



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**(MILIMANI COMMERCIAL & ADMIRALTY DIVISION)**  
**MISC CAUSE NO 590 OF 2014**

**LUCY NJERI KARANGU (PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
CHARLES MUNGAI NGURE).....APPLICANT**

**VERSUS**

**JULIUS NDUNGU KABERERE.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Chamber Summons application dated and filed 5<sup>th</sup> December 2014 was brought under the provisions of Section (sic) 1A, IB, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Section 35(2)(b)(ii) and (iv) (sic), and Section 39 of the Arbitration Act, 1995, Rule 4 (2), 7 (sic) of the Arbitration Rules, 1997, Article 159(3)(c) of the Constitution of Kenya and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

**a. Spent.**

**b. THAT this Honourable Court be pleased to set aside the Arbitral Award dated 20<sup>th</sup> June 2014 given by the Arbitrator in the dispute in the Matter of an Arbitration between Julius Ndungu Kaberere and Lucy Njeri Karangu (as the Legal Representative of the Estate of the Estate of Charles Mungai Ngure (deceased)).**

**c. THAT the Consent dated 25<sup>th</sup> September 2013 between the 1<sup>st</sup> Claimant and the 4<sup>th</sup> Claimant be declared a breach of contract and set aside.**

**d. THAT the dispute between the 1<sup>st</sup> Claimant and the 4<sup>th</sup> Claimant be withdrawn from Arbitration.**

**e. THAT the dispute between the 1<sup>st</sup> and 4<sup>th</sup> Claimant be referred back to this Honourable**

**Court for adjudication and expeditious determination of the dispute.**

**f. THAT the 4<sup>th</sup> Claimant bears the costs of this Application.**

**THE APPLICANT'S CASE**

2. The application was supported by the Applicant's Affidavit that was sworn on 5<sup>th</sup> December 2014. Her Written Submissions and List & Bundle of Authorities were both dated 24<sup>th</sup> March 2015 and filed on 25<sup>th</sup> March 2015.

3. She contended that in his Arbitral Award dated 20<sup>th</sup> June 2014, the Arbitrator made the following orders *per incuriam*:-

“

**a. The Notice of Motion dated 24<sup>th</sup> January 2014 be and is hereby dismissed with each party bearing its own costs.**

**b. The Consent dated 25<sup>th</sup> September 2013 is adopted and rectified in respect of Clause 2 as follows:**

**“the sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs 6,300,000/=) deposited in Court in HCCC No 623 of 2009 being the purchase price for the said Title Numbers Makuyu/Kimorori Block 1/1820; 1821, 1822 and 1823 be released and paid directly to the Respondent personally within 14 days of the date of the Award.”**

**c. Each party shall bear its own costs in relation to the Costs of the Reference and the Award.”**

4. It was her argument that the unilateral amendment, variation, alteration and/or rectification of the said Consent by the Arbitrator was contrary to public policy and the laws of Kenya and was inconsistent with Article 159(3) (c) of the Constitution of Kenya that provides that dispute resolution mechanisms shall not be used in a manner that was inconsistent with the Constitution or any written law.

5. It was also her contention that the Arbitral Award contained decisions on matters that were beyond the scope and jurisdiction of the Arbitration Reference as the Arbitrator's mandate was restricted to setting aside the Consent or in the alternative to adopt the same as it was, and not to rectify the same as the said prayer had not been sought, which action she said, amounted to re-writing the contract between the parties to the arbitration.

6. She therefore averred that it was in the interests of justice that the court set aside the said Final Award and refer the dispute back to court for determination as the 4<sup>th</sup> Claimant would suffer no prejudice if the said orders were granted.

**THE RESPONDENT'S CASE**

7. In response to the said application, on 24<sup>th</sup> April 2015, the Respondent herein filed his Grounds of Opposition dated 23<sup>rd</sup> April 2015. The same were as follows:-

**a. THAT the Application offended the strict provisions of Section 10 and 32A of the Arbitration Act No 4 of 1995 (as amended by Arbitration Act No 11 of 2009).**

**b. THAT the Application constituted allegations of errors of law on the part of the Arbitrator which were not grounds under Section 35(2) and (3) for setting aside the Final Award made**

on 20.06.2014( “the Award”).

c. **THAT the Application amounted to an appeal against the Award given by the Arbitrator.**

d. **THAT the Honourable Court lacked jurisdiction to sit as an appellate court in respect of the Award as there was no prior agreement or consent by the parties in terms of Section 39(b) of the Arbitration Act.**

e. **THAT the overriding objective spelt out in Section 3A of the Civil Procedure Act could not confer a right of appeal where none existed.**

f. **THAT the Application failed to establish that the Award was inconsistent with the Constitution or other laws of Kenya or was inimical to the national interest of Kenya or contrary to justice and morality.**

g. **THAT the Arbitrator considered the issues in controversy before rendering the Award and there was no justification for the Honourable Court interfering with the Award or coming up with its own findings in this matter.**

h. **THAT it was in the public interest that all matters came to a determinate end.**

8. His Written Submissions were also dated 23<sup>rd</sup> April 2015 and filed on 24<sup>th</sup> April 2015.

### **LEGAL ANALYSIS**

9. The provisions of Section 35 of the Arbitration Act under which the Applicant brought her present application provides as follows:-

**35(i) 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.**

**i. 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;**

**2. 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 in conflict with the public policy of Kenya.**

10. The court wishes to point out right at the outset that the provisions of Section 3A of the Civil Procedure Act that were relied upon by the Applicant were not applicable to arbitral matters as the Arbitration Act Cap 49 (Laws of Kenya) is a complete code that governs how arbitral matters are to be handled. The reliance of the said provision by the Applicant was therefore misplaced and irrelevant in the circumstances of the case herein.

11. Turning to the substantive issues, it did appear to the court that the Applicant was aggrieved by the part of the Final Award made on 20<sup>th</sup> June 2014 (hereinafter referred to as “the Final Award”) by Allen Waiyaki Gichuhi set out in Paragraph 3 hereinabove.

12. In the Letter of Agreement and Consent dated 12<sup>th</sup> April 2013 executed by both the Applicant and Respondent and attested by their respective witnesses, it was agreed as follows:-

- 1. The Administrator hereby agrees to grant vacant possession of the suit properties to the Purchaser as per the terms of the sale and purchase agreement with immediate effect.**
- 2. On acknowledging vacant possession, the Purchaser undertakes to withdraw the matter in the high court under HCC (sic) 513 of 2009 and to have no other claim on the Deceased Estate (sic), save for the suit land.**
- 3. The Purchaser consent's (sic) that the Administrator is paid in her personal names the balance of the purchase price of Kshs. 6.3 million currently deposited in courts vide HCC. (sic) 623 of 2009 as soon as practicable and to advise all other parties of this court of court consent.**
- 4. The Administrator and the Purchaser agrees (sic) that each party bears their cost of this agreement, and each party handles and meets the costs of their own advocates/legal advisers as they shall individually agree or be determined.**
- 5. The Administrator grants vacant possession to the Purchaser on as it is basis (sic) and as per the conditions set in the sale and purchase agreement.**

13. It was not clear to the court whether or not the said agreement was acted upon because the Applicant filed a Notice of Motion dated 24<sup>th</sup> February 2014 before the Arbitrator in which she had sought the setting aside of the Consent Agreement dated 25<sup>th</sup> September 2013 which had been executed by the parties' advocates.

14. The terms of this latter Consent were as follows:-

- 1. The Respondent hereby grants to the Claimant vacant possession of the properties known as Title Numbers Makuyu/Kimorori Block 1/1820; 1821, 1822 and 1823.**
- 2. The sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000/=) deposited in HCCC No. 623 of 2009 being the purchase price for the said Makuyu/Kimorori Block 1/1820; 1821,1822 and 1823 be released to the Respondent by way of Deposit to the Respondents (sic) Advocates (sic) Account at Standard Chartered Bank of Kenya, Kenyatta Avenue Branch Account Number 0104021116201.**
- 3. The Release (sic) of the said sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000/=) and the grant to the claimant of vacant possession of the said Title Numbers Makuyu/Kimorori Block 1/1820; 1821, 1822 and 1823 constitute the full and final settlement of the parties (sic) claims against each other.**
- 4. The parties hereby agree to the withdrawal of all matters pending in Court namely HCCC NO. 513 OF 2009, HCC (sic) NO. 618 AND 623 OF 2009.**
- 5. Each party shall bear its own legal costs.**
- 6. This matter be marked as settled.**

15. In the Paragraphs of the Final Award shown hereinbelow, the Arbitrator stated as follows:-

**“26. There is only one issue in contention between the two agreements- the mode of payment of the purchase price...**

27. The question that begs answer is this- would the Respondent still complain if the money was paid directly to her in accordance with Agreement and Consent dated 12<sup>th</sup> April 2013.

31. After carefully (sic) evaluation (sic) the evidence and case law cited above, I FIND as follows:-

a. No evidence has been adduced to show that she communicated with the firm of Kirundi & Co. Advocates to express her disagreement with the terms of the consent dated 25<sup>th</sup> September 2013.

b. No evidence of any fraud or collusion has been particularised or adduced by the Respondent against the advocates who executed the consent dated 25<sup>th</sup> September 2013.

c. No evidence of misrepresentation has been adduced by the Respondent.

I FIND and HOLD that the Respondent has not set out any grounds for setting aside the Consent Agreement dated 25<sup>th</sup> September 2013.

32. The main issue I have found is the complaint by the Respondent regarding the mode of payment. It is abundantly clear that had the consent provided for payment directly to the Respondent, no dispute would have arisen.

37. In the interest of justice, I FIND that rather than setting aside the entire agreement, a simple rectification would suffice. Just like a surgeon would excise a benign tumor to save the body, so too will I excise that part of Clause 2 of the Consent dated 25<sup>th</sup> September 2013 as relates to payment of the monies into the former advocates account. This will give spirit and intent of the aspirations of the Respondent whose sole concern was to have the monies paid directly paid to her.

16. The court carefully considered the findings of the Arbitrator and found that he analysed the parties' submissions on whether or not he could set aside the Consent of 25<sup>th</sup> September 2013 and made a holding of law. Any violation of the law of contract as was suggested by the Applicant was really question of law and not an inconsistency to the Constitution of Kenya, 2010 or laws of Kenya and by its very nature, could only be determined on appeal as a point of law. The case of Hyde vs Wrench (1840) 3 Beav. 334 that the Applicant relied upon was therefore immaterial and irrelevant in the circumstances of this case.

17. The court also found and held that the Final Award was not inimical to the national interests of Kenya as had been contended by the Applicant. Indeed, save for stating that the Final Award herein was contrary to the public policy of Kenya, the Applicant did not demonstrate or provide evidence of the same. It was not sufficient for her to have made the same assertion without providing proof thereof.

18. In the absence of any evidence to the contrary, it was the finding and holding of this court that the Applicant's arguments regarding the setting aside of the Final Award on the grounds that she had relied upon were not convincing to persuade it to set aside the said Final Award. The cases that she relied upon amongst them National Bank of Kenya vs Pipeplastic Samkolit (K) Limited & Another [2001] eKLR and Christ For All Nations vs Apollo Insurance Co Ltd[2002] 2 EA 366, were therefore of no assistance to her.

19. Notably, Section 39 of the Arbitration Act, which the Applicant also placed reliance upon, 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.**

20. As was rightly submitted by the Respondent, this court cannot sit on appeal in the absence of a consent to have any point of law arising in the course of the arbitration or arising out of the award determined on appeal. In addition, this right of appeal cannot be conferred by the provisions of Section 3A of the Civil Procedure Act which the Applicant had sought to rely upon, and which this court found hereinabove was not applicable herein.

21. The court is indeed bound by the provisions of Section 10 of the Arbitration Act that provides as follows:-

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

22. A careful of the Final Award did not also provide any evidence to suggest that the said Final Award contained decisions on matters that were beyond the scope of arbitration. The court was thus not persuaded by the Applicant’s submissions that the said Arbitrator considered issues that were outside the provisions of the reference.

