



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 913 of 1999

RURAL HOUSING ESTATES LIMITED.....PLAINTIFF

VERSUS

ELDORET MUNICIPAL COUNCIL.....DEFENDANT

RULING

Before me are two applications: one by the plaintiff seeking the adoption of the arbitrator's award as the judgment of this court. The plaintiff sought judgment to be entered in its favour in terms of the arbitrator's award dated the said 21st March 2002 by which the arbitrator awarded the plaintiff the sum of Kshs.11,284,317/= plus interest at the rate of 26% per annum with effect from said 21st March 2002 until payment in full. The arbitrator further ordered that each party bears its own costs of the arbitration. He further ordered the parties to share the costs of the arbitrator. The plaintiff was of the view that the arbitrator's award resolved all the matters in dispute between itself and the defendant and therefore the defendant should be compelled by an order of this court to pay to the plaintiff the amount adjudged in its favour by the arbitrator. The application is opposed. The defendant filed grounds in opposition to the application. The defendant further filed a replying affidavit in opposition to the application.

The other application that this court is required to render a decision is the application by the defendant that sought to set aside the said arbitrator's award dated the 21st March 2002. The defendant sought the setting aside of the said award under the provisions of **Section 35** of the **Arbitration Act** and **Rules 7 & 11** of the **Arbitration Rules, 1997** on the grounds that the award had been made during the subsistence of a valid order of the court staying any proceedings before the arbitrator. The defendant further complained that the arbitrator had considered and rendered a decision in respect of matters that were not within the terms and scope of reference to arbitration contained in the agreement between the parties to the arbitration agreement. The defendant sought the setting aside of the award on the grounds that it was prevented from presenting its case before the said arbitrator and further that the arbitrator had made an award in respect of the plaintiff's claims that were time barred under both the **Limitation of Actions Act** and the **Public Authorities Limitation Act**. The defendant was of the view that the arbitrator lacked the requisite jurisdiction to award damages concerning matters not contemplated in the agreement between the plaintiff and the defendant.

The plaintiff opposed the application. The plaintiff was of the view that the present application was yet another attempt by the defendant to frustrate the plaintiff from obtaining judgment in respect of an award made in an arbitration that was court mandated. The plaintiff urged the court to find that the defendant's application seeking to set aside the arbitrator's award lacked merit and should be dismissed with costs.

At the hearing of the application, I heard submissions made by Mr. Alwang'a for the defendant and by Miss Wambui for the plaintiff. The two applications were argued at the same time. Learned counsel relied on pleadings and affidavits filed on behalf of their respective clients. Mr. Alwang'a submitted that the arbitrator's award should be set aside since it dealt with a dispute that was not contemplated within the clause of the agreement that mandated the settlement of any dispute between the plaintiff and the defendant by arbitration. Clause 5.03 of the agreement that was entered between the plaintiff and the defendant on 7th September 1984 provided as follows:

“(a) Any dispute arising from the operation and/or interpretation of this agreement shall be settled amicably within fourteen days by the development committee failing which the same shall be settled immediately in accordance with the provisions of the Arbitration Act (Chapter 49, Laws of Kenya)”.

Under clause 5.01, it was provided that

“The parties hereto shall establish, and thereafter maintain during the execution of the project, a development committee under the chairmanship of the Permanent Secretary to the Ministry for the time being responsible for housing”.

Under clause 5.01 (b), it provided that the development committee would be an advisory and consultative body which was mandated to coordinate and harmonize the various components of the project. Its representatives consisted of various concerned government ministries together with the plaintiff and the defendant. From the evidence presented during the arbitration proceedings, it was clear that the development committee was never constituted as contemplated by the agreement hence the direct reference of the dispute to arbitration.

