

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

MISCELLANEOUS CIVIL APPLICATION NO. 617 OF 2000

VICTORIA NJOKI GATHARA.....APPLICANT

- VERSUS -

ANNE MUMBI HINGA.....RESPONDENT

RULING

On 14th January 1998, the applicant entered into an agreement with the respondent in respect of a parcel of land known as **LR No. 18084** situate within Nairobi area (*hereinafter referred to as the suit property*). The respondent, as the vendor, agreed to sell to the applicant, the suit property for a purchase consideration of KShs.1,500,000/=. The agreement was drawn by Messrs Salim Dhanji & Co. Advocates. On execution of the agreement, the applicant had already paid the respondent the sum of KShs.230,000/=. The balance of KSh.1,270,000/= was to be paid within sixty (60) days of execution of the said sale agreement. A disagreement arose between the applicant and the respondent regarding the manner of payment of the balance of purchase consideration. It appeared that there was a sum of KShs.800,000/= which was to be paid by the applicant to the respondent as a further payment to the sum of KShs.1,500,000/= disclosed in the agreement.

Since there was a clause in the agreement that provided for the resolution of any dispute regarding the construction, validity and performance of the agreement, the parties agreed to refer the dispute to arbitration. They were however unable to agree on an arbitrator. In accordance with Clause 11 of the agreement, the Chairman of the Law Society of Kenya appointed E. N. K. Wanjama as the sole arbitrator. The applicant and the respondent, together with their respective counsels appeared before the said arbitrator. After hearing the parties, the arbitrator made his award on 19th October 1999 in the presence of the applicant and her advocate and in the absence of the respondent. The arbitrator found in favour of the applicant and ruled that the applicant had fully complied with the terms of the agreement of sale and therefore entitled to specific performance of the agreement. He ruled that it was the respondent who had in fact breached the agreement.

The arbitrator notified the respective advocates of the applicant and the respondent to be present during the making of the award. The arbitrator, after the making of the said award, forwarded copies of the award to the said advocates. Upon the receipt of the award, the applicant filed the award in court. She served upon the respondent the notice of filing of the award in court. An affidavit of service was duly filed in court. Subsequently thereafter, pursuant to **Section 36** of the **Arbitration Act 1995**, the applicant sought leave of the court to enforce the award made in her favour. Leave to enforce the award was allowed by this court on 17th January 2002.

The respondent was aggrieved by the said order of the court allowing the applicant to enforce the award of the arbitrator. By an application dated 25th April 2008, the applicant sought an order to set aside the decree issued pursuant to the order of the court of 17th January 2002. The respondent further sought a declaration of the court that the arbitrator had made his award on 19th October 1999 before complying with the law that required him to serve the respondent with notice before the making of the said award. The respondent insisted that she was not served with the notice of the making of the award. She contended that she was neither served with the notice of the filing of the award in court. She reiterated that her advocate at the time was not served with any notice before proceedings took place subsequent to the making of the award. The respondent therefore sought orders of the court seeking the setting aside of the adoption of the award of the arbitrator as the judgment of the court. The applicant opposed the

respondent's application. Similarly, the arbitrator filed a replying affidavit controverting the averments made by the respondent touching on his conduct during the making of the award.

The parties to these proceedings agreed by consent to file written submissions for consideration by court. I have carefully considered the said written submissions. I have also considered the pleadings filed by the parties in support of their respective cases. The issue for determination by this court is whether the respondent established failure by the arbitrator to notify of the date of the making of the award. The second issue for determination is whether the applicant served the respondent with notice before the leave of the court to enforce the award made by the arbitrator was sought. As regard the first issue, it was evident that the respondent was notified of the date when the award was scheduled to be made. At the time the dispute was being considered by the arbitrator, the respondent's advocate was a Mr. Mutinda. The respondent then appointed a Mr. Ouna advocate to act on her behalf. She notified the arbitrator of her decision to change advocates.

The arbitrator, in accordance with the law, was thus required to give notice to the new advocate who had been appointed by the respondent. The new advocate did not however appear before the arbitrator on the date that was fixed for the making of the award. He acknowledged receipt of the notice but complained it was too short. I perused the affidavit of service filed in court. I am satisfied that the respondent was duly notified of the date of the making of the award. In further support of this court's finding on this issue, there was sufficient evidence that after the making of the said award, a copy of the award was availed by post to the respondent by the arbitrator. The respondent cannot therefore claim that she was unaware of the date that the award was made. The respondent participated in the proceedings before the arbitrator. It is therefore inconceivable for the respondent to expect that no award was made even after the expiry of eight (8) years.

As regard whether the respondent was served before the applicant moved the court to enforce the award, it was clear from the evidence on record that the respondent was personally served with notice at the time the award was filed in court. An affidavit of service was filed in court which confirmed that the respondent was served at her business premises with the notice. In any event, it is now over six (6) years since the said award of the arbitrator was adopted as judgment of this court. I think the respondent's application is rather belated. The respondent has been guilty of laches.

I find no merit with the respondent's application dated 25th April 2008. The same is hereby dismissed with costs. The interim orders which were granted by this court are hereby set aside.

It is so ordered.

DATED at NAIROBI this 24th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE