



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC.CIVIL APPLICATION NO.154 OF 2014**

**OBADIA MUCHORI GATHINGI.....1<sup>ST</sup> CLAIMANT**

**GREENCITY INVESTMENT LIMITED.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**WAKI CLEARING & FORWARDING**

**AGENTS LIMITED.....RESPONDENT**

**RULING**

1. The Applicants (**also referred to as The Claimants**) herein contend that the Arbitral award dated 17<sup>th</sup> January 2014 by Paul Ngotho is invalid under the Laws of Kenya and inconsistent with the Constitution. That the Award is in conflict with Public policy as it is unenforceable. Further that it was made in excess of Jurisdiction.

2. The Notice of Motion of 3<sup>rd</sup> Aril 2014 therefore seeks to set aside that Arbitral Award and a Declaration that it is null and void.

3. The journey to this motion is not involved and should not be. Vide a Sale Agreement of 22<sup>nd</sup> January 2007 the 1<sup>st</sup> Claimant sold to the Respondent 1.014 hactares of land Reference number 12715/587 which comprised by measurement 2.028 hactares or thereabouts. The consideration for the sale was Kshs.7,500,000/=.

4. At the time of sale, the land was unsubdivided and the agreement contained special conditions on subdivision. Those conditions have turned out to be critical in the dispute herein. The special conditions are:-

**A. The Vendor undertakes, upon execution hereof to immediately commence the process of subdividing the land into two portions of one decimal nought one four (1.014) hectares each at his own cost, and also obtain the necessary consents to subdivide and transfer one of the subdivided portions.**

**B. It is a fundamental term of this Agreement that the Vendor shall have the piece of land sub-divided longitudinally from the adjacent Land Reference 12715/588 through to the adjacent Land Reference 12715/586 and the Purchaser purchases the subdivided equal parcel neighboring Land Reference Number 12715/552.**

**C. The Vendor undertakes, and shall have the surveyor provide for an access road adjacent the boundary with Land Reference Number 12715/588, into the sub-divided parcel up for sale.**

**D. The Vendor grants vacant possession of the proposed sub-divided portion up for sale immediately upon execution hereof and payment of the deposit aforesaid, further granting the Purchaser permission to put up sheds and garages for its transportation vehicles.**

5. Matters came to head when the Respondent constructed a wall to enclose what it believed to have been the land sold to it. The Respondent maintains that it built the wall along the beacons shown to it by the 1<sup>st</sup> Claimant. In the meantime subdivision was carried out and a title to land measuring 0.9177 hectares transferred to the Respondent.

6. It is common ground that because of the boundary wall, the Respondent is in possession of 0.9398 hectares (and not 1.014 hectares) and has title reading 0.9177 hectares. Spirits were grieving on both sides. The 1<sup>st</sup> claimant is aggrieved about the position of the boundary wall while the Respondent is seeking to get 1.014 hactares which it sees as its entitlement. The misunderstanding between these two was

succinctly captured by the Arbitrator in the impugned Award as simply being that;

**“The Respondent understood the contract to mean that it was buying 1.014 hectares net of road reserve while the 1<sup>st</sup> claimant says he believes he was selling 1.014 hectares gross of some acreage that would be taken by the road reserve (SIC)”**

7. There is a third party to this matter which was not party to the original agreement. It is Greencity Investments Ltd (the 2<sup>nd</sup> Claimant). The remainder of the sold property was designated land Reference No. 12715/6319. This was transferred to the 2<sup>nd</sup> Claimant who is currently in possession thereof.

8. The Court has read and understood the Application and Response and has considered the written Submissions as highlighted through oral address by Counsel.

9. It is accepted by Court that as a General principle the intervention by Court in the arbitration process is narrow. Recourse to the High Court is restricted by the provisions of Section 35 of The Arbitration Act which provides as follows:-

**35 (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 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.**

**(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.**

10. The issues that this Court is asked to determine come down to:-

(a) Was the arbitration award in excess of jurisdiction?

(b) Is the award in consistence with the laws of Kenya and the provisions of the Constitution?

(c) Is the award in conflict with Public Policy?

(d) Is the award unenforceable?

11. It is common ground that the Sale Agreement of 22<sup>nd</sup> January 2007 contained the following Arbitration Clause:-

**“Any dispute and questions whatsoever which shall arise between the parties hereto touching on this agreement or relating to the rights and liabilities of either party hereto shall be referred to an arbitrator to be appointed by agreement of both parties and in the absence of agreement by the Chairman of the Chartered Institute of Arbitrators and the decision of such arbitrator shall be final and binding on the parties hereto.”**

12. The claim before the Arbitrator was set out in the statement of 17<sup>th</sup> December 2012 which bespoke the following award against the Respondent:-

**(a) Removal of the stone wall**

**(b) Reinstatement of the Beacons**

**(c) Damages**

**(d) Cost of survey fee**

13. In response, the Respondent denied the claim and raised a counterclaim dated 7<sup>th</sup> February 2013 seeking the following prayers:-

**i. The said title deed No. 12715/6319 allegedly issued on 26<sup>th</sup> September 2007 in the name of Obadiah Muchiri Githinji and the deed plan No.279183 be rectified to reflect the correct acreage for the claimant after taking into account the entire 9 Metre access road that he ought to have provided.**

**ii. The Respondents title deed No. 12715/6320 issued on 26<sup>th</sup> September 2007 and the respective deed plan be rectified to reflect an acreage of 1.014 Ha.**

**iii. A declaration be issued that the respondent lawfully occupies his rightful share subject to adjustments to make it 1.014 Ha as per the sale agreement dated 22<sup>nd</sup> February 2007 and that the respondent is entitled to quiet occupation and enjoyment of his plot.**

**iv. The refund of the said legal cost of transaction in the sum of Kshs.92,210.00 paid by the Respondent on behalf of the 1<sup>st</sup> Claimant.**

**v. General damages for breach of contract.**

**vi. Costs of the Arbitration.**

**vii. Any other relief that this honorable court may deem fit to grant.**

14. The Claimants assail the Award as being made beyond the terms of reference and in excess of jurisdiction by considering and making findings in respect to the titles. Essentially what is raised by the Claimants is that the dispute was simply a boundary dispute and the Arbitrator did not have jurisdiction to make a determination that touched on the existing titles.

