



**Kibuwa Enterprises Limited v Cyclo Systems Kenya Limited (Environment & Land
Miscellaneous Case E102 of 2022) [2023] KEELC 596 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E102 OF 2022**

**LN MBUGUA, J
FEBRUARY 9, 2023**

BETWEEN

KIBUWA ENTERPRISES LIMITED APPLICANT

AND

CYCLO SYSTEMS KENYA LIMITED RESPONDENT

JUDGMENT

1. This miscellaneous suit was filed through a Notice of Motion application dated May 26, 2022. The Applicant seeks orders that this Honourable court be pleased to cancel, set aside, and lift the court order dated December 19, 2019 (the initial Court order) prohibiting the Applicant, its servants, assigns and /or agents from selling, charging or disposing the suit property being all that piece of land known as Land Reference No 209/494/1 and an order directed to the Chief Land Registrar compelling him/her to lift the order dated December 19, 2019 registered against the title of the suit property.
2. The application is based on grounds on its face and on the supporting affidavit sworn on May 26, 2022 by John Muriuki Kibuchi, a director of the Applicant. He deposes that the Applicant is the registered proprietor of land Reference No 209/494/1 wherein the Respondent was to purchase it at a consideration of Kshs 50 million. Pursuant to the terms of their agreement, the Respondent paid the Applicant Kshs 30 million with the balance of the purchase price being payable on the completion date.
3. The applicant further avers that the sale could not be completed immediately following an injunction issued by the court restraining the Applicant from completing the sale pending the conclusion of an ongoing arbitration case between the Applicant and a previous interested purchaser. Eventually the injunction was lifted, but the Respondent was unable to pay the balance of the purchase price or show that it had the ability to pay.
4. The Applicant then issued a completion notice to the Respondent, rescinded the agreement for sale dated 4th March 2011, forfeited 5 % of the purchase price being Kshs 5 million and refunded



- to the Respondent Kshs 25 million. Dissatisfied by the Applicant's actions, the Respondent gave the Applicant notice to refer the dispute to arbitration under provisions of clause 12 of their sale agreement.
5. The parties then agreed on appointment of Retired Justice J.B Havelock (now deceased), as the sole arbitrator of the dispute. On December 19, 2019, the Respondent obtained interlocutory orders from the court restraining the Applicant from dealing with the suit property in any manner pending hearing and determination of the dispute by the sole arbitrator.
 6. The matter was then heard by the sole arbitrator who issued the award dated February 1, 2021 awarding the Respondent the deposit paid, being Kshs 30 million plus 12% interest less the sum of Kshs 25 million initially refunded by the Applicant in 2019 which order the Applicant complied with in full.
 7. The Applicant contends that the Respondent has no right or claim capable of being protected.
 8. The Respondent opposed the suit vide the Replying Affidavit sworn on September 8, 2022 by Ajit Shah, its director. He admits that the Applicant owns the suit land and that it entered into an agreement for sale with the Respondent for purchase of the suit land. He deposes that the Applicant was unable to complete the transaction pursuant to injunctive orders issued in ELC No 95 of 2011, Gifted Hands Furnishings and Fabrics Limited v Kikubwa Enterprises Limited & Cyclo Systemms Kenya Limited in which the claimants therein had also entered into an agreement with the Applicant to purchase the suit property as well.
 9. He further deposes that upon the injunctive orders issued in ELC No 95 of 2011 being lifted, the Respondent's Advocate wrote to the Applicant's Advocates on November 14, 2018 whereby they confirmed that they were ready to complete the transaction and informed the Respondent's Advocates that the vendor would be required to pay Capital Gains Tax.
 10. On October 24, 2019, the Applicant's Advocates insisted that their client would not pay the capital Gains tax thus having not resolved the completion obligation, the Respondent's advocates gave notice to refer the matter to arbitration on November 14, 2019. However, on November 15, 2019, the Respondent was notified by its bank that the Applicant's Advocate had paid Kshs 24,800,000/= into their bank.
 11. On November 18, 2019, the Respondent's advocate received a letter from the Applicant's Advocates informing it that the agreement had been rescinded pursuant to the completion notice issued on October 3, 2019.
 12. To protect its interest, the Respondent filed ELC Case No 390 of 2019 Cyclo Systems Kenya Limited v Kibuwa Enterprise's Limited, and obtained orders by consent on December 19, 2019 restricting the Applicant from selling, dealing with the property pending determination of the arbitral dispute.
 13. The arbitral award was delivered on February 1, 2021, but the same has not been enforced and it is riddled with inaccuracies thus the Respondent has challenged it in the High Court Commercial Division vide HC comm misc E151 of 2021 -Cyclo Systems Kenya Limited v Kikubwa Enterprises Limited with a view to setting aside the aforementioned award. He avers that it will be in the interest of justice that the court order of December 18, 2019 remains in place.
 14. I have considered all the arguments raised herein including the rival submissions. The parties herein entered into the sale agreement dated March 4, 2011 for purchase of the property known as Land Reference No 209/494/1. A dispute arose between them concerning allegations of inability to complete the sale by both parties. They appointed a sole arbitrator to determine the dispute. The



arbitrator issued the award dated 1st February 2021 awarding the Respondent a refund of the purchase price and interest.

15. The Applicant now seeks this courts intervention to lift an injunction issued in ELC Case No 390 of 2019 Cyclo Systems Kenya Limited v Kibuwa Enterprise's Limited, on December 19, 2019 restraining it from dealing with the suit land, pending determination of the arbitration process. Its ground is that the arbitration process is complete.
16. I find that this is a miscellaneous suit of which the substantive file is ELC 390 OF 2019. I have perused the said file whereby the orders given on 18.12.2019 are worded as follows;

“By Consent

So as to preserve the suit property, LR No 209/494/1, the defendant, their servants and agents are restrained from selling charging or disposing it in any manner whatsoever pending the hearing and determination of the ongoing arbitral dispute between the parties herein before retired Justice Havelock. Mention 19/5/2020”

17. The final orders given in the aforementioned file ELC 390 of 2019 on March 11, 2021 reads as follows;
“The arbitrator having rendered an award, the orders which were rendered in this suit within the framework of section 7 of the *Arbitration Act* are now spent and are replaced by the arbitrator's award. This file is marked closed. Parties are free to initiate adoption/ enforcement proceedings through a miscellaneous application”.

18. The definition of “Spent” in the *Oxford Dictionary* is;

“Used up or exhausted”.

In essence, the import of the orders given on 11.3.2021 in ELC 390 of 2019 is that the orders given earlier had come to an end. This court cannot therefore purport to set aside or cancel that which does not exist.

19. Secondly, even if the applicants had presumed that the orders of 18.12.2019 existed, then the prayer to set aside such orders ought to have been made in the main file so as reactivate that file which is currently closed. It is noted that the only outstanding issue was the enforcement of the award of which any party was at liberty to move the court accordingly in a miscellaneous suit.
20. Finally, it is noted that the applicant did not join the Chief Land Registrar in these proceedings, yet prayer No 2 in the application is directed against the said entity.
21. The upshot of the findings herein is that this miscellaneous suit is not merited. The same is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kibuchi for Applicant

Munyisia holding brief for Mr. J. Singh for Respondent



Court assistant: Eddel

