



360 Degrees Court Apartments Residents Association suing through Nelson Mukora & 3 others v Join Ven Investments Limited & 3 others (Environment & Land Case 61 & 61 of 2015 (Consolidated)) [2022] KEELC 2406 (KLR) (17 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2406 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 61 & 61 OF 2015 (CONSOLIDATED)
CA OCHIENG, J
MAY 17, 2022
IN THE MATTER OF THE ARBITRATION ACT, 1995
AND
IN THE MATTER OF AN ARBITRATION

BETWEEN

360 DEGREES COURT APARTMENTS RESIDENTS ASSOCIATION SUING THROUGH NELSON MUKORA & ROSE KYATEREKERA CLAIMANT

AND

JOIN VEN INVESTMENTS LIMITED 1ST RESPONDENT

THREE SIXTY DEGREES MANAGEMENT LIMITED 2ND RESPONDENT

QUEST LABORATORY LIMITED 3RD RESPONDENT

RULING

1. What is before Court for determination are two Notice of Motion applications dated the 4th August, 2021 and 10th August, 2021 respectively. In the application dated the 4th August, 2021, the Plaintiff/Claimant seeks the following orders:
 1. Spent
 2. That this Honourable Court be pleased to vary, review and or set/aside its orders of 8th June, 2021 requiring the Plaintiff/Applicant to deposit Kenya Shillings Seven Million Two Hundred and Eighty-Eight Thousand, Three Hundred and Eighty-Eight (Ksh. 7, 288, 388/=) within sixty days being security for costs by:-



- a. Reducing the amount to deposit in court to a lower amount preferably to half of the amount (Kshs. 3, 644, 194/0).
 3. That this Court be pleased to extend time within which the Plaintiff/Applicant is to comply with the orders made on 8th June, 2021 for a further 6 months.
 4. That this court be pleased to grant any other orders that this Honourable Court may deem fit to grant.
2. The Application is premised on the grounds on the face of it and the supporting affidavit of Rose Kyaterekera Were, an official of the Plaintiff, where she confirms the Court delivered a Ruling dated the 4th June, 2021 requiring the Plaintiff to deposit security of costs amounting to Kenya Shillings Seven Million Two Hundred and Eighty-Eight Thousand, Three Hundred and Eighty-Eight (Ksh. 7, 288, 388=) within sixty (60) days from the said date. She contends that the Court in the said Ruling, provided that ‘there is liberty to apply’ which to her means, any party with a compelling reason had the right to apply to have the Ruling including orders therein varied should the circumstances warrant. She explains that the Plaintiff is non-profit membership association and has to source for the monies from its members. Further, that the Plaintiff held a Special General Meeting on 3rd July, 2021 to deliberate on how to raise funds so as to comply with the Court Order and have so far deposited a Cheque for Kshs. 700,000/= payable to the joint account opened for the collection of the security. She states that their application dated 28th July, 2020 is merited. Further, the Court’s power on matters security for costs should not be seen as being oppressive or stifling a genuine claim. She reiterates that the Court has unfettered discretion to enlarge time so long as sufficient cause is established.
3. The application was opposed by the Defendant/1st Respondent who filed Grounds of Opposition dated the 11th August, 2021 where it insists this Court has no jurisdiction to grant the orders sought. Further, that the application is solely aimed at validating/insulating the Plaintiff from consequences of contempt of the orders made on 4th June, 2020. It avers that the Application and the proceedings herein are otherwise incompetent in law and an abuse of the court process. Further, that the intervention sought in the Application is not sanctioned by the Arbitration Act and is offensive to the provisions of section 10 of the said Act.
4. In the Notice of Motion Application dated the 10th August, 2021 the Defendant/1st Respondent seeks the following orders:
1. That this Honourable Court be pleased to dismiss the proceedings commenced by the Plaintiff seeking by the Notice of Motion dated 28th July, 2020 seeking to set aside the Final Award dated 24th January, 2020 by W. A. Mutubwa FCI Arb.
 2. That costs of this Application be borne by the Plaintiffs/ Claimants; and
 3. That this Honourable Court be pleased to grant such further and other Orders that might be deemed just and fair in the circumstances.
5. The application is premised on the grounds on the face of it and the supporting affidavit of Sunita Patelits Chief Financial Officer where she explains that vide a Ruling delivered herein on 4th June, 2021, the Plaintiffs were ordered to, within 60 days, deposit in a joint interest earning account held in the names of Guandaru Thuita & Company Advocates and Majanja Luseno & Company Advocates, a sum of Kenya Shillings Seven Million Two Hundred and Eighty-Eight Thousand, Three Hundred and Eighty-Eight (Ksh. 7, 288, 388/=). She contends that the Ruling was delivered in the presence of the Plaintiff’s Advocates and served upon the Plaintiff. She avers that in spite the lapse of the said 60



days period, the Plaintiff has not made the said deposit. She insists that having failed to comply with the aforementioned order, the application seeking to set aside the Arbitral Award dated 4th July, 2020 should be dismissed and a date for directions issued on the Application seeking the Recognition and/ or Enforcement of the Arbitral Award.

