



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 221 OF 2019

ROSA ONGESO.....1ST APPLICANT

CATHERINE ONYANGO.....2ND APPLICANT

-AND-

HARIN BUILDERS LIMITED.....1ST RESPONDENT

ALFRED OMENYA.....2ND RESPONDENT

RULING

Background

1. On 18th May 2010, the applicants herein entered into an agreement with the 2nd respondent in which it was agreed that the 2nd respondent would employ a contractor on behalf of the 1st applicant. Pursuant to the said agreement, the 1st respondent and applicants entered into Joint Building Council (JBC) Contracts to construct 2 storeyed maisonettes for each of the applicants in their respective land parcels situate at Runda in Nairobi County. It is alleged that the Joint Building Council Contracts were signed by the 2nd respondent on behalf of the applicants who were then out of the country.
2. The 1st respondent/contractor carried out its contractual obligations and put up the 2 maisonettes which they subsequently handed over to the applicant but a dispute however arose regarding an alleged substantial amount of monies that were not paid to the contractor.
3. The contractor notified each of the applicants of the existence of a dispute and asked them to agree on the appointment of an arbitrator.
4. One **Dr. Kariuki Muigua** was unanimously appointed the sole arbitrator but the applicants later on challenged the said appointment thus resulting in the decision by **Dr. Muigua** to rescind his acceptance of the appointment.
5. Honourable **Sylvia Mueni Kasanga** was subsequently appointed as the arbitrator after which it was agreed that the arbitrator would determine the issue of her jurisdiction together with the contractor's claim against the applicants.
6. The 2nd respondent then filed a supplementary affidavit to confirm that he signed the Joint Building Council Contracts on behalf of the applicants.
7. In an Award rendered on 26th June 2018, the arbitrator found that
 - a. She had jurisdiction over the arbitration.
 - b. That the matter was not *res judicata*.
 - c. That there was an arbitration Agreement between the applicants and the contractor /1st respondent.
8. Following the aforesaid decision, the applicants applied, before the Tribunal, for the joinder of the 2nd respondent (Mr. Alfred Omenya) to

the arbitral proceedings but the 1st respondent opposed the application on the basis that: -

- a. Mr. Alfred Omenya was not a party to the Joint Building Council Contracts (as he had signed the same as an agent for the Applicants – Rosa Ongeso and Ms. Catherine Onyango);**
- b. Arbitration has at its very core the principle of voluntary submission to Arbitration and thus a party who was not a party to an arbitration agreement could not be joined to those arbitration proceedings;**
- c. There was no arbitration agreement produced by Rose Ongeso and Ms Catherine Onyango evidencing the existence of an arbitration agreement between them and Mr. Alfred Omenya.**

Application

9. In the award published on 10th April 2019, the arbitrator rejected the application for joinder of the 2nd respondent to the proceedings thereby precipitating the filing of the application dated 10th July 2019 wherein the applicants seek orders that: -

- a. Spent**
- b. That this Honourable court be pleased to issue orders staying proceedings in the arbitration proceedings between Harin Builders Limited v Rosa Ongeso and Catherine Onyango presided over by Honourable Silvia Mueni Kasanga(Arbitrator) pending hearing and determination of this application.**
- c. That this Honourable court be pleased to set aside the award made and published by Honourable Silvia Mueni Kasanga(Arbitrator) on the 10th day of April 2019 in the matter of Arbitration between Harin Builders Limited v Rosa Ongeso and Catherine Onyango.**
- d. That this Honourable court be pleased to issue any other orders it deems appropriate in the circumstances.**
- e. That costs of this application be borne by the respondents herein.**

10. The application is brought under Section 35(1) (2) and (3) of the Arbitration Act (hereinafter “the Act”) is supported by the 2nd applicant’s affidavit and is premised on the main grounds that:

- a. The applicants did not execute the Arbitral Agreement and did not authorize the 2nd respondent to execute it.**
- b. The applicants’ application to join the 2nd respondent to the Arbitral proceedings was disallowed yet the 2nd respondent’s inclusion into the suit would have been instrumental in the settlement of the dispute between the applicants and the 1st respondent/Contractor.**
- c. The arbitrator’s finding on the issue of fraud at the preliminary stage was a misinterpretation of the law as fraud is one of the main issues for interrogation in the Arbitral proceedings.**
- d. That unlike the applicants, the 2nd respondent is a party to the agreement that was the subject of the arbitration.**
- e. The Arbitrator considered matters that were not placed before her and made final determination on the substantive issue of fraud before the matter proceeded to full hearing.**
- f. The applicants are apprehensive that if the Arbitral proceedings proceed as directed by the arbitrator, they will be extremely prejudiced thus necessitating the prayer for stay of proceedings pending the hearing and determination of the application to set aside the ruling delivered on 10th April 2019.**

11. The 1st respondent opposed the application through the Replying Affidavit of its Managing Director **Mr. Harish Ramji Manji** who confirms that the 1st respondent entered into a Joint Building Council Contracts to construct a two storeyed maisonettes for each of the applicants which contracts were signed by the 2nd respondent on behalf of the Applicants who were then outside the country.

12. He further states that the 1st respondent duly carried out its contractual obligations by constructing the 2 maisonettes but that despite their written undertaking to pay the balance of the sums due to the 1st respondent under the Joint Building Council Contracts the applicants failed to honour their promise thereby precipitating the institution of the Arbitral Proceedings wherein the applicant concurred with the 1st respondent appointment of the Arbitrator.

