



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**COMMERCIAL & TAX DIVISION**

**HCOMMISC E596 OF 2019**

**NANDA PROPERTIES LTD.....APPLICANT**

**VERSUS**

**AMREEK SINGH MUDHER.....1<sup>ST</sup> RESPONDENT**

**NILESH JAYANTILAL KOTEDIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant filed Chamber Summons on 18<sup>th</sup> November 2019 and sought that the Court recognizes and adopts the Final Arbitral award issued on 15<sup>th</sup> August 2018 as binding order of the Court and as a decree of the Court.
2. The parties entered into an Agreement for sale & purchase of shares of 9<sup>th</sup> May 2008. A dispute arose and in accordance with **Clause 20.8** of the said Agreement contains an Arbitral agreement, the dispute was referred to Arbitration.
3. The Arbitrator heard and determined the dispute and published the Final Award on 15<sup>th</sup> August 2018.
4. The Hon. Arbitrator in the Final Award provided that the Respondents were to pay the Applicant the Arbitral Award within 21 days. The said period has since lapsed.
5. The Respondent has not challenged the Award either on appeal against the Final Award or sought order of setting aside the Final award or opposed the Final Award in any way.
6. The Applicant annexed to the Chamber Summons;
  - a) Agreement of 9<sup>th</sup> May 2008 signed on all pages with Clause 20.8 the Arbitration Clause
  - b) Final Award of 15<sup>th</sup> August 2018
7. The Respondent filed Grounds of Opposition on 23<sup>rd</sup> January 2020 and deposed as follows;
  - a) The Chamber Summons is not tenable in law as it has been brought in breach of express mandatory provisions of law.
  - b) The Award of 15<sup>th</sup> August 2018 contains decisions on matters beyond the scope of the Reference to Arbitration and not falling within the terms for reference to Arbitration.
  - c) The Final Award is in Conflict with public policy of Kenya.

**RESPONDENTS' REPLYING AFFIDAVIT**

8. The 2<sup>nd</sup> Respondent authorized by the 1<sup>st</sup> Respondent swore an affidavit dated 27<sup>th</sup> May 2020 in response to the Applicant's Chamber Summons Application as follows; -
9. That the Final Award dated 15<sup>th</sup> August 2018 contains decisions on matters beyond the scope of the reference to arbitration and goes

beyond the express agreement of the parties. The Award is also in conflict with the public policy of Kenya.

10. The arbitration arose from the Agreement dated 9<sup>th</sup> May 2008 relating to the sale by Respondents to the Applicant of their shares in **Crossfield Securities Limited**. Shortly after the sale, the Company's name was changed to "**ABC Capital Limited**".

11. The Award is in conflict with the public policy of Kenya and ought not to be recognized or enforced by the Court.

12. It is in the interest of justice that the Application be dismissed.

13. The Respondents averred that the Applicant transferred shares to a 3<sup>rd</sup> Party by 20<sup>th</sup> August 2009 as shown by the Annual Return of the Company.

#### **APPLICANT'S FURTHER AFFIDAVIT**

14. The Applicant filed a Further Affidavit sworn by Samuel George Okello dated 3<sup>rd</sup> August 2020 stating as follows; -

a. The transfer of shares is not denied and has been disclosed by the Applicant. The transfer of shares in the renamed ABC Capital Limited, ABC Financial Services Limited, does not in any way affect the Applicant's claim or its right to enforce the Final Award.

b. The claim was by the Applicant herein against the Respondents in the dealings of Crossfield Securities Limited and at no instance was Crossfield Securities Limited a party to the claim either as a Claimant or as a Respondent.

c. The Agreement for the Sale and Purchase of the Shares was entered into between Claimant and the Respondents as such the Claimant has *locus standi* as the Purchaser to seek enforcement of the agreement and final award.

d. The issue of *locus standi* was raised and submitted on by the Respondents during arbitration.

e. The Arbitral Award dated 15<sup>th</sup> August 2018 has not been appealed against or set aside.

