



**Alibhai & another v Osotua Villas Limited (Miscellaneous Case E917 of 2021)  
[2022] KEHC 15977 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15977 (KLR)

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

**MISCELLANEOUS CASE E917 OF 2021**

**A MABEYA, J**

**NOVEMBER 25, 2022**

**IN THE MATTER OF THE ARBITRATION ACT, 1995 (AS  
AMENDED)**

**IN THE MATTTTER OF: THE ARBITRATION RULES, 1997**

**AND**

**IN THE MATTER OF A DISPUTE**

**BETWEEN**

**ARSHAD SHAMSUDIN ALIBHAI ..... 1<sup>ST</sup> APPLICANT**

**NAFISA ARSHAD ALIBHAI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**OSOTUA VILLAS LIMITED ..... RESPONDENT**

**RULING**

1. The application before court was brought by way of chamber summons and was dated November 30, 2021. It was brought under sections 36(1) and (3) of the *Arbitration Act*, 1995 and rules 4(1), (2) and 9 of the *Arbitration Rules 1997*.
2. The application sought orders that the arbitral's final award dated August 10, 2021 be recognized and enforced as an order of the court.
3. The grounds for the application were set out on the face of it and on the supporting affidavit of Arshad Shamsudin Alibhai sworn on November 30, 2021. It was averred that the dispute between the parties streamed form the lease agreement dated February 18, 2015 for the purchase of a two-bedroom villa



- erected on LR No 9134/Naivasha. That a dispute arose and was referred to arbitration as per clause 15 of the agreement.
4. It was further averred that an award of Kshs 13 million plus interest from June 7, 2016 claimant's costs of Kshs 652,500/= and tribunal fees of Kshs 959,125/= was made in favor of the applicants. The final award was published on August 10, 2021. That the award had not been set aside or settled.
  5. The respondent filed grounds of opposition dated February 11, 2022. It opposed the application on the grounds that it did not comply with section 36(2) of the *Arbitration Act* ("the Act"). That the documents under section 36 had not been attached to the application. The respondent also opposed the application vide the bulky replying affidavit sworn by Kitili Mbathi on March 18, 2022.
  6. The respondent found fault with the arbitrator on grounds that he refused to allow the respondent to amend its statement of defence and counterclaim out of time thereby denying it a chance to a fair hearing. That he was biased towards the applicants for allowing them to amend their claim thus there was suspicion on his independence and impartiality. That he awarded the applicants interest despite that the same was not pleaded and thereby dealt with a dispute not before him.
  7. The applicants filed a further affidavit sworn by Arshad Shamsudin Alibhai on February 22, 2022. He thereby reiterated the contents of their supporting affidavit dated November 30, 2021.
  8. The application was canvassed by way of submissions. The applicants' submission were dated March 21, 2022 whilst those of the respondents were dated March 22, 2022. The court has considered those submissions as well as the entire record.
  9. Section 36 of the *Arbitration Act* provides as follows: -
    - “(1) An arbitral award, irrespective of the state in which it was made 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) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
      - a. the duly authenticated original arbitral award or a duly certified copy of it; and
      - b. the original arbitration agreement or a duly certified copy of it.
    3. If the arbitral award or arbitration agreement is not made in the english language, the party shall furnish a duly certified 'translation of it into the english language.”
  10. In *Samura Engineering Limited v Don-Wood Co Ltd [2014] eKLR*, it was held: -

“Of course, section 36(1) of the act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the act, and I should add, to the *Constitution*. Section 36(3) of the act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed...”
  11. This court has perused the court file and the application. A copy of the agreement was produced as was the final award contrary to the averments of the respondent. The applicant met the preconditions for



the enforcement of the award. The onus then shifts to the respondent to demonstrate why the award should not be adopted.

12. Section 37 of the act guides the court in determining whether or not it should recognize and enforce an award. The respondent's case is that the application fails to meet the mandatory requirements of section 36 of the act as the necessary documents have not been attached. That argument fails, the court has already found otherwise.
13. The respondent also challenges the award on the grounds that the arbitrator disallowed amendment of defence and filing of a counter-claim out of the time. Section 35(1) of the *act* provides: -

“Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).”
14. No such application has been filed by the respondent for consideration by the court. In any case, it is evident from the pleadings that the arbitrator granted the respondent time by which to amend its statement of defence and file a counter-claim but the respondent failed to comply with the timelines given. The respondent is estopped from claiming that it was denied a chance to fair hearing as it was its own delay that worked against it.
15. Further, this is not an opportunity for the respondent to appeal against the arbitrator's decision on amendment of pleadings. That would amount to an interference with the arbitral process in contravention of section 10 of the act.
16. On the issue of the award of interest, the court has seen the final award. At 8.5, the award lists down the reliefs that were sought by the claimants. Relief no (c) thereof was for interest. It is therefore not true that the claim for interest was not made. Definitely, the arbitrator did not deal with a matter not before him as alleged.
17. Accordingly, the application is found to be merited and is allowed as prayed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A MABEYA, FCI Arb**

**JUDGE**

