



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 312 OF 2012

DOROTHY SEYANOI MOSCHIONIPLAINTIFF

Versus

ANDREW STUART 1ST DEFENDANT

TONY MARK TONUI2ND DEFENDANT

RULING

Setting aside arbitral award

[1] By a Motion dated 23rd May, 2012 expressed to be brought under Section 35(1) and (2) of the Arbitration Act, No. 4 of 1995, the Applicant is asking this court to set aside the arbitral proceedings and Award made on 12th October, 2011. The application is supported by the affidavits of Dorothy Seyanoi Moschion and founded on the following grounds:-

- a. The purported arbitration proceedings offend the provisions of rule 9 of the Advocates (practice) rules, are unlawful and contrary to public policy.
- b. The applicant was not granted any hearing in breach of the rules of natural justice and contrary to law and public policy.
- c. The applicant was incapacitated by remand during the purported arbitration.
- d. The applicant was not party to the purported arbitration agreement dated 24th March, 2010; rendering the arbitration agreement invalid.
- e. The applicant is a stranger to the 2nd Claimant to whom it is falsely claimed in the Award she sold her property herein.
- f. The purported Award facilitates and sanctions patent fraud by the Respondents against the applicant
- g. The award is in conflict with the public policy of Kenya.

APPLICANT'S SUBMISSIONS

[2] The Applicant filed submissions on 10th October, 2012 to amplify the above grounds. The Applicant also relied on the typed proceedings annexed to the Replying Affidavit of Andrew Stuart in support of the application. It was averred that, from the record; the award was delivered and received by the Applicant

on 7th March, 2012; and copies of the pleadings, documents and submissions by the parties were delivered to the Applicant on 18th May, 2012. She continued; that she is an elderly widow aged over 65 years and also a lay person. And that, from the very beginning of the purported arbitration, it was clear the Applicant did not understand what the proceedings were about. But, the arbitrator did little to make the Applicant appreciate the proceedings and her rights. Instead, the Arbitrator overtly denied the Applicant the rights to file response to the claim and a counter-claim; to legal representation; to call witnesses; and, generally, to fair hearing. She referred the Court to page 17-19 of the typed proceedings for 16th April, 2010; page 3, 4, (page 5 missing), 6, 23, 25, 26 of the typed proceedings of 3rd May, 2012; and Proceedings of 8th December, 2010 and 3rd February 2011 at Langata Women's prison.

[3] She made further claims. On 3rd May, 2010, the proceedings were adjourned to enable the Applicant engage an advocate to represent her in the proceedings. But, she was immediately arrested and charged with a criminal offence. The applicant was thereafter remanded at Langata women's prison for inability to raise the cash bail imposed by the court. She did not have the pleadings and documents including submissions by the other party in respect of the Arbitration while at prison, thus, impossible for her to prepare for the arbitral proceedings. She was also not able to engage/contact advocate(s) or witnesses. In these circumstances, it was not possible for her to prepare for the proceedings. She urged the Court should take judicial notice of the restrictive circumstances and want of apposite facilities at the remand prisons in Kenya and their incapacitating consequences to fair hearing.

[4] She submitted that, on 8th December, 2012, she informed the Arbitrator she was not given prior notice that there were to be proceedings at the prison. To her, it was also clear from the proceedings that the applicant refused to proceed with the matter and expressed her lack of confidence in the impartiality/independence of the Arbitrator and complained the tribunal had denied her fair treatment and fair hearing in the matter. She referred to pages 4-14 of the typed proceedings of 8th December, 2011 and pages 3-14 of the typed proceedings of 3rd February, 2011 at Lang'ata. The Arbitrator ignored the incapacity the applicant was facing at remand; denied her the opportunity to engage an Advocate to represent her in this technical matter, denied her the opportunity to call witnesses, saw no need to recuse himself despite expressed instances of glaring bias and instead 'advised' the applicant-who was remanded- to raise the matter of his impartiality/independence with the High court; and ordered the proceedings closed! Upon ordering the proceedings closed and directing parties to file written submissions, the tribunal proceeded to deliver the Award without ensuring the other parties had served the applicant with their written submissions as directed and without the benefit of the Applicant's written submissions, which she was unable to do for want of necessary facilities, a matter drawn to the attention of the Arbitrator. The totality of this is that the Applicant was not just incapacitated and unable to present her case due to remand, but was denied any or any reasonable opportunity to prepare and present her case, contrary to Section 19 of the Arbitration Act.

[5] According to the Applicant, the purported arbitral proceedings and the arbitral award are a sham, a travesty of justice, inconsistent with all norms undergirding fair and impartial hearing and, are contrary to the rules of natural justice, the law and public policy. The purported arbitration undermines the very essence of arbitration as a dispute resolution mechanism. Section 35(2) (a) (i) and (iii) vests in the court the jurisdiction to set aside an arbitral award where it is proved that a party was under some incapacity; or, where it is established that a party making the application was not given proper notice of the arbitral proceedings or was otherwise unable to present his case. This case evinces the clearest basis for interference with the arbitral award under these provisions of the Act. The purported arbitral proceedings and the award should be set aside *ex debito justitiae*.

[6] The arbitral proceedings and the arbitral award offend the provisions of Rule 9 of the Advocates (Practice) Rules and all known law governing professional/ethical conduct by advocates; and is thus contrary to law. Mr. Andrew Stuart, the 2nd respondent claimed he was entitled to the Applicant's property herein; under an "Agreement" dated 24th April, 2008, which he produced in evidence. The Applicant asserts she never instructed Ransley, McVicker & Shaw advocates representing her in any agreement with Mr. Andrew Stuart in respect of the suit property- Clause 1.1. (f) of the Agreement stipulated that Ransley, McVicker & Shaw Advocates represented both parties; that she never entered into

any agreement with the said Andrew Stuart in respect of the subject property; that she never received any money under the alleged agreement; and, applied to the Arbitrator to send the signature appended on the document to the Criminal Investigation Department for examination. The Arbitrator so no value in this. Even assuming the agreement existed, it was and remains a forgery. Andrew Stuart claimed to have paid the purchase price to Ransley, McVicker & Shaw Advocates and so the said advocates were probable witnesses in the matter on the existence of any valid agreement between the claimant and Mr. Andrew Stuart. This is a serious matter which the arbitrator ought to have given due consideration. These matters were raised several times before the tribunal. Accordingly, she was denied an opportunity to call the said advocates as witnesses yet they held crucial evidence in the matter, particularly the alleged forgery of the applicant's signature on the falsified Agreement and none payment of any money thereunder. The arbitral proceedings and the award, therefore, sanction patent fraud; are vitiated by illegality and unethical conduct herein, is contrary to law and public policy and should be struck out.

[7] Submissions did not end there. She submitted on section 35(2)(a) (iv) of the Arbitration Act that the award dealt with a dispute not contemplated by or not falling within the terms of reference to the Arbitration/contains decisions on matters beyond the scope of the reference to arbitration. The applicant denied she signed the subject arbitral Agreement. But, even assuming the same is valid, the recital to the Agreement is clear that the tribunal was to determine who, as between the Respondents, was rightfully entitled to conclude sale transaction with the Applicant over the subject parcel of land. On that decision being made, the parties were to agree on the terms of the agreement including performance-and that could not have been within the scope of arbitration. The tribunal went beyond this specific matter it was to determine and proceeded to issue orders in nature of specific performance; and orders of "refund" of monies. Nothing was there for arbitration because she has denied having entered into any agreement with Stuart. ? How does she pay monies she denies ever receiving? The court should set aside the award on this additional ground.

[8] The arbitrator should have recused himself in light of queries which were raised on its impartiality. It was not in order for the tribunal to have "advised" the applicant who was remanded to take up the matter with the High Court. Public policy requiring expedition in arbitration does not override the greater public policy and constitutional right to fair hearing by impartial tribunal.

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

[9] The Respondents opposed the application. They were able to narrow down the grounds of the application to three major grounds namely incapacity, the award being in conflict with public policy, and a fraud.

[10] On Capacity, they cited the case of **PRISCILLA NYOKABI KANYUA v A.G & ANOTHER (2010) eKLR** where **Samuel Mukunya J** stated

'...People of unsound mind cannot be able to take part in any function that requires exercise of choice due to their status... A person who is in prison and is of unsound mind is not in control of his faculties... from the fore going it would be quite clear that the inmates being litigated for are those of sound mind and over 18 years... this court makes the following orders, that Section 43 of the constitution does not exclude inmates who are over 18 years and of sound mind from voting in the referendum'

[11] Based on the above decision, the Respondents contended that that the Applicant cannot be said to lack capacity merely because she was in prison remand. Incapacity is only established if a prisoner is deemed to be of unsound mind and under the age of majority. The applicant herein cannot therefore be deemed to have lacked capacity during the arbitration proceedings. Using the legal procedures within the relevant law, the Arbitration proceedings were conducted at the Langata Women's prison on 8th June, 2010 and 3rd February, 2011. The Applicant willingly took part in those proceedings and she even giving her evidence as is shown in annexure "AS 3"- a copy of the entire proceedings including those held at the Langata Women's prison, in the first respondent's replying affidavit. Therefore, confinement in a remand does not constitute incapacity in terms of Section 35 of the Arbitration Act. As a result, the ground of

incapacity and that of not being granted any or any due hearing in breach of natural justice must fail.