#### **APPLICANT'S SUBMISSIONS**

15. The Applicant filed submissions and highlighted several issues for determination.

16. Whether the Final Arbitral Award issued on 15<sup>th</sup> August 2018 should be recognized and adopted. The Applicant submitted that recognition and adoption of an arbitral award is automatic under the provisions of **Section 36 of the Arbitration Act** and can only be refused if the party against whom it is sought is able to satisfy the requirements of **Section 35 or 37 of the Arbitration Act** and the Respondents have not done so.

17. Further, that the Respondents failed to point out the portions of the award they purport to challenge and is in effect inviting the court to sit in appeal of the entire award which is contrary to the principle of finality of arbitration.

18. The Claimant /Applicant in Supplementary submissions confirmed compliance with **Section 36(3) of the Arbitration Act** and filed Final Arbitral Award and Arbitration Agreement annexed to the Chamber Summons the subject of the Application.

19. The **Court of Appeal in Anne Mumbi Hinga –versus- Victoria Njoki Gathara [2009] eKLR** emphasized this point and stated as follows;

**".....the goal of flexibility must yield to – a national policy favoring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straight away. The lesson of Hall Street is that by entering into an arbitration agreement a party necessarily gives up most rights of appeal and challenge to the award in exchange for the virtue of finality of the award."**

20. In **Hall Street Associates LLC Petitioner vs Mazel Inc 552 US- 2008,**

**'The Court observed that permitting enhanced Court review of Arbitration awards 'opens a door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'**

21. Whether the Final Award contains matters beyond the scope of the reference to arbitration. The Applicant submitted that the Respondents have not pointed out which part of the Award is allegedly beyond the scope. **Clause 20.8 of the Agreement** is a general provision which brings under the purview of arbitration any dispute between the parties.

22. The dispute is within the scope of the reference and in terms of the express provisions of the agreement of the parties.

23. On whether the Final Award is in conflict with public policy in Kenya, the Applicant's submission is that the Respondents have not furnished any proof of the alleged illegality or filed an Application under **Section 35 of the Arbitration Act**.

24. The Respondents have not met the threshold that would warrant setting aside the award. In the case of *Continental Homes Limited – versus- Suncoast Investments Limited [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.”***

### **1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS SUBMISSIONS**

25. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Application was brought in breach of the law. The Applicant has/had not filed an award in court as required under **Section 36(3) of the Arbitration Act and Rule 4 of the Arbitration Rules** which is fatal to the Application. Thus, the Application for recognition and enforcement of the Award should be struck out. See; *David Chabeda & Anor vs Francis Inganji [2007] eKLR*

26. The Award **contains decisions on matters beyond the scope of the reference and goes beyond the express agreement of the parties**. The sum of Kshs.4, 831, 292.30 was awarded in respect of “creditors balances due for payment” but for which claim had not yet been made against the company as there was no indemnity against these sums. (See par. 7.2.1 at page 26 of the Award)

27. The Award is vitiated by the Arbitrator’s disregard of the express terms of the Agreement **and the law relating to indemnities**, which disregard took the Arbitrator outside of the scope of the Agreement and reference to arbitration.

28. In the case of *Kenya Sugar Research Foundation versus Kenchuan Architects Limited [2013] eKLR* the court considered this issue and stated as follows; -

***“.....an Arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialized branch of law of agency. He commits misconduct if by his award he decides matters excluded by the agreement....”***

29. Where an Arbitral Award was/is made in breach of the express terms of the contract between the parties, it cannot be recognized or enforced.

30. The **Respondents submitted that the Award was/is in conflict** with the public policy in Kenya. Under the Award, the Applicant was awarded over **Kshs.10, 000, 000** and yet suffered no losses whatsoever. The Award thereby unjustly enriched the Applicant at the expense of the Respondents.

