Junction Apartments Limited v C.M Construction (E.A) Ltd & another (Commercial Civil Case E030 of 2021) [2021] KEHC 429 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)

Neutral citation: [2021] KEHC 429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CIVIL CASE E030 OF 2021

MW MUIGAI, J

DECEMBER 17, 2021

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF ARBITRATION OVER THE CONSTRUCTION AND COMPLETION OF EIGHTY (80) RESIDENTIAL APARTMENTS KNOWN AS "RIARA JUNCTION APARTMENTS" ON DAGORETI/RIRUTA/6608 ALONG DAGORETI/WANYEE ROAD

BETWEEN

JUNCTION APARTMENTS LIMITED ..... APPLICANT

AND

C.M CONSTRUCTION (E.A) LTD ..... 1ST RESPONDENT

STEVE OUNDO ..... 2ND RESPONDENT

RULING

BACKGROUND

NOTICE OF MOTION

1. By a Notice of Motion dated 13th January,2021, the Claimant/Applicant seeks the following orders:-

    1. Spent

    2. THAT there be a stay of execution of the arbitral award published on 14th December, 2020 by the 2nd Respondent pending the hearing and determination of this application.

3. THAT the Court sets aside the Arbitral Award herein dated 14th December, 2020 and published by the 2nd Respondent.

4. THAT the arbitration commences and is heard before a different Arbitrator appointed in accordance with the parties Agreement that is more competent and suited to determine the dispute between the parties.

5. THAT costs incurred by the Claimant/Applicant in the Arbitration before the 2nd Respondent be met and refunded to the Applicant by the 2nd Respondent.

6. THAT the costs of this application be provided for.

2. The application is supported by the Affidavit of Sharon Wanyee sworn on the same day as the application whose averments the court has considered.

1ST RESPONDENT'S PRELIMINARY OBJECTION

3. The Preliminary Objection dated 25th March, 2021, the 1st Respondent states that the Court lacks jurisdiction to deal with the matter herein on grounds that:-

i. That this suit and the application founded on it are fatally defective in law and irredeemably incompetent as they offend the provisions of Sections 10 and 35 of the *Arbitration Act* and are thus outside the realm of Arbitration law and practice.

ii. That the defect is fundamental and strikes at the very core of this Court's jurisdiction and is incurable under Article 159 (2) of the Constitution.

2ND RESPONDENT'S PRELIMINARY OBJECTION

3. That the 2nd Respondent's Preliminary Objection dated 22nd February, 2021 is premised on the grounds that as per Section 16B of the *Arbitration Act* No. 4 of 1995; no suit can be filed against an Arbitrator, the 2nd Respondent, for acts done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator.

GROUNDS OF OPPOSITION

4. The Claimant/Applicant opposed the Preliminary Objection dated 25th March, 2021 on grounds inter alia that:-

1. The Preliminary objection offends the entirety of the provisions Order 2 rule 15 of the Civil Procedure Rules and ought to be struck out in its entirety for the following reasons:-

a. it discloses no reasonable cause of action or defence in law; or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is an abuse of the process of the court.

2. The matter filed by the Claimant before this Court for hearing and determination on merit falls firmly within the scope of section 35 of Act.

3. The following question before the Court cannot be determined without tendering of factual evidence, these are whether or not the arbitral award:

    a. dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration;

    b. was induced or affected by fraud, bribery, undue influence or corruption; and

    c. is in conflict with the public policy of Kenya can only be determined upon the hearing of the main application on its merit as filed by the Claimant.

CLAIMANT SUBMISSIONS

5. As observed in the above cases a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

6. Any question, which claims to be a preliminary objection, yet it bears factual aspects and conflicting positions that calls for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as preliminary point. Anything that purports to be a preliminary objection derive its foundation from factual information which stands to be tested by normal rules of evidence.

7. In respect to the 2nd Respondent's Preliminary Objection, whether the Arbitrator acted in good faith and is as a result immune to any claim brought against him by a party to the arbitration agreement, is an issue of fact that has to be determined after the court has had the opportunity to hear all the parties and examine the evidence tendered before it. It is only in absence of proof of bad faith or fraud that an Arbitrator enjoys immunity from civil liability.