6. This Application was opposed by the Plaintiff/Claimant that filed a Replying Affidavit sworn by Rose Kyaterekera WERE where she confirms that the Court delivered a Ruling on 4th June, 2021 in respect to security for costs amounting to Kshs. 7, 288, 388/= and it provided that there was *liberty to apply*, which meant any party could apply to have the said Ruling varied. She explains the steps the Plaintiff's association has undertaken to adhere to the said Court Order and confirms it has raised Kshs.700,000/= in the joint account held between the respective lawyers. Further, that as at 16th September, 2021, it had raised a sum of Kshs. 1,550,000/=. She insists this court has jurisdiction to vary, review or extend time to allow compliance. She contends that the 1st Respondent is taking the provisions of Section 10 of the Arbitration Act out of context since this court is not intervening in an ongoing arbitration matter but has now become fully seized of the matter owing to the application made to set aside the Award under Section 35 of the Arbitration Act including the 1st Respondent's two applications for both enforcement of the Award but also security for costs. She reiterates that the court has discretionary jurisdiction to enlarge time and the orders sought should be denied as no prejudice will be suffered by the 1st Respondent.
7. The two applications were canvassed by way of written submissions.

Analysis and Determination

8. Upon consideration of the two Notice of Motion applications dated the 4th August, 2021 and 10th August, 2021 respectively, including the respective affidavits and the extensive rivalling submissions, the following are the issues for determination: Whether this Court has jurisdiction to vary and or review the orders issued on 4th June, 2021. Whether the proceedings commenced by the Plaintiff seeking by the Notice of Motion dated 28th July, 2020 to set aside the Final Award dated 24th January, 2020 should be dismissed.
9. I will deal with the two issues jointly.
10. The Plaintiff in its submissions reiterated its averments as per the respective affidavits and contended that this court has jurisdiction to vary and or review the orders issued on 4th June, 2021 as well as set aside the Final Award dated 24th January, 2020 as section 10 of the Arbitration Act is silent on the same. It explained that the order dated 4th June, 2021 expressly provided for 'liberty to apply' clause. It insisted that matters arising from an application brought before this Court by virtue of Section 35 of the Arbitration Act may be dealt with by this Court to achieve the end result which is to hear the main application. Further, that this court is clothed with jurisdiction to hear this application under special circumstances and it has made out a case warranting the orders sought. To buttress its averments, it relied on very many decisions including: Kob Ewe Chee v Kob Hua Leong & another (2002) 3 SLR 643; Kenya Country Bus Owners Association & others v Cabinet Secretary for Transport & Infrastructure & 5 others (2014) eKLR; Fatuma Zainabu Mohammed v Ghati Dennitah & others Petition No 6 of 2013; Gogardhan v Barsati AIR 1972 ALL 246; Westmont Holdings SDN BHD v Central Bank of Kenya (Civil Application 10 (E017) of 2021) (2021) KESC 3 (KLR) (Civ) (8 October 2021) (Ruling); Edward Mwaniki Gaturu & another v Attorney General & 3 others Petition No 72 of 2013; DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited (2017) eKLR; Kenya Bus Service Ltd & another v Minister for Transport & 2 others (2012) eKLR; Tumaini Transport Services Ltd v Tata



Chemicals Magadi Limited (2017) eKLR; and *Dry Associates Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd* (2012) eKLR.****

