



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

Civil Cause 1756 of 2000 & Civil Cause 634 of 2003 (Consolidated)

BEDOUIIN ENTERPRISES LIMITEDPLAINTIFF

V E R S U S

1. CHARLES NJOGU LOFTY

**2. CHARLES MUNGAI GIKONYO (t/a GARAM
INVESTMENTS)DEFENDANTS**

CONSOLIDATED WITH

NAIROBI HCCC NO. 634 OF 2003

BEDOUIIN ENTERPRISES LIMITEDPLAINTIFF

V E R S U S

CHARLES NJOGU LOFTYDEFENDANT

R U L I N G

These two consolidated suits were compromised by an order entered on 27th March, 2007 as follows:-

“BY CONSENT these suits be marked as settled on the following terms:-

1. The Plaintiff be and is hereby granted a further option to renew the lease in respect of part of L. R. No. 209/10502 on the same terms as the lease dated 27th November, 1996 for a further term of 10 years from 1st July, 2003 except for the rent and option to renew the lease.

1A. (As added by a consent order entered on 10th April, 2008)

The 1st Defendant shall be entitled to arrears of rent from the Plaintiff from 1st July, 2003 at market rates, and there shall be judgment for the 1st Defendant against the Plaintiff for such arrears of rent.

2. **The market rent payable from 1st July, 2003 be determined by one arbitrator, who shall be a lawyer and a member of the Chartered Institute of Arbitrators, to be agreed upon by the parties.**
3. **The arbitration shall be conducted and finalised within 30 days from the date hereof.**
4. **Each party shall bear its own costs in respect of the suit and arbitration.**
5. **Each party shall have liberty to apply for further and other orders.**
6. **The Arbitrator's decision shall be final."**

A decree was subsequently issued on 10th April, 2007.

An arbitrator was duly appointed and he conducted the arbitration and filed his award dated 30th August, 2007. The award was as follows:-

"1) The market rent payable by the Respondent to

the Claimant over part of all that parcel known as L. R. 209/10502 situated on Mombasa Road currently occupied by the Respondent from 1st July, 2003 is KShs. 207,000/00 per month subject to a 10% increase every two years thereafter until the end of the renewed term.

2) The Arbitrator's fees and expenses in the sum of KShs. 114,840/00 shall be paid by the parties in equal shares. Any party that has paid more than its share of the Arbitrator's fees and expenses is entitled to a refund of the over-payment from the other party.

3) Each party shall bear its own costs of the arbitration."

The Plaintiff in both suits is BEDOUIN ENTERPRISES LIMITED. The 1st Defendant in HCCC No. 1756 of 2000 and the only Defendant in HCCC No. 634 of 2003 is CHARLES NJOGU LOFTY. Bedouin Enterprises Limited is the tenant of Charles Njogu Lofty in the subject premises. For clarity they will in this ruling be referred to respectively as the "Tenant" and "Landlord". In the Arbitrator's award referred to above it is understood that the term "Claimant" refers to the Landlord while the term "Respondent" refers to the Tenant.

On 1st November, 2007 the following consent order was entered:-

"By consent

Award of the Arbitrator dated 30th August, 2007 is adopted as an order of this court."

On 8th November, 2007 the Tenant filed an application chamber summons of the same date seeking the main order that the arbitrator's award dated 30th August, 2007 and filed in court on 1st November, 2007 be set aside on grounds of public policy. That application is pending disposal.

I have not seen in the court record any papers filed by the

Landlord in response to the application. But on 10th December, 2007 the Landlord filed an application by notice of motion dated 7th December, 2007 seeking the main order that the Tenant do provide security of KShs. 10,685,909/00, the same **"being the award made by the Sole Arbitrator as rent arrears outstanding pending the hearing and determination of its application dated 8th November, 2007"**. It is that notice of motion that is the subject of this ruling. It was in the course of arguments thereon that the consent that amended the consent order of 27th March, 2007 was entered.

The notice of motion is stated to be brought under **section 37** of the **Arbitration Act**, and also **section 3A** of the **Civil Procedure Act, Cap 21**. It is premised upon the following grounds:-

- a) That the Tenant is in occupation of the suit premises where it conducts its business.
- b) That the Landlord agreed to give the Tenant an extension of the lease by virtue of the consent order recorded on 27th March, 2007.
- c) That the Tenant is currently paying rent “that is extremely below the market rates”.
- d) That the Landlord shall continue to suffer irreparable harm “if the (Tenant’s) application is granted without security”.
- e) That it is in the interests of justice that this application be granted.

The supporting affidavit is sworn by the Landlord himself. To it are annexed copies of the decree, the Arbitrator’s award and some cheques issued in payment of rent.

The Tenant has opposed the application upon the following grounds as they appear in the grounds of opposition dated 11th and filed on 13th February, 2008:-

1. That the application is incompetent and not known to law.
2. That it is also bad in law to the extent that it is made under the wrong provisions of the law.
3. That the Landlord has not shown sufficient cause for the grant of the order sought.
4. That he has not demonstrated that there would be any difficulty in enforcing or executing any orders that may be made against the Tenant.
5. That the application does not allege lack of bona fides in the matter.

There is a replying affidavit sworn by one MADATALI CHATUR, a director of the Tenant.

