



Junction Apartments Limited v C.M Construction (E.A) Limited & another (Commercial Case E030 of 2021) [2024] KEHC 10210 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E030 OF 2021
DO CHEPKWONY, J
JULY 11, 2024**

BETWEEN

JUNCTION APARTMENTS LIMITED CLAIMANT

AND

C.M CONSTRUCTION (E.A) LIMITED 1ST RESPONDENT

STEVEN OUNDO 2ND RESPONDENT

RULING

1. This ruling determines the Claimant/Applicant's Notice of Motion application dated 10th May, 2023 which seeks the following reliefs: -
 - a. Spent;
 - b. Spent;
 - c. This Honorable Court be pleased to exercise its discretion to allow Hon. Chepkwony review the entire Judgment in HCCOMM E030 of 2021 and HCCOMMARB E019 of 2022 delivered on 27th February, 2023 and set the same aside together with all consequential orders.
 - d. The costs of this application be provided.
 - e. This Honourable Court be pleased to make such orders as the ends of justice may require.
2. In the grounds adduced in support of the application which are also reiterated in the affidavit of Sharon Wanyee, the Applicant's Director, the Applicant contends that the court's ruling delivered on 27th February 2023 which adopted the arbitral award as the court's judgment, failed to acknowledge several crucial points. These include the assertion that the award was incomplete, non-binding, and unenforceable between the parties.



3. Additionally, the applicant claims they were not given an opportunity to respond to submissions made by the 2nd Respondent concerning impartiality and inconsistency related to their close relationship with the 1st Respondent. Despite seeking a chance to present their submissions, this opportunity was denied, constituting a breach of natural justice.
4. Furthermore, the applicant argues that the arbitral award did not conclusively address the issues before the tribunal, hence postponing determination of some issues was prejudicial to them. Therefore, unless the court's ruling adopting the award is reviewed and set aside, the Applicant faces irreparable harm and substantial losses. The Applicant also asserts that justice tilts in their favour and demands the application be allowed, as the Respondent would not suffer any prejudice in any case.
5. The 1st Respondent opposed the application through a Replying Affidavit sworn by its Director, Manji Ravji Vekariya. He acknowledges the court's ruling delivered on 27th February, 2023, but notes that the Applicant opted to appeal the ruling by filing Civil Appeal No. E112 of 2023, Junction Apartments Limited v C.M Construction Limited. The Applicant also sought a stay of execution of the judgment pending appeal, which was to be heard inter partes as directed by the Court of Appeal. However, after the Court of Appeal declined to grant interim stay and the Applicant withdrew the application dated 2nd May, 2023 in which they were seeking stay of execution.
6. Further to the foregoing, the 1st Respondent averred that the Applicant has not established any ground for review of the ruling dated 27th February, 2023 hence the application at hand is an abuse of the court process.
7. The court directed that the application be canvassed by way of written submissions. Both parties submitted their arguments with the Applicant filing a set of submissions dated the 16th of June, 2023 and the 1st Respondent's submissions are dated 26th June, 2023. These submissions will be considered in the court's analysis and determination of the issues at hand.

Analysis and Determination

8. Having reviewed the application, response, and submissions from both parties alongside relevant legal authorities, the primary issue for determination is:-
 - a. Whether the Applicant has provided sufficient grounds to justify reviewing and setting aside the court's ruling dated 27th February, 2023.
9. Before addressing this issue, it is necessary to address a preliminary issue raised by the 1st Respondent regarding whether the current application constitutes an abuse of the court process. The Respondent argues that since the Applicant chose to appeal the ruling, pursuing a review would contravene Section 80 of the *Civil Procedure Act* and Order 45(2) of the *Civil Procedure Rules*. The Applicant on the other hand, in countering those arguments submitted that so far, no appeal has been filed against the ruling since what was filed was a mere application for stay which was in any event withdrawn. Thus, the Applicant has urged the court to find the application as properly before the court.
10. To resolve this issue, it is essential to examine Section 80 of the *Civil Procedure Act* and Order 45(2) of the *Civil Procedure Rules*. Section 80 of the said *Act* provides as follows:-

“ 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.