Mr. Alwang'a submitted that although the arbitration was court mandated, its terms were to be in accordance with the agreement. He argued that the arbitrator dealt with issues of damages and quantification thereof that was not contemplated by the terms of reference. He maintained that the arbitrator could not rely on the pleadings filed by the parties in the arbitration proceedings before him to reach a determination that the parties had consented to his award of damages to the plaintiff. He was of the view that the award made was a nullity since it was made without jurisdiction. He submitted that the arbitrator had no jurisdiction to terminate the agreement between the parties in accordance with the clause that referred the dispute for determination by arbitration. He further submitted that the final award of the arbitrator was published when there was in existence a valid court order staying any proceedings before the arbitrator.

He argued that by filing the award in court, during the existence a valid order of the court prohibiting its adoption, the arbitrator acted in contempt of the said order of the court. He submitted that an award made in contempt of the orders of the court cannot be valid and should be set aside. He maintained that it was contrary to the Public Policy of Kenya for an arbitrator to proceed and make an award in the face of an order of the court prohibiting him from publishing the award. He further argued that the arbitrator prevented the defendant from presenting its case during the arbitration by denying the defendant an opportunity to call witnesses. He reiterated that the arbitrator made the award without the benefit of oral evidence being adduced by either party. He maintained that it was not open for the arbitrator to make an award on the basis of documents without hearing oral evidence adduced by the parties to the arbitration.

Mr. Alwang'a further submitted that the award ought to be set aside on the grounds that it was not capable of being enforced as it was made contrary to the provisions of the **Limitation of Action Act** and the **Public Authorities Limitation Act** that limited the time by which an aggrieved party can file a claim pursuant to a contract made with the public authority. He was of the view that the arbitrator had fallen in error when he failed to uphold the objection raised by the defendant that the plaintiff's claim was time barred. He maintained that the arbitrator lacked jurisdiction to entertain a claim that was time barred. The defendant urged the court to apply the provision of **Section 35(2)(b)(ii)** and **Section 35(2)(a)(iv)** of the **Arbitration Act 1995** and set aside the award of the arbitrator. He urged the court to award the costs of the proceedings to the defendant.

Miss Wambui for the defendant opposed the application by the defendant that sought to set aside the arbitrator's award. She submitted that the arbitrator made the award in accordance with the terms of reference to arbitration. She submitted that the question as to whether the plaintiff was entitled to damages was a matter that was in issue and that was intended to be determined by the arbitrator. She urged the court not to interfere with the arbitrator's award as the parties had agreed that any dispute between them in respect of the joint venture agreement was to be determined by arbitration. She further submitted that the court had no jurisdiction to consider or look into an award made by an arbitrator where the parties had specifically excluded the jurisdiction of the court. She maintained that it would be contrary to Public Policy for the court to set aside the award that had been arrived at pursuant to an agreement made by the parties to refer the dispute to arbitration. She reiterated that the arbitrator had arrived at the award after taking into consideration all the pleadings that were filed by the parties, including the written submissions presented by the same parties. She reiterated that the issue as to whether damages ought to be paid was squarely within the ambit of the arbitrator. She submitted that the claim by the defendant that the award was published during the existence of an order of the court staying its publication was untrue since the award was published long before the court had issued its ruling staying the publication of the award. She urged the court to consider the circumstances under which the order staying the publication of the arbitrator's award was made, particularly putting into regard the fact that the final award was published on 12th March 2002. She was of the view that the order staying the publication of the preliminary and the final awards could not be given effect to since by the time the order was issued, the said awards had already been published.

Miss Wambui urged the court not to be persuaded by the defendant's argument that it had been prevented from presenting its witnesses before the arbitrator. She submitted that the arbitrator had earlier ruled that it would be unnecessary for witnesses to testify but instead ordered the hearing of the dispute by way of submissions. She explained that since the defendant had submitted to the jurisdiction of the arbitrator by presenting submissions as directed by the arbitrator, it was not available for the defendant to again raise the issue in the present application seeking to set aside the arbitrator's award. She was of the view that it was apparent that the defendant was appealing to this court against the decision of the arbitrator, a fact which the defendant was aware that this court lacked jurisdiction to consider. She submitted that this court did not have jurisdiction to sit on appeal on the decision of the arbitrator. She maintained that the finding by the arbitrator that the issues raised by the plaintiff in its pleadings were not time barred was correct. She denied that the arbitrator had acted in contempt of the orders of the court when he published the final award despite being made aware that proceedings had been filed in court seeking to impeach the arbitration proceeding leading to the award. She submitted that the orders served on the arbitrator did not stop the arbitration proceedings; that was the reason why the arbitrator issued the thirty (30) day notice for the publication of the final award. It was her view that the defendant had not established sufficient grounds to enable this court set aside the arbitrator's award as contemplated by **Section 35** of the **Arbitration Act**. She urged the court to dismiss the defendant's application with costs and enter judgment in favour of the plaintiff in terms of the arbitrator's award dated 12th March 2002.

I have carefully considered the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the submissions made by respective counsel for the plaintiff and defendant, including the authorities cited thereto. As stated earlier in this ruling, the parties to this suit presented two applications to this court for determination. The issue for determination in respect of the application filed by the defendant is whether the defendant established sufficient grounds to entitle this court interfere with the award made by the arbitrator and consequently set it aside. If the court shall find in favour of the defendant in the application to set aside, the plaintiff's application seeking the adoption of the arbitrator's award as the judgment of this court shall fail. Conversely, if the defendant's application fails, this court will have no option but to allow the plaintiff's application for the adoption of the award of the arbitrator as the judgment of the court.

From the pleadings and the arguments presented to the court by the defendant, it was clear that the defendant predicated its application seeking to set aside the award of the arbitrator on **Sections 35(2)(a)(iv)** and **35(2)(b)(ii)** of the **Arbitration Act 1995**. **Section 35(2)(a)(iv)** of the **Arbitration Act** grants this court jurisdiction to set aside an arbitral award where it is established by the aggrieved party that the arbitral award dealt with a dispute that was not contemplated by or not falling within the terms of

reference to arbitration. **Section 35(2)(b)(ii)** of the **Arbitration Act 1995** allows this court to set aside an award which is found to be in conflict with the Public Policy of Kenya. This court is aware that in determining whether or not to set aside an award of an arbitrator, it cannot delve into the merits or otherwise of the award unless it touches on the jurisdiction of the arbitrator to hear and determine the dispute before him. This court is not sitting on appeal from the decision of the arbitrator when considering whether or not to set aside the award. As was held in the Tanzanian case of **DB Shapriya and Co. Ltd Vs Bish International BV [2003] 2EA 404**, courts cannot interfere with findings of fact by an arbitrator. It was further held that mistakes of fact or law cannot be a ground for setting aside or remitting an award for further consideration on the grounds of misconduct.

The courts intervention is limited to determining issues of law which are apparent on the face of the application. In the English case of **Tersons Ltd vs Stevenage Development Corporation [1963] 3 All ER 863** Lord Upjohn LJ set out the circumstances under which a court may interfere with an award of an arbitrator. He stated as follows:

“The courts will not interfere with the conduct of proceedings by the arbitrator except in circumstances which are now well defined. If the arbitrator is guilty of misconduct, his award may be set aside or remitted. If the award contains an error of law on its face, it may be sent back or remitted. If a special case is stated on a question of law, the court will determine that question of law within the framework of the particular special case. But if there is no misconduct, if there is no error of law on the face of the award, or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law so long as any mistake of law does not appear on the face of the award”.

In Kenya, the **Arbitration Act 1995** introduced the concept of Public Policy as a consideration in determining whether or not an award of an arbitrator ought to be upheld by the court. In **Christ For All Nations V Apollo Insurance co. Ltd. [2002] 2EA 366** Ringera J (as he was then) defined Public Policy as follows:

*“...I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award could be set aside under **Section 35(2)(b)(ii)** of the **Arbitration Act** as being inconsistent with the Public Policy of Kenya if it was shown that it was wither (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the nation interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals”.*

