Cape Suppliers Limited & another v Villa Care Limited & another (Arbitration Cause E005 & E014 of 2024 (Consolidated)) [2025] KEHC 4497 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E005 & E014 OF 2024 (CONSOLIDATED)

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

CAPE SUPPLIERS LIMITED ..... APPLICANT

AND

VILLA CARE LIMITED ..... RESPONDENT

AS CONSOLIDATED WITH

ARBITRATION CAUSE E014 OF 2024

BETWEEN

VILLA CARE LIMITED ..... APPLICANT

AND

CAPE SUPPLIERS LIMITED ..... RESPONDENT

RULING

1. On 19-03-2024, Honourable Justice P.M. Mulwa made an order consolidating the two causes herein. When the parties' advocates appeared before me on 25-11-2024, they told me that they had filed their submissions which covered both matters. However, after going through the submissions, I discovered that the applicant in arbitration cause number E005 of 2024 says nothing about arbitration cause number 014 of 2024. its submissions filed in arbitration cause number E014 of 2024 are of a totally different matter relating to taxation. Nevertheless, this ruling will cover both applications.

Application dated 18th January 2024 in Miscellaneous E005 of 2024

2. The application prays for the following orders;

    1. Spent.

    2. There be a stay of adoption and recognition of the arbitral award dated 10th February 2023 but published and released by the sole arbitrator- Mr. Kevin Tom Mogeni on 20th December 2023, pending the hearing and determination of this application.

    3. The arbitral award dated 10th February 2023 but released by the sole arbitrator Mr. Kevin Tom Mogeni and received by the parties on 20th December 2023 be set aside.

    4. The costs of this application be borne by the respondent.

3. The application is based on the grounds that; the award is against public policy, its an affront to natural justice, the arbitrator's conduct manifested obvious bias against the applicant and in favour of the respondent, the arbitrator dealt with a dispute that was not contemplated by or falling within the terms of submissions to arbitration and the award failed to consider a fundamental issue submitted by the parties. The applicant has supported the application through supporting and supplementary affidavits sworn by one Kinaro Kibanya on 18th January 2024 and 3rd May 2024 respectively.

4 Mr. Kibanya who describes himself as a director of the applicant confirms that the parties entered into to several service contracts which were terminated by the applicant following which the respondent lodged a claim for Kshs 6,192,961.00 being for compensation for breach of contract in form of commissions, interests, appointment fees and costs of the arbitration. In the contracts, the respondent was to act as selling agent of the applicant's properties identified in each agreement.

5. The deponent adds that after hearing, the arbitrator made award dated 10th February 2023 but the same was not released to the parties until 20th December 2023. The applicant goes on to give chronology of events leading to the parties getting their copies of the award from the arbitrator. He avers that the arbitrator, by a letter dated 31-01-2023 advised the parties that the award would be published on 10-02-2023 and asked them to pay the arbitration costs before then. The applicant paid its share of costs on 8-02-2023 but the respondent did not meet its part as a result of which the arbitrator wrote an email to the parties on 10-02-2023 indicating that the collection of the award was put off due to failure by the respondent to pay its share of arbitrator's costs and that another date for publication would be announced in due course. The respondent subsequently paid its share of arbitration cost on 24-07-2023 after which the parties made several correspondences to the arbitrator following up the publication of the award but it was not until 28-11-2023 when the arbitrator wrote to the parties purporting that the award was published on 10-02-2023.

6. The correspondences show that the parties were not in agreement with this position taken by the arbitrator on the issue of publication of the award and reminded the arbitrator of his previous advice that the award notice was to be issued later. On 20th December 2023, the arbitrator wrote an email to the parties advising them that they were free to collect the award. Both parties ended up collecting the award on 20-12-2023.

7. The applicant has claimed in its averments that the award was against public policy for the following reasons;

    a. The respondent was not a registered estate agent and as such not deserving of payment of commission out of the agreements.

b. The award of costs of Kshs 868,700.00 failed to consider 50% of the portion paid by the applicant despite the prayer in the statement of claim having asked for costs on indemnity basis.

c. It did not consider the pleadings, testimony of Dorcas Wanjiru and applicant's submissions.

d. It compensates the respondent for marketing services when there was no evidence that there were any sales concluded on account of its services.

e. The effect of the award was to unjustly enrich the respondent for work not done.

f. The award promoted and enforced contracts which were drafted and structured in perpetuity.

g. The award consisted of contradictions in respect of receipt and admissibility of the parties' evidence.

8. On the issue of public policy, the applicant states that the award was an affront to natural justice which is manifested in the following instances;

a. It consisted of compensation based on a non-existent parcel of land which was not part of the agency contract (L.R 1/402 (I.R. 12689) and pegged on a wrong value.

b. It breached the statutory provisions of the *Estate Agents Act*.

9. The applicant further avers that the arbitrator showed open bias against it in that;

a. He found that the agreements were marketing agreements and not estate agency agreements.

b. It ignored some pertinent parts of the applicant's evidence and therefore finding no faut on the part of the respondent.

c. It went against the weight of evidence produced by the applicant.

10. Lastly, the applicant has claimed that the award failed to consider a fundamental issue submitted by the parties to the tribunal in that the award is silence on the issue of whether the contract was perpetual in nature and therefore against public policy and that the applicant had inherent right to terminate the contract.

11. In its replying affidavit sworn by Hiram Gachugi Nderitu an advocate who was appearing for the respondent, it is deponed that the application has been brought out of statutory time and as such this court lacks jurisdiction to deal with the application. The deponent claims that the letter dated 31st January 2023 was explicit that the award would be published on 10-02-2023 and that should be the date from which time for filing application for setting aside the award started running.

12. The deponent contends that the applicant paid its share of costs on 8-02-2023 while it paid it's on 24-07-2023. He also confirms the correspondences between the parties and the arbitrator in regard to publication of the award as narrated by the applicant. He however maintains that the arbitrator's email dated 28-11-2023 was merely reminding the parties that the award was published on 10-02-2023. He adds that the allegations by the applicant do not constitute reasons or grounds for setting aside the award because the same are issues of appeal. He concludes by stating that the applicant has not shown how the award is inconsistent with the law and *the Constitution*.

13. I have read through the long unnecessarily repetitive submissions by the parties. I have also read through the award and other documents produced as annexures in the application. Before I go into the merit of the application, it is important that I make decision on the preliminary issue of jurisdiction. It is trite law that where an issue of jurisdiction is raised, the court should consider that first before going

into the merits of the matter. It is been held in many judicial authorities that jurisdiction is everything and once the court finds that it lacks jurisdiction on a matter before it, it must down its tools instantly. One of the authorities is Amazon Transporters Limited v Public Procurement Administrative Review Board & 2 Others; Jennygo Enterprises Limited (Interested Party) (2025) KEHC 2457 (KLR) where the court held that;

> This is because jurisdiction of the court is the first thing that a court of law must first be certain that it has to entertain any claim before it. Jurisdiction is everything without which a court of law acts in vain. Jurisdiction is conferred by *the Constitution* or statute. Parties cannot clothe a court of law with jurisdiction, even by consent. Neither can a court of law arrogate itself of the jurisdiction that it does not have or possess and purport to entertain a claim which the statute considers to be stale or statute barred.'

14. In this matter, if I were to find that the application was filed outside the timelines provided in Section 35(3) of the *Arbitration Act*, I will have no justification going into the other issues. Section 35(3) of the *Arbitration Act* provides that;

> 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.'

15. I do not wish to repeat what I have reproduced above on the chronology of events leading to the collection of the award. The parties are in agreement that the award was to be published on 10-02-2023. It is also clear to me that when that date came, the arbitrator informed the parties that he would issue another notice for publication of the award. Parties are also in agreement that the arbitrator did not come back to them until 28-11-2023 when he sent an email indicating that the award had been published on 10-02-2023. The respondent claims that this email was a reminder that the award was published on 10-02-2023 but it is mute about the directions by the arbitrator dated the same day to the effect that he would issue a fresh notice for publication. It is also clear from the correspondence between the parties and the arbitrator that the said fresh notice was never given. One may not know the reason for the arbitrator to mix up his communication to the parties on the publication of the award. It could have been an error or deliberate but the fact remains that both parties did not have access to the award owing to the communication dated 10-02-2023.

16. Further to the above, it has not escaped the attention of the court that the award was not available for collection by the parties until 20-12-2023. It was not the fault of the applicant that the award was not yielded to it until that date. The applicant paid its share of the arbitration costs before the initial date of publication and the delay in releasing it to the parties was caused by failure by the respondent to pay. In view of the above, it is my finding that this application having been filed on 18-01-2024 was filed within the three months period provided for in Section 35(3) of the *Arbitration Act*. Consequently, this court has the requisite jurisdiction to hear and determine the application.

17. I now turn to the merits of the application. The grounds upon which an arbitration award may be set aside by the court are provided for in Section 35(2) of the *Arbitration Act* which provides that;

> 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

(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.'

18. The applicant claims that the award was against public policy. For a party to succeed on this ground, it must show to the satisfaction of the court that the award was inconsistent with the laws including *the Constitution* or it is against the national interest of the country or it is so gross that letting it stand would be a travesty of justice and morality. In Glencore Grain Ltd v TSS Grain Millers Ltd (2002) KEHC 1110 (KLR) Honourable Justice D.A Onyancha held as follows which I fully agree with;

> A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/ or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning that just "against the law". It would include contracts or acts that are void. "Against public policy" would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.'

19. According to the applicant, the award went against the statutory provisions of the Estates Agents Act which restricts unregistered persons from practising as estate agents. It claims that the respondent was not a registered agent and trading as such as appears in the service agreements was illegal and the respondent could therefore not have benefitted from the contract.

20. The applicant falls short of stating that the contracts between it and the respondent were illegal. The applicant voluntarily entered into the agreements and was ready to benefit from the same by way of getting tenants and buyers. Actually, it made some benefits from the same agreements it claims to have been drawn against the law. In my view, the applicant cannot turn around after it terminated the agreements and hide behind the legal capacity of the respondent. In its two notices of termination, the applicant did not state that the termination was as a result of discovery that the respondent was not a licensed estate agent. During the hearing before the arbitrator, the applicant's witnesses gave different reasons for termination and never raised the issue of illegal operations of the respondents and only raised it in its submissions. In making decision on this issue, the arbitrator at paragraph 7.20 of the award stated;

> In the proceedings before me and pleadings, no suggestion was made by the respondent that the claimant was practising as an estate agent without a licence. Nothing could have been difficult for the respondent to make these allegations and produce evidence from the licensing authority to show that the claimant and, indeed Mr. Ojijo did not hold the relevant licence for the period in issue.'

21. The law is that whoever wants the court to believe in existence of a fact or state of affairs has the burden of proving the facts. It was the applicant who was alleging that the respondent with whom it had entered into several agreements did not possess a licence. If indeed the appellant wanted the arbitrator to believe or find that the respondent was not an estate agent, he should have produced evidence to show otherwise. Raising the issue at the submissions stage without having produced evidence is not acceptable. The tribunal was right in declining to consider the issue in favour of the applicant. I find this argument to have been an afterthought and unmerited. In the circumstances, I hold that the award was not against public policy on account of agreements having the violated the law.

22. The applicant has submitted further that the award of costs of Kshs 868,700/= offends the principle of fairness and justice. Paragraph 8.4 of the award indicates that the arbitration costs of Kshs 868,700.00 was awarded to the respondent. The respondent has not denied that half of this costs was met by the applicant. There is clear evidence that the applicant paid Kshs 433,050/= to the arbitrator as part of the arbitration costs. It is true that costs should be compensatory and although discretionary should not be awarded to the extent of the winning party being paid over and above what is just or in a manner that amounts to unjust enrichment. In these circumstances, it would be against public policy for a party to be compensated twice. However, in this case, it would appear to me that the amount given by the arbitrator was considering possibility, which is often in matters of this nature, of one party paying the entire arbitration costs and claim the same in execution process. I therefore decline to set aside the award of costs and direct that the amount paid by the applicant shall be claimed or credited in the process of execution.

23. The applicant has also claimed that the arbitrator acted against public policy in that he violated the principle of fairness and justice by awarding Kshs 4,930,000/= for two plots in kindaruma road based on the value of Kshs 850,000,000.00 instead of their open market value of Kshs 400,000,000.00. In my view, this is an issue of weight of evidence and merits of the arbitrator's decision which is not challengeable in this court as it does not fall under the grounds for setting aside an arbitral award.

24. It is also claimed that the award in parcel number 1/402 (I.R. 12689) was not justified as the plot was nonexistent and was not part of the agreements. If that were to be so, then the arbitrator would have fallen into an error of making decision on matters not covered by the contract between the parties. This would obviously fall under the ground of deciding on an issue not referred to him for arbitration and therefore challengeable under Section 35(2)(iv). I note that the stated parcel of land is mentioned

in the statement of claim as having been part of the parcels covered under the contract between the parties. At page 30 of the supporting affidavit is a service agreement which bespeaks of two plots on kindaruma road (1 acre and 1.13 acres respectively) on L.R number 1/402. If the plot was nonexistent, then why did the applicant offer it for sale and engage the respondent in marketing or selling the same? The service agreement was part of the documents produced before the arbitrator. From the agreement, I do not see what the applicant is referring to parcel number 1/401. The award at paragraph 8.1.1 talks of two plots on kindaruma road measuring 1 and 1.13 acres which I believe is what is in the said service agreement. It is clear to me that the claim that the parcel was not part of the agency agreement is untrue and unfounded.

25. The applicant has also argued that the arbitrator considered matters which were beyond his scope by holding that the notice of termination served by the applicant did not state the fault and the consequence of the failure to rectify. While it is true that the arbitrator made the said statement, I believe that the same was an obiter dictum. It was made in the process of the arbitrator's analysis of evidence and it was not a holding.

26. There is a further argument that the award failed to consider pertinent issues submitted for determination by the parties. According to the applicant, the parties had framed an issue of whether or not the contracts were perpetual which was against public policy but the arbitrator failed to consider and decide on that. Paragraph 6.38 of the award puts down what the applicant had submitted on the perpetuity of the contracts. In my opinion, this question was answered by the arbitrator at paragraph 7.24 of the award where he stated that there was no ambiguity in the clauses on termination and all the parties embraced it. Reading through the award, it is clear that the arbitrator addressed clause 5 of the agreements which made provisions for termination and did not buy the argument on perpetuity. This ground therefore has no basis.

27. On bias, I have not identified any conduct of the arbitrator that can be said to have manifested bias. The areas which the applicant claims to have shown bias contain analysis of evidence by the arbitrator and the reasons for arriving at specific decisions. This is not an issue of bias but merits of the decisions over which this court has no jurisdiction.

28. In view of the above analysis, it is my finding and I hold that the application dated 18th January 2024 lacks merits and the same is dismissed with costs to the respondent.

Application dated 12th March 2024 in Arbitration cause number E014 of 2024

29. This application seeks that this court adopts arbitral award dated and published on 10th February 2023 by Kevin Tom Mogeni Esq. MCIArb, the sole arbitrator and the same be enforced in the same manner as a decree or order of the High Court and costs of the application. The same is supported by affidavit Daniel Agili who describes himself as a director of the applicant.

30. The applicant's submissions in respect of this application are embodied in its submissions dated 11-11-2024 filed in arbitration cause number E005 of 2024. The respondent did not file any submissions but filed a replying affidavit sworn by Kinaro Kibanya on 8th April 2024. In the replying affidavit, the only ground of opposition was that the arbitration cause number E005 of 2024 was seeking to set aside the award and the same should be heard first before adoption of the award is considered.

31. It is not disputed that the award exists. I have already dismissed the respondent's application seeking to set aside the award. What is now left is that, the award stands as published by the arbitrator. I see no reason why the application should not be granted safe for what I have observed in my ruling in arbitration cause number E005 of 2024 on costs. Indeed, it will be unfair enrichment for the applicant

to get the full costs as awarded by arbitrator when half of the same was paid by the respondent. In this regard the applicant is only entitled to portion of costs of Kshs 868,700.00 which remained after payment by the respondent.

32. In this regard, I allow the application dated 12th March 2024 in the following terms

    a. Subject to (b) below, the award of Kevin Tom Mogeni Esq. MCIArb, the sole arbitrator in this matter dated and published on 10-02-2023 is hereby adopted as a decree of this court and shall be enforced as the decree of this court.

    b. Notwithstanding (a) above, the applicant shall only be entitled to Kshs 435,650.00 as costs of arbitration.

    c. I make no orders as to costs of this application.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Gachuki for the applicant and Miss Kiiru for the respondent.