



REPUBLIC OF KENYA



Manyonje v Leap Investment Limited & another (Environment and Land Miscellaneous Application 1 of 2021) [2022] KEELC 4878 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2021
CA OCHIENG, J
SEPTEMBER 19, 2022**

BETWEEN

GREGORY MULIRU MANYONJE APPLICANT

AND

LEAP INVESTMENT LIMITED 1ST RESPONDENT

ELKANA MUGODO MWESELI 2ND RESPONDENT

RULING

1. What are before Court for determination are two Notice of Motion Applications dated the February 5, 2021 and the May 26, 2021 respectively. In the Notice of Motion dated the February 5, 2021, which is brought pursuant to Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* as well as Section 35(2) and (3) of the *Arbitration Act*, the Respondent seeks the following orders:
 1. Spent
 2. That there be a temporary stay of enforcement and/or execution of the Arbitral Tribunal Final Award made and published by the Arbitrator Collins Namachanja in Nairobi on December 14, 2020 and the Correction Award dated January 22, 2021 by the same Arbitrator Collins Namachanja together with all consequential orders thereto pending the hearing and determination of this Application inter partes.
 3. That there be a temporary stay of enforcement and/or execution of the Arbitral Tribunal Final Award made and published by the Arbitrator Collins Namachanja in Nairobi on December 14, 2020 and the Correction Award dated January 22, 2021 by the same Arbitrator Collins Namachanja together with all consequential orders thereto.



4. That the Arbitral Tribunal Final Award made and published by the Arbitrator Collins Namachanja in Nairobi on December 14, 2020 and the Correction Award dated January 22, 2021 by the same Arbitrator Collins Namachanja together with all consequential orders thereto be and are hereby set aside.
5. The Applicant be awarded the costs of the Application.
2. The Application is supported by the affidavit of Gregory Muliro Manyonje and premised on the grounds that the Arbitral Award dated the December 14, 2020 and corrected on January 22, 2021 in favour of the Claimants was based on forged documents and therefore the making of the said Award was induced or affected by fraud perpetrated by the Claimants. Further, that the Arbitral Tribunal failed, refused and or neglected to address the Preliminary Objection he had raised on the ground that he had rescinded the impugned Sale Agreement due to breach by the Claimants hence arbitration was overtaken by events. He states that the Claimants claim before the Arbitral Tribunal was based on falsehoods, misinformation, non-disclosure of material facts and fraud which he brought to the attention of the Arbitrator Mr. Collins Namachanja, but the said Tribunal failed to act judiciously in accordance to the law and procedure. He contends that the Arbitral Award failed, refused and or neglected to make a finding that there was undue influence and bad faith from the Claimants and they were not deserving of the Arbitral Award as made and published by the Arbitrator including the Correction Award and all other consequential orders emanating therefrom.
3. The Application was opposed by the Claimants who filed a Replying Affidavit sworn by Elkana Mugodo Mweseli who confirms the arbitration proceedings was initiated by virtue of Clause 17 of the Sale Agreement executed by the parties on April 19, 2018. Further, that the President of the Law Society pursuant to the terms of the said Agreement appointed a Tribunal to hear and determine the dispute. He explains that the Arbitrator Collins Namachanja was appointed and drew his mandate from the Arbitration Clause and the Respondent never objected to his appointment. He contends that the Respondent despite being invited to the Arbitration proceedings declined to participate and failed to prosecute any of the alleged issues during the Arbitration proceedings. He avers that the Respondent wrote to the Arbitrator that he was not ready to participate in the Arbitration process but they continued to serve him with all documents, notices, dates of the Arbitration process, upto the issuance of the Award, as well as the Award itself. He reiterates that no challenge was lodged before the Arbitral panel as to its composition, impartiality or capacity, hence the same cannot be challenged after an Arbitral Award. He reiterates that the Respondent has not fulfilled the ingredients set out in Section 35 of the *Arbitration Act* in respect to setting aside the Arbitral Award.
4. The Claimants in their Notice of Motion Application dated the May 26, 2021 brought pursuant to Section 36(1) of the *Arbitration Act*, Order 46 Rule 18 and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B, 3, 4A and 57 of the *Civil Procedure Act*, seeks the following orders:
 1. The Arbitral Award arising from the Arbitration proceedings between the parties herein issued by the Arbitral Tribunal's Collins Namachanja as the Arbitrator sitting in Nairobi dated and executed on the December 14, 2020 as the Final Award and corrected on January 22, 2021 be adopted and entered as a Judgment of this Honourable Court.
 2. The Respondent do equally bear the costs of this Application and any consequential costs.
5. The Application is supported by the affidavit of Elkana Mugodo Mweseli and the grounds that vide an agreement executed by the parties on April 19, 2018, the parties submitted themselves to Arbitration under Clause 17 of the Special Conditions of the said Sale Agreement. Further, that upon declaration of the dispute in terms of the agreement, Arbitral proceedings were commenced and concluded vide



an Award in their favour made on December 14, 2020 and corrected on January 22, 2021. They claim the Respondent has not satisfied the Award and the same must be adopted as a Judgment of the court for execution.

6. The Respondent opposed the application by filing Grounds of Opposition and a Replying Affidavit sworn by Gregory Muliru Manyonje where he contends that the said Application is incurably defective as it offends the provisions of Section 6 of the *Civil Procedure Act* as there is a previously instituted suit between the parties herein being Nairobi ELC Misc. Civ Application No. E035 of 2021 where directions had been given. He insists that this Court should stay any proceedings in this current suit until the earlier suit he filed is heard and determine. He avers that the instant suit is an abuse of the Court process as he served the Claimants with the earlier documents together with directions given by this Court. Further, that his suit filed on February 5, 2021 should be allowed to proceed on a priority basis for determination and the Claimants' will not be prejudiced. He reiterates that he rescinded the Sale Agreement dated the April 19, 2018 vide his letter dated the March 12, 2020. He explains that the purported Addendum is a forgery which is subject to criminal action by DCI and DPP. He claims the Claimants never sought to reinstate the rescinded Agreement hence the same could not be referred to Arbitration. He reiterates that the Arbitral Award is based on fraud and non-disclosure of material facts and hence cannot be adopted.
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 February 5, 2021 and the May 26, 2021 respectively, including the respective affidavits and the rivaling submissions, the following are the issues for determination: Whether this Court has jurisdiction to set aside or stay the enforcement of the Arbitral Tribunal Final Award made and published on December 14, 2020 and the Correction Award dated the January 22, 2021. Whether the Arbitral Award arising from the Arbitration proceedings between the parties herein dated and executed on the December 14, 2020 as the Final Award and corrected on January 22, 2021 should be adopted and entered as a Judgment of this Honourable Court.
9. I will deal with the two issues jointly.
10. The Respondent in his submissions contend that the Arbitral Tribunal Award dated the December 14, 2020 and Correction Award dated the January 22, 2021 was based on forged documents and therefore induced or affected by fraud. He further submitted that he raised a Preliminary Objection before the Arbitral Tribunal and notified the Arbitrator that the aforementioned Sale Agreement had been rescinded but the Arbitrator failed to make a Ruling on the same and proceeded to make an Award. He reiterated that the impugned Award is null and void and should be set aside. Further, that the Claimants should pay the costs herein. To support his arguments, he relied on Section 17 and 35(2) of the *Arbitration Act* as well as the following decisions : *Peter Muriuki Ngure vs Equity Bank (K) Ltd* (2018) eKLR; Supreme Court of Kenya Petition No. 47 of 2019 *Geo Chem Middle East vs Kenya Bureau of Standards* (2020) eKLR; *Housing Company of East Africa Limited vs The Board of Trustees National Social Security Fund & 2 others* (2018) eKLR; Fraud In Litigation - *Takbar v Gracefield Developments Ltd* and Fraud in Arbitration – *Sinocore International Co. Ltd vs RBRG Trading (UK) Ltd*.
11. The Claimants in their submissions contended that the application dated the February 5, 2021 is not merited as the Arbitration was initiated in accordance with Clause 17 of the Sale Agreement. Further, that the Respondent voluntarily declined to attend the Arbitral proceedings and has not



