Shako v Kanyi t/a Kenya Projects Budget & Executive Homes (Miscellaneous Civil Application 146 of 2021) [2022] KEHC 12496 (KLR) (23 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 146 OF 2021

OA SEWE, J

MAY 23, 2022

BETWEEN

ONESMUS KALAGHE SHAKO ..... APPLICANT

AND

DAVID MUREITHI KANYI T/A KENYA PROJECTS BUDGET & EXECUTIVE HOMES ..... RESPONDENT

RULING

1. Before the Court for determination is the applicant's Chamber Summons dated 30th June 2021. It was filed herein on 2nd July 2020 under Section 36(1) of the *Arbitration Act*, 1995 for orders that the Final Arbitration Award prepared and issued by Ali Mandhry (Arbitrator) on 18th December 2020 be recognized, adopted and enforced as a Decree of this Court; and that costs of the application be provided for.

2. The application was based on the grounds that on 14th January 2016, the applicant entered into an agreement with the respondent for the sale of a two-bedroomed house, known as Maisonette 3, situate at Bamburi Parkside Phase 1B on a piece of land known as Subdivision No. MN/1/343. It was averred that the applicant paid the deposit of Kshs. 750,000/= which was duly acknowledged by the respondent; and that, in blatant breach of the contract, the respondent did not meet his part of the bargain. Consequently, the applicant filed Mombasa Chief Magistrate's Civil Suit No. 1464 of 2019: Onesmus Kaleghe Shako v David Mureithi Kanyi t/a Kenya Projects Budget & Executive Homes in a bid to enforce its rights under their contract.

3. It was further averred that before the matter could proceed to conclusion, the parties opted to have their dispute referred to arbitration for amicable settlement; to which end, Ali Mandhry was appointed by mutual consent. The dispute was consequently resolved by way of arbitration and a Final Award made on 18th December 2020 but was not availed to the parties until 14th June 2020 because the respondent

had declined to pay the Arbitrator's fees. The applicant now seeks the recognition and adoption of the Final Award as a Decree of the Court to pave way for its enforcement.

4. The respondent filed a Replying Affidavit to the application, sworn by him on 23rd October 2021. He conceded that he did enter into an agreement with the applicant dated 14th January 2016 for the sale of a two-bedroomed Maisonette at Bamburi Parkside Phase 1B on land known as Subdivision Number MN/I/343; and that he did not meet his part of the bargain. He however asserted that failure to comply on his part was due to circumstances beyond his control, in that there emerged a boundary dispute; and therefore that the Maisonette in question, if constructed as planned, would have encroached on the adjacent property.

5. The respondent further averred that he offered the applicant an alternative house but that he insisted on having the Maisonette that was the subject of their agreement. The respondent therefore conceded that this impasse led to the filing of Mombasa CMCC NO. 1464 of 2019 and the ensuing arbitral proceedings. He further expressed his satisfaction with the Final Award dated 18th December 2020, save for the issue of the Arbitrator's costs. Hence, at paragraph 10 of his Replying Affidavit, the respondent deposed that:

> "...I have always been willing to comply with the award in terms of ensuring that the Applicant is given alternative housing as per the Arbitral award."

6. He annexed copies of correspondence exchanged between his advocate and the applicant's advocate as Annexures DMK-1 and DMK-2 to confirm his averment. He however challenged the Arbitrator's fee of Kshs. 510,000/= and termed it exorbitant. Accordingly, the respondent averred, at paragraphs 15 and 16 of his Replying Affidavit that while he is willing to comply with the Arbitral Award in terms of offering an alternative housing unit to the applicant, there is no justifiable reason why he should pay Kshs. 510,000/= to the Arbitrator; an amount which is beyond 30% of the total value of the subject matter.

7. The applicant filed a Further Affidavit, with leave of the Court. He averred that the respondent knew all along that the parties would have to pay the Arbitrator his fees; and that to question that aspect of the Final Award is to ask for review through the backdoor. He added that if the respondent was dissatisfied with the order on fees, then his recourse ought to have been on appeal. The applicant reiterated his averments in his Supporting Affidavit and prayed that his application for adoption and recognition of the Final Award be allowed.

