



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MISC. CIVIL APPLICATION NO. E209 OF 2021**  
**IN THE MATTER OF THE ARBITRATION ACT, 1995**  
**AND**  
**IN THE MATTER OF A DISPUTE**  
**BETWEEN**  
**RUPRA CONSTRUCTION COMPANY LIMITED.....CLAIMANT**  
**-VERSUS-**  
**LONGONOT PLACE LIMITED.....RESPONDENT**  
**RULING**

1. Before me for consideration and determination are two (2) applications and a notice of preliminary objection. The first is the Chamber Summons dated 6<sup>th</sup> May, 2021 (hereinafter referred to as “the first application”) brought by the claimant and supported by the grounds laid out in its body and the facts stated in the affidavit of **Joginder Singh Rupra**, the director of the claimant. Here, the claimant sought for the recognition and enforcement of the arbitral award made and published by the sole arbitrator (Mr. Emmanuel O. Odhiambo) on 10<sup>th</sup> December, 2020.

2. To resist the first application, the respondent put in Grounds of Opposition dated 23<sup>rd</sup> June, 2021.

3. The Notice of Motion dated 25<sup>th</sup> May, 2021 (hereinafter referred to as “the second application”) was brought by the respondent and is supported by the grounds present on its face and the facts stated in the affidavit of **Judy Wanjiku Njuguna**, General Manager of the respondent. Therein, the respondent sought for the orders hereunder:

**i. Spent.**

**ii. THAT this Honourable Court be pleased to extend time within which the applicant/respondent (“the respondent”) was required to file the application setting aside part of the award dated 10<sup>th</sup> December, 2020 to exclude the period between 10<sup>th</sup> December, 2020 and 1<sup>st</sup> April, 2021.**

**iii. THAT the application for setting aside part of the award dated 10<sup>th</sup> December, 2020 be deemed to have been filed within time and/or in compliance with the time fixed by Section 35(3) of the Arbitration Act.**

**iv. THAT part of the award dated 10<sup>th</sup> December, 2020 and published on 1<sup>st</sup> April, 2021 awarding the respondent (“the claimant”) the sum of Kshs.167,105,197.87 and ultimately awarding the claimant the net sum of Kshs.78,153,206.87 together with interest, in the arbitral proceedings between the parties herein be set aside.**

**v. THAT as a result of setting aside of the award of Kshs.167,105,197.87 ordered in favour of the claimant, the award made in favour of the respondent for the sum of Kshs.88,951,991/ be confirmed.**

**vi. THAT following the orders hereinabove, part of the award together with the adjustment in favour of the respondent be recognized and enforced as a judgment of the court in the following terms:**

- a. That it be and is hereby determined that the claimant did not proceed regularly and diligently with the works, accruing the respondent the right to terminate its contract with the claimant.
- b. That it be and is hereby determined that the respondent was entitled to terminate its contract with the claimant and that the respondent followed the termination procedure in clause of the Joint Building Council Contract.
- c. That the claimant do pay to the respondent the sum of Kshs.88,951,991/.
- d. That the claimant do pay to the respondent interest in the sum of Kshs.88,951,991/ at the rate of 12% per annum from 10<sup>th</sup> December, 2020 being the date of the award until payment in full.
- e. That costs of the arbitration be borne by the claimant.

4. The claimant filed the notice of preliminary objection dated 7<sup>th</sup> June, 2021 to challenge the second application for being time barred by dint of the provisions of Section 35(3) of the Arbitration Act (“the Act”).

5. The two (2) applications and the preliminary objection were canvassed by written submissions followed by brief oral highlights by the parties’ respective advocates.

6. I have considered the grounds set out on the face of the respective applications; the facts deponed in the respective supporting affidavits; the Grounds of Opposition; the preliminary objection; and the contending submissions plus authorities cited.

7. A background of the matter in brief is that the parties entered into a contractual agreement where the claimant was to undertake renovation works at the respondent’s apartments situated along Kijabe and Harry Thuku Road on L.R. No. 209/9523 Nairobi (“the property”).

8. A dispute ensued between the parties and the same was referred for arbitration, with Mr. Emmanuel O. Odhiambo being appointed as the sole arbitrator to handle the dispute. The arbitral proceedings commenced and finally, the arbitrator made his award on 10<sup>th</sup> December, 2020 by awarding the claimant the sum of Kshs.78,153,206.87 together with interest at the rate of 12%p.a.

9. It is appropriate to first address the preliminary objection.

10. The claimant on its part urged this court to strike out the second application for being time barred and cited *inter alia*, the case of **University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR** in which the court rendered itself thus:

**“For that reason delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.”**

11. The claimant further submits that there is no provision for extension of the time within which to file an application seeking to set aside an arbitral award and hence this court has no jurisdiction to entertain the second application.

12. The respondent on its part states that following the arbitral award made on 10<sup>th</sup> December, 2020, the parties herein were engaged in negotiations with the arbitrator regarding his fees and that the arbitrator only released the award on 1<sup>st</sup> April, 2021 upon payment of his reviewed fees.

13. The respondent further submits that the time ought to run from the date on which the award was received by the party seeking to challenge it.

