



REPUBLIC OF KENYA



KENYA LAW
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**Shah & another v Greenview Developers Limited (Miscellaneous Application E204 of 2024)
[2025] KEHC 1527 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E204 OF 2024

BM MUSYOKI, J

FEBRUARY 14, 2025

BETWEEN

DARSHAN PRABHULAL SHAH 1ST APPLICANT

MILI PANKAJ SHAH 2ND APPLICANT

AND

GREENVIEW DEVELOPERS LIMITED RESPONDENT

RULING

1. The application before this court has been brought under Section 36(1) of the *Arbitration Act*. The application dated 8th March 2024 is seeking the following orders;
 1. Leave be granted to the applicant to enforce the arbitral award dated 25th April 2023 as a decree of the court.
 2. The costs of this application be provided for.
2. In the supporting affidavit sworn by Darshan Prabhulal Shah on 8th March 2024, it is deponed that the applicants and the respondent entered into an agreement for sale dated 17th November 2017 for the purchase of a residential house erected on Land Reference Number 1870/VIII/120 but a dispute arose between the parties concerning structural defects, incomplete fittings, and fitted equipment on the suit property, as well as a failure to deliver completion documents. Pursuant to an arbitration clause in the agreement for sale, Mr. Arthur K. Igeria was duly appointed as the sole arbitrator to hear and determine the said dispute. The arbitration proceedings were heard before the arbitrator who published an award dated 25th April 2023 in which he made the following award: -
 - a. The respondent to carry out a comprehensive geotechnical assessment to determine the level at which the foundation footings were placed, and the adequacy of the compaction on the



imported backfill to prevent further settlement and potential of sink holes. The backfill must be sloped at 70 degrees and protected by concreting.

- b. The respondent to undertake demolition of the existing reinforced concrete boundary walls and proper designed reinforced concrete boundary walls be constructed under advice of a structural engineer.
 - c. The respondent to repair if any and all defects in the interior and exterior parts of the property including cracks and leakages.
 - d. The parties to obtain, a written confirmation of the status and remedial action taken in respect of the reinforced concrete boundary walls, the property be procured by the applicants and the respondent from an independent and qualified structural engineer to be agreed upon by the Claimant and the Respondent.
 - e. The costs of procuring this report to be borne solely by the respondent.
3. The respondent opposed the application through grounds of opposition dated 10th May 2024 which raises only two grounds. The first ground is that the application is premature as the award sought to be enforced is not a final award because the arbitrator is yet to deliver an award on costs. The second ground is that all the aspects of the arbitration award have been satisfied in full except the unresolved and undetermined issue of costs.
 4. I have read the applicant's submissions dated 20th June 2024 and the respondent's submissions dated 17th October 2024. I note that the existence and validity of the award is not contested and that the respondent has not made any efforts to set aside the said award. The respondent has not indicated whether it has the intention of applying to set aside the award. It is also notable that the period within which the respondent is allowed by the law to challenge the award has since lapsed.
 5. The Respondent relied on the Court of Appeal decision in *Kenfit Limited v Consolata Fathers (NRB CA Civil Appeal No. 229 of 2006)* [2015] eKLR and *Insurance Company of East Africa Ltd [2020] eKLR vs Ezra Odondi Opar 2006* KEHC 932 (KLR) to drive home its position that the application is premature since the arbitrator has not given award on costs. I have read these authorities and it is my position that they are distinguishable with this matter. The Court of Appeal in *Kenfit Limited* case did not address itself to the meaning of 'award' under the *Arbitration Act*. In the *Insurance Company of East Africa Limited* case, the court was dealing with an application to set aside an arbitral award and the issues therein are also distinguishable from the current application.
 6. Section 3(1) of the *Arbitration Act* defines 'award' to include an interim award. I find persuasion in the authority of *Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited [2021] eKLR*, which has been cited by the applicant where Hon. Justice D.S. Majanja, when faced with a similar issue, held as follows: -

While I accept that I am bound by the decision of the Court of Appeal in *Kenfit Limited v Consolata Father (Supra)*, I hold that the decision was per incuriam as the court's attention was not drawn to Section 3(1) of the *Arbitration Act* which states that, 'arbitral award' means any award of an arbitral tribunal and includes an interim arbitral award." This means that any award whether interim or otherwise is an award and may be enforced as it is an award under Section 36(1) of the *Arbitration Act*.

7. Further, Section 36 does not qualify what kind of award may or may not be enforced. As a practical matter, it is inconceivable that an arbitral tribunal can issue interim or partial awards during the proceedings to resolve specific issues but which cannot be enforced until the final award. Just like the



court may issue a preliminary decree, the Arbitration Act does not foreclose the issuing of interim awards that may be enforced as the arbitral proceedings continue."

8. The same learned Judge held in *Kimaryo v First Riverside Acres Limited & another* [2022] eKLR, that: -

Further, I disagree with the Respondents that since the proceedings were not complete, the Applicant's application for recognition and enforcement was premature. Under section 3(1) of the Arbitration Act, 'arbitral award' means any award of an arbitral tribunal and includes an interim arbitral award. This means that any award whether interim or otherwise is an award and may be enforced as it is an award under section 36(1) of the Arbitration Act.

9. In *Upperhill Chambers Limited v Vio Tech Limited & another* (2024) KEHC 64 (KLR), Hon. Justice Kizito Magare found the position of Honourable Justice Majanja in the above cases to be sound. I also do not hesitate to join the two Judges in taking that position.
10. The respondent has not made claim or sought to rely on any grounds set out in Section 37 of the Arbitration Act. This Section provides grounds upon which the court may decline to recognize or to enforce an arbitral award. In the premises, it must be taken that the respondent has no issue with the award save for his claim that the application is premature.
11. The second ground of opposition can only be contested during execution process. Part compliance of an award cannot be a bar to the court adopting an arbitration award. That is an issue which should be raised during execution proceedings.
12. In conclusion and based on the above analysis, it is my finding that the application dated 20th June 2024 is merited and I proceed to allow it with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Njiru holding brief for Mr. Makori for the applicant and Mr. Kioko holding brief for Mr. Mbabu for the respondent