[12] The ground of Public Policy was contested too. In hand is the case of **CHRIST FOR ALL NATIONAL v APOLLO INSURANCE CO. LTD (2002) 2EA 366** where **Ringera J.** (as he then was) in dismissing an application to set aside an Arbitral Award on the grounds that it was in conflict with public policy in Kenya stated that the same could only be set aside if:-

- a. **It was inconsistent with the constitution or other laws.**
- b. **It was inimical to the national interest of Kenya.**
- c. **It was contrary to justice and/or morality (this includes consideration whether the award was induced by corruption or fraud.**

The Applicant also cited the holding in **GELNCORE GRAIN LTD v T.S.S GRAIN MILLERS LTD (2002) 1 KLR 606** on when an award will be held to be offensive to the public policy of Kenya. And were of the view that the applicant herein has not shown how the award is contrary to Kenya's public policy and has not met the threshold required for this court to set aside the Arbitral Award.

[13] The alleged fraud was denied. It had not even been proved as required in law. The Applicant alleged on several times that her signature was forged on both the arbitration agreement of 24th March, 2009 and the sale agreement of 24th April, 2008. Yet, she did not object to the production of those documents during the arbitration proceedings. They referred the court to the case of **APA INSURANCE CO. LTD v CHRYSANTHUS BARANABAS OKEMO (2005) eKLR Fred Ochieng J.** held

“...As the applicant did not challenge the oral evidence tendered before the arbitrator, it is no longer available for him to challenge that evidence. If the applicant had objections to admissibility that objection should have been raised... the applicant would have become entitled to challenge the award.”

Other than the allegations she made, there is no expert evidence on forgery of her signature. Allegations of forgery are of a serious nature and must be proven true beyond reproach. The alleged fraud has not been proved and this ground must fail.

[14] Section 35 of the Arbitration Act at subsection 3 provides:-

“An application for setting aside an arbitral award may not be made after 3 months have lapsed from when the arbitral award was received by the party making the application to set aside the award.”

In the case before the Court, the arbitral award was sent to all parties including the applicant in a letter dated 12th October, 2011. **Nyamu J.** in **TRANSWOOD SAFARIS LTD v EAGLE AVIATION LTD & 3 OTHERS HC MISC APPLICATION NO 238 OF 2003** held that “... A notice to all parties that an award is ready is sufficient delivery...”, and was quoted by **P.F Ransley J** in the case of **MAHICAN INVESTMENTS LIMITED & 3 OTHERS v GIOVANNI GAIDA & 80 OTHERS (2005) eKLR.** The address used to inform the applicant of the award, P.O Box 1288 -00502, is the same address she used when swearing her supporting affidavit to the application dated 23rd May, 2012 now before this Honourable court, and as such it cannot be said that the applicant did not receive the notification of the award. It is clear that 3 months from 12th October, 2011 have lapsed since the award was received, and as such this application is time barred and on that ground alone this application must fail. It is incorrect for the Applicant to submit in paragraph 5 that the arbitrator confirmed that the award was delivered and received by the applicant on 7th March, 2012. It is very clear in the letter dated 7th March, 2012 that the arbitrator is confirming that the award dated 1st September, 2011 was delivered to all parties under the cover of the letter dated 12th October, 2011. The applicant should therefore not mislead this court as to when the award was actually delivered.