23. Appreciably, a party cannot rely on the provisions of Section 35 of the Arbitration Act with the expectation that the court will review or permit a re-litigation of matters where an arbitral tribunal has evaluated facts and evidence that were placed before it and made a finding on the same.

24. In the same vein, this court has no jurisdiction to re-open and re-evaluate facts that were presented before the aforesaid Arbitrator with the anticipation that it would come to a conclusion that would be different from what he had arrived at or arrive at a finding the Applicant herein would find to be favourable to her.

25. The Applicant was thus estopped from presenting to the court any material evidence and proceedings that were before the Arbitrator for re-determination by this court.

26. As regards Prayers Nos (c), (d) and (e) of the Applicant’s present application, this court took the firm view that it had no jurisdiction to entertain or grant the same. Its hands were tied by virtue of the provisions of Section 10 of the Arbitration Act mentioned hereinabove. Indeed, a court has no jurisdiction whatsoever to set aside a Final Award that has been made by an arbitral tribunal and order that the dispute be referred back to the court to hear and determine the same.

27. Evidently, the Applicant was dissatisfied with the Arbitrator’s findings for reasons this court could not discern bearing in mind that the Arbitrator directed that the sum of Kshs 6,300,000/= be paid directly to her as opposed to her advocates as had been indicated in the Consent dated 25<sup>th</sup> September 2013.

28. In fact, the court was baffled why the Applicant who was to receive the sum of Kshs 6,300,000/= would reject the same and seek to set aside the entire Consent of 25<sup>th</sup> September 2015 which was on all fours with the said Letter of Agreement and Consent dated 12<sup>th</sup> April 2013, she and the Respondent duly executed.

29. It was apparent that the Applicant was trying to get a second bite of the cherry. However, the very nature of arbitral proceedings is their finality as contemplated by the provisions of Section 32A of the Arbitration Act. She must therefore be stopped right in her tracks so as to bring litigation between her and the Respondent to an end. She cannot be allowed to renege on agreements that she entered into with the Respondent, directly and through their respective advocates as this would no doubt cause prejudice to the Respondent.

30. Accordingly, having considered the pleadings, affidavit evidence, written submissions and case law in respect of the parties’ cases, the court came to the conclusion that the Applicant did not satisfy it that she had met any or all of the grounds under Section 35 of the Arbitration Act that she was relying upon to

warrant interference by this of the said Final Award. As a result, the Applicant's present application must fail in its entirety.

31. It is important to note that the Applicant had initially filed her application to set aside the Final Award within the time stipulated in the Arbitration Act but withdrew the same to enable her file a proper application. The court opted not to rely too much on technicalities and considered the merits of the Applicant's application with a view to bringing this matter to a just conclusion. Appreciably, litigation must come to an end.

32. Finally, the court also wishes to observe that from the documentation that was presented in the application herein, it was not clear whether the only outstanding issue for determination in the arbitral proceedings by the Arbitrator was the Applicant's Notice of Motion dated 24<sup>th</sup> February 2013. It did appear to the court that the said Final Award was more of a Ruling rather than a Final Award as it was the determination of an application.

33. However, in view of the fact that the documentation presented to this court was very sketchy and the Arbitrator had indicated in Paragraph (3) of his Final Award that he had made an Interim Award on 9<sup>th</sup> January 2014, the court had no option but to consider what the Applicant wanted to set aside as a Final Award. It will say no more on this issue as the same was not raised by the Applicant herein. Her acquiescence amounted to a waiver to object.

34. The above notwithstanding, the Applicant would still not have been able to persuade this court to interfere with the said decision even if the same was deemed to be a Ruling unless she could have demonstrated that there was in existence, a consent that would have enabled this court invoke its jurisdiction to hear an appeal on points of law as has been contemplated under Section 39 of the Arbitration Act.

### **DISPOSITION**

35. For the foregoing reasons, the upshot of this court's ruling was that the Applicant's Chamber Summons application dated and filed 5<sup>th</sup> December 2014 was not merited and the same is hereby dismissed with costs to the Respondent.

36. It is so ordered.

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

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED AT NAIROBI** this 22<sup>nd</sup> day of September 2015

**F. AMIN**

**JUDGE**