14. Reference is made to the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** cited in the submissions by the respondent, where the court defined the term ‘preliminary objection’ in the following manner:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”**

15. On the subject at hand, the relevant provision is **Section 35 (3) of the Act** which expresses the following:

**“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, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.”**

16. Upon my perusal of the record, it is not in dispute that the arbitral award was made on 10<sup>th</sup> December, 2020 and a notification of the same was issued, with the arbitrator indicating that the award would be made available to the parties upon payment of his fees amounting to Kshs.8,502,400/=.

17. The record shows that subsequently, the arbitrator by way of various correspondences reviewed his fees downwards, finally agreeing to the sum of Kshs.5,000,000/= to be shared equally between the parties, by way of the letter dated 22<sup>nd</sup> February, 2021. It is apparent that the agreed upon fees was subsequently paid sometime on or about March, 2021.

18. The record also shows that an enquiry was made on 31<sup>st</sup> March, 2021 by way of email to follow up on availability of the award to which the arbitrator responded by stating that the award would be available the next day upon confirmation of payment.

19. In view of the foregoing, I am satisfied that the time would begin to run from 1<sup>st</sup> April, 2021 as indicated by the respondent and since the second application was brought sometime on or about the 25<sup>th</sup> day of May, 2021, the same was filed within the timelines stipulated under **Section 35(3)** (supra) and is therefore not time barred as claimed by the claimant.

20. Consequently, the preliminary objection dated 7<sup>th</sup> June, 2021 Is found to be without merit.

21. This brings me to the second application. Having determined that the same was filed within the stipulated timelines, orders (ii) and (iii) of the second application shall remain as spent.

22. It is noted that the pending issue for determination is essentially whether the arbitral award ought to be set aside.

23. The respondent states that the arbitral award contains errors of law and fact for the reasons that the arbitrator inflated the sums awarded to the claimant and further awarded sums for works not pleaded or proved by the claimant.

24. The respondent also faulted the arbitrator for awarding reliefs which were not sought in the claim, thereby making the award contrary to public policy.

25. It is also the averment and submission of the respondent that despite finding that it had lawfully terminated the agreement with the claimant, the arbitrator did not award any damages for loss suffered.

26. The respondent further submits that the award defies logic and that the arbitrator went beyond the scope of his mandate, and hence the award ought to be set aside.

27. In reply, the claimant submits that the arbitral award was properly and reasonably made, and hence there is no basis to have it set aside.

28. **Section 35 (2) of the Act** provides as follows:

**“An arbitral award may be set aside by the High Court only if—**

...

**(b) the High Court finds that—**

...

**(ii) the award is in conflict with the public policy of Kenya.”**

29. The respondent is basically challenging the award for the reason of being contrary to public policy. In the case of **Christ for All Nations V Apollo Insurance Co Ltd, Nairobi HCCC No. 477 of 1999** cited in the claimant’s submissions, the court rendered itself inter alia as follows:

**“... I take the view that although public policy is a most broad concept incapable of precise definition...an award will 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 it was either (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...”**

30. **Section 39 of the Act** provides that:

**“(1) Where in the case of a domestic arbitration, the parties have agreed that—**

**(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or**

**(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.**

**(2) On an application or appeal being made to it under subsection (1) the High Court shall—**

**(a) determine the question of law arising;**

**(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.”**

31. Upon my perusal of the pleadings and the material contained on the record, there is no evidence to indicate that the arbitrator contravened public policy or acted outside the scope of his mandate.

32. I am satisfied that the award made by the arbitrator is supported by the pleadings which were placed before him. Furthermore, concerning the claim for loss by the respondent, upon my perusal of its counterclaim, I note that no such relief was sought and hence the arbitrator was not obligated to make any such award in damages.

33. In the end, I am of the view that the respondent has not brought any credible evidence to warrant the setting aside of the arbitral award in question. Consequently, the second application is without merit, the same is dismissed with costs to the claimant.

34. The first application concerns itself with the enforcement and recognition of the arbitral award.

35. The claimant on the one part is of the view that since the arbitral award has not been set aside or challenged on appeal, it would be in the interest of justice for the orders sought to be granted. The respondent on the other hand is of the submission that the orders sought ought to be rejected.

36. Section 36(1) of the Act stipulates as follows:

**“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.”**

37. Further to the foregoing, Section 36(3) of the Act is clear that:

**“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”**

38. I have looked at the final award annexed to the first application and I am satisfied that it conforms to the requirements set out hereinabove.

39. In the absence of any credible proof by the respondent as to why the arbitral award should not be enforced and recognized, as indicated above, I find no basis to decline to grant the orders sought in the first application.

40. Accordingly, the following orders are hereby made:

**a. The Chamber Summons dated 6<sup>th</sup> May, 2021 succeeds as prayed and the claimant herein is granted leave of the court to enforce the arbitral award made on 10<sup>th</sup> December, 2020 by the Arbitrator Emmanuel O. Odhiambo. The claimant shall have costs of the Summons.**

**b. The Notice of Motion dated 25<sup>th</sup> May, 2020 is hereby dismissed with costs to the claimant.**

**c. The preliminary objection dated 7<sup>th</sup> June, 2020 is hereby dismissed with no order on costs.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Claimant

..... for the Respondent