



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION No 414 of 2015**  
**IN THE MATTER OF THE ARBITRATION ACT 1995**  
**AND**  
**IN THE MATTER OF THE ARBITRATION BETWEEN:**

**Dr SUNIL SACHDEV**

**PUSHPA SUCHDEVA .....APPLICANTS**

**VERSUS**

**KITISURU COUNTRY VILLAS LTD .....RESPONDENT**

**RULING**

1. The dispute before the Court in this matter relates to the interpretation of an arbitral award. That was the Final Award of Mr Philip K Murgor handed down on 3<sup>rd</sup> March 2015.

2. The Application before the Court is brought by the Claimants in the Arbitration. It is dated 22<sup>nd</sup> September 2015 and was filed on 23<sup>rd</sup> September 2015. The Application is brought by Chambers Summons pursuant to **Section 36 of the Arbitration Act, Cap 49, Section 59 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010**. The Application seeks the following Orders:

“1. **THAT** the Honourable Court be pleased to Order that the Arbitrators Final Award dated the 3<sup>rd</sup> March 2015 be deemed as filed as a record of this Honourable Court and be adopted as a judgment of this Honourable court.

2. **THAT** the costs of this application be provided for” (sic)

3. The Application is based on the Grounds set out in the Application and the Affidavit of Pushpa Sachdeva. The grounds are that:

(1) The parties by virtue of a Settlement Deed dated 3<sup>rd</sup> May, 2013 had agreed that in the event of a dispute between the parties, the dispute shall be referred to an arbitrator.

(2) That a dispute did indeed arise between the parties and as agreed in the Settlement Deed the matter was referred for Arbitration and the Arbitrator was duly appointed by the Chartered Institute

of Arbitrators;

(3) The matter was determined before an Arbitrator who made a Final Award dated 3<sup>rd</sup> March 2015, in which the Arbitrator awarded and directed inter alia that the Respondent should pay the Applicants bank simple interest on overdraft of Kshs. 1,182,908.42 (“the bank interest”) as at 31<sup>st</sup> July 2014 at the prevailing commercial bank rates;

(4) The Applicants have since the making of the Award been pursuing for payment of the bank interest to be paid by the Respondent but the Applicants efforts have been in vain because the Respondent has failed and neglected to honour the Award made by the Arbitrator in regard to the bank interest.

(5) That Applicant now returns a copy of the Final Award for filing as part of the record of the court and subsequently adoption of the finding of the Arbitrator as a judgment of this Honourable Court.

4. The Supporting Affidavit repeats the background of the dispute and Arbitration. At paragraph 8 the Deponent states; *“THAT I urge the court to adopt the Award as duly filed as a record of the Court and subsequently adopted as a judgment of this Honourable Court. Further I urge the court to issue an Order for the Respondent to be compelled to pay the bank interest that they have failed and or neglected to pay.”*

5. The Application is opposed by the Respondent. The Replying Affidavit is sworn by its director Samuel Mwaura Waweru. At paragraph 3 he states; *“That there is no ground or basis in law or in fact for granting the orders sought by the Applicants, since the Final Award made by the Arbitrator and as tabulated by the Applicants has been paid in full by the Respondent and the same is therefore spent.”* . At paragraph 7 and 8 he explains the dispute between the Parties. The Applicants have filed a Supplementary Affidavit which also sets out a version of the Final Award as follows:

*(a) Kshs. 3million being the outstanding balance of the settlement amount*

*(b) Interest on Kshs. 5million at 20% per annum from 1/9/2013 until settlement in full*

*(c) Additional bank simple interest on overdraft of Kshs1,182,908.42 as at 31<sup>st</sup> July 2014*

*(d) Additional bank simple interest on overdraft of Kshs. 1,182,908.42 as at 31<sup>st</sup> July 2014*

*(e) 100% of the arbitrators fees and expenses together with VAT.”*

The Applicant’s position as stated in paragraphs 7 to 9 of the Supplementary Affidavit is *“That the Respondent only paid Kshs.5,189,736 as broken down in their aforesaid letter dated 6<sup>th</sup> March 2015. The amount payable as calculated by the Applicant’s Advocates in their aforesaid letter dated 4<sup>th</sup> March 2015 was Kshs.6,372,644.42. The balance owing is therefore Kshs.1,182,908.42 which is the bank interest amount”* and *“... the figure of Kshs.1,182,908.42 was the additional bank interest charges on the overdraft as at 31<sup>st</sup> July 2014 as indicated in my witness statement filed on 8<sup>th</sup> August 2014... In view of the forgoing it is clear that there is still a balance of Kshs.1,182,908.42 to be paid and I humbly urge this Honourable Court to adopt the award and issue a decree accordingly.*

6. The Affidavits point to a clear dispute over the interpretation of the award. The terms of the Award were clear and provided:

*I hereby AWARD AND DIRECT FULL AND FINAL SETTLEMENT OF ALL ISSUES IN DISPUTE BEFORE ME, SAVE FOR THE ASSESSMENT OF COSTS:*