What was the genesis of the dispute between the plaintiff and the defendant? The plaintiff owned certain parcels of land within the Municipality of Eldoret measuring approximately 207 acres. The said parcels of land were within three (3) blocks of land being Block 15 Parcel No.233, Block 15 Parcel No.234 and Block 15 Parcel No.236. The plaintiff entered into a joint venture agreement with the defendant whereby the defendant, anticipating to obtain a loan from the government and the National Housing Corporation, agreed to finance the development of residential houses in the plaintiff's parcels of land on the understanding that the plaintiff would be engaged as a developer and would be allowed to sell the houses so constructed at a profit. The plaintiff agreed to construct community facilities, including a primary school, two nursery schools, a health centre and two playing grounds. The plaintiff was also required to surrender land that was to be reserved for internal roadworks and infrastructure. The community facilities were, upon completion, to be transferred to the defendant.

In the arbitration proceedings, it was determined that the community facilities occupied approximately

seven (7) acres. From the pleadings filed before the arbitrator, it was evident that the defendant did not obtain the entire loan amount that it had anticipated from the World Bank through the Government of Kenya and the National Housing Corporation. Other than the construction of the community facilities and the internal roadworks and infrastructure, the joint venture between the plaintiff and the defendant was not realized. From the time the construction stopped to the time the plaintiff moved the court for the appointment of an arbitrator to determine the dispute between itself and the defendant, it was approximately ten (10) years. It was apparent from the agreement that other than obtaining the development of community facilities, the defendant did not have any direct benefit from the joint venture agreement. The plaintiff, as the developer would have benefited in having a housing development constructed in its parcels of land from a loan secured by the defendant which the developer would have sold for profit and thereafter repay the loan to the defendant.

It was evident from the agreement that other than guaranteeing the loan that was to be advanced for the development of the said residential houses, the defendant's participation in the construction of the residential houses was limited. In the joint venture agreement, it was provided that the plaintiff was to be in-charge of the development of the residential houses and the attendant infrastructure. It was in the context of failure by the defendant to secure the entire loan amount that was required for the realization of the project that the plaintiff sought to invoke clause 5.03 of the agreement that provided for the resolution of any dispute that may have arisen by arbitration.

According to the defendant, the failure of the project did not entitle the plaintiff to sue it to recover damages. I have carefully read the joint venture agreement together with the annexed loan agreement. It was clear that the agreement did not specifically provide for the payment of damages in the event of failure of the project. In fact, under clause 3.04 (b), it was only the defendant who was entitled to be paid liquidated damages in the event that the plaintiff would fail to perform its part of the terms of the joint venture agreement. The only remedy available to the plaintiff in the event that the contractor would delay in the construction of the housing units was to freeze interest due on the loan advanced to it by the defendant. It is trite law that where a contract does not provide for payment of damages, then, such damages, unless liquidated and is reasonably foreseeable from the conduct of the offending party, may not be awarded by the tribunal hearing the dispute.

Upon evaluation of the arguments advanced on behalf of the plaintiff and the defendant, it was clear to this court that the defendant is on firm ground when it submitted that the arbitrator dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration. The arbitrator, correctly in my view, reached the determination that the joint agreement was so flawed and was poorly drafted that it was in actual fact incapable of enforcement due to inherent deficiencies in it. The arbitrator fell in serious error of the law when he purported to hold the defendant liable on the basis of subsequent unsuccessful negotiations that were held between the plaintiff and the defendant after the failure of the project with a view to resuscitating the project. In my view, the basis of the agreement between the plaintiff and the defendant was the joint venture agreement and any subsequent negotiations that did not result in further agreement being entered into, cannot, by any stretch of imagination, be considered as a basis of contractual relationship between the plaintiff and the defendant.