11. Order 45 Rule (1) and (2) of the [Civil Procedure Rules](#) on the other hand, provides as follows:-

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.”
12. Taking cue from the stated provisions, Section 80 provides that a party aggrieved by a decree or order from which an appeal is allowed may apply for a review if no appeal has been filed. Order 45(2) similarly allows for a review under certain conditions. More importantly, a party cannot simultaneously pursue both an appeal and a review. (See the case of [Orero v Seko](#) [1984] KLR 238.
13. In consideration of those principles alongside the facts in this case, I have read through the records and find they indicate that while the Applicant initially sought to stay the ruling pending appeal vide a miscellaneous suit, it later withdrew the application. In its submissions, the 1st Respondent intimated that the Applicant had filed an appeal before the Court of Appeal although it was conceded that an appeal can be initiated by either filing the Notice of Appeal and or Memorandum of Appeal. Nonetheless, neither of the parties has availed evidence of either a Notice of Appeal or a Memorandum of Appeal with respect to the subject ruling for this court’s perusal. In this Court’s view, the filing of an application seeking orders for stay and the subsequent withdrawal of the said application cannot be equated to the filing of an appeal before a Court of Appeal. Without evidence of a lodged appeal, the court cannot assume the exhaustion of appeal options, as has been argued by the 1st Respondent.
14. This Court proceeds to determine whether the Applicant has sufficiently justified the need for a review and setting aside the ruling dated 27th February, 2023. Sections 80 and Order 45(2) of the [Civil Procedure Rules](#) restrict the grounds for review to discovery of new and important evidence, mistake or error apparent on the record, or other sufficient reasons and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.
15. The Applicant contends that the court’s failure to allow them to present their submissions and respond to the 2nd Respondent’s arguments constituted a breach of natural justice and a mistake in the ruling. They further argue that the involvement of a project architect closely associated with the arbitrator compromised the award’s impartiality, which constitutes new and significant evidence.



16. Secondly, the Applicant argues that the court erred in adopting an award that was incomplete, non-binding, addressed issues beyond the parties' dispute and also a futuristic award thus committing an error apparent on the face of the record.
17. The 1st Respondent on the other hand submitted that the grounds adduced by the Applicant challenge the merits of the ruling rather than presenting grounds for review based on an error apparent on the record or within the confines of Order 45. In the 1st Respondent's view, the Applicant is merely arguing that the court was wrong in its ruling and is now asking the court to revisit the decision and warns that this court that it cannot sit on its own appeal.
18. In view of the foregoing, it is apparent that the high court's power to review its decisions must be exercised within the framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* (Supra). Thus, review being a creation of the statute must be limited to grounds and scope prescribed in the rules, the first being the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed, or order made.
19. In that regard, the Applicant submitted that there was currently new evidence that the project architect whom the arbitrator delegated indirect assignment to undertake the final accounts was a close associate and beneficiary of the final award. That such close association compromised the Arbitrator's impartiality and while knowing that one of the possible beneficiaries to the award was known to him, the Arbitrator ought to have recused himself.
20. As earlier stated by this court, an Applicant alleging discovery of new and important evidence must demonstrate that he/she/it has discovered it since the passing of the order sought to be reviewed. He/she/it must demonstrate that he/she/it could not procure the alleged new evidence despite exercise of due care and diligence. And further, that the evidence was crucial to the determination of the matter. However, the evidence presented does not demonstrate that the Applicant could not have discovered the alleged relationship between the project architect and the arbitrator earlier with due diligence. Additionally, the allegations lack supporting documentation or proof of the architect's benefit from the award. Therefore, they do not meet the criteria for new and important evidence under Section 80 and Order 45(2).
21. Secondly, the Applicant submitted that it was a mistake and an error on part of the court to adopt an award which was substantially incompetent, non-binding and unenforceable. According to the Applicant, the award dealt with issues and disputes which parties had not submitted to the tribunal and even awarded some ambiguous orders which were futurist in nature. The Applicant has therefore beseeched the court to hold that it was erroneous to adopt such an ambiguous award as a judgment and decree of this court hence the need to review the ruling and have the award set aside.
22. It is however important to illustrate what a mistake or error apparent on the face of the record is. In the case of *Moses Kipkolum Kogo v Nyamogo & Nyamogo Advocates* [2000] eKLR the court held that: -

"There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions a clear case of error apparent on the face of the record would be made out. An error which requires to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record."



23. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya v Ndungu Njau* [1996] KLR 469, held thus: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter, nor can it be a ground for review that the court proceed on an incorrect expansion of the law”.

24. In this case, the Applicant submitted that the court erred in adopting an award which was not final and had postponed some issues to be determined later, in other words without determining on them in finality. It must be stated with concurrence that the finality of an arbitral award is a crucial aspect of its enforceability. In most jurisdictions, including Kenya, an arbitral award must be final so as to be enforceable. Finality generally means that the arbitral tribunal has conclusively resolved all the issues submitted to it for decision. This prevents parties from engaging in further litigation on the same issues and ensures the efficacy of arbitration as an alternative dispute resolution mechanism.

25. The legal framework governing arbitration is primarily set out in the *Arbitration Act*. Section 35 of the *Arbitration Act*, 1995, Laws of Kenya, provides for the enforcement of arbitral awards. It states that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforced upon application to the High Court, unless it finds that the award is contrary to public policy or other grounds for refusal of enforcement exist under the *Act*.

26. This Court and other within and beyond our jurisdiction have reiterated that only final arbitral awards are enforceable. In providing guidance on the interpretation of what constitutes a final award, the court in the case of *Republic v Samsung C&T Corporation* (2016) emphasized that a final award generally refers to the decision or ruling made by the arbitral tribunal that conclusively resolves the dispute submitted to arbitration. The final award must then resolve all issues including liability and the amount of damages or other relief where applicable, conclusively. It should clearly state the tribunal's decision on each issue in dispute together with the reasons for the decision unless the parties have agreed otherwise.

27. In emphasizing the need for finality in arbitral awards as a precursor to their enforceability, the Court of Appeal in the case of *Kenfit Limited v Consolata Fathers* [2015] eKLR had the following to say: -

“We find merit in the reasoning by the learned judge. There can only be one award from a decision and determination of an arbitrator; this is not to say that the one award cannot be contained in two or more documents or made at different times. What we say is that the one award must be the final or composite award that determines all issues referred to the arbitrator for consideration. An award does not become final merely because the word “final” has been inserted as its heading; an award is final when all issues for consideration have been canvassed and a finding or determination made.”

28. Having examined the contents of award made on 14th December, 2020 wherein the Arbitrator made the final award in the following terms as per the last paragraph of the award: -

“Accordingly, I award and direct in full and Final settlement of the Matters in issue in this reference that: -

1. The Claimant’s claim is dismissed in its entirety;



2. The Respondent's counterclaim is partially allowed in that an order for specific performance of the Sale Agreements dated 14th November, 2016 and 22nd June, 2017 respectively is hereby issued against the Claimant.
 3. That the Final Accounts be prepared in accordance with Clause 34:20 of the Agreement and the sums accruing thereof be satisfied within six (6) months at a simple interest rate of 14% p.a.
 4. In the spirit of my order for directions number 1 and the effect of my order in Paragraph 3.2.16 above, I order that parties address their differences on their respective defects lists even as re-measurement of work is undertaken. Once concurrence is arrived at on the outstanding defects, the Respondent is mandated to make them good pursuant to the provisions of the Agreement.
 5. Each party to bear the costs of this Arbitration equally.
 6. That the amount due as Arbitrator's costs is Kshs.3,091,149.90 (Kenya Shillings Three Million Ninety-One Thousand One Hundred Forty-Nine Cents Ninety Only) which each party must settle its half share thereof before the collection of this Award.
 7. If a party shall have paid more than its share of the Arbitrator's costs as directed in paragraph above, then the other party shall within thirty (30) days of collection of this Final Award reimburse the party that has paid more than its share of the Arbitrators costs so paid. Simple interests calculated at 14% per annum shall be charged on any amount outstanding thereafter until the same is paid in full.
29. Although the Arbitrator expressed that the award was in full and Final settlement of the Matters in issue between the parties, Clauses (3) and (4) outlined above explicitly reserved and did not determine the ultimate sum due from the Final Accounts, as well as the assessment of outstanding defects and their respective liabilities. Therefore, this Court is convinced that the award issued on 14th December, 2020 remains incomplete and non-final, pending the determination of these financial aspects. And upon resolving these issues conclusively, can the arbitral award achieve finality. Finality ensures that arbitral awards have the necessary clarity and conclusiveness so as to be enforceable and effectively resolve disputes.
30. Adherence to the principle of finality in arbitral awards enhances the integrity and effectiveness of arbitration as a dispute resolution mechanism. It is for this reason, that this court is persuaded that the Applicant has presented a valid case for reviewing this court's ruling dated 27th February, 2023, in order to rectify the apparent error of having adopted an incomplete Arbitral Award as the court's Judgment.
31. Consequently, the ruling dated 27th February, 2023 and its consequential orders are hereby set aside. Each party shall bear its own costs. The matter to be scheduled for further directions before the Presiding Judge of the Milimani Commercial Division.

It is so ordered.

DATED AND SIGNED AT KIAMBU THIS 8TH DAY OF JULY 2024.

D.O CHEPKWONY

JUDGE



DELIVERED VIRTUALLY, DATED AND SIGNED THIS 11TH DAY OF JULY 2024.

JOSEPHINE MONG'ARE

JUDGE

