REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 371 OF 2018

LINDA BOMU .....APPLICANT

VERSUS

KILUWA LIMITED.....RESPONDENT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 103 OF 2018

KILUWA LIMITED .....PLAINTIFF

VERSUS

LINDA BOMU .....DEFENDANT

R U L I N G

1. Being related suits by virtue of the fact that one suit seeks to enforce an arbitral award when the other seeks to injunct the enforcement of the said award, it was decided, with the concurrences of the parties that the two suits be consolidated. In the order for consolidation, it was further directed that the Application filed by Kilua Limited together with the Replying Affidavit be treated as opposition to the Application filed by Linda Bomu. In effect what is to be heard is the application dated 28/12/2018.

2. The grounds upon which the application is made are that there was executed between the parties, an agreement for the sale of one of seventy three apartments to be developed upon a parcel of land known as **sub-division No. 18888 Section 1 mainland North Mombasa,** and known as **KILUA RESORT APARTMENTS** at a price and consideration of **Kshs.24,000,000/-**.

3. The salient terms of the said agreement were that the vendor would ensure that the completion of the construction would not be later than the 30/6/2014. On his side the purchaser would pay the price by deposit of Kshs. 240,000/= being 1% as commitment fees, prior to the sale agreement, and Kshs 12, 000,000/= upon execution of the agreement with the balance of the purchase price upon completion and handing over. It is common ground that the agreement was never executed even though drafted but the Applicant did pay to the Respondent a sum of Kshs.13,257,500 towards the purchase price.

4. Despite payment as agreed the respondent did not complete construction on the dates agreed and was unable to complete more than two years after the agreed handover date. When the default persisted the Applicant served a completion notice and notice of intention to rescind and demanded a refund of the sums paid. Despite the notice to complete, the Respondent still failed to complete construction with the consequence, in the view of the applicant, that contract stood rescinded and the sum paid became refundable.

5. There having been an agreement between the parties that all dispute would be referred to the arbitration by an arbitrator appointed by the chartered institute of Arbitrators, Kenya, the Appellant requested for arbitration and a single arbitrator was appointed by the agreed appointing authority. The arbitration proceeded and one of the issues raised before the arbitrator was a preliminary objection that there was no valid arbitration agreement hence the forum lacked the requisite jurisdiction to hear and determine the dispute. That objection was heard

and dismissed by the arbitrator by a ruling dated 20/09/2017 by which the arbitrator found that he had jurisdiction in the matter to among other things find if there was an arbitral agreement together with whether or not there was jurisdiction on him to handle the matter.

6. With the preliminary objection dealt with, the arbitrator proceeded and a final award made. In the final award, the arbitrator made six substantive orders including a declaration of breach of contract by the Respondent; a decision that the rescission by the applicant was in consonance with the agreement; refund of Kshs.11,704,000; general damages for breach of contract in the sum of Kshs. 8,000,000/=; interest on the sum awarded at 12% p.a. plus costs in the sum of Kshs.651,000/=. It is that final award the Applicant seeks to enforce while the respondent seeks to forestall enforcement by an injunction.

7. The grounds upon which the respondent resists enforcement are contained in the Notice of Motion dated 3/12/2015 expressed to be brought pursuant to Articles 50(i) of the Constitution, Section 1A 1B & 3A of the Civil Procedure Rules and Order 51 Rules 1 of Rules. There is also a Replying Affidavit sworn by one **HUSSEIN SHARIFF ALWAY**. In both documents the Respondent challenges and contest the enforcement of the arbitral award on the grounds largely contained in the preliminary objection and determined by the arbitral tribunal with a stress that there was never any valid agreement as the same did not meet the thresholds of Section 3(3) of the Law of contract Act it being contended in sum that there being no agreement for sale of land duly executed there could not have been an arbitral agreement and therefore the arbitral tribunal usurped jurisdiction and mandate it did not have and lastly that the respondent never participated at the arbitral proceedings.

8. Pursuant to the court orders and directions of 20/12/2019 parties filed and exchanged written submission dated 22/2/2019 and filed on 28/2/2019 and those of 6/3/2019 and filed on 8/3/2019. Those are the same submissions parties attended court and highlighted on the basis that the application to enforce the judgment was opposed by that for injunction and the replying affidavit filed on behalf of the respondent.