31. It is the Respondents submission that the indemnity at **Clause 8.2.2** was only given in favor of the Applicant (Nanda Properties Limited) and not in favor of the company (Crossfield Securities Limited) even though the company was a party and signatory to the Agreement.

32. Awards that are unjust and unconscionable are against public policy and cannot be enforced or recognized by a court of law. Ringera J. (as he then was) in *Christ For All Nations versus Appollo Insurance Co. Ltd [2002] EA 366* considered the concept of public policy from the prism of Section 35(2)(b)(ii) as follows; -

***“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 is shown that it was either (a). inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of Kenya or (c) contrary to justice or morality.”***

33. The Applicant suffered no loss and yet has been awarded Kshs.10.5 Million under the Award. This is an unjust and unfair award and cannot be recognized or enforced by the court. The Award is offensive to justice and morality as it unjustly enriches the Applicant and impoverishes the Respondent.

### **APPLICANT’S SUPPLEMENTARY SUBMISSIONS.**

34. The Applicant filed supplementary submissions and stated that nothing in the Act prohibits the furnishing of the copies of the Award and the Agreement within the Application for enforcement. Further, that the Applicant has furnished certified copies of the Arbitral Award.

35. In addition, the Applicant submitted that the Arbitrator’s award was confined to the issues that were within the provision of the arbitration clause, which does not exclude any particular grievance or dispute from arbitration.

### **DETERMINATION**

36. **The issue for determination is whether the Final Award should be recognized and enforced as an order of the Court or be set aside.**

37. The Respondent objected to the Application and submitted that **Section 36 (3) Arbitration Act** was not complied with, hence the application is in breach of the law.

38. The Court found that the Applicant filed the Agreement for Sale & Purchase of Shares 86% of issued Share Capital of Crossfield

Securities Limited between Nanda Properties Ltd & Crossfield Securities Ltd which contains the Arbitration Agreement at Clause 20.8 titled Governing Law & Dispute Resolution. The Copy annexed is signed on each page and certified on 15<sup>th</sup> November 2019

39. The Respondent took issue with the fact that the Final Award was not original and/or certified and the Agreement a copy was not certified.

The Applicant also filed Final Award of 15<sup>th</sup> August 2018 in original form as it is dated and signed in black ink in the Arbitrator's hand. Both are annexed to the Chamber Summons 18<sup>th</sup> November 2019.

In Kay Construction Co Ltd vs Attorney General [2015] eKLR; The Trial Court observed;

***“The provisions of Section 36(3) of the Arbitration Act do not specify who is to certify the award or the document and the Sections [65 & 68] of Evidence Act do not apply.”***

40. This Court confirms that the Applicant complied with Section 36 (3) of Arbitration Act by the presentation and attachment of both Final Award in original form and the Arbitration Agreement/Clause housed in the Agreement for Sale & Purchase of Shares.

41. The Respondent took issue with non-compliance of the **Rule 4 & 5 of Arbitration Rules 1997** as follows;

***4. (1) Any party may file an award in the High Court.***

***(2) All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.***

***(3) If an application in respect of the arbitration has been made under rule 3(1) the award shall be filed in the same cause; otherwise the award shall be given its own serial number in the civil register.***

***5. The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.***

42. The Court finds that the Applicant complied with the Arbitration Rules as the Chamber Summons was filed in Court on 18th November 2019 and served to the Respondents way even before the 7 days to the hearing. The Respondent filed Grounds of Opposition on 27th January 2020.

43. Recourse to the High Court against the Arbitral Award is by virtue of **Section 35 of the Act** which provides for the Respondents to file an application for setting aside the Arbitral Award.

**Section 35(3) Arbitration Act** provides;

***An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award.***

44. The Respondent had 3 months from the date of receipt of the Final Award of 15<sup>th</sup> August 2018 to file an application to set aside the Arbitral award. The Respondent failed to file the said application within the requisite period. However, the Applicant filed Grounds of Opposition on 27<sup>th</sup> January 2020.

