



**Mwai v Gichiri (Environment and Land Miscellaneous Application  
E065 of 2024) [2025] KEELC 139 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 139 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E065 OF 2024  
BM EBOSO, J  
JANUARY 23, 2025**

**BETWEEN**

**CHARLES GATIMU MWAI ..... APPLICANT**

**AND**

**TABITHA NJANJA GICHIRI ..... RESPONDENT**

**RULING**

1. Through the notice of motion dated 27/9/2024, Charles Gatimu Mwai [ the applicant] invited this court under Section 36(1) of the Arbitration Act, to adopt as a judgment of this Court, what he described as “the award dated 18<sup>th</sup> August 2020 and delivered by Hon Arbitrator Michael Githinji Tanu”. The said application is the subject of this ruling. The respondent opposed the application. The two key issues that fall for determination in the application are (i) Whether there is a binding arbitral award capable of recognition, adoption and enforcement under Section 36 of the Arbitration Act; and (ii) Whether there is a proper ground for refusal of recognition or refusal of enforcement of the alleged award.
2. In summary, the case of the applicant is that, he entered into a land purchase agreement with the respondent, pursuant to which the respondent sold to him land parcel number Ruiru/Mugutha Block 1/10987 at Kshs 2,000,000. He paid to the respondent the agreed purchase price. The respondent subsequently failed to comply with the terms of the agreement and refused and/or neglected to transfer the land to him.
3. Aggrieved by the respondent’s failure to transfer the land to him, he invoked the arbitration agreement which is contained in Clauses 10 and 11 of the sale agreement and initiated arbitration proceedings. Despite the respondent being summoned by the arbitrator, she refused and/or neglected to attend. He adds that the arbitrator was left with no option but “to write his findings.”



4. The applicant contends that the terms of the arbitrator’s award stipulate that the respondent should refund the money paid as purchase price for parcel number Ruiru Mugutha Block 1/10987 in full or, alternatively, offer a suitable and acceptable plot to him. He urges the court to adopt and enforce the award.
5. The respondent opposed the application through a replying affidavit. She also filed written submissions dated 4/12/2024. Her case is that what the applicant is waving as an arbitral award is a nullity. She contends that Clauses 10 and 11 of the sale agreement which contain the framework on dispute resolution were completely ignored. It is her case that no notice of a dispute was issued to her and that the witnessing advocate/arbitrator did not invite her for a joint meeting as required under Clause 10.
6. The respondent further contends that the award is a nullity because the witnessing advocate/arbitrator, Michael Githinji Tanu, did not have the capacity of a witnessing advocate, adding that the said advocate did not take out a practising certificate in the year 2020, contrary to Section 37 (1) of the Arbitration Act [sic]. She adds that she was not given notice of the arbitral proceedings to enable her present her case.
7. The respondent adds that the applicant has not filed a certified copies of the sale agreement and the alleged award to warrant recognition and enforcement orders. She faults the purported award for failure to disclose the judicial seat of arbitration. She adds that the purported award has never been delivered to her, contending that she first saw it as an exhibit during proceedings in Ruiru SPMC MCLE Case No E007 of 2024 which case was dismissed, prompting the applicant to bring the present application.
8. The respondent faults the arbitrator for “prosecuting” her case [the respondent’s case] through Zachariah Gichiri Kariuki who was not privy to the arbitration agreement. Lastly, she faults the applicant and the arbitrator for breaching the Arbitration Act and Clauses 10 and 11 of the sale agreement which contain the arbitration agreement.
9. The court has considered the application, the response to the application, and the parties’ respective submissions on the application. As observed in the opening paragraph of this ruling, the two issues that fall for determination in the application are: (i) Whether there is a binding arbitral award capable of recognition, adoption and enforcement under Section 36 of the Arbitration Act; and (ii) Whether there is a proper ground for refusal of recognition or refusal of enforcement of the alleged award. The two issues will be briefly analysed and disposed sequentially in the above order.
10. Is there a binding arbitral award capable of recognition, adoption and enforcement? The parties’ mutual framework on arbitration [the arbitration agreement] is contained in Clauses 10 and 11 of the sale agreement dated 3/1/2020 and reads as follows-;
  10. If there is any dispute between the parties over this agreement they shall issue a notice of seven (7) days to each other with a copy to their witnessing advocate who shall within seven (7) days of receipt invite both parties for a joint meeting and may arbitrate any dispute and his decision and award shall be binding on the parties and can only be reviewed by an arbitrator appointed by both parties or upon inability to agree by any arbitrator appointed by the chartered institute of arbitrators who shall be guided by the Arbitration Act in existence at the material time.
  11. In case of any indisposition by the witnessing advocate the parties may agree on a single arbitrator within seven (7) days of any notice by one party to the other of existence of a dispute failure to which the chairman of the Chartered Institute of Arbitrators shall appoint one arbitrator to hear the dispute and whose decision shall be guided by the Arbitration Act in existence at the material time and his decision shall be final.”



11. Mr. Michael Githinji Tanu was the parties' common advocate and was the witnessing advocate for the purpose of Clause 10 of the sale agreement. He is the author of the document dated 18/8/2020 which the applicant is waving and calling an arbitral award. For reasons that only the witnessing advocate knows, he described the document as "report and proposed award." He defined the document in the opening sentence as follows:

"Here below is my arbitration efforts report and proposed award under Condition 10 of the sale agreement dated 3rd January, 2020 signed by the parties."

12. The witnessing advocate made the following definitive and conclusive statement in the disposal part of the document that the applicant calls an arbitral award:

"Proposed Award

In view of the foregoing it is not possible to make an award as only one party – the purchaser has been heard the other party having only talked to the undersigned on the phone. However, the vendor should refund the money paid for LR No Ruiru Mugutha Block 1/10987 in full or alternatively offer a suitable and acceptable plot to the purchaser. The refund or plot exchange and documentation thereof should be done within ninety (90) days."

13. It does emerge from the above excerpts and, indeed, from the entire document dated 18/8/2020 that the witnessing advocate came to the conclusion that it was not possible to make an award in the dispute at that stage. He then decided to make a report in which he stated as such. If he had an award, he should have rendered a binding award. He did not render any, instead he proposed what he considered to be a possible way of resolving the dispute. Put differently, having failed to conduct arbitral proceedings, he concluded that he could not render a binding award. He authored what he called "arbitration efforts report and proposed award."
14. Clearly, the document dated 18/8/2020 is not a binding arbitral award capable of recognition, adoption and enforcement under Section 36 of the *Arbitration Act*. If the applicant is seized of a different document in the nature of a binding arbitral award, the said document has not been presented to the court in the manner prescribed by the *Arbitration Act*. Indeed, both the sale agreement and the proposed award dated 18/8/2020 are not certified and would not attract recognition and enforcement in the state in which they were presented.
15. For the above reasons, the court finds that the applicant has not presented to the court a binding arbitral award capable of recognition, adoption and enforcement under Section 36 of the *Arbitration Act*.
16. Is there any proper ground for refusal of recognition or refusal of enforcement of the alleged award? The court has already made a finding to the effect that the court is not seized of a certified and binding arbitral award capable of recognition or enforcement.
17. Having made the above finding, it is to be noted that Section 37 (1) provides an elaborate framework on the statutory grounds upon which this court may decline to recognize or enforce an arbitral award. The section provides as follows:
1. 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— (i) 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, under the law of the state where the arbitral award was made; (iii) the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or (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; or (vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

- b. if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

18. Were the document dated 18/8/2020 to be found to be a binding arbitral award, the court would be expected to interrogate it in the context of the above statutory grounds and in the context of all the allegations that the respondent has levelled against the arbitral process and the conduct of the witnessing advocate/arbitrator. It is clear from the affidavits presented to the court and from the impugned documents that the respondent was not given notice of any arbitral proceedings and was not invited to present her case. For reasons that only the witnessing advocate/arbitrator knows, he chose to deal with one Zachariah Gichiri Kariuki who was not privy to the arbitration agreement. He did not bother to issue to the respondent the arbitral invitation contemplated under Clause 10 or any other formal invitation requiring the respondent to attend the arbitral proceedings or to present her case. Indeed, none was exhibited. Similarly, the applicant did not bother to issue the seven (7) days dispute notice contemplated under Clause 10 of the sale agreement. Consequently, the purported report and proposed award stands to be rejected under Section 37 (1) (a) (iii) of the *Arbitration Act*.

19. Secondly, it does emerge from the uncontroverted affidavit of the respondent and from the document dated 18/8/2020 that no arbitral proceedings were held. Indeed, there is no mention of any physical or virtual session or any submissions tendered in relation to any arbitration proceedings involving the two parties. It is clear from the document dated 18/8/2020 that the document was authored by Michael Githinji Tanu based on his knowledge of the transaction as the parties' common advocate in the land transaction. Put differently, the procedure culminating in the proposed award violated Article 50 (1) of the *Constitution* which provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

20. Violation of the edict of fair hearing under Article 50 (1) of the *Constitution* renders the proposed award liable for rejection under Section 37(a) (v) of the *Arbitration Act*.



21. Lastly, what Mr. Michael Githinji Tanu presented is a report on his effort to arbitrate and a on how to resolve the dispute. He did not render a binding award. At this point, there is no binding award. As and when arbitration is carried out and a binding award is rendered by the arbitrator, the court will be available to adopt the binding award. For now, the document dated 18/8/2020 stands to be rejected under Section 37(1) (a) (vi) of the *Arbitration Act*.
22. For the above reason, my finding on the second issue is that the document dated 18/8/2020 suffers from the vitiating elements contemplated under Sections 37(1) (a) (iii); 37(1) (a) (v); and 37(a) (vi) of the *Arbitration Act* and therefore there are sufficient grounds for refusal of recognition and refusal of enforcement.
23. For avoidance of doubt, the applicant will be at liberty to initiate recognition and enforcement proceedings once proper arbitration proceedings are conducted and a binding award is rendered. At this point, the plea for adoption is premature.
24. In the end, the application dated 27/9/2024 is struck out for having been brought before a binding award is rendered. Taking into account the circumstances of this application, particularly the fact that the respondent has not contested the fact that he received full purchase price but has failed to convey the land to the applicant, parties will bear their respective costs of the application.
25. Lastly, it is clarified that the date for delivery of this ruling was reserved while the Presiding Judge was still stationed at Thika ELC. Effective from 13th January 2025, the Judge was transferred to Meru ELC and Chuka ELC. It is for this reason that this ruling is being rendered virtually at Meru ELC. The relevant original court file shall be returned to Thika ELC forthwith and the Court Registry at Thika ELC shall upload the ruling onto the CTS immediately.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 23RD DAY OF JANUARY, 2025**

**B M EBOSO [MR’**

**JUDGE**

In Presence of:

Ms Muriithi for the applicant

Court Assistant – Tupet