Submissions by the Applicant

9. The position taken by the applicant is that there was a valid arbitration agreement between the parties founded upon the unsigned agreement and severable from that agreement even if the same was found to be void or indeed unenforceable. To the applicant, the only question the court has to pose and determine is whether the final arbitral award ought to be recognized, adopted and enforced. Counsel then submitted that once made, an arbitral award ought to be enforced subject only to Section 37 of the Act which sets out the ground upon which the court may decline to recognize, adopt and enforce award. The counsel then sought to align its submissions by seeking to address the grounds set out in Section 37 of the Act. In his submissions, the applicant contends and maintains that the agreement pursuant to which she paid the sum for purchase price, even if not signed, was a contract binding upon the respondent as the party whose advocate drew it and who received payment upon it hence he was by reason of estoppel barred from resiling from its effects including the arbitration clause at clause 13.9. It was additionally submitted that an arbitration agreement may be in a clause or in a separate agreement as provided under Section 4 of the Act.

10. On the defect of the agreement based on incapacity of the respondent, the applicant answered the same in the negative while affirming that the agreement was a valid one under the Kenyan Law and that the respondent was given due notice. On the status of the arbitral award counsel submitted that the same remains undisturbed by an order of setting aside.

11. It was then urged that the suit filed to challenge the award was improperly brought and did not lie before the court for failure to comply with the provisions of Section 35 of the Act in that it is not an application anticipated by the law and the grounds advance do not meet the threshold of setting aside an award. The decision in ***Ann Mumbi vs Gallera*** was then cited for the proposition of law that an arbitration award can only be set aside on the grounds under the Act, as agreed between the parties in an arbitration agreement and further that no court is entitled to interfere with an award on appeal save for the circumstances enacted under Section 39 of the Act.

12. It was then urged additionally that all the grounds raised by the respondent were advanced and argued before the arbitral tribunal and decided on the merits. The decisions in ***Tanzania National Road Agency vs Kundan Singh Constitution Ltd [2013] eKLR*** and ***Nyutu Agrovet Ltd vs Airtel Networks Ltd [2015] eKLR*** were then cited for the proposition and enunciation of the law that enforcement of arbitral award under Section 36 of the Act is automatic unless the conditions set under Section 37 are met because arbitration is voluntary process by the parties who desire that no courts interference in their affairs and that once an award is made parties intend that it becomes final.

13. On the defendants application for injunction, submissions were offered along the principles of grant of temporary injunction pending suit it being underscored that there was no prima facie case with probabilities of success in that there was an understanding by which payment were made to the Respondent on mutual agreement that it would build and handover the apartment on a specified date. The Applicant then cited to court the decisions in ***Hussein Ali vs Commissioner for Lands [2013] eKLR*** and ***Francis Tihatha vs HFCK [2014] eKLR*** from the position that a party with unclean hands for being in breach should not be granted an injunction to enable him derive advantage from own default and that non-disclosure of material facts disentitles one to an injunction. Court was also urged not to concentrate only on the strength of the plaintiffs case but also on the strength of the defence advanced and the decision in ***Orion East Africa Ltd vs Ecobank Kenya Ltd [2015] eKLR*** was cited for that position Section 10 was then cited and submitted to discourage interference by the court in arbitral proceedings by grant of temporary or final orders of injunction. It was urged that arbitration as an alternative dispute Resolution mechanism is constructed on the understanding and appreciation that by the principle of party autonomy, intervention by the court should be the exception rather than the rule.

Submissions by the Respondent

14. For the respondent, the position taken and urged was that there was no arbitration agreement as the purported agreement did not amount to one when put on the prism of the Law of contract Act Section 3(3). The authors of Commercial Arbitration, by Mustill and Boyal, 4th Edition, were then quoted to say and assert when an arbitration award would be wholly or partially void. The English case of ***Associated Engineering 10 vs Government of Andhra Pradesh [1992] AIR 232*** was cited for the proposition that the law does not permit an arbitrator to act arbitrarily, capriciously, irrationally or independently of the contact but must act in terms of the contract.

15. Those principles were then applied to the facts of this case by it being submitted that an arbitration clause must be in writing and cannot be implied.