[16] At no time during the proceedings, did the applicant herein raise an objection or was stopped from raising an objection to any part of the proceedings. The applicant gave her testimony willingly while in remand at the Lang'ata Women's prison, as is shown at pages 3 -14 of the proceedings at Lang'ata. The applicant had never been denied the opportunity to call witnesses or engage counsel, and that the only reason why proceedings were closed and parties were asked to put in their submission was that the arbitrator felt that 2 years was a long time for an arbitration to be ongoing and as such used his discretion to bring the same to finality. At page 16 of the proceedings the applicant said she had witnesses but they were not present, clearly refuting the allegation that the applicant had been denied opportunity to call witnesses. The Applicant makes an unfounded allegation that the arbitrator was biased, ignored the incapacity of the applicant, and denied her the opportunity to get representation. Contrary to the allegations, the arbitrator is an independent, impartial party and it is not his job to give advice. The arbitration proceedings of 3rd may, 2010 were adjourned to enable the applicant engage counsel as per her request-see pages 24-27 of the proceedings of the aforementioned date. The record shows what exactly happened and the Applicant is only distorting the events herein to suit her. Further, the allegations of improper conduct, and or conflict of interest on the part of Ransley, McVicker & Shaw Advocates are unfounded. The said firm represented the first respondent in the arbitration proceedings and drew up the second sale agreement between the applicant and the first respondent. The said firm of advocates did not represent the applicant in the arbitral proceedings as claimed by her. There are no rules of ethics that were breached despite the Applicant's claim that the said advocates were probable witnesses. Paragraph 28 contradicts paragraph 23 of her submissions because she cannot deny she instructed the firm of Ransley, Mcvicker & Shaw advocates to represent her, and at the same time claim conflict of interest for the said firm to act for the first respondent.

[17] The Applicant is seeking the arbitral award to be set aside on the claim that it was made beyond the mandate/scope of the Arbitrator. Of note, the second respondent herein, Mark Tonui had applied for the same arbitral award by Mr. Steven Gatembu Kairu on 1st September, 2012 to be set aside on the same grounds. But the application was dismissed by G.K Kimondo, J in **TONY MARK TONUI v ANDREW STUART & ANOR MISC APPLICATION NO. 69 OF 2012** with costs to the respondents. Thus, the instant application now before this court is res judicata, and as such must be dismissed. The applicant's submissions herein are meant to mislead the court as to what actually happened during the arbitration and in light of the foregoing, the applicant has not met the requirements for which an arbitral award may be set aside under Section 35(2). The said application is an afterthought and an abuse of the court process. The same should be dismissed with costs to the first respondent.

COURT'S RENDITION

[18] Broadly catalogued, the Applicant is seeking the award herein to be set aside on grounds that; a) the Applicant was under some incapacity; b) the Applicant was not given proper notice of the arbitral proceedings or was otherwise unable to present her case; c) the award dealt with a dispute not contemplated by or not falling within the terms of reference to the Arbitration or contains decisions on matters beyond the scope of the reference to arbitration; d) the award was induced by fraud; and e) the award was contrary to the law and in conflict with public policy of Kenya. These grounds are prescribed under section 35(2) of the Arbitration Act. And any party who approaches the Court under section 35 of the Arbitration Act must operate within the strict confines of that section. The policy undertone thereto is the nature of arbitration as a consensual mechanism for dispute resolution and the need to promote arbitration as an alternative dispute resolution by allowing least intervention by the Court, and of course anything not provided for would be interference. Section 10 of the Arbitration Act captures that intention. I will, therefore, determine whether the Applicant has met the threshold set out in section 35 of the Act if the Court is to set aside the award. Each ground will be evaluated accordingly.

Of incapacity

[19] Section 35 of the Act uses very specific words "...a party to the arbitration agreement was under some incapacity..." I would imagine that, incapacity in the sense of section 35 of the Arbitration Act would include the state of being a minor or of unsound mind or such other physical incapacity which is recognized by law as disabling or depriving legal capacity. I do not think, therefore, the incapacity

envisioned under section 35 of the Act would include difficult situations or circumstances that a person finds himself or herself in, such as imprisonment or remand because the law provides for procedures to conduct a judicial or quasi-judicial proceeding in, and prison establishments in Kenya have facilities for such undertakings including arbitration. No wonder, arbitral sessions were had in prison as a result of that enablement. There is nothing to show that the Applicant was not afforded the prison facilities to conduct her defence in prison. Therefore, as long as there are procedures and facilities within prison establishment and the law which allow judicial proceedings to be conducted therein, I am not able to take judicial notice that the difficulties or unpleasantness which is ordinarily associated with confinement in a remand constitute incapacity in terms of Section 35 of the Arbitration Act. I am afraid if Courts were to take judicial notice of incarceration as incapacity will be a guarantee for all prisoners with Court cases or appeals to be deemed to have been denied fair trial. No doubt being in prison remand is quite unpleasant situation, but it is not incapacity in the sense of section 35 of the Arbitration Act. I find myself in agreement with Jan Mohammed on that issue. I am also content to rely on the persuasive decision in **PRISCILLA NYOKABI KANYUA v A.G & ANOTHER (supra)** on the subject. The arbitral tribunal acted prudently and held sessions in Lang'ata Women Prison remand. Accordingly, the ground alleging incapacity fails and is hereby rejected.