8. As was held by Shah, JA. in *John Gitata Mwangi and 3 Others –vs- Jonathan Njuguna Mwangi and 4 Others* Civil Appeal No. 213 of 1997.

9. In the case of *National Cereals & Produce Board –vs- Erad suppliers & General Contracts Limited* [2014] the Court of Appeal had the following to say in respect of the nature of the court process for setting aside an arbitral Award.

> " in order to arrive at a decision whether an arbitral award was induced or effected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction. That view of the matter accords with the definition of the phrase 'original jurisdiction' in Black's Law dictionary 4th Ed. Rev. 61971 where it is defined thus: "jurisdiction in the first instance; jurisdiction to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts".

10. In addition to the foregoing, Arbitrators are experts whose liability should be based upon the terms of their appointment agreement with the parties. As was held in *Norjarl –vs- Hyundai*, [1991] 1 Lloyd's Rep. at 536 by consenting to act as an Arbitrator, an individual impliedly becomes a third party to the parties' original arbitration agreement. The court further added that:-

    a. "Arbitration agreement is a bilateral contract between the parties to the main contract. On appointment the arbitrator becomes a third party to the arbitration agreement which becomes a trilateral contract."

11. The upshot of all these provisions is that while enforcing rules of procedure, the court should not lose sight of the bigger picture; the court's mission to render substantive justice. The Court of appeal has addressed the issue in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others* [2018] eKLR.

12. Indeed; as was observed by the Supreme court in the case of *Independent Electoral & Boundaries commission –vs- Jane Cheperenger & 2 Others* [2015] eKLR the court held that:

    a.

    "It is distinctly improper for a party to resort to the preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

1ST RESPONDENT SUBMISSIONS

13. The 1st Defendants Objection is based on the interpretation of this court's jurisdiction under Section 35 as read together with section 10 of the *Arbitration Act* and the rules made thereunder. To put these sections in context, we start at Section 32A which provide that:

    " Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the matter provided by this Act" [emphasis added].

14. There is no dispute that the Plaintiff and the 1st Defendant do not have any contrary agreement regarding the finality and the binding nature of the award on them and that the only recourse against the award is as provided under Section 35 of the Act which provide inter–alia that:-

    " Application for setting aside arbitral award.

    Recourse to the High Court against an arbitral award may be made only by application for setting aside the award under sub-sections (2) and (3) ..." [Emphasis added].

    Rules 4 and 7 of the Arbitration Rules, 1997 provide that:-

    Rule 4(1) "Any party may file an award in the High Court

    i. (2) All application subsequent to the 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" ..." [Emphasis added].

15. In speaker of the *National Assembly vs. Karume* [2008] KLR 425, the Court of Appeal laid down the principal that

> " where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of parliament, the procedure should be strictly followed" ..." [Emphasis added].

16. In *Zacharia Okoth Obado –vs- Edward Akongo Oyugi & 2 others* [2014] eKLR, the Supreme Court at paragraph 37 of the judgment quoted with approval the dictum of Kiage J.A. in *Nicholas Kipto Arap Koris Salat vs. IEBC and 6 others* [2013] eKLR that:-

> i. "....I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to do substantial justice in an efficient proportionate and cost effective manner and eschew defeatist technicalities were meant to aid in the overthrow or destruction of rules of procedure and to create anarchical free for all in the administration of justice..."

2ND RESPONDENT SUBMISSIONS

17. The Supreme Court again reconsidered the position of parties resorting to the use of Preliminary Objections and pronounce itself as follows in the case of Independent Electoral & boundaries Commission –vs- Jane Cheperenger & 2 others [2015] eKLR where it was held that:

> " The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits. [Emphasis ours].

ARBITRATOR'S IMMUNITY

18. It was submitted that the question that follows is whether the above allegations can impeach an Arbitrator's immunity as provided for by the law.

19. Section 16B of the *Arbitration Act* states as follows:-

> " An Arbitrator shall not be held liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator."