The substance of the submissions of Mrs. Shaw, learned counsel for the Landlord, is that although the reference to arbitration by the consent order of 27th March, 2007 was under Order 45 of the Civil Procedure Rules and not under the arbitration clause in the lease between the parties, the Landlord has brought the present application under section 37 of the Arbitration Act because the Tenant’s application to set aside the Arbitrator’s award was brought under section 35 of the same Act. Mrs Shaw further submitted that the Arbitrator’s award having been adopted as an order of the court the court’s jurisdiction to set aside the award ceased. In essence what Mrs. Shaw is saying is that the Tenant’s application to set aside the award is misconceived and incompetent. When asked by the court why the Landlord did not apply to strike out the Tenant’s application, Mrs. Shaw replied that it was not considered expedient to apply to strike out the application and that the present application was considered the correct way to proceed.

Mrs. Shaw further submitted that based upon the consent order of 27th March, 2007 the Landlord is entitled to rent from 1st July, 2003 at the monthly rate of KShs. 207,000/00 subject to increase by 10% every two years. It is common ground that the arrears of rent as at 31st December, 2007 calculated as per the consent order of 27th March, 2007 and the determination of the Arbitrator, and after giving credit for payments towards rent paid by the Tenant, would be KShs. 10,685,909/00.

Finally, Mrs. Shaw submitted that the order sought should be granted in order to secure the Landlord’s interest and further, that all future rent calculated at the market rate determined by the Arbitrator should be deposited into an escrow account to be jointly held by the parties’ advocates. She raised doubt about

the Tenant's ability to pay the enhanced rent in view of the fact that it has been paying rent by cheques (exhibited in the supporting affidavit) that are drawn by a person other than the Tenant.

Mr. Mogere, learned counsel for the Tenant, responded that the application is incompetent in that whereas it is brought under section 37(2) of the Arbitration Act, which refers to an application to set aside or suspend an arbitral award under sub-section (1)(a)(vi) of the same section, the Tenant's application by chamber summons dated 8th November, 2007 is in fact brought under section 35, and not under section 37(1), of the Act.

On the merits, Mr. Mogere submitted that no factual basis has been laid for granting the order sought under the inherent powers of the court. No danger to the Landlord has been demonstrated as would warrant an order for security. There is no complaint that the Tenant has not been paying rent. It matters not that it may have paid the rent through other parties if there has not been any default.

Finally, Mr. Mogere submitted that since the Arbitrator's award has been challenged, the Landlord is not entitled to the enhanced rent, and so there are not any arrears of rent. There is thus no danger at all to the Landlord's interests.

I have considered these rival submissions, including the cases cited. I have looked at both sections 35 and 37 of the Arbitration Act, 1995. Section 35 provides for applications to set aside arbitral awards. All such applications would be brought under that section. Section 37(1) on the other hand sets out the strict grounds upon which the recognition or enforcement of an arbitral award may be refused. Section 37(1)(a)(vi) provides as follows:-

“37. (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-

(a) at the request of the party against whom it is invoked, if the party furnishes to the High Court proof that-

(i).....

(ii).....

(iii)

(iv)

(v)

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(b)”

It is to be noted that in the present case there is no application to recognise the arbitral award. Such application was rendered unnecessary by the consent order of 1st November, 2007 by which the award was adopted as an order of the court. There is also no application before the court to enforce the award. Such application would not be necessary on account of the settlement contained in the consent order entered on 27th March, 2007 and the decree issued thereon.

Section 37 (2) provides:-

“37. (2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in sub-section (1)(a)(vi), the High Court may, if it considers it proper, adjourn its

decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.”

As already noted, there is not before the court any application to recognise or enforce the arbitral award. So, this court has not any occasion to consider the matters set out in section 37(1)(a)(vi). The Landlord therefore cannot properly move the court for an order for security under section 37(2). Inasmuch as the application is brought thereunder, it is incompetent, and I so hold.

It is not necessary or proper at this stage to consider whether the Tenants’ application to set aside the arbitral award is competent or properly before the court, and I decline to do so. That must await hearing of the application.

Mr. Mogere implicitly conceded that the Landlord has properly approached the court under section 3A of the Civil Procedure Act, Cap. 21. He urged that even then the application has no merit. The purpose of an order for security is to safe-guard the interests of a party who is in danger of incurring loss that may not be made good by the opposite side. The Landlord extended the Tenant’s lease for a further 10 years from 1st July, 2003 as per the consent entered on 27th March, 2007. So, their landlord and tenant relationship is set to last until 30th June, 2013.

The decree issued pursuant to the said consent order has been available to the Landlord since 1st November, 2007 when the arbitral award was adopted as an order of the court by consent. I have not seen any order of stay of execution of decree in the court record. There is no evidence that the Landlord has moved to execute the decree and encountered any problem. It appears to me that by filing the present application the Landlord is merely trying to fetter the Tenant in its prosecution of the chamber summons dated 8th November, 2007. Justice in this matter will be better served by disposal of the said application with expedition.

Having considered the merits of the notice of motion dated 7th December, 2007 I find none as would entitle the court to exercise its discretion in favour of the Landlord. In the event, the application is dismissed with costs to the Tenant. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 14TH DAY OF NOVEMBER, 2008