45. The only other legal basis under the Arbitration Act that facilitates grounds for refusal of recognition or enforcement of the Arbitral Award is Section 37 of the Act. The party that wishes to pursue refusal of recognition and /or enforcement of arbitral award irrespective of which state in which it was made (international arbitral awards) shall furnish proof of any listed grounds under **Section 37 Arbitration Act**.

46. From the above provisions this is a domestic arbitral award and therefore any grounds for setting aside the award ought to have been made under **Section 35 of Arbitration Act**.

47. The Respondents took issue with the Final Award that it contains decisions on matters beyond the scope of the reference and goes beyond the express agreement of the parties. The Respondent's relied on the now famous Airtel Networks Kenya Ltd vs Nyutu Agrovet Ltd [2011] eKLR where the High Court found that the Arbitrator '**expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the realm of contract into the world of tort and damages for negligence**'.

48. Assuming that the Grounds of Opposition are properly on record under the Arbitration Act, the Respondents contend that the Arbitral Award contains decisions on matters beyond the scope of reference to arbitration and deals with a dispute not falling within the terms of reference of Arbitration.

49. The Respondents contended that the Applicant's claim was for Kshs 31,440,857.35 against the Respondents for indemnity. The Arbitrator awarded Kshs 10,504,072.63 made up of 9 items including those outlined from Clause 7.2.1. Creditor's balances due for payment.

50. The Claimant relied on Clause 8.2.2 of the Agreement for sale & Purchase of Shares and that it was the intention of the parties that all claims be paid and that included indemnity.

51. The Respondents further averred that to indemnify the Claimant included any claim which may be made against the Company arising out of all and any trading activity of the Company. With regard to Credit Balances due for payment, the Respondents submitted that no claim was made to the Company and therefore there was no basis for indemnity from Respondents to Claimant.

52. The Arbitrator found that although indemnity normally lies until the promisee has paid the 3<sup>rd</sup> party Claim, but the law; (Paragraph 982 of Halsbury's Laws of England 3rd Edition) also provides where in a contract there is a special provision whose construction has the effect of allowing the right to be enforced before actual loss has been sustained. The Arbitrator found that Clause 8.2.2. of the Agreement, the Respondents undertook to indemnify the Purchaser against any claim which may be made against the Company including such sums as maybe due and owing to any customers of the Company.

53. The Respondents found the extension of scope of the dispute to indemnity and Creditors balances resulted in unjust enrichment to the Claimant /Applicant and impoverished the Respondents. They found the decision of the Arbitrator was contrary to the express terms of contract of Agreement for Sale & Purchase of shares and this was/is contrary to **Section 37(1) (b) (ii) of Arbitration Act**, public policy as spelt out in the landmark case of ***Christ For All Nations versus Appollo Insurance Co. Ltd [2002] EA 366 supra.***

54. Whether there was extension of the scope of the dispute before the Arbitrator or not can be determined by reference to the Arbitration Agreement/Clause in the Agreement executed by the parties. The Court finds that as stipulated in **Clause 20.8 of the Agreement** for Sale & Purchase of Shares provides;

**Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be referred to and finally resolved by Arbitration under the Provisions of Arbitration Act 1995.....The determination of the Arbitrator shall be final and binding upon parties and so far as the law permits, not subject to appeal. Each party agrees to perform and observe promptly and without delay any arbitration award made against it in accordance with its terms.**

55. In ***Open Joint Stock Co Zarubezhstroy Technology vs Gibb Africa Ltd [2017] referred to Fili Shipping Co Ltd vs Premium Nafta Products & Others [2007] UKHL 40, where the Court stated;***

***“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same Tribunal. The Clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from Arbitrator's jurisdiction.”***

56. The above cited cases impact on the content of an Arbitration Clause/Agreement, where it is general as stipulated above it is deemed to include any and all disputes between parties based on the Agreement unless expressly excluded.

