



**THE REPUBLIC OF KENYA**

**THE HIGH COURT AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC CIVIL APPL NO 109 OF 2013**

**IN THE MATTER OF THE ARBITRATION ACT, NO 4 OF 1995**

**AND**

**IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBTRATION AWARD**

**BETWEEN**

**SIMBA VILLAS LIMITED.....APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK STAFF**

**PENSION FUND REGISTERED TRUSTEES.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Chamber Summons application dated and filed on 27<sup>th</sup> March 2013 was brought under the provisions of Section 35(2) (a) (v) & (b) (ii) of the Arbitration Act No 4 of 1995 and Rule....(sic) of the Arbitration Rules. It sought the following prayers:-

**1. THAT the Award of the Sole Arbitrator Steven Gatembu Kairu (FCIArb) dated 29<sup>th</sup> December 2012 in the matter of an arbitration between the applicant and the respondent be set aside.**

**2. THAT Costs be provided for.**

**THE APPLICANT'S CASE**

3. The said application was supported by the Affidavit of Anzelimo Pancras Owino that was sworn on 27<sup>th</sup> March 2013. The Applicant's Written Submissions were dated and filed on 23<sup>rd</sup> March 2015.

4. The Applicant stated that it was a company that was engaged in the management of the estate constructed on L.R. No 9042/685 within Nairobi, known as Simba Villas (hereinafter referred to as "the subject property") and having legitimate interest in the same, it had the *locus standi* to bring the

proceedings herein.

5. It contended that the Arbitral Award was not in accordance with the Arbitration Act as the aforesaid Arbitrator did not decide the dispute between the parties in accordance of the Contract, that he did not take into account the usages of trade applicable to the transaction, that he did not apply the relevant substantive law on interpretation of written documents and that he took, into account, extraneous circumstances in making his decision.

6. It was also its averment that the said Arbitral Award was in conflict with the public policy of Kenya for promoting commercial exploitation of members of the Applicant and for being inconsistent with judicial opinion on parole evidence rule.

7. It therefore urged the court to allow its application as prayed.

### **THE RESPONDENT'S CASE**

8. In response to the said application, on 23<sup>rd</sup> September 2013, Matano Nyaa, the Respondent's Pension Liaison Manager, swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on even date. The Respondent's Written Submissions were dated and filed on 2<sup>nd</sup> June 2015.

9. The Respondent stated that pursuant to the Arbitration Clause in various leases over a development on the aforesaid subject property, a dispute relating the construction of a swimming pool and gymnasium, was by agreement of the parties herein, referred to the aforesaid Arbitrator.

10. It stated that the said Arbitrator took into account all factual and legal matters as were presented to him by the parties and that the parties having chosen arbitration as their mode of settlement of their disputes, the parties were bound by the said Arbitral Award as no appeal was open to either of them.

11. It was its view that allowing the said application, which it termed an abuse of the process of the court, would mean that the dispute would remain unresolved. It therefore urged the court to dismiss the Applicant's present application with costs to it.

### **LEGAL ANALYSIS**

12. The provisions of Section 35 of the Arbitration Act under which the Applicant brought its present application provide as follows:-

**(2) 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). An arbitral award may be set aside by the High Court only if:-**

**a. The party making the application furnishes proof.**

**1. 1. 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**

**2.2. The High Court finds that-**

**ii. The award is in conflict with the public policy of Kenya.**

13. The Applicant raised issues regarding the construction of a contract which it contended includes two (2) distinct processes namely, interpretation of the language used by the parties and the implication of the terms where the contract was silent.

14. In this regard, it referred the court to the case of **Investors Compensation Scheme Limited vs West Bromwich Building Society (1998) 1 WLR 896** which encapsulated the principles of interpretation of a contract and averred that many contract disputes turn to the proper interpretation of the contract between the parties.

15. It was therefore its argument that the said Arbitrator did not give effect to the substantive law on interpretation of documents when he interpreted “retained parts” which was plain and unambiguous, to exclude the swimming pool and gymnasium and therefore acted contrary to the provisions of Section 35 (2)(a)(v) of the Arbitration Act.

