



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS CAUSE NO. 566 OF 2016**

**KIOGORA MUTAI.....RESPONDENT/CLAIMANT**

**VERSUS**

**CHARTWELL HOLDINGS LIMITED.....APPLICANT/RESPONDENT**

**FRED N. OJIAMBO.....ARBITRATOR**

**RULING**

1. The application before the court seeks the setting aside of the Arbitral Award dated 7<sup>th</sup> November 2016.
2. The applicant, **CHARTWELL HOLDINGS LIMITED**, were the vendors, who developed and erected an office block on the suit property; whilst the respondent, **KIOGORA MUTAI**, was the purchaser of office suite number 3 on the 4<sup>th</sup> floor of “*Fortis Office Suites*”.
3. In his award, the arbitrator **FRED N. OJIAMBO**, held that the office suite which the purchaser had bought lacked enough openings so as to comply with the Building Code, with respect to ventilation and lighting. Accordingly, the arbitrator declared the said office suite to be defective.
4. In the light of that finding, the arbitrator ordered the vendor to rectify the premises, so as to provide sufficient ventilation and/or lighting, and to bring it into compliance with the Building Code.
5. The arbitrator further ordered that if the vendor failed to undertake rectification, the purchaser could undertake the said rectification, at the cost of the vendor.
6. The vendor has challenged the arbitral award, and has asked the court to set it aside on the grounds that;
  - a) **the whole arbitral process from which the award emanated, was tainted with bias and prejudice against the vendor; and**
  - b) **the award and the process leading to it, were contrary to the Public Policy of Kenya and is in breach of the Constitution of Kenya.**

**(i) Bias and Prejudice**

7. It was the vendor's case that the arbitrator failed to appreciate the fact that the vendor was not able to open up the curved part of the suite.

8. To my understanding, the arbitrator was alive to the fact that the vendor may fail, for whatever reason, to open up the curved part of the suite. It was for that reason that the arbitrator specifically stated that in the event that the vendor did not undertake the rectification, the purchaser was at liberty to undertake the said task.

9. But even if the arbitrator had failed to appreciate the inability of the vendor to open up the curved part of the suite, that would not have constituted bias or prejudice against the vendor.

10. I understand the vendor to be complaining that the arbitrator failed to take into account the professional opinion of the vendor's reputable suppliers and also the vendor's architect. That would imply that the arbitrator would have arrived at a wrong decision, in the opinion of the vendor.

11. It is not the function of the High Court to delve into the substance of the arbitral award, to ascertain whether or not the same was "*the right decision*" in the circumstances.

12. If the High Court were to undertake that task, that would amount to it sitting on an appeal over the decision of the arbitrator.

13. The High Court has no jurisdiction to act as an appellate body over the award of an arbitrator.

14. The only mandate which the High Court has been clothed with is to determine, within the strict narrow limits set out in Section 35 of the Arbitration Act, whether or not the award should be set aside.

15. Therefore, it is not the function of this court to ascertain whether or not the arbitrator neglected to take into account the "*usages of the trade applicable to the particular transaction in issuing the Award*".

(ii) The Award is contrary to Public Policy in Kenya and is in breach of the Constitution.

16. The vendor submitted that the arbitrator contravened Section 159 (3) of the Constitution of the Republic of Kenya.

17. It was asserted that the arbitrator relied on a proposed law, which was not in force. The said proposed law is the **KS Code (2009) (English): Building Code of the Republic of Kenya (2009) Edition.**

18. According to the vendor, it is the **KS Code 1997 Edition** which was applicable in Kenya.

19. The 1997 Edition was said to allow a developer to adopt either Mechanical or Natural Ventilation or Both.

20. The vendor's case was that the arbitrator failed to do justice when determining the dispute. In the circumstances, the vendor cited the following words of Ogola J., in concluding that the arbitrator failed to satisfy the public policy consideration;

**"Our Constitution at Article 10 thereof sets out our national values which all decision makers in the country are obligated to observe while performing a public duty. Those values, when it comes to judicial officers and arbitrators must necessarily import that duty to do justice in deciding disputes. A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration...."**

21. In answer to that aspect of the vendor's case, the purchaser pointed out that the applicability of the 1997 Edition of the Building Code was never canvassed before the arbitrator.

22. I have carefully perused the submissions which the parties made before the arbitrator, and I found no submissions on the question as to whether or not the 2009 Code was applicable. Therefore, the arbitrator cannot have been called upon to determine something which was never in contention before him.

23. In anything, both parties appear to have accepted that the 2009 Code was applicable. I so find because, in its submissions the vendor said;

**“30. The Claimant has submitted that the suite is not built according to the KS Code (2009) (English): Building Code of the Republic of Kenya (2009) Edition”.**

24. The vendor then proceeded to argue that the building was suitable for habitation and complies with the building code.

25. And to remove any doubt about the code which it was referring to, the vendor annexed the **KS Code (2009) Edition**.

26. In the circumstances, the vendor cannot now turn around and submit that the 2009 Code was not applicable in Kenya.

27. Accordingly, the arbitrator cannot be said to have erred when he placed reliance on the Building Code which the parties had in their contemplation when they canvassed their respective cases before him.

(iii) The award is inimical to the National Interests of Kenya

28. First, I emphasize that Section 35 of the Arbitration Act, pursuant to which this application was brought, does not have, as a basis for setting aside an arbitral award, the ground described in the above sub-title.

29. Therefore any issues raised under that perceived ground does not fall within the recognized and limited grounds stipulated.

30. But in any event, I hold the view that the mere fact that a building was habitable and safe for occupation does not necessarily mean that the building was built in accordance with either the building plans agreed upon between the developer and the contractor, or that the building met the terms of the relevant Building Code.

31. I do not understand the arbitrator to be telling the vendor to sell to the purchaser, something which the vendor did not have. The arbitrator is telling the vendor to provide a suite which meets the agreed specifications, and in the alternative, if the vendor is unable to do so, the arbitrator has told the purchaser that he may proceed to undertake the necessary rectification, which would bring about the agreed terms.

32. And whilst the costs of the requisite rectification may not have been factored into the agreement, I find that that does not imply that the defect should not be remedied. My position is that if the vendor had provided the window in the terms agreed upon, there would have been no need for rectification.

33. When the vendor provided a defective suite, it cannot complain when it is required to incur an extra expense to remedy such defect.

34. The fact that other persons have already taken possession of units which were similar to that which the purchaser had bought, does not imply that the purchaser should be forced to accept his unit even though it does not meet the agreed specifications.

35. The arbitrator’s role was not that of protecting the national interests of developers or of real estate investors. The role of the arbitrator was to make a determination on the specific dispute between the vendor and Kiogora Mutai.

36. And just because the arbitrator has ordered the vendor to do the needful, cannot be the basis for other purchasers to insist on the things which the purchaser is entitled to in this case. Each contract is possibly unique, even if the subject matters are similar. Therefore, it is open to real estate investors and to developers to tailor agreements in such a manner as will not impose upon them, obligations which they believe to be incapable of attainment.

37. In the final analysis, I find no merit in the vendor's application dated 5<sup>th</sup> December 2016. The said application is therefore dismissed, with costs to the purchaser.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of May 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Mrs. Marunga for Mukunga for the Respondent/Claimant

Onyango for the Applicant/Respondent

No appearance for the Arbitrator

Collins Odhiambo – Court clerk.