20. According to the 2nd Respondent, the concept of arbitral immunity stems from judicial immunity. It has been argued that judicial immunity does not simply exist to protect the individuals who hold judicial officer rather it exist for a broader purpose that is to protect litigants and the litigation process by ensuring judicial independence and decision finality. It is means to an end, not an end in itself. This purpose requires, therefore, that persons who perform judicial like functions to also be protected from liability which ensures that they are free from fear of liability and harassment which allows them to excise their responsibilities with complete impartiality and independence.

21. *Lord Salmon in Sutcliffe –vs Thackerah* (1974) AC 727 stated as follows:

> " It is well established that judges, barristers. Solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in courts during the course of a trial. This is not because the law regards any of these with special tenderness but because the law recognized that, on a balance of convenience, public policy demands that they shall all have such an immunity.....the immunity which they enjoy is vital to the efficient and speedy administration of justice.
>
> Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognized that public policy requires that they too shall be accorded the immunity to which I have referred.

22. According to the 2nd Respondent's advocate, what the claimant alleges to be grounds why the arbitrator, based on alleged non-disclosure, which fact is denied are:-

a. Bias by the Arbitrator in favour of the 1st Respondent, based on alleged non-disclosure, immunity fact is denied.

i. This claim cannot hold as the Arbitrator duly disclosed his relationship with the Project Architect and the Claimant has provided this letter indicating that the Arbitrator had fulfilled his duty to disclose.

ii. Even if the Arbitrator did not so disclose, it is our submissions that failure of the Arbitrator's duty to disclose does not render him liable to a suit for damages or refund of Arbitral fee as he is still shielded by immunity. Reference is made to the Texas court of Appeal case of Michael Pullara vs. American Arbitration Association where the court had the following to say:

> "The doctrine of arbitral immunity emanates from judicial immunity. Judicial immunity provides judges with absolute immunity for their judicial acts."

iii. Our *Arbitration Act* under Section 35 (2) gives fraud, bribery, undue influence or corruption as grounds for setting aside the Arbitral Award. The Claimant therefore, need not to sue the Arbitrator, if it alleges bias, as the same can be used to demand setting aside of the Arbitral Award by the Court.

b. The Claimant states that by virtue of failing to deliver the Award in a timely manner, the Arbitrator has breached has breached his contract with the parties. The allegation cannot hold as the Arbitrator duly delivered his Award in a timely manner and we refer the court to paragraph 12(g), (h) (i) and (j) above. Further,

the concept of statutory immunity covers any claims in contract or tort as Russel on Arbitration.

c. The Claimant states that the Arbitrator failing to render a complete award, which is denied, as advanced by the Claimant does not give rise to reasons for limiting an Arbitrators immunity, as this amounts to an attack on the substance of the award itself.

23. According to the 2nd Respondent, the question of bias, delay in delivering an Award or failure to render a complete Award do not amount to attacks on the jurisdiction or functional capacity of the Arbitrator. They amount to challenges on the Award itself. Once an Arbitrator has rendered an award, he becomes functus officio and the proper challenge which the claimant should have mounted is for the Arbitral award to be set aside as provided for under Section 35 of the *Arbitration Act*, not to drag the Arbitrator to Court.

DETERMINATION

24. I have considered the Notice of Motion herein, the 1st and 2nd Respondents Preliminary Objections, the Claimant Grounds of opposition and the written submissions filed on behalf of the respective parties.

25. The court's view is that the sole issue for determination is whether the Preliminary Objections dated 25th March, 2021 and 22nd February, 2021 filed by the 1st and 2nd Respondents respectively have merit, and should be allowed.

26. The Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd.* (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

> Law, JA.:
>
> "...a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
>
> Newbold, P.:
>
> "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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

27. In *David Nyekorach Matsanga & Another vs. Philip Waki & 3 Others* [2017] eKLR, the three Judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

> " 37. Much more recently, the Supreme Court again reconsidered the position of parties resorting to the use of Preliminary Objections and pronounced itself

as follows in the case of Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others [2015] eKLR.

> "[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."[Emphasis ours]
>
> [38] The Supreme Court thus laid it clear that the focus ought to be both the purpose as well as the nature of the Preliminary Objection. If it will serve the public purpose of sparing the sparse judicial time and also militate against profligate deployment of time and other resources then the court ought to entertain the Preliminary Objection. Of course, there is also the rider and caution that disputes are better off being resolvedjudicially, than summarily."