*i. I award and direct that the Respondent shall pay the Claimant the sum of Kenya Shillings Three*

Million (K.shs. 3,000,000) being the outstanding balance of the Settlement Amount within 14 days of this Award.

ii. I award and direct that the Respondent shall pay the Claimant interest on Kenya Shillings 5 Million (Khs. 5,000,000) at the rate of 20% per annum from 1<sup>st</sup> September, 2013. Until the entire amount in (i) is settled.

iii. I further award and direct that the Respondent shall pay the Claimant the additional bank simple interest on overdraft of Ksh. 1,182,908/42 as at 31<sup>st</sup> July, 2014 at the prevailing commercial bank rates until payment of (i) above in full.

iv. I award and direct that the Respondent shall pay the Claimant 100% of the arbitrators fees and expenses together with VAT.”

7. The letter from the Applicants’ Advocates dated 4<sup>th</sup> March 2015 set out the terms of the award as:

“1. Principal amount	Kshs.3,000,000.00
2. Interest at 20% on Kshs 5m	
from 1/9/2013 to 17/3/2015	Kshs. 1,541,096.00
3. Bank interest amount	Kshs. 1,182,908.00
4. Simple interest on bank interest	
At 16.9% pa from 31/7/14-17/3/15	Kshs. 108,172.00
5. Arbitral fees and expenses	Kshs. <u>115,000.00</u>
Total	Kshs. 5,947,176.42

8. As stated above, the Respondent challenges this calculation and put forward its own figures. The Deponent of the Replying Affidavit states that the Applicant’s Advocates included in their computation contained in their letter of 4<sup>th</sup> March 2015 a fifth item for the amount of KShs. 1,182,908.42 which was not part of the Award. That amount was challenged and on 18<sup>th</sup> March the Applicants wrote to the Arbitrator seeking clarification of the Award. By a Letter dated 9<sup>th</sup> March received on 15<sup>th</sup> April 2015 the Arbitrator clarified his award as follows: “In the circumstances this is to confirm that simple interest on bank interest is payable to the Claimant as awarded under Summary Finding No III of my Final Award delivered on 3<sup>rd</sup> March 2015. I did award and direct, that the Respondent shall pay the Claimant the additional bank simple interest on the overdraft of Kshs 1,182,909.20 at at 31<sup>st</sup> July 2014, at the prevailing commercial bank rates until payment of the outstanding balance of the Settlement Amount. Thereafter on 29<sup>th</sup> April the sum of KShs. 5,189,736.00 was paid by RTGS to the Applicants by the Respondent through their respective Advocates.

9. The underlying dispute between the Parties involved the sale of a property. After paying the deposit of Kshs. 4,500,000/= the Claimants decided they did not wish to go through with the sale and demanded a refund of the deposit paid. Some payment was made but there was a balance remaining. The Parties then entered into a Settlement Deed dated 3<sup>rd</sup> May 2013. The Settlement Deed provided for the Respondent to pay the Applicants the sum of Kshs. 5,000,000.00. Of that sum only Kshs. 2,000,000.00 was paid. Interest was payable at 20% pa in the event of default. Payment was not made on the payment date and the dispute went to arbitration as provided in the agreement.

10. What is clear from the Summary of the Award is that the Arbitrator made his award under the 4 headings listed above. Those are:

- (1) The sum of Kshs. 3,000,000.00 (Three Million Shillings) comprising the balance unpaid
- (2) Interest on the sum of Kshs 5,000,000.00 at the rate of 20% from 1<sup>st</sup> September 2013 until the date the entire outstanding amount in (1) above is paid
- (3) Interest on the overdraft of Kshs. 1,182,908.42 at the prevailing commercial rate until payment of (1) above is paid in full. Such interest to be simple interest
- (4) The Respondent was to pay the Claimants' costs.

The Supplemental Affidavit records (3) as being bank simple interest on overdraft of Kshs. 1,182,908.42 as at 31 July 2014 and stops there.

11. Parties have filed Written Submissions which the Court has considered. It is clear there is no dispute as to items (1), (2) and (4). The issue before the Court relates to point (3) above. The issue before the Court is whether or not it should recognise and enforce the award. The Applicant asks the Court to do so. The Respondent asks the Court not to do so on the grounds that there is nothing for the Court to enforce as the Award has been complied with. The Applicants interpret that as an Application for interpretation of the Award. Such interpretation is unnecessary as the Applicant requested the Arbitrator to clarify his Award, which has been done. What the Respondent is in fact saying is that the Court should not recognise the award because it has been satisfied. That simply is what the Court has to decide, has the award been satisfied or not?

