

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM ARB NO. E058 OF 2024
IN THE MATTER OF THE ARBITRATION ACT, CAP 49

-AND-

IN THE MATTER OF THE ARBITRATION

-BETWEEN-

ANGELA MWIKALI.....APPLICANT

-AND-

SAUTI COOPERATIVE SAVINGS

& CREDIT SOCIETY LIMITED.....RESPONDENT

RULING

1. Before me is a Chamber Summons application dated 5th September 2024 filed by the applicant pursuant to the provisions of Articles 10, 20(1) & (2), 23, 27, 47(1), 50(1), 159(2)(c) & 165 of the Constitution, Sections 35(1), (2)(a) (iv) & (b)(ii), (3) & (4) of the Arbitration Act, CIArb Arbitration Rules 2020, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and all other enabling provisions of the law. The applicant prays for a declaration that part of the Final Arbitral Award by Mr. Kairu Mbuthia violates public policy for failing to address fraud in respect to the size of the claimant’s two plots and offends the rules of natural justice. She also prays for an order to set aside the Award directing the respondent to compensate the applicant than amount equivalent to the value of the plots measuring 14 by 7 meters, at current market rates, as per the Valuation Report to be conducted by the Tribunal appointed Valuer and substitute it with

a Final Award of Kshs.9,000,000/= as per Mr. Babu Njihia's valuation, and that the Claimant's two plots measure 21 by 7 meters each.

2. In addition to the foregoing, the applicant seeks an order to vary part of the Final Award to include an additional Kshs.1,500,000/= for economic loss, making a total of Kshs.10,500,000/= in compensation, which sum is already held in a joint interest-earning account and vary the Award on Arbitral costs limited to Tribunal fees to include full legal costs and damages. In the alternative, the applicant prays for an order for specific performance & mandamus, directing the Land Registrar to issue Title Deeds for the two plots, and an order for the OCS Buruburu Police Station to provide security during the transition of the land to the applicant. In the alternative, the applicant prays for an order for monetary compensation or specific performance, and for the respondent to be directed to provide alternative land in Donholm, Nairobi, of a value equivalent to Kshs.10,500,000/=: with transfer costs to be borne by the respondent. The applicant also prays for this Court to determine the dispute substantively or in the alternative, refer the matter to a new neutral Arbitrator for fresh determination within one month based on existing documents and evidence.
3. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Ms Angela Mwikali, the applicant herein. She averred that between the years 2005 & 2009, she entered into several land sale agreements with the respondent for plots on Nairobi/Block 82/8760, but then the respondent fraudulently reduced the plot sizes from 21x7 meters to 14x7 meters, which prevented her from completing a land sale to a third party, by the name Isaac Mitau, and she was also unable to refund the said buyer's deposit of Kshs.3,150,000/=: thus risking a lawsuit. She

stated that as a result, she initiated Arbitration proceedings on 22nd November 2022, and a Final Award was delivered by the Arbitrator, Mr. Kairu Mbutia on 7th June 2024 but received by her on 24th July 2024.

4. Ms Mwikali stated that the Arbitrator ignored substantial evidence of fraud concerning the plot sizes, despite the issue being repeatedly raised. She claimed that the Arbitrator failed to consider expert evidence from Planner Alex Nthiwa and Valuer Babu Njihia, who confirmed the correct size of the plots as 21x7 meters. Ms Mwikali averred that the Arbitrator disregarded a valuation of Kshs.9,000,000/=, ignored Government-approved survey maps and failed to Award the applicant Kshs.1,500,000/= for economic loss. That instead, the Arbitrator relied on rescinded contracts unrelated to the dispute.
5. She further contended that procedural fairness was violated when the Arbitrator ordered a joint valuation after pleadings had closed and issued ambiguous, speculative orders not grounded in law. She contended that the Tribunal also failed to explain its refusal to Award party-to-party costs, which are rightly due. She asserted that the Arbitral Award violates Articles 40 & 50 of the Constitution, discriminates against her, and denies her fair compensation, resulting in injustice, financial loss, and mental anguish.
6. In opposition to the application, the respondent filed a replying affidavit sworn on 4th November 2024 by Mr. David Elly Ndwigah, the respondent's National Chairman. Mr. Ndwigah averred that the parties herein voluntarily submitted to Arbitration under the Sale Agreement dated 2nd November 2009, resulting in a Final Award issued on 7th June 2024 by Mr. Kairu Mbutia, sole Arbitrator. He contended that the instant application is incompetent and defective as the prayers being sought cannot lawfully be granted by this Court, thus the instant application should be struck out.