16. ***Christ for all Nations vs Apolo Insurance Co. Ltd [2002] EA 366*** was then cited for the holding that an award would be set aside under Section 35(2) of the Act if it is found to be contrary to the constitution or Kenyan statute; when it inimical to national interests or when contrary to justice and morality. In the instant case it was submitted that there was no written and executed agreement between the parties as envisaged under Section 4(2) of the Act. In the respondents view, the provision is satisfied when there is a signed agreement by all parties a series of correspondents and other documents disclosing a meeting of minds and or exchange of correspondence by which the fact of a contract is admitted.

17. In this matter it was said that three scenarios were absent and lacking. **DR. Kariuki Mwigua's** book, ***"settling disputes through arbitration in Kenya"*** was then cited to the effect that an arbitration clause needs to concisely refer to a specific legal relation between the parties and the dispute desired to go to arbitration. It was thus submitted that the clause relied upon in this matter was too vague.

18. On whether injunction should be granted to the respondent, it was submitted on behalf of that respondent that there had been established a prima facie case in that no agreement was ever signed between the parties and that the respondent was exposed to suffer irreparable injury that cannot be compensated by an award of damages because the sum awarded, was to the respondent, outrageous and therefore to grant the orders sought would render HCC No. 103 of 2018 nugatory. It was then concluded that there is a clear grievance by the respondent before the court which it was imperative to be heard and determined before the award is recognized adopted and enforced.

Analysis and determination

19. Having read the pleadings, affidavits with annexure and the submissions by the parties. I do take the view that the only issue for determination here is whether there has been established grounds to set aside an award made by an arbitrator and dated the 20/9/2017. The flip side is whether the award is due for recognition adoption and enforcement.

20. As held by the Court of Appeal in ***Nyutu Agrovet Ltd vs Artel Networks Ltd (supra)*** this court is not expected to freely and routinely interfere in arbitral proceedings because, arbitration is by nature voluntarily choice made by parties to exclude litigation from their dispute resolution mechanism by such parties asserting their autonomy being the best custodians of their commercial and contractual obligations and rights.

21. Being a Court of Law this court is bound to act only in accordance with the law starting with the constitution, statutes and *stare decisis* which guides its steps including settling for it boundaries by vesting jurisdiction. It is now at a trite position that where the constitution or statute provide a manner of handling a dispute that procedure must be strictly adhered to[1]

22. The dispute before me is governed by the Arbitration Act as consistently interpreted by the Kenyan Courts and other courts in other jurisdiction. The arbitration Act, which guides the courts steps has a firm backing in the Constitution of Kenya 2010 which obligates courts to promote alternative dispute resolution mechanisms including arbitration.

23. I am in no doubt that as it stands today, our arbitration Act, which is essentially model regulation adopted by the community of nations under **UNICITRAL** is not unique to Kenya but fits being viewed as a "the best practices in arbitration encoded". The statute provides parameters upon which an award can be upset in whole or in part. I see those parameters in Sections 35, 36 and 37 of the Act. Having looked at and studied those provisions in light of the dispute before me, I do find that the only ground that the respondents invokes to make a recourse to this court is the contention that there is no valid arbitration agreement under the Kenyan Law.

24. That contention as captured in the papers filed and argued by counsel appears premised on the provisions of Section 4 of the Act and Section 3(3) of the law of Contract Act.

25. From the onset, I wish to say that the invocation of Section 3(3) Law of Contract Act was inappropriate. Inappropriate because the matter before me is not, from the pleading, an action to enforce an agreement for the sale of an interest in land. The proceedings must remain what the pleadings on both sides reveal to be the ***recognition, adoption and enforcement of an award***. That award has in fact been exhibited to court and both side, do agree that it was made on the date disclosed and by the arbitrator appointed by the Chartered Institute of Arbitrators, Kenya.

26. I do find that the invocation and reliance on Section 3(3) of the Law of Contract Act, was a red herring intended to blur and cloud the issue before the court. I find as such and I will not endeavor to consider it as relevant in this determination. I thus focus on the admitted fact that there is an award which the disputants seeks courts determination whether it ought to be enforced or it ought to be set aside.

27. That focus must therefore address the respondent's grievances that there is no valid agreement on the basis that the contract in which the arbitration agreement anchored was never signed by all the parties. That document is exhibited by both sides in their Affidavits. It is shown to have been drawn by **Ms Naban Swaleh Advocate** who is disclosed at clauses 1.12 and 1.14 to have been the advocate for both parties. That agreement bears the signature of the vendor but without a seal as expected of a corporation like the respondent but it is not signed at all by the applicant.

