



Geke Building Masters Limited v Muritu & 4 others (Miscellaneous Application E008 of 2023) [2025] KEHC 7259 (KLR) (Commercial and Tax) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7259 (KLR)

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

MISCELLANEOUS APPLICATION E008 OF 2023

JWW MONG'ARE, J

MAY 26, 2025

BETWEEN

GEKE BUILDING MASTERS LIMITED APPLICANT

AND

WACHIRA MURITU 1ST RESPONDENT

STUDIO FOURTEEN LIMITED 2ND RESPONDENT

MWAKI MAKAU 3RD RESPONDENT

SWIFTCOST CONSULTANTS LIMITED 4TH RESPONDENT

GREAT RIFT VALLEY LODGE 5TH RESPONDENT

RULING

1. It is common ground that this suit commenced by way of an Originating Summons filed by the Applicant (“Geke”) and dated 11th January 2023 and whose primary prayer was to declare that a dispute had arisen and that the same was to be referred to arbitration. On 21st June 2023, the court allowed the application to the effect that the dispute and the matter were to be referred to arbitration and that the Chairman/Vice Chairman of the Architectural Association of Kenya was to appoint a sole arbitrator whose finding was to bind Geke and the 1st Respondent (“Wachira”) pursuant to Clause 45 of the Agreement and Conditions of Contract for Building Works dated 13th May 2022. In the alternative, Geke was allowed to appoint a sole arbitrator and his finding was to be binding on both Geke and Wachira.
2. The arbitration proceeded and an award dated 13th September 2024 (“the Award”) was published by the arbitral tribunal (“the Arbitrator”) where Wachira was directed to pay Geke Kshs.3,604,392.00 / = together with interest. Wachira has now approached the court by way of the application dated 19th



September 2024 and seeks to set aside the Award and that the court makes a final determination on the issues in dispute and that it makes such other ancillary orders it considers appropriate under the special circumstances of the case. The application has been canvassed by way of written submissions which I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination.

3. Wachira grounds his application under inter alia sections 35(1), (2)(a)(i) & (iii) and 35(2)(b)(ii) of the Arbitration Act(Chapter 49 of the Laws of Kenya) which provide as follows:-

35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) 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)

(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

.....

(b) the High Court finds that—

(i).....

(ii) the award is in conflict with the public policy of Kenya.

4. Wachira submits that he has never been given an opportunity to take part in the proceedings leading to the issuance of the Award and that he was also never given an opportunity to participate in this proceedings either personally or through his legally appointed representatives as per by law required since the application was never personally served upon him and as such, was never aware of the existence of that application for the matter to be referred to arbitration. That the Arbitrator commenced the Arbitration proceedings without any form of communication to Wachira of his appointment and/or commencement of the arbitration proceedings thereby denying him a fair and lawful chance to be present and take part in the proceedings either in person or through his appointed representative and/or advocates, which is repugnant to the right to a fair hearing as enshrined under Article 50 of the Constitution.

5. Wachira submits that giving him an opportunity to be heard will not obscure justice in any way and will only ensure that his rights are not violated unjustly and that the matter is determined in a fair manner based on merits. Wachira submits that he never instructed anyone to act on his behalf in the arbitration proceedings and that only the 3rd Respondent partially took part in the said proceedings and with no authority to act on behalf of the other Respondents. Wachira claims that he only became aware of the existence of the arbitration proceedings when he was served with the Award via a WhatsApp message from (+254-*-*-635) an unknown person who failed to introduce themselves or the purpose of the



- service and that Geke may try to enforce the Award against him before the same is even endorsed by the Court as per by law required occasioning a mockery of justice. Wachira submits that the service via WhatsApp message in itself does not constitute proper service as per by law required.
6. Wachira submits that that as a result of the unfair and unjust arbitration proceedings, he has been unlawfully condemned to pay Geke the awarded sum without being given an opportunity to be heard and to defend his case which is in conflict with the public policy of Kenya. As such, Wachira urges that it would be fair and just if the orders sought are granted to avoid a miscarriage of justice and to give him an opportunity to be heard on the issues in this matter.
 7. In response, Geke submits that the Respondents were served with the Originating Summons together with the Notice of Motion and they subsequently appointed the firm of Messrs. Jacob Oloo & Company Advocates vide their Notice of Appointment dated 27th January 2023. That the said law firm intimated that it was acting for all the Respondents for purpose of this suit and that when the matter came up for mention on 5th March 2023, counsel for the Respondents was present and addressed the Court accordingly. However, on subsequent proceedings they never appeared nor did they file an application to cease acting for the Respondents, Wachira included, despite being served with Mention Notices and affidavit of service filed.
 8. Geke submits that on the basis that the Respondents were represented by the said law firm of Jacob Oloo & Company Advocates, Geke provided their contacts to the Arbitrator and further service was done to the said law firm. That Wachira paid costs for the suit in two instalments as was assessed by the Deputy Registrar. Geke further submits that as the arbitral proceedings progressed, the 3rd Respondent appeared in the second meeting and furnished the Arbitrator with the contacts of Wachira and that he was not acting on behalf Wachira as alleged. That on realization that the said law firm was unresponsive to the Arbitrator's message during the first meeting, parties were contacted individually using their official E-mail addresses and phone numbers and the Arbitrator heard this matter without the participation of the Respondents nor their advocates and issued the Award.
 9. I have gone through the grounds advanced by Wachira and the submissions of the parties highlighted above. I agree with Wachira that a violation of his right to a fair hearing is a matter of public policy that goes to the root of the Award and if proved, is capable of making the court set aside the Award. Going through the record, it is evident that from the onset, Wachira was being represented by the firm of Jacob Oloo & Company Advocates as can be seen from the Notice of Appointment dated 27th February 2023 and counsel's appearance before the Deputy Registrar on 6th March 2023. When the matter was mentioned before court on 23rd May 2023, the court noted that there was no proof of service of the originating summons and the matter was set to be mentioned on another date. On that date, that is, 21st June 2013, there was no appearance for the Respondents and Geke's counsel informed the court that counsel representing the Respondents had earlier informed the Deputy Registrar that they were not in opposition of the application for appointment of an arbitrator. The record indicates that this is the position and informed the reason why the court allowed the application on the same day. The record also indicates that Wachira's current advocates filed a Notice of Change of Advocates dated 19th September 2024 indicating that they had taken over the conduct of this matter in place of Messrs. Jacob Oloo & Company Advocates.
 10. From the above, it is clear that Wachira has always been represented by counsel in this proceedings, first, with the firm of Messrs. Jacob Oloo & Company Advocates and now with their current advocates, Messrs. Gaylord Nyaiyo & Company Advocates. It is therefore not correct for Wachira to claim that he had no knowledge of this proceedings and yet he had an advocate representing him all along. It is thus presumed that Wachira, through his counsel on record knew about these proceedings or must



have been apprised of the same together with the orders to proceed to arbitration. It has also not been controverted that Wachira's previous advocates were aware of the taxation in this matter and that the same number used to pay the filing fees in this matter was the same one that paid the certified costs in two instalments. This implies that Wachira and his advocates always knew about the ongoings in this matter but Wachira now conveniently and selectively chooses to state that he was never aware of this proceedings.

11. Turning to whether Wachira was aware of the arbitration proceedings, I note that in the Award, the Arbitrator noted that the Respondents were represented on record by the firm of Messrs. Jacob Oloo & Company Advocates but that the advocates did not show up after the Arbitrator contacted them citing that they had not received further instructions from Wachira. The Arbitrator states in the Award that he "...accorded the Respondents several Opportunity to present their case and the tribunal having taken all reasonable steps to ensure as far as possible that the Respondents commit to a defence, no response has been received." The Arbitrator stated that he was guided by section 26(b) and (c) of the Arbitration Act on how to proceed where the said provisions provide that

Unless otherwise agreed by the parties, if, without showing sufficient cause—

.....

- (b) the respondent fails to communicate his statement of defence in accordance with section 24(1) the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) a party which fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;
12. Having gone through the Award and based on my findings above that Wachira and his advocates always knew about the orders of referring the matter to arbitration, I am unable to conclude that Wachira was denied a fair hearing as claimed. It is clear that Wachira knew about the arbitral proceedings and chose not to attend and he can only have himself to blame for not participating in the same. The Arbitrator was rightly guided by the law when he proceeded with the hearing of the matter and publishing of the Award as all attempts to get Wachira to participate in the arbitration, failed.

Conclusion and Disposition.

13. In the foregoing, I hold and find that the 1st Respondent (Wachira) has failed to convince the court that the Award ought to be set aside. His application dated 19th September 2024 is accordingly dismissed with costs assessed at Kshs.40,000.00/=.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2025

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

N/A for the Applicant.

N/A for the Respondent.

Amos - Court Assistant