7. Mr. Ndwigah asserted that prayers 4 to 10 in the application herein improperly seek this Court to interfere with the Arbitration Award, whereas, the law only permits Courts to enforce or entirely set aside an Arbitral Award, not to partially vary or amend it. He stated that the issue of fraud in respect to plot sizes was duly considered and addressed by the Arbitrator and this Court cannot revisit the same. Mr. Ndwigah averred that the respondent is also aggrieved by the Award and seeks that it be set aside in full. He stated that the Arbitrator ignored express terms of the Sale Agreement, particularly regarding infrastructure costs payable by the applicant and disregarded relevant evidence, thereby making the Award contrary to public policy.
8. In a rejoinder, the applicant filed a further affidavit sworn on 6th December 2024 by Ms Angela Mwikali, the applicant herein. She maintained that the Final Award dated 7th June 2024 does not meet legal standards and violates public policy and natural justice. She averred that this Court has the requisite jurisdiction to hear and determine the instant application and has the power to set aside or vary part of the Arbitral Award under applicable laws and constitutional principles.
9. Ms Mwikali insisted that the issue of fraud regarding the size of plot Nos. 554 (1338) & 555(1339) was not properly addressed by the Arbitrator, who concealed fraud and omitted crucial expert evidence from Planner Alex Nthiwa, Which showed that her plot sizes are 21 by 7 meters each. She contended that the respondent's counter-application to set aside the Award in its entirety is time-barred, incompetent, and defective. She urged this Court to allow the instant application in the interest of justice, fairness and public policy, and asserted that the respondent would not suffer prejudice if the instant application is allowed.

10. The application herein was canvassed by way of written submissions. The applicant's submissions dated 21st January 2025 were filed by the law firm of Kihoro, Muritu Advocates LLP, while the respondent's submissions dated 7th February 2025 were filed by the law firm of Desai, Sarvia & Pallan Advocates.
11. Mr. Kihoro, learned Counsel for the applicant relied on the provisions of Section 35 of the Arbitration Act and the case of **Christ For All Nations v Apollo Insurance Co. Limited** [2002] 2 E.A. 366, in arguing that an Arbitral Award should be set aside where it offends public policy, exceeds the Arbitrator's mandate, or is tainted by procedural irregularities. Counsel referred to the Supreme Court case of **Nyutu Agrovat Limited v Airtel Networks Kenya Limited & another** [2015] eKLR, and submitted that the Court has supervisory jurisdiction over Arbitration proceedings to ensure adherence to legal principles and the rule of law. He asserted that the respondent engaged in fraud by misrepresenting the size of the applicant's land which measures 21 by 7 meters per the government-approved subdivision, as 14 by 7 meters, with the intent to gain an unfair advantage over the applicant.
12. Counsel contended that the respondent's survey subdivision map, prepared by a licensed physical planner and approved by authorities, is a key document for land title registration and boundary verification. He argued that it is inseparable from the Sale Agreement and that all the expert witnesses supported its accuracy, confirming the applicant's plot size as 21 by 7 meters. Mr. Kihoro relied on a Forensic Report indicating that the respondent altered the survey subdivision map to reduce the plot size from 21 by 7 to 14 by 7 meters. He asserted that in view of the above, the Arbitrator was biased and favoured the respondent, thus violating Article 50(1) of the Constitution as well as international human rights instruments such as the UDHR, ICCPR, and

CEDAW, by ignoring crucial expert evidence, particularly, from Mr. Nthiwa, which could have clarified the size dispute and led to a fairer outcome.

13. Mr. Kihoro faulted the Arbitrator for issuing coercive and ambiguous revaluation orders instead of granting specific performance. He submitted that the Arbitral Award undermines procedural fairness, disregards credible evidence, and facilitates fraudulent conduct, thereby warranting this Court's intervention to set aside the impugned part and substitute it with an order for specific performance. Counsel referred to the provisions of Section 48 of the Evidence Act and the case of **Kenya Shell Ltd v Kobil Petroleum Limited** [2006] eKLR, and asserted that the subject Arbitral Award offends public policy and undermines the applicant's constitutional rights to property and fair hearing. He urged this Court to either set aside the Award or if referred back to Arbitration, ensure it proceeds before a different, impartial Arbitrator.
14. Mr. Kihoro contended that despite presenting credible expert evidence, the Arbitrator failed to consider key claims which included fair compensation of Kshs.10,500,000/= for plots sold to a third party, and economic loss of Kshs.1,500,000/=. Counsel stated that the Arbitrator unlawfully ordered for a fresh valuation after the close of the hearing, violating the principle of Finality, exceeding his mandate, and denying the applicant a chance to challenge new evidence. He asserted that this action reopens the case and pressures the applicant into a consent through undue influence. Counsel stated that the Arbitrator denied the applicant full costs without justification, contrary to the established principle that costs follow the event.
15. Mr. Sarvia, learned Counsel for the respondent relied on the Court of Appeal case of **Kenya Oil Company Limited & another v Kenya Pipeline Company** [2014] KECA 851 (KLR), and urged this Court to remain within its limited

review role and not act as an appellate body. He submitted that the applicant's application is misconceived as the Arbitration Act does not grant the Court jurisdiction to review or substitute an Arbitral Tribunal's decision. He argued that by filing the instant application, the applicant is effectively appealing against the Arbitral Award under the guise of a setting-aside application, which is outside the Court's mandate under Section 35 of the Arbitration Act.

16. Mr. Sarvia referred to the Supreme Court case of **Geo Chem Middle East v Kenya Bureau of Standards** [2020] KESC 12 (KLR) and contended that issues of fraud and land size were already addressed by the Tribunal hence this Court should respect the contractual nature of Arbitration. He also cited the case of **Christ for All Nations v Apollo Insurance Co. Limited** (supra) and submitted that an Award may be set aside if it contradicts the Constitution, national interest, or is contrary to justice and morality. He argued that in this case, the Arbitrator disregarded contractual terms on infrastructure costs and ignored relevant evidence, rendering the Award unjust. He submitted that the subject Arbitral Award should be set aside entirely as it violates public policy. Counsel asserted that while Arbitral Finality is important, it cannot shield Awards that are unjust or contrary to public interest.

ANALYSIS AND DETERMINATION.

17. Upon consideration of the instant application, the grounds on the of it face and the affidavits filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the parties, the issue that arises for determination is whether the applicant is entitled to the orders being sought.
18. Before delving into the merits of the instant application, I find it prudent to first address the respondent's application which seeks to set aside the Arbitral Award on the basis that the Arbitrator disregarded the express provisions of the

Sale Agreement, specifically those relating to infrastructure costs payable by the applicant and also failed to consider material evidence, thereby rendering the Award contrary to public policy.

19. It is important to note that the respondent did not file a formal application to seek the aforementioned order. Instead, it merely included the request in its replying affidavit to the application herein. This Court holds that this approach is neither proper nor legally acceptable for seeking substantive orders from the Court. In the premise, if the respondent intended to have the Arbitral Award set aside, it ought to have done so by filing a formal application in accordance with the procedure laid out under Section 35 of the Arbitration Act.
20. In the absence of a formal application by the respondent, this Court shall disregard the averments made in that regard, as well as the submissions supporting those averments.

Whether the applicant is entitled to the orders being sought.

21. This Court's jurisdiction in Arbitration matters is limited to the extent provided for under Section 10 of the Arbitration Act. This limitation arises from the principle that an Arbitrator's findings of fact and the meaning of the contract between the parties is Final. Consequently, this Court cannot entertain claims of factual or legal error by the Arbitrator or interfere with such findings. This position is anchored on the provisions of Section 32A of the Arbitration Act which states that -

Except as otherwise agreed by the parties, an Arbitral Award is Final and binding upon the parties to it, and no recourse is available against the Award otherwise than in the manner provided by this Act.

22. The aforesaid position was also articulated by the Supreme Court in the case of **Geo Chem Middle East v Kenya Bureau of Standards** (supra), where the Court quoted Ochieng J's (as he then was) holding in the High Court as follows-

It is not the function nor mandate of the High Court to re-evaluate such decisions of an Arbitral Tribunal, when the Court was called upon to determine whether or not to set aside and Award ... if the Court were to delve into the task of ascertaining the correctness of the decision of an Arbitrator, the Court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving Finality to Arbitral Awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the Arbitral Tribunal. (Emphasis added).

23. This Court's jurisdiction to set aside an Arbitral Award is provided for under Section 35 of the Arbitration Act. Section 35(2) of the said Act provides for grounds upon which an Arbitral Award may be set aside. It states 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.

24. In this application, the applicant seeks orders for setting aside part of the subject Arbitral Award on grounds that it is contrary to public policy for failing to address fraud in respect to the size of the applicant's two plots, substitution of the subject Award with a Final compensation of Kshs.9,000,000/= based on Mr. Babu Njihia's valuation, variation of the subject Award to include

Kshs.1,500,000/= for economic loss, making a total of Kshs.10,500,000/= and to expand cost Awards to cover full legal fees and damages. In the alternative, the applicant seek orders of specific performance, including issuance of Title Deeds, police security for handover of the property, or an order compelling the respondent to provide equivalent alternative land in Donholm worth Kshs.10,500,000/=.

25. In light of the foregoing, this Court is of the considered view that all the grounds and reliefs sought in the instant application save for the claim that the subject Award is contrary to public policy and referral of this matter to a new neutral Arbitrator for fresh determination, amount to an invitation for this Court to sit on appeal over the said Award, which is contrary to the provisions of Section 32A of the Arbitration Act, as those grounds are not among those permitted under Section 35 of the Arbitration Act.
26. In the case of **Bomas of Kenya Limited v Standard Investment Bank Limited** (Civil Application E456 of 2021) [2023] KECA 544 (KLR) (12 May 2023) (Ruling), the Court of Appeal when discussing the import of Section 35 of the Arbitration Act held that –

By agreeing to Arbitration, the parties limit interference by Courts to the grounds set out in Section 35 of the Act. By necessary implication they waive the right to rely on any further grounds of review, ‘common law’ or otherwise. Section 35 (1) of the Act provides that recourse to the High Court against an Arbitral Award may be made only by an application for setting aside the Award under subsection (2).

27. In the circumstances, the sole ground upon which this Court may determine whether or not to set aside the Arbitral Award made on 7th June 2024 by Arbitrator Mr. Kairu Mbuthia, is whether the Award, in whole or in part, is

contrary to public policy. Thereafter, should the Court find that the Award or any part thereof violates public policy, it may order that the matter be referred to a new, impartial Arbitrator for fresh determination.

28. The applicant's case is that the respondent committed fraud by misrepresenting the applicant's plot size as 14 by 7 meters, instead of the correct size of 21 by 7 meters as per a government-approved survey subdivision map. She emphasized that the map, prepared by a licensed planner and backed by expert witnesses, is integral to the Sale Agreement and land registration. The applicant went ahead and cited a Forensic Report showing that the survey subdivision map was altered by the respondent to reduce the plot size. The applicant contended that the Arbitrator acted with bias by disregarding key expert evidence especially from Mr. Nthiwa and instead issued coercive and ambiguous revaluation orders, rather than granting specific performance. She contended that this conduct violated Article 50(1) of the Constitution and international human rights standards (UDHR, ICCPR, CEDAW), thus justifying the setting aside of the impugned part of the Award and its substitution with an order for specific performance.
29. What amounts to public policy was extensively discussed by the Court in the case of **Christ for All Nations v Apollo Insurance Co. Ltd** (supra), as hereunder-

Public policy is a broad concept incapable of precise definition. An Award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.

30. Once parties agree to submit their dispute to Arbitration, they fully subject themselves to the jurisdiction of the Arbitrator and they are bound by the Arbitrator's decision. Upon reviewing the pleadings and the Arbitral Award in question, I am not convinced that the Arbitrator disregarded evidence regarding the size of the applicant's plots. Notably, the Arbitrator at paragraph 59 of his Award addressed the question of fraud as hereunder-

I shall now address the question of fraud as advanced by the Claimant and specifically in relation to the sizes of the plots. This is a conundrum that can only be decrypted by inspecting the agreements executed by the parties. I have in a bid to answer this question gone beyond the primary agreement and considered the agreement between Caleb Anabwani and the Claimant herein. I cannot fail but note that the size of the plots have always been clear in the parties minds as being 7m by 14m.

I therefore find it insincere for the Claimant to allege that there was misrepresentation on the part of the Respondent. The Claimant has always been clear in her mind as to the sizes. This transaction having been contractual and the sizes having been identified every step, no amount of claim of misrepresentation can suffice. It is noteworthy that this angle of fraud had not arisen until the Tribunal sort (sic) a clarification as to the dimensions of the plots in the maps provided. The two sale agreements that form the basis of this Arbitration are clear that the plots in question were of the size 14m by 7m,

These agreements were never contested by any party. The Tribunal is satisfied that the size in the agreement is the size in question and that there was no fraud in so far as the claimant was not to be handed anything less than what she contracted for. It is in this context that I

find that the evidence of Martin Papa was of no probative value to the present case.

By alleging at this point that the sizes of the properties were 7m by 21 m, the Claimant is inviting this Tribunal to do is to use the judicial process to renegotiate the terms of the contract voluntarily executed by the parties.

31. From the annexures to the affidavit in support of the instant application, I am satisfied that the Arbitrator thoroughly evaluated the evidence on record. Further, it is clear beyond any doubt that both the Agreement between the parties herein and the subsequent Agreement between the applicant and the third party were for the sale of Plot Nos. 554 and 555, each measuring 14 meters by 7 meters. Accordingly, as rightly held by the Tribunal, the applicant was fully aware at the time of entering into the Sale Agreements that she was purchasing two plots measuring 14m by 7m each, and not 21m by 7m. The Tribunal at paragraph 65 of its Award held that -

The Claimant having based her claim on the contracts clearly stipulating the sizes is estopped from running away from the contract when the shoe doesn't fit. Even if the Tribunal were to hold that terms were unfair, its hand is tied. The parties executed the said agreements voluntarily without any coercion, fraud or intimidation at all. The Claimant cannot now turn around and feign ignorance and demand for more.

32. In view of the above finding by the Arbitrator, I am not persuaded that he failed to determine the issue of fraud on the size of the applicant's two plots.

33. On the applicant's claim for an order of specific performance, the Tribunal at paragraph 76 after evaluating the evidence adduced by the parties before him held that it could not grant an order for specific performance because the larger parcel of land from which the two subplots were to be excised had already been sold to a third party. Since this third party who now holds rights over the land is not part of the current dispute, any such order would be ineffective and would not resolve the issues at hand.
34. In addition to the foregoing, it is evident from the applicant's averments that she took issue with the Tribunal's directive that the value of the plots be determined at current market rates through a valuation to be conducted by a Valuer appointed by the Tribunal. The applicant argued that the said order effectively amounted to the Arbitrator improperly initiating a fresh valuation after the close of proceedings, thereby breaching the principle of Finality, and thereby exceeded his mandate, and denied her the opportunity to challenge new evidence. Upon reviewing the Arbitral Award, I am not persuaded that the Arbitrator, by issuing a directive for valuation by a Tribunal-appointed Valuer, violated the principle of Finality in Arbitral proceedings.
35. It is worth noting that after evaluating the evidence presented by both parties, the Arbitrator had the discretion to Award compensation and determine the amount due to the applicant. The Tribunal at paragraphs 77 & 78 of the Award held that-

On the issue of adequate refund, the Tribunal notes the difficulty this prayer brings bearing in mind that there are two valuations presented. The Tribunal finds that the two valuers had different instructions and were seeking dissimilar results. Whereas one was looking for the present value of a plot the size 7m by 21m the other one was addressing

the value of a 7m by 14m plot with the infrastructure having been put into place. The Tribunal shall come back to this point.

Towards this end, the Tribunal is of the view that to meet the ends of justice, a joint valuation be conducted by the parties to establish what the value of two 7m by 14m plots in the particular area would be today. That is the amount the Tribunal shall pronounce as the Award herein. To avoid conflicts between the parties and to eliminate the chances of conflict, at the parties cost, the tribunal shall appoint a third valuer who shall be responsible for preparing a report to be adopted by the Court.

36. It is evident from the above that instead of arbitrarily assigning a value, the Tribunal opted to engage an expert in that field to ascertain the current market value of the plots. This valuation would then form the basis upon which the respondent would compensate the applicant.
37. It is now well settled that an Arbitral Award cannot be said to be contrary to public policy just because it is against one party. In the case of **Christ for All Nations v Apollo Insurance Co. Ltd** (supra) the Court stated as follows on public policy-

Justice is a double-edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust ... in my judgment this is a perfect case of a suitor who strongly believed that the Arbitrator was wrong in law and sought to overturn the Award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the

Arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards Finality of Arbitral Awards and parties to Arbitration must learn to accept Awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act.

38. In light of the strictures of what public policy entails, I am not persuaded that the Arbitral Award made on 7th June 2024 by Arbitrator Mr. Kairu Mbutia or part thereof is contrary to public policy and/or the rules of natural justice.
39. Accordingly, it is my finding that the applicant has not made out a case to warrant being granted an order for setting aside part of the subject Arbitral Award on grounds that it is contrary to public policy for failing to address fraud in respect to the size of the applicant's two plots, and/or an order for referral of this matter to a new neutral Arbitrator for fresh determination.
40. The upshot is that the application dated 5th September 2024 is not merited. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on 18th day of September 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of;-

Mr. Jesse Kihoro for the applicant

Ms Mutu holding brief for Mr. Sarvia for the respondent

Ms B. Wokabi – Court Assistant.

ORIGINAL