8. Directions were then given on 27th October 2021 that the application be canvassed by way of written submissions; and whereas the applicant complied on 16th November 2021, the respondent did not. In his written submissions, Mr. Mwawasi proposed the following issues for determination:

   (a) Whether the application is merited;

   (b) Whether the Court can review and/or alter the Final Arbitral Award as passed; and,

   (c) Who bears the costs?

9. Counsel submitted that, all that the applicant was required to do was to comply with the provisions of Section 36 of the *Arbitration Act*, by annexing either the original or certified copies of the Arbitral Agreement and the Final Award. He urged the Court to find that this has been done by way of Annexures "OKS-1" and "OKS-2"; and therefore that the application is meritorious. On the respondent's averments in connection with the Arbitrator's fees, counsel submitted that this Court lacks the jurisdiction to review or alter the Final Award. He posited that, if indeed the respondent was aggrieved by the order on fees, then he ought to have filed an appeal under Sections 14(3)

and 17(6) of the *Arbitration Act*; which he did not do. Counsel relied on *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR and *Golden Homes (Management) Limited v Mohammed Fakruddinn Abdullahi & Others* [2019] eKLR.

10. Accordingly, Mr. Mwawasi prayed that the application be allowed and the orders sought by the applicant be granted as prayed. He also urged that the applicant be awarded costs on the basis of the principle that costs follow the event.

11. Section 36(1) of the *Arbitration Act*, pursuant to which the instant application has been brought, provides that:

> " 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."

12. In this instance, the parties are in agreement that they submitted themselves to the jurisdiction of the arbitral tribunal pursuant to their Agreement for Sale dated 14th January 2016. Clause R thereof states that:

> " Any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the *Arbitration Act* 1995 of Kenya (Act No. 4 of 1995) as amended by the *Arbitration (Amendment) Act*, 2009 (Act No. 11 of 2009) or other Act or Acts for the time being in force in 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 the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one 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."

13. It is also common ground that the process went on smoothly and that a Final Arbitral Award was made by the Arbitrator, Mr. Ali Mandhry, on 18th December 2020. Moreover, the applicant has filed, along with his application a certified copy of their Arbitral Agreement as well as a Certified true copy of the Final Award (as Annexure OKS-14(c)). Clearly therefore, the application has merit. Indeed, Rule 6 of the *Arbitration Rules*, does recognize that:

> " 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." (emphasis supplied)

14. I note however that a half-hearted attempt was made by the respondent to challenge the aspect of the Final Award by which he was ordered to pay the Arbitrator's fees in the sum of Kshs. 510,000/=. Half-hearted because no application was filed by the respondent either for the setting aside of the Final Award under Section 35 of the *Arbitration Act* or for refusal of recognition under Section 37 of the Act. It is now well settled that unless the Court is approached as envisaged by the *Arbitration Act*, it has no mandate to intervene in the arbitral process whether on costs or otherwise; for in Section 10 of the *Arbitration Act* is the stipulation that:

> " Except as provided in this Act, no court shall intervene in matters governed by this Act."

15. And, in *Anne Mumbi Hinga vs Victoria Njoki Gathaara* [2009] eKLR, the Court of Appeal restated this legal position thus:

> " We therefore reiterate that there is no right for any Court to intervene in the arbitral process, or in the award, except in the situations specifically set out in the *Arbitration Act* or as previously agreed in advance by the parties..."

16. Similarly, in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR the Court of Appeal held that:

> " Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."

17. Counsel for the applicant likewise made reference to additional persuasive decisions by the High Court in this connection, notably, Golden Homes (Management) Limited v Mohammed Fakruddinn Abdullai & Another (*supra*) on this point. In the premises, the feeble protestations by the respondent in respect of the order for the payment of the Arbitrator's fees by him are misplaced.

18. In the light of the foregoing, I find merit in the application dated 30th June 2021. The same is hereby allowed and orders granted as hereunder:

    (a) That the Final Arbitration Award made by Ali Mandhry (Arbitrator) on 18th December 2020 be recognized, adopted and enforced as a Decree of this Court;

    (b) That costs of the application be borne by the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2022.

OLGA SEWE

JUDGE