12. The Notice of Motion seeks an Order that the Award be deemed as filed as a record of this Honourable Court. That is a procedure that is not known to the Law. If the Applicants are seeking enforcement, the proper first issue for resolution, is should the award be recognised. The Award has been filed in original together with a copy. The Arbitration Agreement contained in the Deed of Settlement is also exhibited. In the circumstances, Section 36 of the Act provides that the Court shall recognise the award unless it falls within the exceptions provided for by Section 37 of the Act. It says

13. The Arbitration Act provides :

**36. Recognition and enforcement of awards**

*(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.*

*(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.*

*(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—*

*(a) the original arbitral award or a duly certified copy of it; and*

*(b) the original arbitration agreement or a duly certified copy of it.*

*(4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.*

*(5) In this section. the expression “New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General*

*Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.*

14. In deciding which of those two Sections applies, the Court must consider the merits of each argument as well as the terms of the Award. If that included interpretation of the Award, that is an essential step in the analysis the Court is required to undertake.

15. The next question is whether the Court will enforce the Award? Section 37 provides the grounds on which a Court can refuse to recognise and enforce an award as follows:

**37. Grounds for refusal of recognition or enforcement**

*(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—*

*(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—*

*(i) 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, under the law of the state where the arbitral award was made;*

*(iii) the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or*

*(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or*

*(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made;*

*or*

*(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;*

*(b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.*

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

16. Section 37(1)(vii)(b) gives the Court the power to refuse to recognise an award if “(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.”. The Court therefore, must consider the implications of enforcement of this Award. The Application makes clear that the main purpose in seeking enforcement of the Award is to seek payment of the Sum of Kshs. 1,182,902.42 which was incurred by the Applicants as interest on the sum of Kshs 4,500,000. It is the case that the Applicant’s sought recovery of that sum in the Arbitration. That is apparent from the two penultimate paragraphs of the Witness Statement exhibited to the Supplemental Affidavit. They also sought “additional bank interest of Kshs. 1,182,908 at the Bank rate from 1<sup>st</sup> August 2014 until payment in full”. It is clear that phrase is illogical. In addition if it were to stand alone it would mean the Claimants were asking for double recovery of the sum of Kshs.1,182,908.42. However they were seeking “interest on the unpaid principal and interest at 20%. The figure for the principal used was Kshs3,718,356.00. In fact the Arbitrator awarded interest at 20% on the unpaid principal of Kshs 5,000,000/= (Five Million Shillings). The Arbitrator also awarded at point (iii) interest on the sum of Kshs 1,182,908.42 **at the prevailing commercial rates**” It is clear from that analysis that the Arbitrator took into account the principal and the interest incurred. He also ordered interest on those two categories of “claim” at different rates. The Applicant’s Demand requests payment of 5 categories of claim as follows:

(1) The Principal (5,000,000 less 2,000,000)	Kshs 3,000,000
(2) Interest on the principal at 20% pa	Kshs 1,541,096
(3) Simple interest at 16.9% of 1,182,908.42	Kshs 108,172
(4) Arbitral fees and expenses	<u>Kshs 115,000</u>
Total	<u>Kshs4,764,268</u>

However, in addition it claims the sum of “bank interest amount” of Kshs 1,182,908.42 bringing the total to Kshs 5,947,176.42. The Respondent corrected the calculation by removing the figure of Kshs1,182,908.42 and adding the sum for costs as Awarded. It is clear from the documents before the court that the Arbitrator considered the issue. At paragraph 84-86 of the Award he states:

*“84. On the other hand, the Respondents submitted that the entire Settlement Deed nowhere makes mention of any payable Bank interest. If they were the basis of negotiations it is clear that the Claimant was amply compensated by the generous Settlement Amount offered in the Deed.*

*85. In any case, the Deed contemplated default in payment and provided equally generous interest at the rate of 20% per annum to cater for such default*

*86. In the premises, the Respondent would be doubly jeopardised if it were made to pay both the interest offered in the Settlement Deed and the purported bank interest, the basis of which was not laid by the Claimants...”*

It is therefore clear that the Arbitrator both considered the claim for “bank interest” additional to 20% interest and rejected the claim. What he did was allow interest upon interest. In the circumstances the inclusion into the Demand of the sum of Kshs. 1,182,908.42 was misconceived. It amounts to double recovery and the Applicants would have been aware of that from the reasons of the Award.

17. In the circumstances, the sum due and payable under the award was Kshs 4,764,268 together with

costs. That sum has been paid by the Respondent on 29<sup>th</sup> April 2015. That is several months before the filing of the Chambers Summons.

18. In the circumstances, there is no subject matter for the Court to enforce. The Award has been satisfied. Further, if the Court was to concede to the Application, that would enable the Applicants to recover under a head of claim expressly excluded by the Arbitrator. That would go against the spirit of the arbitration being final and binding. Such recognition and enforcement would therefore be contrary to the public policy which is to enable, recognise and enforce arbitration agreements. For those reasons the Application is dismissed with costs.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Dated: 15<sup>th</sup> August 2016**

**SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>th</sup> DAY of August, 2016**

In the Presence of:

I Otieno – Court Clerk

Mr Muchini - Applicant

Respondent