



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. 255 OF 2012**

**IN THE MATTER OF TAXATION OF PARTY AND PARTY BILL OF COSTS**

**ANDREW STUART.....APPLICANT**

**VERSUS**

**DOROTHY SEYANOI MOSCHION.....RESPONDENT**

**ARISING FROM**

**IN THE MATTER OF THE ARBITRATION ACT**

**AND**

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**TONY MARK TONUI.....CLAIMANT**

**AND**

**ANDREW STUART.....1<sup>ST</sup> RESPONDENT**

**DOROTHY SEYANOI MOSCHION.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a chamber summons dated 8<sup>th</sup> August 2018. It is filed by **DOROTHY SEYANO MOSCHION** (hereinafter Dorothy). Dorothy prays for orders that:

a) The Honourable Court be pleased to review and set aside its proceedings of 25<sup>th</sup> June 2012 and the consequential decree/orders issued on 3<sup>rd</sup> July 2012.

b) Costs of the application be provided

**BACKGROUND**

2. Dorothy is or was (it is not clear what the current position is) the registered owner of property LR No 5892/11 situated in Karen, Nairobi. A dispute between Dorothy, **TONY MARK TONUI** (hereafter Tony) and **ANDREW STUART** (hereafter Andrew) was referred to arbitration before a sole arbitrator Mr. Steven Gatembu Kairu. An award was delivered by the arbitrator on 1<sup>st</sup> September 2011.

3. Tony filed an application seeking to set aside that award under the court file Misc Application No 69 of 2012. That application was dismissed by Justice G.K. Kimondo on 24<sup>th</sup> April 2012.

4. Following that dismissal Andrew on 25<sup>th</sup> May 2012 filed under this file an ex parte chamber summons application seeking enforcement of the arbitration award. The application was heard and determined on 25<sup>th</sup> June 2012. By that determination a decree in respect to the enforcement proceedings was issued by the court.

5. Dorothy on 23<sup>rd</sup> May 2012 filed an application under the court file HCC No 312 of 2012. By that application Dorothy sought prayers that:

*a) The purported arbitration proceedings offend the provisions of rule 9 of the Advocates (practice) rules, are unlawful and contrary to public policy.*

*b) The applicant was not granted any hearing in breach of the rules of natural justice and contrary to law and public policy.*

*c) The applicant was incapacitated by remand during the purported arbitration.*

*d) The applicant was not party to the purported arbitration agreement dated 24<sup>th</sup> March 2010, rendering the arbitration agreement invalid.*

*e) The applicant is a stranger to the 2<sup>nd</sup> claimant to whom it is falsely claimed in the award she sold her property herein.*

*f) The purported award facilitates and sanctions patent fraud by the Respondents against the applicant.*

*g) The award is in conflict with the public policy of Kenya.*

6. By a Ruling delivered on 25<sup>th</sup> September 2014 Justice F. Gikonga dismissed that application by Dorothy.

7. By the present application Dorothy has raised several grounds. But it is important to restate the jurisprudence on review. Review is premised on Order 45 Rule 1 of the Civil Procedure Rule where an applicant is required to show there is new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant at the time a decree is passed. An applicant can also show there is a mistake or error apparent on the face of the record, or for any other sufficient reason.

8. Dorothy has faulted the hearing of the enforcement of arbitration award on the basis that it was done ex parte without notice to her. Dorothy relied on the case Sadru Kurji & another v Shalimar Limited & 2 others (2008) eKLR, a decision of the court of appeal. Dorothy relied on the passage of that case where the court stated:

***“Clearly, the failure to serve the appellant with a notice of the application for enforcing arbitral award as a judgment denied them a hearing and this offends the rules of natural justice.”***

9. It should be appreciated that Rule 6 of the Arbitration Act, Cap 49, provides:

*“if no application to set aside an arbitral award has been made in accordance to section 35 of the Act the party filing the award may apply ex parte.*

The case Dorothy relied on, Sadrudin Kurji (supra), indeed recognised Rule 6 when the learned judges stated:

*“A careful reading of the rules suggest that an ex parte proceeding are eschewed. However if any party wishes to move the court ex parte, then rule 6 comes into play. One must seek the leave of the court to enforce any arbitral award such an application may only be made where no party has taken steps to move the court under section 35.”*

10. It is not therefore unheard of under the Arbitration Act for an ex parte application, such as the one the court handled on 25<sup>th</sup> June 2012, to be entertained.

11. I dare say that even if that was not so I would not be in a position to hear an application with such grievance because that would be tantamount to me sitting in an appeal of a decision of another high court judge. An appeal from the High Court lies in the court of appeal. That is where Dorothy should have gone if she was of the view the judge who entertained the matter on 25<sup>th</sup> June 2012 reached wrong conclusion of the law.

12. From the orders which were entertained by Justice F. Gikonyo in the application of Dorothy it will be noted that some of the grounds raised in the application before me are res judicata. Such grounds as that the arbitration Award was against public policy, the award was fraudulent, and that Dorothy was not granted a hearing. Dorothy is not permitted to relitigate the same issues in the application before me.

13. Dorothy has also failed to show any new and important matter or evidence that she has discovered to merit a review. Nor is there an error which this court can be called to correct.

14. On the whole there is no merit in the application before me, and the same is dismissed with costs to the 1<sup>st</sup> respondent.

15. I need, before concluding, to deal with the objection raised by the learned counsel Mr Miyare, objecting to the representation by learned

counsel Ms Janmohammed of the 1<sup>st</sup> respondent. In my view there is no basis of that objection because the provisions of order 9 Rule 9 of the Civil Procedure Rules is intended to protect the outgoing counsel from having a brief taken away from him/her without notice. That provision is a 'shield' not a 'sword'. Further that Rule needs to be juxtapositioned with the constitutional provision that everyone should be allowed to choose and be represented by an advocate. The 1<sup>st</sup> respondent having chosen learned counsel Ms Janmohamed his choice cannot be interfered with by this court.

**CONCLUSION**

16. The Chamber Summons dated 8<sup>th</sup> August 2018 for reasons set out above is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<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 **27<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**