11. The Defendant in its submissions contended that the Plaintiff's application for review is not founded in law as this Court has no jurisdiction under the *Arbitration Act* to issue an order for variation and/or review and extend time in proceedings post arbitration. It insisted that the clause on 'liberty to apply' does not donate jurisdiction where none exists. Further, that where the *Arbitration Act* does not provide for a specific remedy, then the court would have no jurisdiction to grant such a remedy. It reiterated that 'liberty to apply' does not confer jurisdiction. To support its arguments, it has also relied on very many decisions including: *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR; *Kamconsult Limited v Telkom Kenya Limited & another* [2016] eKLR; *Dinesh Construction Company (K) Limited V Kenya Sugar Research Foundation* Nairobi Misc Applic No 272 of 2017; *Talewa Road Constructors v Kenya National & another* [2019] eKLR; *Easy Properties Limited v Express Connections Limited* Nairobi HCCC E 094 of 2018; *Macfoy Vs United Africa Co Limited* (1961) 3 ALL ER 1169; *Cristel v Cristel* (1951) 2 All ER 574; *Industrial Hardware (Kenya) Ltd & 5 others v Standard Chartered Bank Kenya Ltd* [1999] eKLR; Nairobi JR Appl No 165 of 2013 *R v Principal Secretary, State Department for Housing and Urban Development, Ex parte Kenyatta Peter & 3 others* and *Koh Ewe Chee v Koh Hua Leong & Another* (2002) 3 SLR 643.
12. As to whether this Court has jurisdiction to vary and or review the orders issued on 4th June, 2021 and if proceedings commenced by the Plaintiff seeking by the Notice of Motion dated 28th July, 2020 to set aside the Final Award dated 24th January, 2020 should be dismissed.
13. The dispute herein revolves around an Arbitral Award dated the 24th January, 2020. Further, the 1st Respondent was awarded costs amounting to Kshs. 7,288, 388/=. On 4th June, 2021, the Court ordered the Plaintiff to provide security for costs by depositing the aforesaid amount in a joint account of Guandaru Thuita & Company Advocates and Majanja Luseno & Company Advocates. Further, in the said Ruling, the Court provided for the 'liberty to apply' clause. The Plaintiff has now sought to review the orders issued on 4th June, 2021 so as to only deposit half the security for costs and for the time to be enlarged to enable it do so. The 1st Respondent has opposed the application and insists this court is devoid of jurisdiction to do so. Further, that the Notice of Motion dated 28th July, 2020 to set aside the Final Award dated 24th January, 2020 should be dismissed. The Plaintiff however contended that Section 10 and 35 of the *Arbitration Act* made room for review and or setting aside of orders emanating from an Arbitral Award. In that regard, I wish to refer to the two sections in the *Arbitration Act* which provides *inter alia*:-
14. Section 10 of the *Arbitration Act* stipulates that;

"Except as provided in this Act, no court shall intervene in matters governed by this Act."
15. While Section 35 of the Arbitration Act states that:
 - (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 [Rev. 2012] Arbitration CAP. 49 A20-21 [Issue 1] (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 in 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.”

16. Nyarangi JA in *The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited* (1989) KLR 1, while dealing with the issue of jurisdiction held that:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. While in the case of *Kamconsult Limited v Telkom Kenya Limited & another* [2016] eKLR the Court of Appeal had this to say in varying or reviewing of an Arbitral Award;

“However the *Arbitration Act* does not provide for review of High Court decisions made pursuant to Section 17(6) of the Act, and therefore under Section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases, a rule cannot override a substantive law. Sections 3A, 63e and 80 of the Civil Procedure Act are also not applicable pursuant to Section 10 of the *Arbitration Act*. [18] We take note of the fact that arbitration proceedings are intended to provide a faster and less technical process for resolution of disputes. Thus the omission to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation.”

18. See also the decisions of *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR and *Talewa Road Constructors v Kenya National & another* [2019] eKLR.



19. I have had a chance to peruse the Ruling dated 4th June, 2021 and the Plaintiff's instant application and I note that it has cited various legal provisions including the Civil Procedure Rules which do not apply in post arbitral proceedings as Section 10 of the Arbitration Act is explicit on the intervention of the Court.
20. The Plaintiff proceeded to rely on the provision of 'liberty to apply' clause as stated in the impugned Ruling and brought forth their application.
21. In the case of Industrial Hardware (Kenya) Ltd & 5 others v Standard Chartered Bank Kenya Ltd [1999] eKLR, the Court of Appeal while dealing with the issue of liberty to apply, held as follows:

"In asking the learned Judge to set aside the consent order counsel for the plaintiffs submitted that this could be validly done under the liberty to apply clause in the order. We do not agree. It would have taken little effort for Mr Kowade to discover that the Court of Appeal in England in the case of *Cristel v Cristel* [1951] 2 All ER 574 held that *prima facie*, the words, liberty to apply in an order meant that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the court; they did not confer any right to ask the court to vary the order. That is the correct position in law and the liberty to apply clause in the consent order did not entitle the plaintiffs to apply to set aside or vary the consent order."
22. Based on the facts before me while associating myself with the decisions I have cited, insofar as the Plaintiff relied various Constitutional provisions on the right to be heard including access to justice and proceeded to explain how it is raising funds from its members to pay the aforementioned sum, I find that this court is devoid of jurisdiction to vary or review a post arbitral order and further that the 'liberty to apply' clause the Plaintiff seeks to rely on, is not available to it, as at this juncture, it seeks to open up new fronts in a matter that had already been determined. Further, the said clause cannot be used to vary a court order to avoid complying with it and is not a window for review.
23. See also the Singaporean decision of *Koh Ewe Chee v Koh Hua Leong & another* (2002) 3 SLR 643.
24. In the circumstance, I will proceed to down my tools.
25. It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 4th August, 2021 unmerited and will dismiss it with costs. As for the 1st Respondent's Notice of Motion application dated the 10th August, 2021, since the Plaintiff has not complied with the orders of the Court issued on 4th June, 2021 on depositing the aforementioned amount being security of costs, I have no recourse but to find it merited and will allow it. I award the 1st Respondent the costs of the two applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