Fair hearing: Notice of proceedings; opportunity to present case; and impartiality

[20] Allegations that; the Applicant was not given proper notice of the arbitral proceedings; was not given an opportunity to present her case and was not heard by an impartial tribunal are matters of natural justice but which have been codified in the Constitution as fair hearing. It is not correct, at least from the record, that the Applicant was not given notice of the arbitral proceedings. The record shows she was informed of the proceedings and she participated in person. The award was delivered under the cover of the letter dated 12th October, 2011 through her address given in the pleadings. Her claim that she received the award on 7th May 2012 is not entirely true and probably she wanted to take leverage of the letter dated 7th March, 2012 which was only a confirmation by the arbitrator that the award dated 1st September, 2011 was delivered to all parties under the cover of the letter dated 12th October, 2011. As such, the grounds that she was not given proper notice of the arbitral proceedings or the award was delivered late, do not have a foot on which to stand. Both grounds fail flat and are rejected accordingly.

[21] I have already held that the arbitral tribunal acted prudently and conducted hearings at the prison. I have also held that the Applicant was given notice of the arbitral proceedings and the award was accordingly delivered to her. These things would negate the other allegations that the Applicant was not given an opportunity to present her case and was not heard by an impartial tribunal. I take exception to the allegation that the arbitral tribunal was not impartial. Those are serious allegations which touch on the conduct of the arbitrator and ought to be supported by cogent evidence which suggests bias or prejudice against the Applicant. The law would require other practical steps to be taken by the person complaining to ensure that her quest is realized by showing that such circumstances exist as to give rise to justifiable doubt on the impartiality and independence of the arbitrator. I have scavenged through the proceedings in search of any such impropriety and I find none. The mere fact that the arbitrator reached a decision which the Applicant is not satisfied with, does not amount to impartiality. Equally, closure of the proceedings is unavoidable part of due process and cannot found a ground to set aside an award. The Applicant was given time to call her witnesses; she did not. The Applicant was allowed time to engage an advocate of choice; she did not do so. Again, parties, including the Applicant, were afforded time to file their submissions; she failed to file. Such conduct becomes head long. And I am forced to re-state that, when time-lines have been set by the court for parties to take certain actions, it is upon the parties to comply and failure thereto is not the mistake of the Court. The tribunal allowed that window to the parties and the Applicant, being the party in default cannot accuse the tribunal for failing to confirm whether she had complied with its orders. Courts have said, not once, not twice but countless times that a party in default will never excite the magnanimous attention of the law and equity. This is a perfect case of deliberate temporizing by a party of proceedings of which the Court should never be made an abettor by the offending party. I wish to also state that insistence by a party that the arbitral tribunal is not impartial does not make the tribunal impartial. For those reasons, the allegations that she was not afforded an opportunity to present her case and that the arbitral tribunal was not impartial fail as well.

Conflict of interest

[22] On one hand, the Applicant alleged that she did not instruct Ransley, McVicker & Shaw Advocates to act for her in the drafting of the agreements in question. On the other hand, she stated that there is a conflict of interest for the said firm of advocates to act for the 1st Respondent in this case which relate to the said agreements. The latter submission in itself is a contradiction of the former submission. But besides that, the mere fact that an advocate acted for both parties in an agreement subject of the proceedings, does not *per se* amount to conflict of interest. The party applying must show there is real possibility of the advocate concerned using the privileged information to the detriment of the said party and or to the advantage of the other party. The following rendition of the Court in **GUARDIAN BANK LIMITED v SONAL HOLDINGS (K) LIMITED** is apt elucidation of that point:

[11] This application is about rule 8 of the Advocates (Practice) Rules which provides as follows;

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “ I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case

must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious.