28. However, prior to the agreement and after its drafting, there are correspondence about the parties negotiations and intentions. What I consider pertinent are two letters dated 13/4/2012 by the respondent to the Applicant. As worded, both seem to be letters of offer made to the applicant. The difference appears to be that one has provision for acceptance by the applicant while the other does not have same. However both have the fundamental ingredients of a contract of sale in that, the property is identified, the price is disclosed, mode of payment is revealed and the time within which the construction would be concluded is equally stated in details.

29. It is at this juncture necessary to quote portions of the letters annexed as LB-1A in the applicant's affidavit:-

> **"I will also appreciate you sending me your full address particulars after which I will prepare a sales agreement for your perusal.**
>
> **Also pls note that the apartment becomes fully reserved after payment of the commitment fee of 1%, as per attached letter.**
>
> **I will separately send you another mail with the general details of the project, for your information and hopefull circulation amongst your friends".**
>
> **"….(v) If the Purchaser, upon receiving the agreement for sale is not willing of unable to execute the agreement for sale, within fourteen (14) days from the date of receipt thereof, the Reservation Fee shall be refunded to the Purchaser upon return of all unexecuted documentation.**
>
> **6. Title: The Purchaser shall, on completion of all matters tated in the agreement of sale, get a title to the Apartment by way of a Sub-Lease.**
>
> **Confirmation: Kindly confirm your acceptance of this offer by signing, the duplicate copies of this letter of offer and returning the same to us within the stipulated period together with payment of the Reservation Fee stated in point No. 4 above.**
>
> **Period: The validity of this Reservation Letter is of the(10) working days from the date hereof and if no acceptance and payment is received from the Purchase within the said period then this Reservation Letter will be deemed to have lapsed.**
>
> **In the event that you have any queries on the terms set out herein, kindly contact us prior to the execution of his Reservation Letter.**
>
> **Thank you.**
>
> **Yours faithfully,**
>
> **For: KILUWA LIMITED**
>
> **DIRECTOR OPS.**
>
> **I, the Purchaser mentioned hereinabove, have read and understood this Reservation Letter and hereby confirm my acceptance to the above terms and conditions (stated in point No. 7 above) and will return this with a banker's cheque for the Reservation Fee or copy of Telegraphic Transfer confirmation advice Within 7 working days from the date hereof (stated in point No's 4 and 8 above).**
>
> **Signed……. Date 23 April 2012**
>
> **Cc: Lawyers Mr. Nabhan Swaleh**
>
> **M/s Nabhan Swaleh Advocate**
>
> **P.O. Box 43235 Mombasa, Kenya**

30. In my view based on the two letters when the applicant accepted the terms of sale and paid not only the reservation/commitment fees but also the 50% of the purchase price, which was accepted by the respondent without reservations, there was a valid contract of sale concluded. In law this is contract discernible from correspondence or series of documents.

31. But that was not all. There are subsequent receipts issued for payments made including an email requesting for refund of excess payment made and one accepting to effect the refund of such surplus. In the Replying Affidavit sworn by the Applicant, at pages 048 and 85, there is letters by one **Renato F Bachmann**, info@kilua.co.ke, which acknowledged payment and requested for an account to which the surplus to the agreed payment would be sent. That mail was authored on the 5/7/2012 while later on 11/04/2016 the same person did write to the Applicant yet another mail in which he said:-

> **"After deliberations held with our Directors, we are advised that we**
>
> **shall return your money's paid in towards apt.115, without making statutory deduction normally made as by law.**
>
> **The only deductions will be commissions paid to agents if applicable.**
>
> **Unfortunately we are also affected by the Chase Bank debacle, since they are our house bank.**

This means we have a terrible cash flow at this moment.

We will start making repayment as soon as our cash flow allows, and our Directors will give it the necessary priority". (*Emphasis provided*)

32. From the few documents highlighted above, among others, it is clear to the court that there was an agreement for sale and that the same would be reduced into an agreement upon payment of 50% of the purchase price. That agreement was indeed drawn by counsel acting for both parties. That agreement when read with the correspondence highlighted above sit in congruence and point to the terms upon which the parties had intended to engage. It is to me clear that by the agreement, which I note was signed on behalf of the respondent and duly admitted in the Affidavits and submissions, reveal and confirm that the parties voluntarily had a meeting of minds that in case of a dispute such would be determined by an arbitral tribunal appointed by the Chartered Institute of Arbitrators, Kenya. That is what I consider to constitute a contract in a series of documents. This position is not unknown to the respondent. In their submissions the following is asserted:-

"Section 4(2) Arbitration Act 1995, requires that the arbitration agreement be in writing. This requirement is satisfied if an arbitration agreement is contained in:-

(a)

(b) An exchange of letters, telex, tax, electronic mail or other areas of telecommunication which provide a record of the agreement".