28. The Supreme Court in Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others (supra) held that:-

> " [16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).

29. According to the 1st Respondent, the application dated 15th January, 2021 offends provisions of Section 10 and 35 of the *Arbitration Act*, 1995.

30. Section 10 of the same Act provides that:-

> " 10. Extent of court intervention
>
> Except as provided in this Act, no court shall intervene in matters governed by this Act."

31. While Section 35 provides that:-

> "PART VI – RECOURSE TO HIGH COURT AGAINST ARBITRAL AWARD
>
> 35. Application for setting aside arbitral award
>
> (1) 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).

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

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

32. The 1St ground of objection is this suit and the application founded on it are fatally defective in law and irredeemably incompetent as they offend the provisions of Section 10 & 35 of *Arbitration Act*. The Applicant filed Certificate of Urgency, Notice of Motion, Supporting Affidavit and a Plaint on 13th January 2021. The Respondent took issue with the pleadings filed as they do not conform to Rule 4 (2) of Arbitration Rules 1997 that provides;

> 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.

> The Court finds that the pleadings ought to conform to filing of Summons. Order 8, Rule 3 CPR 2010 provides;
>
> .....the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
>
> The Applicant is granted leave to file Summons and serve the Respondents who are at liberty to amend their pleadings if need arises before the hearing of the substantive matter by the Trial Judge.

33. The 2nd Respondent ground of objection is premised on Section 16B (Immunity of Arbitrator) of the *Arbitration Act* No.4 of 1995 that no suit can lie against an Arbitrator for acts done or omitted to be done in good faith in the discharge or purported discharge of his functions as an Arbitrator.

34. The Claimant asserts that the issues in this matter firmly falls within the scope of Section 35 of the *Arbitration Act* and the objections do not deal with pure points of law. According to the Claimant, the objections cannot be determined without delving into the facts of the matter and the evidence tendered before the court.

35. The Court's view is that the application is premised on issues that fall within the realm of Section 35 of the *Arbitration Act* and not necessarily suing the Arbitrator but by highlighting issues regarding the Arbitration process and/or outcome that result in either the hearing of a dispute not contemplated by the parties, or the award was induced or affected by fraud, bribery, undue influence or corruption or the process and outcome of Arbitration are contrary to public policy.

36. The parties made their choice of forum for dispute resolution as Arbitration. They freely negotiated the mode of appointing the Arbitral Tribunal, the venue, the dates, the procedures and the process as provided by the *Arbitration Act*. They condensed their choice into the Arbitration Agreement/Clause which binds their choice and actions during arbitration proceedings.

37. The resultant Arbitral Final Award can only be challenged under Section 35 of the *Arbitration Act* which mandates the Applicant, the party making the application in /to the High Court furnishes proof of either of the grounds set down for setting aside the arbitral award. The aggrieved party ought to tender evidence as proof and bring itself within the legal bounds of Section 35 of the Act for the Court to exercise its jurisdiction under the Act. The prerequisites of Section 35 of the Act require evidence, that the Arbitrator failed to act in good faith and the award ought to be set aside but not suing the Arbitrator directly in a civil claim in the same proceedings. In other words, the allegations made against the Arbitrator upon proof are to support setting aside of the award but not suing the Arbitrator in the same proceedings. The grounds set out for setting aside in the Act are issue-based and not personality -based.

38. This Court therefore finds that although the Arbitrator enjoys immunity ascribed by Section 16B of *Arbitration Act*, the claims/allegations made against the Arbitrator are subject to proof of whether the Arbitrator acted in good faith or not and to buttress setting aside the arbitral award. This calls for evidence and cannot be curtailed at the Preliminary Objection stage.

39. The 2nd Preliminary Objection cannot be considered without delving into the facts of the matter before court.

DISPOSITION

a. The 1st and 2nd Respondent's preliminary objection of 20th March, 2015 lack merit and are disallowed.

b. The applicant shall amend pleadings and respondents shall have corresponding leave to amend pleadings 30 days each.

c. The substantive matter shall be heard in any Court within the Commercial & Tax Division.

d. Costs shall be in the cause.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2021 (VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE