



**Spencer v Home Africa Communities Ltd & another (Arbitration Cause E059 of 2022)
[2024] KEHC 2283 (KLR) (Commercial and Tax) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E059 OF 2022
JWW MONG'ARE, J
MARCH 5, 2024**

BETWEEN

CARA SPENCER APPLICANT

AND

HOME AFRICA COMMUNITIES LTD 1ST RESPONDENT

MIGAA MANAGEMENT COMPANY LTD 2ND RESPONDENT

RULING

1. The court is called upon to determine two (2) applications filed by the Applicant, Home Africa Communities Ltd. By the court directions the Applications were canvassed together and therefore this ruling disposes of both applications. The first application is the Chamber Summons application dated 18th May, 2023 brought under Order 45. Order 54 (1) of the [Civil Procedure Rules 2010](#). The Applicant seeks the following orders:-
 - i. spent
 - ii. spent
 - iii. spent.
 - iv. The Honourable Court be pleased to review and set aside its ruling delivered on 28th February, 2023 in which the court allowed the Applicant/Respondent application to adopt and enforce the arbitral award published on 7th October 2022 by the sole arbitrator Dominic Njuguna Mbgigi (MCArb) between the parties herein as a judgment and decree of this court pending the hearing and determination of this application and the suit
 - v. any other orders this court deems fit.



- vi. costs of the application.
2. The application is supported by the annexed affidavit of Sally Ireri the internal legal counsel of the Applicant sworn on 18th May 2023. The application is premised on the grounds that this honourable court failed to consider the Applicant's submissions when rendering its ruling dated 28th February, 2023 and erroneously allowed the application for recognition and adoption of the arbitral award. The Applicant is apprehensive the Respondent will proceed to execute the said award and attach its assets. The Applicant avers the application is brought without unreasonable delay.
3. The application is opposed by the Replying Affidavit of Vincent Mmeli Olala, the advocate in the conduct of the matter for Cara Spencer sworn on 13th June 2023. He avers the matter herein arises from an arbitration and that Section 10 of the Arbitration Act bars this court from intervening in matters governed by the Arbitration Act. The ruling of 28th February 2023 was in respect of the party's application in respect to Sections 35 and 36 of the Arbitration Act.
4. He avers the application is unmerited as the Applicant misused his opportunity accorded by the court to file submissions and failed to do so in a timely manner and hence the Applicant is an author of his own mistakes as he failed to attend court or comply with its directions. Further, the Respondent argues that the application is not brought timely and the same ought to be dismissed.
5. The second application dated 7th June, 2023 brought under Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks the following orders:-
 - i. spent
 - ii. pending the hearing and determination of this application inter parties this honourable court be pleased to grant an interim stay of the proclamation, attachment and/or sale of the Applicant's assets as listed in the Respondent's Agent's proclamation notice dated 5th June, 2023.
 - iii. That pending hearing and determination of this application inter parties this honourable court be pleased to restrain the Respondent by themselves or their agents from proclaiming, attaching and/or selling the Applicant's assets as listed in the Respondent's proclamation dated 5th June 2023.
 - iv. That this honourable court be pleased to set aside, and or quash the proclamation, attachment and /or sale of the Applicant's assets as listed in the Respondent's proclamation dated 5th June, 2023.
 - v. That this Honourable court be pleased to permanently restrain the Respondents or their agents from proclaiming attaching and/or selling the Applicant's assets as listed in the Respondent's proclamation dated 5th June, 2023.
 - vi. That this Honourable court be pleased to issue any further orders and or directions as may be necessary to give to the orders sought herein and it deems fit in the interest of justice.
6. The application is premised on the grounds that the Respondent is in the process of executing the decree arising from the Arbitral Award published on 7th October 2022 and adopted as the judgment of the court on 28th February 2023. The Respondent through Mbeki Auctioneers has served the Applicant with a proclamation notice dated 5th June, 2023 seeking to proclaim the Applicant's assets and the Applicant therefore stands to suffer irreparable loss and damage. The Proclaimed assets belong to the Applicant and not the judgment debtor.



7. The Application is supported by the annexed affidavit of Duncan Ngeno, the internal legal counsel of the Applicant sworn on 7th June, 2023 in which he mirrors the grounds of the application.
8. In Response, Cara Spenser filed the Replying affidavit sworn on 12th June 2023 by Vincent Mmeli Olala the advocate in the conduct of this matter on behalf of the decree-holder. He avers that vide the arbitral award published on 7th October 2022 by the Sole Arbitrator Dominic Njuguna Mbigi the judgment debtor Migaa Management was ordered to pay the decree-holder Cara Spenser a sum of Kshs 80,000/= the said arbitral award having been adopted as the judgment of this court and the same not having been set aside and or appealed against, the decree holder is entitled to execute the decree as the amount remains unpaid. He stated that the goods having been proclaimed in the Applicant's office are deemed to belong to the Applicant. He urged the court to dismiss the application with costs.
9. In its submissions the Applicant brought the attention of the court to Section 80 of the [Civil Procedure Rules](#) as read together with Order 45 Rule 1 of the [Civil Procedure Rules](#) as the guiding law that provides for the review of court orders. According to the Applicant, the application for review is premised on the ground that there is an error apparent on the record in that the court failed to consider its submissions dated 31st January 2023, when rendering its decision of 28th February, 2023.
10. The Applicant argues the error apparent on the record is clear as paragraph 24 of the impugned ruling states the Applicant did not file submissions. The Applicant argues the application seeking to recognise and enforce the arbitral award was opposed but the court inadvertently held that no submissions were filed. The Applicant argues the application is brought timely upon receiving a copy of the ruling. The Applicant urges the court to allow the application as filed.
11. The Applicant argues the actions of the Decree holder in proclaiming the goods of the Applicant are unlawful and illegal in that the Arbitrator judgment laid full liability solely on the judgment debtor without any fault to the Applicant. The Applicant urges the court to be guided by the case in [Equatorial Commercial Bank Ltd v Bubacon Agencies Ltd & 3 others](#) [2013] eKLR where the Honourable Court in allowing a similar application stated that the intended execution is ill-motivated and made in bad faith without establishing the realm ownership of the properties intended for proclamation and to add salt to injury, the properties to be attached were the properties of the Objector and the Judgment Debtor had nothing to do with them totally.
12. The Decree holder/Respondent submits the application for lifting and setting aside the proclamation order is frivolous. The Respondent argues the application is not an objector proceeding and is not filed by the alleged objector as per the provisions of Order 22 of the [Civil Procedure Rules](#). He argues the proclamation is in order as per paragraph 34 of the Final award the Arbitrator awarded the judgment holder Kshs 80,000/= as costs of the application.
13. It is argued that the Submissions filed by the Applicant were filed without the leave of the court days after the court had indicated there was no compliance by the Applicant. The Respondent urges the court to dismiss the application.

Analysis and Determination

14. I have considered the application, the grounds in support of the application, the affidavits in support and opposition as well as the rival written and oral submissions by both parties. Two issues arise for determination by the court, to wit:-
 - i. whether the Applicant has made out a good case for review of the orders sought
 - ii. whether the court should set aside the proclamation of the attached goods.



15. I will first deal with the first issue on whether the court should review its ruling of 28th February, 2023 on the grounds that the court failed to consider the Applicant's submissions.
16. The laws applicable for review is Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) provides as follows: -

Section 80. Review

“Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

[Order 45, rule 1.] Application for review of decree or order.

“1.

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the appellant, or when, being Respondent, he can present to the appellate court the case on which he applies for the review”

17. Order 45 sets out the scope for review as:-
- i. discovery of new and important matter or evidence
 - ii. mistake or error apparent on the face of the record
 - iii. any other sufficient cause.



18. In the instant application the Applicant advances the ground on error apparent on the record. The Respondent argues there was no error apparent on the face of the record as the Applicant failed to file submissions within the prescribed timelines by the court.
19. It is trite law that the court can correct an error apparent on the record, however the error must be self-evident. the court in its ruling dated 28th February, 2023 at paragraph 24 indicated the Applicant despite being present when directions to file submissions were issued had not filed their submissions. This is what the Applicant calls an error apparent on the face of the record as its submissions were not considered.
20. To the mind of the court, it appears as if the Applicant is asking the court to sit as an appeal court on its own decision. I find the Applicant seeking to review the orders of 28th February 2023 is asking the court to re-analyse and re-evaluate its evidence on record.
21. The court agrees with the Applicant’s position that indeed an error apparent on the record ought to be self-evident, the point of departure is that the current application seeks to go beyond the scope of a review. The error of not filing submissions was authored by the Applicant, we therefore cannot fault the court for not considering something that was not on record at the time of its decision making.
22. The court therefore finds the ground upon which the review application is premised far-fetched and in the circumstances fails to invoke the court’s jurisdiction on review. The upshot is that the application dated 18th May, 2023 seeking review and or setting aside the ruling of 28th February, 2023 fails to meet the threshold for a review and the same is without merit.
23. I will now move to the second issue as to “whether the court should set aside the proclamation of the attached goods.”
24. The final award by the arbitrator was published on 7th October 2022, the same was recognized and adopted as a final award by this court on 28th February 2023 and the Respondent through its Auctioneers issued a proclamation notice dated 5th June 2023 which is being sought to be set aside by the Applicant.
25. The execution of the decree was brought within one year from the time of passing the award.
26. Order 22 Rule 18 stipulates that:-

“Where an application for execution is made

More than one year after the date of the decree,.. the court executing the decree shall issue notice to the person against whom execution is applied for requiring him to show cause, and a date to be fixed, why the decree should not be executed against him”.
27. The court is vested with the powers to enforce execution as per section 38 of the *Civil Procedure Act*. The Decree holder is also entitled to the fruits of the judgment. The final award dismissed the claim against the 2nd Respondent with no orders as to costs, while the 2nd Respondent was ordered to pay the Claimant costs of the applications dated 5th May 2022 and 31st May 2022 in the sum of Kshs 80,000/=.
28. This property which has been proclaimed in the proclamation notice dated 5th June 2023, the Applicant argues the same amounts to the property of the Applicant and the Applicant will stand to suffer irreparable harm if the attachment is allowed to proceed.
29. To the mind of this court the proclaimed goods having been found in the Premises of the Applicant the decree holder, the court is satisfied that the Auctioneers acted properly in proclaiming the same



as no evidence has been able tabled before the court to establish that the assets do not belong to the 1st Respondent.

30. The proclamation is in satisfaction of the final award and thus the same is legal and enforceable. The court having recognized the final award as a judgment of this court it has no business to interfere with the execution of the decree.

31. In the circumstances, therefore, the court finds the application dated 7th June 2023 is unmerited. The same is dismissed with costs. The upshot is that both applications dated 18th May 2023 and June 2023 are found to be without merit. Both applications are dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

1. Mr. Vincent Olala for the Applicant.
2. N/A for the Respondent.
3. Amos - Court Assistant

