



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL APPLICATION NO. 241 OF 2018

GREAT BODY GYM LIMITED.....APPLICANT

VERSUS

SHAH & PATEL (INDUSTRIES) LIMITED.....RESPONDENT

JUDGMENT

PRELIMINARY

1. Parties were ordered to file final submissions in this matter but when I sat to consider this judgment, only the respondent had filed theirs. The applicant had not.

BACKGROUND

2. *Shah & Patel Industries Limited* (*Shah & Patel*) are the registered owners of all that parcel of land known as **LR. No. 209/565 IEBA Building, Moi Avenue, Nairobi** (the building). *Shah & Patel* agreed to lease to *Great Body Gym Limited* (*Gym*) 3786 sq ft of the 2nd floor of that building and approximately 500sq ft of the attic of the building.

3. The lease had an arbitration clause. The parties appointed **J.B. Havelock** as a sole arbitrator.

4. The dispute before the arbitrator arose from the Gym's vacation of the building on **24th December 2015** and claim by *Shah & Patel* that *Gym* was in breach of the lease by, amongst others, failure to obtain written consent of *Shah & Patel* in respect of alteration to the building; permitting use of heavy Gym equipment over the permitted weight; failure of the Gym to keep walls, timber, slab and other fixtures and fittings in good repair; and failure of the gym to keep the roof of the building in good repair and condition. *Shah & Patel* therefore, claimed from Gym **Ksh 17, 806,621.16**. Gym denied the breach of the terms of the lease and the amount claimed by Shah & Patel. Gym counterclaimed that since Shah & Patel failed to respond to the notice dated **17th December 2015** issued by Nairobi City County which require them to undertake repairs of the building and provide approved architectural and structural drawing and structural engineer's report and avail occupation certificate that accordingly Gym had no choice but to vacate the building before the determination of the lease. Gym counter claimed the costs of its re-location into new premises, costs of construction **Ksh 125,000**, renovation of their new premises **Ksh 8,492,695**; loss of business during construction **Ksh 500,000**; loss of rent and security deposit held by Shah & Patel **Ksh 832,000**; and loss of expected profit for the period of the remainder of the lease **Ksh 4,500,000**.

5. The arbitrator delivered his award on **1st October 2017**.

6. Gym has by notice of motion dated **23rd January 2018** sought to have the arbitrator's award to be set aside.

ANALYSIS AND DETERMINATION

7. I will in considering the matter before me be guided by the holding in the case *Christ for All Nations vs Apollo Insurance Co. Ltd* [2002] 2 E.A. 366 where **Ringera J** (as he then was) stated:

"...the public policy in Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."

8. I will also consider the holding in the case of ***Anne Mumbi Hinga Vs Victoria Njoki Gathara*** [2009]eKLR viz-

*“The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts as ours have been modeled on the **UNICITRAL MODEL LAW**. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the Court’s intervention or facilitation.”*

9. To understand the gist of why Gym seeks to have the arbitrators award set aside, I will reproduce part of the affidavit of **Anthony Thuo Kimani** the manager of Gym as follows:

“a. THAT upon hearing witness for both the Respondent and the applicant, the Arbitrator made the final award on 1st October, 2017, whereby he allowed the Respondent’s claim and dismissed the Applicant’s counterclaim. (Attached as Exhibit ATK-7 is a certified copy of the Arbitral Award dated 1st October 2017).

b. THAT the Applicant received the said Award on 30th October 2017 from Messrs. Havelock, Nduati & Co. Advocates on behalf of Hon. Justice (Rtd) J.B. Havelock. (attached as exhibit ATK -8 are copies of letters requesting the release of the Award and the letter acknowledging receipt).

c. THAT pursuant to the said Arbitral Award, the Arbitrator allowed the Respondent’s claim and dismissed the Applicant’s counter claim and the award was as follows:

- That the Applicant was not entitled to terminate the lease as a result of the Notice and, consequently, it was not entitled to vacate the premises as it did presumably on 6th January, 2016.

- That the Applicant termination of the lease amounted to a breach of contract.

- Awarded damages payable by the Applicant to the Respondent of Ksh 6,578,196/20.

- That the Applicant’s claim is dismissed in its entirety.

d. THAT the Applicant is dissatisfied with the said Arbitral Award as the same is a flagrant violation of established principles of law and justice and a contravention of public policy as to fidelity to uphold the Constitution and the laws of Kenya.

e. THAT the leased premises L.R. No. 209/565, Nairobi was built in 1919 when Kenya was a British Protectorate, with the offices of the Imperial British East Africa (IBEAF) housed there.

f. THAT I am informed by my advocate on record which information I verily believe to be true, that a building of such historical significance was gazetted as a national monument under Legal Notice No. 1427/2001 – Antiques Monuments Act (Cap 215). Section 23 of that Act makes it an offence to destroy, remove, injure, alter or do any act that imperils the preservation of a monument.

g. THAT I am informed by my advocate on record which information I verily believe to be true, that after a property has been declared monument, it is subjected to numerous controls which restrict use, access and development of the monument.

h. THAT from the foregoing, it is obvious that the parties could not have purported to contract over L.R. 209/565 without committing an illegality. Further that any repairs done on the property without the requisite consents would have been illegal.

i. THAT it is clear that the Arbitration Award was made contrary to public policy and established principles of law and justice that parties cannot enter into an illegal contract.

j. THAT I am informed by my advocate on record which information I verily believe to be true, that where a contract is illegal as formed, or is intended to be performed in a legally prohibited manner, the Court will not enforce the contract, or provide any other remedies arising out of the contract.

k. THAT from the foregoing it is clear that the Arbitral Award was made contrary to public policy, that public policy dictates that no Court will lend its aid to a man who founds his cause of action upon an illegal contract.

l. THAT I am informed by my advocate on record which information I verily believe to be true, that the new lease agreement entered into by the parties is not dated, stamped nor registered. Consequently, such Lease Agreement is contrary to the provisions of the Registration of Titles Act (repealed) and the Stamp Duty Act. In the circumstances it has no probative value, is inadmissible as an exhibit and ought to have been expunged.

m. THAT I am informed by my advocate that the purposes of Stamping and Registration of leases is intended to ensure that Landlord have paid local rates and taxes due to the government. By failing to do so the Landlord was deliberately avoiding tax which is illegal.

n. THAT I am informed by my advocate on record which information I verily believe to be true, that as a tenant, the applicant has constitutional rights to protection of health, safety and economic interests by a service provider, the landlord/proprietor.

o. THAT further, there is little doubt and it is quite obvious from a rudimentary reading of the law that the Agreement between the

parties herein was frustrated by any reading of the law or at all. It is inconceivable that an independent, unbiased arbitrator could reach the decision that the Applicant was not entitled to vacate the leased premises in the absence of the building being repaired or the Nairobi City County's Notice being complied with.

P. THAT it is now only fair and in the interest of justice that the application be allowed as the applicant stands to suffer loss and prejudice as it shall have to pay a sum of Kshs 6,578,196.20 as ordered by the Arbitrator, whilst it is clear that the Respondents claim was without merit."

10. Under section 35 (b) (ii) of the arbitration Act Cap 49, the High Court may set aside the arbitrators award where 'the award is in conflict with the Public Policy of Kenya.' This is the section Gym seeks to rely upon. But when one considers the reproduced paragraphs of the affidavit above, it becomes clear that what Gym seeks is an appeal of the award. It ought to be remembered that the arbitrator is the master of facts and this court cannot substitute its understanding of the facts. This is what was stated in the case of **Deekay Contractors Limited v Construction & Contracting Limited [2014] eKLR** – viz:

*"The issue of issuance or otherwise of the certificate under clause 22 of the agreement is an issue of fact and as an Arbitrator is the master of facts, this court cannot fault facts as had been captured by the Arbitrator. See the cases of **KENYA OIL COMPANY LIMITED & ANOTHER v KENYA PIPELINE COMPANY [2014] eKLR, MORAN v LLOYDS [1983] 2 ALL ER 200 and DB SHAPRIYA & CO. V BISHINT [2003] 3 EA 404**, where there is judicial consensus that-*

"All questions of fact are and always have been within the sole domain of the Arbitrator...the general rule deductible from these decisions is that the Court cannot interfere with the findings of facts by the Arbitrator."

11. There is no basis for finding that the arbitrator contravened the constitution or the law. Gym failed to show how he had so contravened, if at all. In my view, the arbitrator masterly dealt with the legal issues presented before him and finally made a determination which cannot be faulted.

12. To demonstrate that, I will refer to some parts of the award.

13. On the submissions, on the Antique Monuments Act, this is what the arbitrator stated:

"D. What was the effect of Legal Notice No. 1427/2001 gazetted L.R. 209/565 as a monument under the Antiques and Monuments Act?"

In my view, the Respondent raising this point in submissions was, more or less, an afterthought. No mention of the Antique and Monuments Act or indeed its successor statute the National Museums and Heritage Act (2006) was made during the hearing and the provisions of those statutes was not put to either of the claimant's witnesses. Be that as it may, I have perused both the Act and the Regulations thereunder. The National Museums (open spaces and areas of National Heritage) (Protection and Management) Rules, 2009 apply to "all open spaces, protected areas, national monuments, protected buildings and areas of cultural, natural or national heritage declared as such by the Minister for the purposes of the Act." It may be presumed that Gazette Notice No. 1427 of 2001 which included the IBEA building declared it and other buildings therein described as national monuments. It would appear to be the Respondent's submission that it is an offence to destroy, remove, injure, alter or defeat or do any act that imperils the preservation of a monument. I read that to mean that it was the Respondent's view that the claimant had committed one or other of the listed "offences" at the time that the Respondent vacated the premises. There was absolutely no evidence brought before the arbitral tribunal to this end."

14. On what was the effect of the lease not been dated and not been registered, again the arbitrator with masterly flair considered first the period when the lease commenced and determined that the lease was unaffected by the non dating, and secondly, the arbitrator found after examining various decisions that the stamp duty was not relevant and further stated:

"...although the parties hereto may not have a formal stamped and registered lease, the document before the arbitral tribunal must still be considered as an agreement for lease. In my view, the terms and conditions detailed herein comprise what was agreed between the parties including that there is no right of termination as contained therein."

15. On the whole, Gym is seeking to set aside the award and in doing so, leads to what was stated by **J. Kamau, J** in the case **Simba Villas Limited v Kenya Commercial Bank Staff Pension Fund Registered Trustees [2015] eKLR** as thus:

"It was evident from the applicant's arguments that the issues it raised mainly touched on points of law. A perusal of the Arbitral Award shows that the Arbitrator considered the facts and legal issues that were placed before him and made a determination of the same. The interpretation the Arbitrator made in respect of the contract between the parties herein was a matter of law and he adequately addressed the same in his Arbitral Award."

16. There is no merit in the application before me. Accordingly the notice of motion dated **23rd January 2018** is dismissed with costs to **Shah & Patel Limited**. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

MARY KASANGO

JUDGE