16. In addition, it stated that the said Arbitrator did not appreciate that where a swimming pool was developed as part of the amenities, then the members of the management company had the right to enjoy the said facilities. It was their further contention that it was contrary to usages of trade to vest management of amenities in a gated community to a different entity other than the management company because the noise pollution and other inconveniences would interfere with the quiet possession of the members.

17. 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.

18. Although the court noted the parties’ submission regarding the interpretation of the contract, it did not wish to re-open the same to re-evaluate what the Arbitrator had found as he was properly seized of the facts of the case in the first instance. The court was thus prevented from interfering with his findings and holdings of law.

19. In addition, the Arbitrator’s findings regarding exclusion of the swimming pool and the gymnasium from the retained parts, his finding that the shops included the swimming pool and the gymnasium and his finding that an Annual General Meeting had been held where the question of the purchase of the swimming pool appeared as an one of the agenda items, were matters of fact for which this court has absolutely no jurisdiction to entertain.

20. Consequently, as was rightly pointed out by the Respondent, the Applicant was restricted to seeking to set aside the said Arbitral Award only on the grounds set out in Section 35 of the Arbitration Act and could not seek to appeal against the decision of the said Arbitrator.

21. Notably, Section 39 of the Arbitration Act provides as follows:-

**Where in the case of a domestic arbitration, the parties have agreed that—**

**a. an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or**

**b. an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.**

22. In this respect, the court agreed with the holdings in the cases of **Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others [2015] eKLR**, **Deekay Contractors Limited vs Construction & Contracting Limited [2014] eKLR** that were relied upon the Respondent to the effect that it is not within the domain of a court to substitute the findings of an arbitrator once he had made a determination of the same unless as provided for under the Arbitration Act.

23. In the circumstances, in the absence of a consent by the parties to have questions of law arising out of the Arbitral Award or in the course of the arbitral proceedings, the court was bound by the provisions of

Section 10 of the Arbitration Act that provide as follows:-

**“Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

24. Turning to the question of the Arbitral Award having been contrary to public policy as envisaged in Section 35 (2)(b)(ii) of the Arbitration Act, the court came to the conclusion that the said Arbitral Award was not inconsistent with the Constitution of Kenya or other written or unwritten laws of Kenya, that it was not inimical to the national interest of Kenya or contrary to justice and morality as was set out by Ringera J (as he then was) in the case of Christ for All Nations vs Apollo Insurance Co Ltd [ 2002] 2 E.A. 366 that the Applicant relied upon and was also alluded to by the Respondent.

25. Indeed, as the Respondent herein submitted and the court had found hereinabove, the issues raised by the Applicant as aforesaid and the application of the parole evidence rule were matters of law that ought to have been addressed as an appeal. Re-evaluating the application of the law on intrinsic or extrinsic evidence would amount to an appeal which this court found and held it had no jurisdiction to deal with.

26. Accordingly, having considered the pleadings, the affidavits, the written submissions and the case law that were relied upon in support of the respective parties' cases, the court was more persuaded by the Respondent's arguments that the court had no jurisdiction or power to determine whether or not the said Arbitrator had properly interpreted the contract between the parties as doing so would be tantamount to hearing an appeal arising out of the Arbitral Award in a round- about way.

27. While this court has an eye for justice, it could not set aside the Arbitral Award on the grounds that had been relied upon by the Applicant for lack of jurisdiction to do so. From the evidence that was placed before the court, it was clear that the Applicant did not satisfy it that the said Arbitral Award was in conflict with the public policy of Kenya or that the said Arbitral Award was not in accordance with the Arbitration Act.

28. The importance of finality of arbitral awards is aptly captured in Section 32A of the Arbitration Act that stipulates that:-

**“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”**

29. In the case Christ for All Nations vs Apollo Insurance Co Ltd (Supra), which this court wholly associated, Ringera J (as he then was) aptly rendered himself on the effect of finality of arbitral awards when he stated thus:-

**“ ...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.”**

## **DISPOSITION**

30. For the foregoing reasons, the upshot of this court's ruling was that the Applicant's Chamber Summons application dated and filed on 27<sup>th</sup> March 2013 was not merited and the same is hereby dismissed with costs to the Respondent.

31. It is so ordered.

**DATED and SIGNED at NAIROBI this 18<sup>th</sup> of September 2015**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at NAIROBI this 29<sup>th</sup> day of September 2015**

**F. AMIN**

**JUDGE**