In any event, the joint venture agreement did not confer any proprietary right over the parcels of land that constituted the project to the defendant. The ownership of the project parcels of land was and still vests in the plaintiff. The defendant's participation was restricted to securing funds to enable the realization of the project. Once it became apparent that the defendant was unable to secure the required funds, the plaintiff, in my view, was at liberty to secure another financier. The plaintiff did not have any proprietary rights over the parcels of land that it had surrendered to the defendant for the construction of community facilities. Even if the defendant was not a participant in the project, the plaintiff would still have been obliged under the law to surrender land for public utilities if it proposed to subdivide its said parcels of land. I therefore hold that the arbitrator acted outside the scope of his mandate and jurisdiction when he awarded damages to the plaintiff, a matter that was not contemplated in the joint venture agreement entered between the plaintiff and the defendant.

As regard the conduct of the arbitrator during the hearing of the arbitration, whereas the arbitrator had

jurisdiction to determine the manner in which the arbitration proceedings were to be conducted before him, I am of the view that it was out of order for the arbitrator to impose a procedure of trial upon the parties without seeking their consent. Whereas the arbitrator may have formed an opinion that the parties had agreed with his suggestion that the arbitration proceeding be determined by parties filing their documents and thereafter making submissions on the basis of the said document thereof, it was clear to this court that such procedure, in the circumstance of this case, would not have aided the arbitrator to reach a just determination of the dispute.

My reading of the opinions of the arbitrator written in the course of the arbitration proceedings leads me to the conclusion that the arbitrator was extremely anxious to dispose off the arbitration by the shortest possible route irrespective of whether or not the ends of justice would be served. That was the reason why, without any prompting, the arbitrator formed an opinion, that is not supported by evidence, that it was undesirable for the parties to adduce evidence because memories would have faded and further that officers of the defendant who were conversant with the agreement would no longer be in the employment of the defendant. In reaching that decision, the arbitrator denied the parties an opportunity to cross-examine the veracity of the other party's allegations. The arbitrator's concern that the officers of the defendant who were conversant with the details of the agreement may not be available to testify was misplaced in view of the fact that the defendant, being a body corporate, is allowed in law to avail any witness who can testify on its behalf on the basis of the position that the defendant would have taken in the case.

A decision arrived at on the basis of evidence that was not tested to establish its veracity by cross-examination cannot be upheld by this court. I am in agreement with the defendant that it would be contrary to the Public Policy of Kenya for an arbitrator's decision to be upheld when the process leading to it was fraught with procedural deficiencies. The said procedural deficiencies impacted negatively on the final decision reached by the arbitrator. It is immaterial for this court to make a finding regarding whether or not the plaintiff's claim was barred by limitation under the **Limitation of Action Act** and the **Public Authorities Limitation Act** in view of the above finding reached by the court.

The upshot of the above reasons is that the application by the defendant to set aside the award of the arbitrator shall be allowed. The arbitrator's award is set aside by reason that it was made contrary to the Public Policy of Kenya in accordance with **Section 35(2)(b)(ii)** of the **Arbitration Act 1995** in that it was arrived at after the arbitrator had ignored the basic tenets of the law that requires every claim made to be proved or established to the required standard of proof. The defendant further established that the arbitral award dealt with a dispute that was not contemplated or not falling within the terms of reference to arbitration as provided under **Section 35(2)(a)(iv)** of the **Arbitration Act 1995**. As stated earlier in this ruling, this court is conscious that it is required in law to uphold agreements between parties to a contract who have agreed to have any dispute between them resolved by arbitration. However, where it appears that the arbitration process has been circumvented and a decision has been reached that is not contemplated in the agreement between the parties, this court will have no option but to intervene in accordance with the powers granted to it under the **Arbitration Act, 1995**. Unfortunately for the plaintiff, this is one of the rare cases that the court has been compelled to intervene and set aside an award of an arbitrator in view of the glaring errors of the law that is evident on the award. The arbitrator's preliminary and final awards are hereby set aside with costs to the defendant.

Since the arbitrator's award that was being sought to be adopted has been set aside, the plaintiff's application seeking the adoption of the said arbitrator's award as the judgment of this court cannot succeed. It is hereby dismissed with costs to the defendant.

DATED AT NAIROBI THIS 28TH DAY OF AUGUST 2009

L. KIMARU

JUDGE

