the director of the Applicant Company who deponed that he was aware of the Claimant's alleged sub-lease with regards to apartment No. 13 on Plot No. 1127 Original No. 22/2 situate in Watamu which was transferred to him irregularly and unlawfully by one Erli Pier Angelo who was the Sub-lessee without the knowledge, participation and or control of the Applicant herein who is the registered lessor contrary to provisions of clause 2:17 of the sub lease.



3. It was stated the applicant is the sole manager of all common areas in Mounts Bay Residence where the Respondent is a sub-lessee and that the respondent has on several occasions interfered and incited other condominium owners to interfere with the management and or operation of the Applicant in management of the common areas which resulted to a warning letter by the Applicant to the respondent. Further that the respondent has failed to heed the warning and continued to interfere with the management of the applicant resulting to a Notice for termination of the alleged sub lease.
4. It was further stated that pursuant to issuance of the said Notice of termination of the sub lease, the Respondent filed in Malindi ELC No. 48 of 2021 Marco Piroli versus Mounts Bay Estates Limited in respect of the alleged sub lease for apartment No. 13. That during the pendency of the ELC Case, the Respondent declared a dispute under the arbitration act and singlehandedly appointed a sole arbitrator Mr. Kyalo M. Mbobu without the ELC court referring the matter for arbitration.
5. It was also stated that the lack of consensus in appointment of an arbitrator between the party was in contravention with Section 12 of the Arbitration Act thus a ground for setting aside the Arbitral interim award No. 1
6. It was deponed that the subject matter which is the sub lease of Apartment No. 1 is not capable of arbitration between the parties herein as there was no privity of contract between the Applicant and the respondent.
7. The respondent filed a Notice of Preliminary Objection and a replying affidavit both dated 29th September 2021. The preliminary objection attacks the jurisdiction of this court in dealing with matters related to land and also the form of institution of the proceedings that challenge an arbitration.
8. In the replying affidavit, the respondent stated that he is the registered owner of the Apartment by reason of transfer between Ernie Angelo Pier who was the registered owner by a sub-lease between him and the Applicant. That by dint of the transfer, Ernie Angelo Pier assigned his interests and rights in respect of the apartment to him.
9. It was stated that the respondent together with other apartment owners raised the issues as to the mismanagement and misappropriation of funds of the estate but only he (the respondent) was victimized and a notice for termination of the sub lease was issued. That it was on the basis of these reasons that he referred the dispute to arbitration and with threats of eviction pending arbitration he sought preservation orders vide Malindi ELC case No. 48 of 2021.
10. It was further deponed that this Honourable court lacks the jurisdiction to entertain this application for the dispute in question relates to Environment and land and only the ELC court has the preserve of dealing with such matters.

Submissions, Analysis and Determination

11. I have perused the submissions of the parties which I must say I do appreciate for being thorough and well researched, however, I do not wish to reproduce the same. The issues that arise for determination are;
 1. Whether the Notice of Motion dated 14th September 2021 is defective for want of form?
 2. Whether the application is statute barred?
 3. Whether this Court has jurisdiction to determine on whether or not to set aside the interim award?



Whether the Notice of Motion dated 14th September 2021 is defective for want of form?

12. The respondent contends that under Rule 2 and Rule 3 of the Arbitration Rules 1997, applications for setting aside arbitral awards are made by way of originating summons. The Applicant counters that the issue raised by the respondent is only a procedural technicality and a lapse of form which should be overlooked.
13. Here I am faced with the decision of substance over form. Under Section 3 of the *Judicature Act*, the hierarchy of laws in Kenya include *the Constitution* of Kenya as the grundnorm, followed by Acts of Parliament and all other laws and regulations follow thereafter as subsidiary. Consequently, Arbitration Rules 1997 do not take precedence over *the constitution* and in this regard Article 159(2)(d) which accords precedence to substance. See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2015] eKLR.
14. That said, I am inclined to focus more on the substance of the application rather than its form as I am not convinced that the respondent would suffer any prejudice.

Whether the application is statute barred?

15. The respondent submitted that the instant applications fall short under Section 17 (6) of the *Arbitration Act*. The Applicant justifies the application guided by Section 35 of the Act.
16. I have looked at the Sections relied upon by both parties. Section 17 speaks to competence of a tribunal to rule on jurisdiction. Section 17 (6) states that; where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court within 30 days after having received notice of that ruling, to decide on the matter.
17. Section 35 (3) on the other hand provides that an application for setting aside the arbitral award may not be made after 3 months have lapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under Section 34 from the date on which the request had been disposed of by the Arbitral Award.
18. The instant applications seeks to set aside the interim arbitral award dated 18th August 2021 and published on even date. The issue of jurisdiction is not raised in the prayers. It is trite that parties are bound by their pleadings thus my finding that the applicable law is Section 35 (3). The application was filed on 20th September 2021 well within the timeline prescribed by the Section.

Whether this Court has jurisdiction to determine on whether or not to set aside the interim award?

19. An application for setting aside an Arbitral award is envisaged by Section 35 of the *Arbitration Act* and it is not an appeal from the Arbitral award. In considering an application for setting aside an Arbitral Award, the court exercises original jurisdiction as opposed to appellate jurisdiction.
20. In *Cape Holdings Ltd Vs Synergy Industrial Credits Ltd* [2016] eKLR the court held that;

“The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.”



21. In the case of *Rashid Moledina & Co (Mombasa) Limited & Others vs Hoima Ginnners Limited* (1967) E.A. 645, it was held that,

“Courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute”.

22. *Kenya Shell Ltd vs Kobil Petroleum Ltd* [2006] eKLR where the Court of Appeal expressed the views of Ringera J in the case of *Christ for All Nations vs Apollo Insurance Co. Ltd* (2002) EA 366 where the court held that;

“Although public policy is a most broad concept incapable of precise definition.... An award could 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 either it was:

- 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.”

23. In *Continental Homes Ltd Vs Suncoast Investments Ltd* [2018] eKLR the court held that;

“In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.”

24. While analyzing the provisions of **Section 35**, I am aware that the same depending on circumstances of each case. The Applicant’s quest for setting aside the arbitral award is premised on grounds that there is a pending case involving the parties herein in Malindi ELC Case No. 48 of 2021. From the pleadings, it is evident that there is a dispute as to privity of contract, which contract in this matter is a sub-lease.

25. I am of the view that the Environment and Land Court has the preserve of dealing with matters touching on leases. I will therefore not delve into the issue of privity of contracts between the parties.

26. That said, I find that there being a pending matter between the parties at the Environment and Land Court, it would only be prudent to set aside the interim arbitral award pending the hearing and determination of the suit at the ELC.

27. Flowing for the foregoing, the application succeeds in the following terms;

- a. That the interim arbitral award dated 18th august 2021 be and is hereby set aside.
- b. That the proceedings in Nairobi Arbitration between Marco Piroli versus Mounts Bay Estate limited be and are hereby stayed pending hearing and determination of Malindi ELC No. 48 of 2021.
- c. There are no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF MAY, 2022.



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S.M. GITHINJI

JUDGE

In the presence of; -

1. Miss Juaji holding brief for Kilonzo Aziz advocates for the Applicant
2. Litoro & Omwebu advocates for the Respondent(absent)

