



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISC CASE NO.E 158 OF 2019**

**IN THE MATTER OF ARBITRATION PROCEEDINGS**

**BETWEEN**

**PANESTATE DEVELOPMENT LIMITED.....APPLICANT**

**- AND -**

**MAKAAZI MANAGEMENT COMPANY LIMITED..... RESPONDENT**

**RULING**

1. Parties, in this matter entered into a lease agreement dated **12<sup>th</sup> May 2017** whereby the respondent (hereinafter Makaazi) leased 52 two bedroom apartments and 24 one bedroom apartments, situated at Rose Garden Apartment erected on L.R. No. 209/6888. The term of the lease was five (5) years and (one) 1 month.

2. I will begin by stating that parties are bound by their pleading. This is trite. In this regard let me refer to the case **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) eKLR** where **Justice A.C. Mrima** stated:

“Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

3. I begin by stating the obvious, that parties are bound by their pleadings, because the applicant (hereinafter Panestate) deviated from its – pleadings in its submission. The court will not consider that deviation because that will be unfair/unjust to Makaazi.

4. Panestate has brought before court Notice of Motion application dated 10<sup>th</sup> May 2019. By it, it is sought that the Award published by the arbitrator Patterson M. Kamaara on 11<sup>th</sup> April 2019 be set aside. It is premised on the following grounds:

“That the arbitrator published the award dated 11<sup>th</sup> April 2019 in which he dismissed the applicants claim therein directed the applicant to pay the respondent 10,680,000/= only being a refund of the deposit paid by the Respondent pursuant to the Lease Agreement;

That in the award published on the 11<sup>th</sup> April 2019, the Arbitrator failed to consider all issues raised by the parties and admissions made by the Respondent;

That in the said Award, the Arbitrator considered issues which had not been raised in the parties pleadings therefore determining issues beyond his jurisdiction as provided by the parties.

That the said award is contrary to public policy as:

- a. It infringes on the Applicant's rights to property under Article 40(1) of the constitution 2010 and S. 66(1)(a) and (c) of the Land Act, 2012 and;
- b. It allows a tenant to occupy the property without paying rent which is inimical to the applicant's business interests and the law.

That the 2<sup>nd</sup> Respondent was unfair and biased in favour of the Respondent;

That the Applicant will suffer immense prejudice should the Award published on the 11<sup>th</sup> April 2019 not be set aside and

It is in the interests of justice that this Application be allowed."

5. Panestate by the affidavit in support expounded the above grounds. It began by making a broad statement that the arbitrator was biased in favour of Makaazi. It went to say that it seeks setting aside of the award on the ground the arbitrator failed to consider the issues raised by it and gave the particulars as follows:

- a. the 1<sup>st</sup> Respondent's admission that it had used the said apartments and wished to pay rent thereof;
- b. that the Applicant herein did everything in its power to correct or rectify any issues raised by the Respondent despite that the said issues had been raised in a manner not compliant with Clause 14 of the Lease Agreement; and
- c. the delay in the handover of the property was caused by circumstances beyond the Applicant's control.

6. I have perused the parties pleadings, before the arbitrator and I have also perused the Award. Nothing in those documents supports Panestate's contention that Makaazi made an admission that it wished to pay rent. It was a controversy before the arbitrator with regard to when possession was given. This is what the arbitrator found was proved:

**"Evidence shows that they (Panestate) could not hand over possession on 15<sup>th</sup> June 2017 because the demised premises were not complete."**

7. The arbitrator proceeded to find Panestate was in breach. That was a finding of fact by the 'master of facts.'

8. Panestate also stated the arbitrator considered issues which were not raised in the parties pleadings and that he went beyond the scope of determination. There was no elaboration of this statement in the application or affidavit in respect to that statement. I do concur with the submissions on behalf of Makaazi that the arbitrator considered the evidence adduced before him together with the documents presented by the parties. The arbitrator cannot be faulted as Panestate attempts to do in that regard.

9. Panestate seeks the setting aside of the award on the ground the award was contrary to public policy. It argued that the award allowed the tenant (in this case Makaazi) to assume possession of the property without paying rent. As stated before, it was the arbitrator's finding of fact that Panestate was in breach of contract. In so doing arbitrator found that it failed to furnish the property as agreed and that there was incomplete construction of work.

10. The award in my view cannot be faulted, as Panestate seeks, under the constitutional provision of Article 40.

11. I have considered on the whole the arbitrator's very well reasoned award and I fail to see that his award can be faulted as Panestate seeks. Panestate also failed to demonstrate bias on arbitrator's part. Perhaps the statement made in the case **Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited** where the words of **Justice Ringera** (as he then was) were repeated is apt in this matter. Panestate needs to understand that **"Justice is double-edged sword"**. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the laws justice as unjust".

12. The application before me fails to meet the threshold of section 35 of the Arbitration Act. I will again echo the words of Justice Ringera as follows:

**"He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."**

13. The application by **Notice of Motion** dated **10<sup>th</sup> May 2019** is without merit and is dismissed with costs.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **29<sup>th</sup>** day of **APRIL**, 2020.

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**