proved elements warranting the setting aside of the Award. They insist the Respondent was before, at the time and even during proceedings notified of the appointment as well as intention to appoint Arbitrator. Further, he never objected to the appointment nor challenged the Arbitral Tribunal. They contend that there is no evidence tendered to prove the Award was induced by fraud and the said issue was never raised in the Arbitration Tribunal. They aver that the application dated the May 26, 2021 is merited and should be allowed. Further, that since Arbitral process is a consensus, voluntary procedure through which parties can resolve a dispute, this court can only intervene under Section 10 of the *Arbitration Act*. To buttress their averments, they relied on Sections 26, 32A, 35 and 36(1) of the *Arbitration Act* including the following decisions: *Jennifer Shamalla vs Law Society of Kenya & 15 others* (2017) eKLR; *Midco Holdings Limited vs Summit Textiles (EA) Limited* (2014) eKLR; *Mihacan Investments Limited & 3 others vs Giovanni Gaida & others* (2005) eKLR; *Nyutu Agrovet Limited vs Airtel Network Limited* (2015) eKLR and *Reliable Concrete Works vs Ngewanji Company Limited* (2022) eKLR.

12. As to whether this Court has jurisdiction to set aside or stay the enforcement of the Arbitral Tribunal Final Award made and published on December 14, 2020 and the Correction Award dated 22nd January, 2021 or if the said Award should be adopted as a Judgment of this Honourable Court.
13. The dispute herein revolves around an Arbitral Tribunal Final Award made and published on December 14, 2020 and the Correction Award dated the January 22, 2021. The Respondent filed an Application seeking to set aside and or stay the enforcement of the impugned Award contending that it was induced by fraud and insisted that the Sale Agreement which formed the basis of the said Award had been rescinded. The Claimants on the other seek to have the said Award adopted as a Judgment of this court. In that regard, I wish to refer to various relevant sections in the *Arbitration Act* touching on the dispute herein.
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 26(b) and (c) of the *Arbitration Act* states that:

“ Unless otherwise agreed by the parties, if, without showing sufficient cause - (b) the respondent fails to communicate his statement of defence in accordance with Section 24(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations; (c) a party which fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”
16. Further, Section 32A of the *Arbitration Act* provides inter alia:

“ Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”
17. Yet, Section 35 of the *Arbitration Act* provides thus:

“ (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.”

18. In the case of *Kamconsult Limited v Telkom Kenya Limited & another* [2016] eKLR the Court of Appeal had this to say in respect to 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.”

19. See also the decision of *Reliable Concrete Works vs Ngewanji Company Limited* (2022) eKLR.
20. I have had a chance to peruse the impugned Award including other annexures and note that the Respondent voluntarily declined to participate in the Arbitral Proceedings vide his letter dated the September 5, 2020 (annexure ‘GMM2’) and neither did he file a Defence nor provide any documents. I note the Arbitrator vide his letter dated the 11th September, 2020 stated his intention to proceed with the Arbitral proceedings. The Respondent has not furnished court with any court order stopping the Arbitral Proceedings nor the Notice of Preliminary Objection as alleged in his Supporting Affidavit. The Respondent further did not demonstrate if he indeed made an Application to stop the arbitration proceedings as there was an alleged fraud. Section 26 (b) and (c) of the *Arbitration Act* gives the Arbitrator powers to proceed with arbitration where the Respondent fails to file a Defence nor appear in the proceedings as in this instance. Further, Section 32A makes an Arbitral Award final and binding upon the parties. It is hence my considered view that Respondent has not fulfilled the elements set out in Section 35 of the *Arbitration Act* in respect to setting aside of an Arbitral Award.



21. Based on the facts before me while associating myself with the decisions I have cited and relying on the quoted legal provisions, I opine that this court is devoid of jurisdiction to vary or review post arbitral proceedings. It is my considered view that since the Respondent voluntarily declined to participate in the arbitration proceedings, he has come to court too late in the day to attempt to set aside the impugned Award, yet the Sale Agreement which formed the fulcrum of the dispute in the said proceedings provided for an arbitration clause. In the circumstance, I will proceed to decline to set aside the said Award but direct that the Arbitral Award arising from the Arbitration proceedings between the parties herein dated and executed on the 14th December, 2020 as the Final Award and corrected on January 22, 2021 be adopted and entered as a Judgment of this Honourable Court.
22. It is against the foregoing that I find the Respondent's Notice of Motion Application dated the February 5, 2021 unmerited and will dismiss it. I find the Claimants' Notice of Motion Application dated the May 26, 2021 merited and will allow it. I award the Claimants' the costs of the two Applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