Award dealt with matters beyond scope of reference

[24] I will combine the grounds, namely that; the award dealt with a dispute not contemplated by or not falling within the terms of reference to the Arbitration or contains decisions on matters beyond the scope of the reference to arbitration. It is desirable that counsels should state facts as they appear. I have perused the Arbitration Agreement between all the three parties herein dated 24th March, 2009 and it is in plain eye sight that it related to three (3) separate agreements dated; 1) 23rd June, 2007 between the 2nd Respondent and the Applicant; 2) 24th April, 2008 between the 1st Respondent and the Applicant; and 3) 23rd July, 2008 between the 2nd Respondent and the Applicant. All these agreements related to L.R. NO 5892/11 which is the suit property, and the disputes that had arisen for arbitration were; **who is the rightfully entitled to conclude a transaction on the piece of land; and the parties have agreed to refer the dispute and matters arising out of the sale agreements to arbitration and final determination.** This is a perfect arbitration agreement for all the three agreements and it would be naïve to state that it was limited to only determining who would conclude the transaction on the land without reference to the agreements cited in the Arbitration and which the arbitration agreement expressly adverted were its sphere of influence. Therefore, all matters arising from the constituent agreements were to be referred to and determined by the arbitrator; matters herein formed part of the reference to arbitration and, thus, the award did not contain any decision outside the scope of reference. The said Arbitration Agreement was signed by all the parties including the Applicant. The allegation that she did not sign the agreements is a matter of fact which is in the province of the grand master on facts-the arbitrator-who found the agreements were valid and had been duly signed by the parties. Thus, the grounds that the award dealt with a dispute not contemplated by or not falling within the terms of reference to the Arbitration or contains decisions on matters beyond the scope of the reference to arbitration fail the test under section 35 of the Arbitration Act. I reject them.

Allegation the award was induced by fraud

[25] This ground contains serious charge on the integrity of the arbitrator, and if proved, compromises the entire arbitral process as a judicial process. Invariably, any award obtained through fraud and corruption is said to be tinctured with terminal fatalities. It, therefore, behooves upon the party alleging fraud to establish fraud or corruption to the required standard. The specific acts which constitute fraud must be pleaded and proved as such. Cogent evidence is then needed to establish fraud. But what is cogent is by no means equal to mere allegation of fraud as is the case here. After taking meticulous care, I have not encountered any instance of fraud in the entire proceedings or anywhere in the application, the affidavits in support and all the documents annexed thereto. Needless to say that fraud is a serious allegation which imputes a charge of a criminal nature on the arbitrator, and should not be made casually; before it is made, it would certainly require a person to take a conscientious decision based on sufficient evidence to prove the claim of fraud. Anything less would open all professional persons presiding over some judicial or quasi-judicial proceedings to irreparable ridicule on flimsy and malicious allegations of fraud and corruption; and that is not good for any civilized legal process or system. Accordingly, I find no shred of evidence of fraud. Thus, the ground of fraud as a basis for setting aside the award fails.

Was award contrary to the law and in conflict with public policy of Kenya ?

[26] From the way the Applicant has tailored her submissions, it seems she is making an overall impression of the matters complained of to mean that the award was contrary to the law and in conflict with public policy of Kenya. The question as to when an award is said to in conflict with the public policy of Kenya was enunciated in a masterly fashion by **Ringera J** (as he then was) in **CHRIST FOR ALL NATIONS V APOLLO INSURANCE COMPANY LIMITED (2002) 2 E.A. 366**, the relevant part being that:

“... An award could be set aside under section 35(2) (b) of the Arbitration Act as being inconsistent with the Public of Kenya if it is shown that it was either a) inconsistent with the Constitution or other laws of Kenya written or unwritten, or b) inimical to the national interest of Kenya, or c) contrary to justice or morality”. [Underlining supplied]

[27] I admit, just as Ringera J proclaimed, public policy is most broad concept incapable of precise definition. But that does not mean it is an impossible ground; it has been unpacked and the circumstances of each case should enable the Court to decide whether the award was inconsistent with the Constitution or other laws of Kenya, written or unwritten- the latter also refers to common law principles, doctrines of equity, international law and other principles of general application which are part of the laws of Kenya. The entire corpus of this case has not revealed any element or instance of a violation of the Constitution or any law of the land. The award complied with the full menu of the Arbitration Act and the Constitution on procedure, rights of parties and substantive requirements in a quasi-judicial proceeding. From my analysis above, the Arbitral tribunal observed and served the right to fair hearing including right to administrative action and to be heard by an impartial tribunal under Article 47 and 50 of the Constitution. The Arbitration Act was also complied with. In the premises, I do not think the award was contrary to law or in conflict with the public policy of Kenya. The ground fails too.

ORDERS

[28] The upshot is that the application dated 23rd of May, 2012 is dismissed with costs to the Respondents.

Dated, signed and delivered in open Court at Nairobi this 25th day of September, 2014

F. GIKONYO

JUDGE

In the presence of:-

Alex court clerk

M/s Serem for 1st Respondent

M/s Serem for Mr. Kariuki for 2nd Respondent

Kaluma for Applicant – Absent