33. What the respondent submits is the established principle of the law of contract that a contract can be discerned in a series of documents. The author of Halsbury's Laws of England, 4th Ed, Reissue Vol. 9(1) writes of this position of the law and says:-

The expression contract may, however be used to describe any or all of the following:- …..

(2) The document, or documents constituting or evidencing that series of promises or acts or their performance".

34. I thus do find that there was indeed an agreement and thus a contract that any dispute between the parties would be referred and resolved by arbitration. That being my finding and having said that the only issue for my determination, based on the grievance by the respondent is that single point, I now turn to the penultimate issue; should the final arbitral award be recognized, adopted and enforced or should it be set aside?

35. The answer to the question is to be found in seeking to find out whether there are the statutory reasons advanced by the respondent to vitiate the arbitral award. I do find and hold that none has been alleged and proved. If none is so alleged nor proved then it follows that there is no *prima facie* case with probabilities of success which is the gunshot to the journey in deciding whether or not to grant an injunction. In coming to this conclusion, I have not only looked at the Applicants stand point but also that by the respondent. Following from the foregoing conclusions, I do find that there is no basis to set aside the award and now get the persuasion from the words of Muya J in ***Tanzania Roads Agencies vs Kundan Singh Construction Co. Ltd (supra)*** that:-

"What can be decided from the above is that recognition of arbitral awards is automatic under the provisions of Section 36 of the Act and can only be refused if the party against whom it is sought is able to satisfy the requirements of Section 37 of the Arbitration Act"

36. There are two last issue I would wish to comment upon before I conclude. The first concern the mode of seeking to set aside an arbitral award. The statute at both Section 35 and Rule 7, Arbitration Rules, 1997, mandate that the application be supported by an Affidavit specifying the grounds on which the party seeks to set aside the award. These words tell me that it ought to be an application and not a suit by a plaint as the respondent has done in HCC No. 103/2018.

37. I say so noting that one of the benefits arbitration is reputed to have over litigation is promptitude and the need for expeditious disposed of disputes. When a party opts to institute a suit by plaint in a matter that merely seeks the courts guidance on a straight forward matter whether or not, like here, there was an arbitration agreement, he need not go the long route of filling a plaint and waiting to serve summons for the defences to be filed and then wait for pleadings to close. In that case the desired timeous disposal is lost and the parties desire to have their dispute resolved by a means they viewed expeditious is lost. In such a case, permitting a full blown litigation may be seen to go against the direction by the ***Court of Appeal in Nyutu Agrovet Ltd vs Airtel Networks Ltd (supra)*** "that arbitration would serve no useful purpose if the courts were allowed to intervene willy-nilly in arbitration".

37. The second question is whether the Applicant was within the law in seeking to have the Arbitration award set aside on the same reasons it advanced and argued as a preliminary objection and were dismissed by the arbitral tribunal. The law under Section 17 of the Arbitration Act is mandatory that grievances with a preliminary ruling and concerning jurisdiction be challenged in the High Court within 30 days. In this matter the determination on jurisdiction was made on 20/9/17 but no challenge was made against it till November 2018. By the time the challenge was made in HCC No. 103/2018, the issue had become statute barred and could not be raised as a basis of setting aside the award.

38. Ultimately I do allow the Applicant's application dated 28/12/2018 and filed in HC. Misc. Application No. 371 of 2018 with costs. That means that the Respondents application dated 3/12/2018 and filed in HCCC No. 103 of 2018 is dismissed with costs to the applicant.

39. By way of case management, and not to let HCC No. 103 of 2018 go to sleep and be forgotten, I direct that parties attend the court on

10/12/2019 to address the court on the way forward with the plaint therein pending.

Dated and delivered at **Mombasa** this **25th** day of **October 2019**.

P.J.O. OTIENO

JUDGE