14. He states that the parties thereafter appeared before the arbitrator for the preliminary meeting wherein it was agreed that:

- a. The Arbitrator would handle both the cases of Harin Builders Limited vs Rosa Ongeso and Harin Builders Limited v Catherine Onyango;**

b. The Claimant was to make an application addressing the issue of whether there was a contract between the parties in both cases and the Arbitrator would make a determination on her jurisdiction.

14. He states that following the said directions, the 1st respondent filed an application dated 12th March 2018 seeking orders that the Arbitral Tribunal makes a finding that there is an agreement between the parties and that it has the jurisdiction to deal with the matter. The applicants then contested the existence of a contract between them and the 1st respondent and after hearing submissions from both sides, the Arbitrator on 22nd June 2018 found that:

a. There was an Arbitration Agreement executed between the applicants herein and the 1st respondent.

b. The matter was not res judicata; and

c. The Arbitrator had jurisdiction over the Arbitration.

15. He states that the present application seeking to challenge the interim award of 10th April 2019 is an attempt to set aside the award of 22nd June 2018 wherein the Arbitrator found that the intended 2nd respondent Professor Alfred Omenya signed the Joint Building Council Contracts as the agent of the applicant herein. It is the respondent's contention that: -

a. The impugned Interim Award of 10th April 2019 did not address and/or determine the issue of fraud with finality as has erroneously been alleged by the applicants herein:

b. The Interim Award of 10th April 2019 only addressed the issue of fraud from the aspect of the paucity of evidence supplied by the applicants in support of their application who had alleged, as they have once again done in this present application, the existence of a fraudulent conspiracy without establishing with concrete evidence the existence of such fraudulent conspiracy between the 1st and 2nd respondent.

c. Allegations of fraud are very serious and require proof on a very high standard and cannot and should not be made lightly without concrete evidence of that effect;

d. The applicants herein have once again vide their application of 11th July 2019 failed to produce any concrete evidence of a fraudulent conspiracy;

e. The applicants cannot join a party to an arbitration who is not a party to the arbitration agreement that forms the basis of the arbitration proceedings and such an "illegal joinder" can lead to the challenge of the Final Award by the party so erroneously joined thereby jeopardizing the entirety of the Arbitral proceedings.

f. This application by the applicants is an attempt to frustrate and delay the hearing of the Arbitration wherein no Statement of Claim and Defence have been filed on account of baseless interlocutory applications instigated by the applicants and the counsel before the Arbitrator.

16. Parties canvassed the application by way of a written submissions which, I have considered. The main issue for determination is whether the applicants have made out a case for the granting of the orders to set aside the Award of 10th April 2019. Section 35(1) (2) and (3) of the Act stipulates as follows:

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, the 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.

(3) 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.”

17. I note that the Arbitrator rendered herself as follows on whether the applicant will suffer prejudice should the Architect not be joined to the proceedings at paragraphs 5.36 and 5.37 of the impugned Award: -

“5.36- From the Arbitration Agreement definition of a party, it is my understanding that the Architect does not fall into any of these categories. The Architect is neither claiming through nor is he under any party in this case. My understanding of this definition in a building construction matter would be relationships as domestic sub-contractors who can claim through a main contractor or who are under a main contractor.

5.37- At this instance I HOLD and DETERMINE that the Architect is NOT a party to the Arbitration proceedings.”

18. On the issue of fraud, the Tribunal found that:

“5.46- I therefore find and determine that this Tribunal does not have sufficient evidence before it to determine whether acts of fraud, commission and/or omissions were committed by the Architect as alleged and therefore cannot rely on this matter as a reason to join the Architect into the Arbitration as a Party.”

19. The wording of Section 35(2) of the Act, which I have already highlighted in this ruling, is deliberate and clear on the specific circumstances under which an arbitral award may be set aside. In my humble view, an applicant who fails to demonstrate that his application satisfies the said conditions cannot succeed in setting aside an arbitral award.

20. In the present case, the applicants took issue with the Arbitrator’s finding on the issues of the alleged fraud and joinder of the Architect to the arbitral proceedings. As I have already stated in this Ruling the gist of the applicant’s case is that arbitral award should be set aside on the basis that they did not execute the Arbitral Agreement; that their application for joinder was rejected; that the finding on fraud was premature, and that the arbitrator considered matters not placed before her.

21. After carefully perusing the arbitral award and the submissions by the parties, I find that the reasons advanced by applicants fall do not fall within the purview of the conditions listed under Section 35(2) of the Act for setting aside of an Arbitral Award. I note that the closest that the applicants came to the said conditions is the claim that the Arbitrator went beyond the scope of her mandate by determining the substantive issue of fraud before the matter proceeded to full hearing. I however find that the issue of fraud was so closely linked to the issue of joinder of the Architect/2nd respondent to the arbitral proceedings such that it would have been impossible to make a determination on joinder without dealing with the issue of fraud.

22. Needless to say it is trite law that the mere fact that an arbitrator errs in his findings on the interpretation of the law of facts does not qualify such a decision to be set aside. I find useful guidance in *Mahan Limited v Villa Care ML* HC Misc. Civil App. No. 216 of 2018 [2019] eKLR wherein it was held:

“It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them. It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act.”

23. It is therefore my considered view that the Applicant has not satisfied the requirements for grant of the orders to set aside the award.

24. For the reasons that I have stated in this ruling, I find that the application dated 10th July 2019 is not merited and I therefore dismiss it with costs to the 1st respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 24th day of September 2020 in view of the declaration of measures

restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyarango for Jemator for the applicant.

Mr. Muchiri for the 1st respondent

Court Assistant: Sylvia