57. Therefore, the Arbitrator herein from the Arbitration Agreement/Clause rightly dealt with issue regarding Creditor's balances and indemnity in arriving at the Arbitral sum as they were issues that arose between parties based on the contract and they were not expressly excluded.

58. As regards the issue of whether the Arbitrator's Final Award is contrary to public policy for the reasons that it is unjust, oppressive unfair and punitive; it is contrary to **Article 40 of COK 2010** and in violation of fair administrative and judicial action, The Respondents have not spelt out the exact contravention of the Constitution or written law, the injustice or immorality save for impeachment of the Arbitrator's finding and award in favor of the Claimant/Applicant. The only issue raised is with regard to Article 40 of COK 2010 on breach of Right to Property but this was the substance of the claim before the Arbitrator.

59. The Court's mandate at this stage is limited as follows; ***DP Shapriya & Co vs Bishnit (2003) 3 E.A. 404;***

***“All questions of fact are and always have been within the sole domain of the Arbitrator.....the general rule deductible is that the Court cannot interfere with finding of facts by Arbitrator.”***

60. In the case of; ***Kenyatta International Convention Centre (KICC) vs Greenstar Systems Limited [2018] eKLR*** the court pointed out;

***“... In any event, matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are matters over which only the Arbitrator had jurisdiction to deal; and which this Court would have no mandate to interfere”.***

61. ***Kenya Bureau of Standards vs Geochem Middle East where the Court observed;***

***“Regrettably, this Court does not have authority to make an assessment on merits of the Arbitral award. The jurisdiction of the High Court, when called upon to set aside an award is limited to what is permissible pursuant to section 35 of the Arbitration Act.”***

***See also; Continental Homes Ltd vs Suncoast Investments Ltd [2018] e KLR supra & TCAT Limited vs Joseph Authur Kibutu [2015] eKLR on the same principle.***

62. The totality of the above case-law is that the Court in Arbitration matters is bound by **Section 10 of Arbitration Act**, to deal only with the jurisdiction donated by the Arbitration Act **Sections 35, 36 & 37** with regard to Setting Aside, Recognizing, Enforcing domestic/international Arbitral awards under the Arbitration Act. In this instant, the Arbitrator was within the boundaries of the parties

Arbitration agreement/clause. He did not veer off the dispute before him as presented by parties as the Arbitration Clause did not expressly oust any of the impugned issues dealt with during Arbitration proceedings.

63. The Arbitrator's finding and award of Kshs 10,504,072.63 from the Claimant's claim of Kshs. 31,440,857.35 against the Respondents based on the reasoning that the Clause 8.2.2 implied indemnity from all claims against the Company could be paid by the Respondents cannot be regarded as illegal without specific facts that the Arbitrator either considered extraneous matters not presented before him or he introduced and relied on his own evidence, and not what the parties presented during proceedings. The bone of contention is the Arbitrator's finding and this Court is not on appeal.

64. The construct of the Arbitration Clause/Agreement allowed disputes between parties arising from the executed Agreement. The Arbitrator did not act in manifest disregard of the contract between parties but gave a plausible interpretation of the law with regard to indemnity and Creditors balances. These were issues that were raised during the presentation of the parties claims.

**DISPOSITION**

65. **The Applicant's application of 18<sup>th</sup> November 2019 to recognize and adopt the Arbitral award of 15<sup>th</sup> August 2018 is Granted.**

66. **The Respondents grounds of opposition brought under Section 37 of the Arbitration Act are dismissed.**

67. **Each party to bear own costs.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 24<sup>TH</sup> JUNE 2021(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. OWINO FOR THE APPLICANT**

**MR SARVIA FOR THE RESPONDENT**

**COURT ASSISTANT – TUPET**

**MR. SARVIA:** I have instructions to apply for leave to appeal.

**COURT:** The formal Application shall be filed.

The Respondent shall have Certified copies of proceedings and Ruling upon payment of requisite fees. Stay of execution granted for 30 days.

**M.W. MUIGAI**

**JUDGE**