15. A view taken by the Respondent and which seems logical is that in the nature of the dispute that was being entertained, it was inevitable that the acreage/sizes of the respective subdivision be determined. Central to the Response and Counter claim was that there was an attempt by the 1<sup>st</sup> Claimant to give the Respondent less land that it had bought. And this was always a live issue as is demonstrated by prayer (1) and (ii) of the Counterclaim. Thus :-

**i. The said title deed No. 12715/6319 allegedly issued on 26<sup>th</sup> September 2007 in the name of Obadiah Muchiri Githinji and the deed plan No.279183 be rectified to reflect the correct acreage for the claimant after taking into account the entire 9 Metre access road that he ought to have provided.**

**ii. The Respondents title deed No. 12715/6320 issued on 26<sup>th</sup> September 2007 and the respective deed plan be rectified to reflect an acreage of 1.014 Ha.**

16. It was therefore not surprising that the issue of acreage was one of the issues that the Arbitrator framed for determination ie. issues (1) (2) (3) and (5):-

**1) Is the 1<sup>st</sup> Claimant in breach of contract for having the portion it sold to the Respondent surveyed to 0.9177 of a hectare instead of 1.014 hectares, ie. exactly 50% of the original acreage of 2.028 hectares?**

**2) Was the sale price of Kshs.7,500,000/= based on acreage of 1.014 ha?**

**3) Whether or not the Respondent acquiesced to the net acreage of 0.9177 ha. by signing the transfer documents and accepting the title.**

**5) Whether or not the 1<sup>st</sup> Claimant lost its right over the portion of LR No. 12715/6319 it claims was encroached by the Respondent for not objecting when the Respondent constructed the wall.**

Importantly, these were amongst 8 issues framed by the Arbitrator and submitted to the parties for comment. The Claimants herein do not seem to have disagreed with the manner in which the Arbitrator had framed the issues.

17. It was therefore not beyond the scope of reference or Jurisdiction when the Arbitrator made an award that required the rectification of existing titles or issuance of new titles to reflect what he had found to be the just entitlement of each of the parties before him.

18. Was the award contrary to law? Counsel for the Claimants made some rather general submissions that the Award was contrary to the Law Society Conditions of sale, and the Survey Act. First, the Court does not see any contradiction between the Arbitrator's Award in paragraph 81 and his final Order. In paragraph 81 he observed;

**‘It turned out that the boundary wall not on the position shown on the deed plan to mark 0.9177 of a hectare or the one marking 1.014 hectares but a totally different location marking 0.9398 of a hectare according to unchallenged evidence submitted by F K Magiri engaged by the Respondent’.**

While the effect of his Award is that the Respondent should get title for land measuring 0.9398 which is the size of current land occupation by the Respondent as marked out by existing wall. This Order was made in furtherance to the finding in paragraph 81. There is no inconsistency.

19. Rectification of the Land Register and Titles is contemplated by The Land Registration Act 2012. And rectification can be undertaken to correct the area of Land in a title. Rectification can be by the Registrar (section 79) or by an Order of Court (Section 80) Section 80 reads:-

**“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

An arbitration award is of binding nature once recognized and enforced under the provisions of Section 37 of The Arbitration Act. And in effect becomes a Court Order. In the event that the Award will be recognized, it becomes enforceable under the provisions of section 80 above. That also puts to rest the doubt by the Claimant that the Award is not enforceable.

20. There was also an attempt by the Claimants to state that the Award was made contrary to the Applicant's Constitutional right to fair hearing. This in the Courts view was an attempt to expand the scope of the Application as bias was not one of Grounds set out in the Application before Court.

21. It was submitted by the Claimants that the award was against Public policy because the boundary wall is crooked and can easily collapse. What the Claimants did not do was to point out, either in the Pleading or in the evidence, when the issue of the strength and integrity of the wall became an issue for consideration by the Arbitrator. I accept the Respondents submissions that this belated issue is not only irrelevant but was never a matter for determination by the Arbitrator.

22. Finally, the Claimants were unhappy about the order of costs in the Award. The Claimants were ordered to pay 90% of The Respondents costs. The Claimants see an injustice, as in their view, they successfully defended the Counterclaim.

23. The provisions of Section 32B of the Arbitration Act empower an Arbitrator to determine and apportion costs of Arbitration. While costs ordinarily follow the event, it is a matter of the discretion of the Arbitrator. A discretion to be exercised, as always, judiciously. The only occasions, in my view, when the Court can set aside an award of Costs by an Arbitrator is when it falls within the matters set out in Section 35 of The Arbitration Act. It must be demonstrated, for instance, that the Award on costs was induced, or affected by fraud, bribery, undue influence or corruption or is inimical to public policy.

24. None of this is raised here and the Court simply is asked to re-evaluate this Award from the perspective of its correctness or otherwise. The scope of this Court's jurisdiction under Section 35 of The Arbitration Act does not include sitting on Appeal against the Decision of the Arbitrator and I respectfully, decline to consider the issue of costs.

25. In the end, the Court sees no merit in the Notice of Motion of 3<sup>rd</sup> November 2014 and does hereby dismiss it with costs.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> Day of November, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Muendo for Applicant

Kimigicha for Mulyalo for Respondent

Alex - Court clerk