REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 61 OF 2015

360 DEGREES COURT APARTMENTS RESIDENTS

ASSOCIATION *suing through* **NELSON MUKORA**

ROSE KYATEREKERA WERE

BENSON MAKALE.....PLAINTIFF

VERSUS

JOIN VEN INVESTMENTS LIMITED.....DEFENDANT

As consolidated with

IN THE MATTER OF AN ARBITRATION

BETWEEN

360 DEGREES COURT APARTMENTS RESIDENTS

ASSOCIATION *suing through* **NELSON MUKORA**

ROSE KYATEREKERA WERE

BENSON MAKALE.....CLAIMANTS

AND

JOIN VEN INVESTMENTS LIMITED.....1ST RESPONDENT

THREE SIXTY DEGREES MANAGEMENT LTD.....2ND RESPONDENT

QUEST LABORATORIES LIMITED.....3RD RESPONDENT

RULING

Introduction:

1. This Ruling is in relation to a Notice of Motion Application dated 25th September, 2020 in which the Defendant is seeking for the following orders:

> ***a) That the Plaintiff/Claimant does deposit in bank account that is run by the firm of Majanja Luseno & Company Advocates the sum of Kenya shillings seven million two hundred and eighty-eight thousand three hundred and eighty-eight (Kshs. 7,288,388.00) being security of the assessed Arbitral Costs and expenses within thirty (30) days from the date of the issuance of the order and supply of the bank account details.***

b) That pending such deposit and/or compliance with Order 3 above, this Honourable Court pleased to wholly stay proceedings commenced by the Plaintiff seeking by the Notice of Motion dated 28th July, 2020 seeking to set aside the Final Award dated 24th January, 2020 by W.A Mutubwa FCIArb.

c) That there be liberty to apply.

d) That costs of this Application be borne by the Plaintiffs/Claimant; and

e) That this Honourable Court be pleased to grant such further and other Orders that might be deemed just and fair in the circumstances.

2. The Application is supported by the Affidavit of the Defendant's Chief Financial Officer who deponed that the proceedings herein were by consent recorded before Hon. Justice O. Angote J. on 10th October 2012 *(sic)* referring the matter to arbitration whereupon the matter was consolidated with the proceedings commenced before the sole Arbitrator Wilfred Mutubwa.

3. It was deponed that the parties appeared before the Arbitrator who, after hearing the dispute, proceeded to render his decision in an Award dated 29th January, 2020. It was deponed that the 1st Respondent/Defendant has incurred substantial costs in defending these proceedings and is being exposed to further costs in defending the proceedings seeking to set aside the Arbitral Award.

4. According to the Defendant, the costs and expenses in defending the proceedings were assessed in the sum of Kenya shillings seven million two hundred and eighty-eight thousand three hundred and eighty-eight *(Kshs. 7,288,388.00)* and that the Plaintiff has expressed unwillingness to meet costs in the arbitration proceedings.

5. It was deponed that the purchasers and/or members of the Plaintiff were never advised of the outcome of the arbitral proceedings that were concluded before W.A Mutubwa and that there has been no resolution passed to sanction the filing of the Application dated 28th July, 2020 by the Plaintiffs' members who are purchasers of the units erected on Land Reference number 12715/290 Syokimau.

6. It is the Defendant's case that unless the orders sought are granted, there was a likelihood that the Defendant would be subjected to further costs in defending the Motion dated 28th July, 2020, which costs shall not be recoverable since the Plaintiff has no known attachable assets save for service charge paid by purchasers.

7. One of the officials of the Plaintiff swore a Replying Affidavit and deponed that the Defendant/Applicant filed an Application for enforcement of the Arbitral Award on 15th July, 2020 while the Plaintiff filed an Application dated 28th July, 2020 for setting aside the Arbitral Award.

8. He deponed that the two Applications came up for hearing on 23rd September, 2020 when the court gave directions that both Applications be disposed of by way of written submissions and that the Defendant should have raised the issue of security on or at least before the hearing date of the two Applications was fixed.

9. It is the Plaintiff's case that the main issue for determination in the two pending Applications is whether the arbitral award was contrary to public policy or not and that for the Defendant to purport to limit the Plaintiff's right to set aside the award by imposing payment of costs is imprudent.

10. According to the Plaintiff's official, the Application was filed prematurely because the Defendant was yet to apply for the recognition and enforcement of the additional award on quantum of costs; that the Defendant did not obtain a money decree but an award for costs and that the Application was akin to attachment before debt.

11. It was deponed that the Defendant has completely misunderstood, misinterpreted and hence misapplied the provisions of Section 37(2) of the Arbitration Act; that an Application for security under the said provision is limited and conditional to instances where an Application for setting aside has been made to the type of court referred to under the provisions of Section 37(1)(a)(vi) of the Arbitration Act and that the said sub-section deals with a case where the Application for the setting aside or suspension of an arbitral award has been made before the court has determined an application by a beneficiary of an arbitral award for the recognition or enforcement of the same.

12. It is the Plaintiff's case that the sub-section of the law that the Defendant is relying on is inapplicable in circumstances such as those prevailing in this case where the Application for setting aside and the one for recognition are to be heard together and that the sub-section also connotes that the Court handling the Application for setting aside the arbitral award is not the same as that handling the recognition of the award and most likely is in a different state or jurisdiction.

13. The Defendant's advocate submitted that the Defendant has an order for costs and expenses in its favour; that the Plaintiff has expressed its unwillingness to pay the said costs and that the Plaintiff has not exhibited evidence for any funds it has put in place to meet the Defendant's costs.

14. According to the Defendant's counsel, this court has jurisdiction under the Arbitration Act to stay proceedings pending the issuance of security in the manner sought; that Section 37(2) of the Act is applicable in this matter; that the Plaintiff has no known assets which can be attached and that the Plaintiff is not an income generating entity and gets its funding from the service charge paid by its members.

15. The Defendant's counsel relied on the case of ***University of Nairobi vs. Multiscope (2020) eKLR*** in which the Court of Appeal while striking out an Application to set aside an arbitral award held as follows:

> *"On the flipside, the Respondent's contention that it may also be prejudiced if the orders are granted as the applicant had demonstrated inability to pay the arbitral fees which was a much lesser amount is not without substance. In the circumstances we find it necessary to protect the interest of both parties by issuing an order of stay of proceedings on condition that the applicant shall deposit half the amount awarded by the arbitrator into an interest earning account in the joint names of the parties' advocates within 90 days from the date hereof."*

16. Learned counsel for the Defendant stated that the order sought does not amount to payment of monies to the Applicant but the securing of costs; that the payment of costs was a consequence of proceedings that were commenced by the Plaintiff and that the Plaintiff's Application to set aside the arbitral award was a disguised appeal against the decision of the Arbitrator.

17. The Plaintiff's advocate submitted that had the Defendant been serious and sincere about the necessity for an order for security for costs, it would have made the said Application immediately the Plaintiff applied to set aside the Award; that the Application to set aside the said Arbitral award was made on 28th July, 2020 and that no explanation has been given to explain why it never filed the Application for security for costs until 60 days later.

18. Counsel for the Plaintiff submitted that as if that was not enough, the Defendant proceeded to collect the award on quantum costs; that when the two main Applications for setting aside and for Enforcement came up for hearing, the Defendant knew how much costs had been assessed and that courts have abhorred dilatory tactics by parties who exhibit indolence in moving the court for security for costs orders.

19. Counsel relied on the case of ***Noornamohammed Abdullah vs. Ranchorbhai J. Patel (1962) EA 447*** where the court held as follows:

> *"It is not necessary for the purposes of the present case to pursue this topic further, for quite apart from the special considerations, which may apply to the question of ordering security for costs incurred in the court below, we are satisfied that on general principles the present application must be refused. We base that decision upon the dilatoriness of the first respondent in making the application, together with the other matters which we have discussed above and which tell in favour of the appellant. We therefore dismiss the application with costs."*

20. The Plaintiff's counsel also relied on the case ***Cancer Investments Limited vs. Sayani Investments Limited (2010) eKLR*** which cited with authority *Halsbury's Laws of England 4th Edn Vol 37 paragraph 305* as follows:

> *"305. Application for Security for Costs: Although an Application for security for costs may be made at any stage of the proceedings, it should be made as promptly as possible, and it should not be made too late or too close to the trial, since unless there is a reasonable explanation for the delay it may be refused."*

21. It was submitted that the Defendant has completely misunderstood, misinterpreted and hence misapplied the provisions of Section 37(2) of the Arbitration Act under which it has approached the court and that an Application for security under the said provision is limited and conditional to instances where an Application for setting aside has been made to the type of court referred to under the provisions of Section 37(1)(a)(vi) of the Arbitration Act.

22. It was submitted by the Plaintiff's counsel that the said sub-section of the law would be inapplicable in the circumstances such as those prevailing in this case where the Application for setting aside and the one for recognition are and were directed to be heard together.

23. According to the Plaintiff's counsel, the Defendant is yet to apply for recognition and enforcement of the additional award on quantum of costs; that the assessment does not feature anywhere in the Application for enforcement and that in as far as the Application for security for costs is made prior to an Application seeking the enforcement of the additional award, then the Application is premature and ought to be rejected.

24. Counsel submitted that the amount in the Application is sought as payment for the assessed costs and that the Application is a clever way by which the Defendant is seeking execution of an Arbitral Award on costs but disguising the execution as an Application for security for costs.

25. The Plaintiff's counsel submitted that an Application for security for costs is one that invokes the discretionary powers of the court when sufficient cause has been established by the Applicants, on whom the incidence of the legal burden of proof lies and that the Defendant/Applicant ought to establish that the Plaintiff/Respondent herein, if unsuccessful in the proceedings filed herein, would be unable to pay costs due to poverty. The Defendant's counsel relied on numerous authorities which I have considered.

Analysis and findings:

26. I have considered the Application, the Replying Affidavit, the submissions by counsel and the cited authorities. The issues that arise for determination are:

> *a) Whether the court should stay the proceedings to set aside the final award dated 24th January, 2020.*
>
> *b) Whether this Application is unmerited in light of the court orders/directions of 23rd September, 2020.*
>
> *c) Whether the court should make an order for security for costs.*

27. The record shows that on 10th October, 2017, this court referred the dispute herein to Mr. Willy Mutubwa, as an Arbitrator, for hearing and disposal. After the Arbitrator made his Award on 29th January, 2020, the Defendant filed an Application dated 15th July, 2020 for enforcement of the said Arbitral Award. The Plaintiff on the other hand filed an Application dated 28th July, 2020 to set aside the Arbitral Award.

28. Both Applications came up for hearing on 23rd September, 2020 when the court, after hearing representation of both parties, directed the parties to file written submissions in respect to the two Applications. The Defendant was to file and serve a Replying Affidavit after which the Plaintiff was to file submissions within fourteen (14) days. The Defendant was directed to file his submissions within fourteen (14) days after being served with the Plaintiff's submissions. The two Applications were to be mentioned on 18th November, 2020 to confirm compliance and take a Ruling date.

29. A few days after the directions of the court, the Defendant filed the present Application in which it is seeking for Kshs. 7,288,388 as security on the ground that the Plaintiff has previously shown its unwillingness or inability to discharge its financial obligations in the arbitral proceedings; that the Defendant has a good Defence and that the proceedings by the Plaintiff were commenced without the requisite resolution of its members.

30. The Application for the deposit of security was filed pursuant to the provision of Section 37(2) of the Arbitration Act which states as follows:

> *"37. Grounds for refusal of recognition or enforcement*
>
> *(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (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."*

31. The Subsection (1)(a)(vi) referred to in the above provision reads as follows:

> *"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 that party furnishes to the High Court proof that*
>
> *…(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."*

32. The Plaintiff has argued that an Application for security under Section 37 (2) of the Act is limited and conditional to instances where an Application for setting aside has been made to the type of court referred to under Section 37(1)(a)(vi) of the Arbitration Act. This, according to the Plaintiff, is only applicable in a case where the Application for the setting aside or suspension of an Arbitral Award has been made before the court has determined an Application by a beneficiary of an Arbitral Award for recognition or enforcement of the same.

33. In my view, the Plaintiff is splitting hairs on the import of Sections 37(1)(a)(iv) and 37(2) of the Arbitration Act. Under the said provisions of the law, the court may stay the proceedings to set aside an Award until security is provided. It does not matter that this court directed that the Application for setting aside the Award be heard together with the Defendant's Application for recognition and enforcement of the Award.

34. Indeed, although the parties agreed to argue the two Applications together, it follows that the court will have to determine the Plaintiff's Application for setting aside of the Award, and in the event it finds the Application not to be merited, determine the Defendant's Application for enforcement of the Award. However, if the Application by the Plaintiff to set aside the Award succeeds, then the court will have no basis to consider the Application for enforcement.

35. That being the case, and the Plaintiff having filed an Application seeking to set aside the Arbitral Award, and this court being seized of the Application to enforce the Award, the court has the discretion of ordering for security before hearing the Plaintiff's Application pursuant to the provision of Section 37(2) of the Arbitration Act.

36. The Plaintiff has argued that there was inordinate delay in filing the current Application, and that the Application should have been made before the court gave its directions on 23rd September, 2020. The record shows that both the Plaintiff and the Defendant filed their respective Applications in July, 2020 for enforcement of the Award and setting aside of the Award respectively.

37. Before the court could determine the two Applications, the Defendant filed the current Application on 28th September, 2020. The current Application was filed by the Defendant in the same month the directions were given, and within two (2) months from the date when the two main Applications were filed. That period, in my view, is not inordinate. The Application was made promptly and is properly before this court.

38. The reading of Section 37(2) of the Arbitration Act shows that the court has the discretion to order for security before hearing an Application to set aside an Award. It should not be lost to any party what the rationale for security for costs is. In the case of ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR*** the court held as follows:

> *"The test in an Application for security for costs is not whether the Plaintiff has established a prima facie case but whether the*

Defendant has shown a bona fide Defence. This was the holding in the case of ***Shah vs. Sheti Civil Appeal No. 34 of 1981.”***

39. The same principles were espoused in the case of ***Jayesh Hasmukh Shah vs. Narin Haira & Another (2015) eKLR*** in which the court held:

> *“It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.”*

40. In the case of ***University of Nairobi vs. Multiscope (2020) eKLR*** the Court of Appeal held as follows:

> *“On the flipside, the Respondent's contention that it may also be prejudiced if the orders are granted as the applicant had demonstrated inability to pay the arbitral fees which was a much lesser amount is not without substance. In the circumstances we find it necessary to protect the interest of both parties by issuing an order of stay of proceedings on condition that the applicant shall deposit half the amount awarded by the arbitrator into an interest earning account in the joint names of the parties' advocates within 90 days from the date hereof.”*

41. It is not in dispute that the Arbitral Tribunal made an order for costs in favour of the Defendant. The Award on Quantum for costs stems from the Final Award of the Arbitrator. The said Award is what the Plaintiff has challenged.

42. The Plaintiff has not denied that it is an Association whose finances are generated from service charge paid by the owners of the units on the suit property. The Plaintiff has not placed before this court the mechanisms that have been put in place to meet the arbitral costs and the costs of these proceedings in the event it does not succeed in setting aside the Award. Indeed, no resolution has been placed before this court to show that the Plaintiff's members sanctioned the filing of the Application to set aside the Award or that the Plaintiff generates income that is sufficient to off-set the Award.

43. That being the case, and to protect both parties, the Plaintiff shall furnish security pending the hearing of its Application to set aside the Award. The Defendant's Application dated 25th September, 2020 is allowed as follows:

> ***a) The Plaintiff/Claimant to deposit into an interest earning account in the joint names of the parties' advocates, being the firm of Guandaru Thuita & Company Advocates and Majanja Luseno & Company Advocates within sixty (60) days from the date hereof the sum of Kshs. 7,288,388.00 being security of the assessed Arbitral costs and expenses.***
>
> ***b) Pending the deposit of Kshs. 7,288,388.00 as directed above, the proceedings commenced by the Plaintiff by way of the Notice of Motion dated 28th July, 2020 seeking to set aside the Final Award dated 24th January, 2020 are hereby stayed.***
>
> ***c) Parties are at liberty to apply.***
>
> ***d) Each party to bear its own costs.***

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 4TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE