



**Kithi & another v Muindi & another (Commercial Arbitration Cause E062 of 2022)  
[2023] KEHC 22266 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22266 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E062 OF 2022**

**DAS MAJANJA, J  
SEPTEMBER 15, 2023**

**BETWEEN**

**REBECCA MUTINDI KITHI ..... 1<sup>ST</sup> APPLICANT  
JOSEPHINE MOKAYA KIAGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PETER MASAI MUINDI ..... 1<sup>ST</sup> RESPONDENT  
ALBERT MUOKI MASAI ALIAS MBANDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 07.10.2022, the Arbitral Tribunal (“the Arbitrator”) published an award finding that the agreement between the parties dated 18.04.2017 (“the Agreement”) for the sale of the 1<sup>st</sup> Respondent’s (“Peter”) share in the property Plot No.0197 situated in Konza, Makueni County (“the Plot”) was repudiated and that the 2<sup>nd</sup> Respondent (“Albert”) was liable to pay the Applicants Kshs. 1,597,550.00 and USD 6,656.15 attracting interest at 12% p.a. on the former and 3% p.a. on the latter payment in full from 07.06.2017. Albert was also to pay the Applicants Kshs. 525,000.00 towards legal and tribunal costs with interest thereon at 12% p.a. from the date of the Award until payment in full.
2. The Applicants have filed the Chamber Summons dated 31.10.2022 made, inter alia, under section 36 of the *Arbitration Act* seeking recognition and enforcement of the Award. This application is supported by the affidavits of the 1<sup>st</sup> Applicant (“Rebecca”) sworn on 31.10.2022 and 23.02.2023. It is opposed by Peter through his affidavits sworn on 14.02.2023 and 02.03.2023 and by Albert through the Grounds of Opposition dated 28.03.2023. The parties have also filed written submissions.



## Analysis and Determination

3. Under section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the *Arbitration Act*. This court, under section 36 of the *Arbitration Act*, has the power to recognize and enforce domestic arbitral awards in the following terms:

36 (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37

- (2) ...
- (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish
  - (a) the original arbitral award or a duly certified copy of it; and
  - (b) the original arbitration agreement or a duly certified copy of it.
- (4) .....
- (5) .....

4. Section 37 of the *Arbitration Act* sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award as follows:

37. Grounds for refusal of recognition or enforcement

- (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



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- (iii) the  
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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



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(b) if the High Court finds that—

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Kenya;  
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contrary  
to the  
public  
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Kenya.

- (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.
5. Peter opposes the application on the ground that he did not participate in the arbitral proceedings leading to the Award the Applicants seek to enforce. He urges that if the court grants the application, he will be condemned unheard which is against public policy and the rules of natural justice. He also states that the Applicants are guilty of material non-disclosure and their application is full of falsehoods.
  6. According to Peter, the application lacks merit as he was the proprietor of the Plot balloted as No. 0197 in Konza Ranching and Farming Co-operative, Makueni County by virtue of being a shareholder of an allotment letter. That he instructed his son, Albert to sell the Plot as he was ill and wanted to dispose of it in order to fund his treatment. He states he informed all his family members including the Applicants of his intention.
  7. Peter denies the Applicant's' allegation that he transferred the Plot to Albert. He states that he was informed of a potential buyer who never came through and another buyer, NMM later purchased the Plot. He denies ever seeing the 2<sup>nd</sup> Applicant ("Josephine") and that the Agreement is tainted by fraud and collusion by the executing parties including the advocate who drew the Agreement who is a relative of Josephine.
  8. Peter depones that he is a stranger to the Agreement as he has never been to the said advocate's office and contends that he is an 85-year-old senior citizen who does not sign on documents but rather puts his thumb print on them. Peter avers that he has never received any money from the Applicants and reiterates that he has never entered into an agreement nor sold the Plot to the Applicants as alleged, therefore he cannot deal with parties to whom he is unaware of. He claims that the Agreement was repudiated and the parties allegedly decided to go by way of Arbitration in which he was never involved nor participated in.
  9. Peter denies that he was served with any documents preceding the arbitration and that he only became aware of this matter after he was served with incomplete pleadings by the Applicants' agent. He contends that in purchasing land, one does not pay Kshs. 1,000, 2000, 3000 or 5,000 as shown by the Applicants in their M-pesa statement to allegedly support their claim of making payments to purchase the Plot. That the Applicants by their own conduct admitted payment was not made in accordance



with their Agreement and they intimated to Peter that the said payments were made to support Albert in his election campaigns.

10. Peter claims that Albert seems to have had a liaison with Rebecca who is his aunt during the campaign season and that Peter cannot be made to pay for the two relatives' activities as he was not a beneficiary. That the Applicants are claiming interest that are backdated to 2017 when they themselves have shown that payment was made to them in the year 2020 and that according to the Order for Directions No.1 which was signed by the Arbitrator on 27.04.2022 it was stated that the tribunal shall charge a net fee in the sum of Kshs. 250,000.00 while in the Award, she orders Albert to pay Kshs. 525,000.00 towards costs.
11. Albert opposes the application on the ground that the Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration because he was not a party to the Agreement which contained the arbitral clause between Rebecca and Peter. Consequently, that the arbitral proceedings should have been with regard to disputes between Rebecca and Peter only. He further contends that the Agreement which contained the arbitral clause did not contemplate that disputes between the Applicants and third parties with regard to the transaction would be referred to arbitration. That this is because the arbitral clause only governed disputes between Rebecca and Peter, who were the only parties to the Agreement and that being a stranger to the Agreement, he was improperly and unlawfully entangled as a party to the arbitration proceedings, given that he was not a party to the arbitration agreement and did not submit to resolving the dispute through arbitration.
12. Albert avers that the Award is contrary to public policy on the ground that the Arbitrator departed from the doctrine of privity of contract by finding against Albert who was not a party to the Agreement. That the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. Albert also contends that the Arbitrator departed fundamentally from the law and legal norms by finding that "the agreement is repudiated by the 2<sup>nd</sup> Respondent's conduct", despite the fact that Albert is a stranger to the Agreement.
13. According to Albert, the Arbitrator, in the Award, exhibited open bias as against him by making findings against him despite the fact that he was not a party to the Agreement containing the arbitral agreement. Further, that the Arbitrator did not find against the Peter who was the registered proprietor of the Plot, the Vendor of the Plot and a party to the Agreement. Albert maintains that the Agreement was between the Applicants and Peter as such, the parties had an obligation to ensure that all rights and obligations envisaged in the Agreement were observed and the Arbitrator in the Award cannot thus purport to assign and impose these obligations upon Albert.
14. That the Arbitrator found against Albert in all her awards despite the fact that the Agreement would not have failed but for the Applicants' failure to complete payment of the purchase price on time and Peter's failure to execute the transfer documents on time. That the Arbitrator, in the proceedings and in the Award disregarded the fact that Albert was engaged by Peter for the limited purpose of being an agent in the transaction/sale of the Plot and his role was limited to receipt of funds towards purchase of the Plot and any further actions or omissions in accordance with instructions of the principal. Albert claims he was not tasked with undertaking the transfer of the Plot as the same was not registered in his name and that the Arbitrator failed to take into account the fact that any actions and/or omissions by Albert with regard the present dispute were done with the authority and direction of Peter as the principal. This is because the Albert was under obligation to do as instructed by the principal.
15. Albert states that in the Award, the Arbitrator disregarded the general rule that an agent of a disclosed principal cannot be held personally liable and that for all the reasons stated above, Albert had no basis



to participate in the arbitration because the attendant costs of arbitration were exorbitant and he could not afford. That enforcing the Award would be prejudicial to him as he will be condemned unheard to pay the value of the subject matter arising out of a transaction to which he was but an agent; and costs and interest in proceedings arising out of a transaction to which he was but an agent, and had no basis in either law or fact to participate in.

16. In considering whether or not to recognise or enforce an award, the court must be careful not to exercise appellate jurisdiction. From the grounds I have outlined above, the Respondents' appear to assail the Arbitrator's conclusions of fact. The court, in exercise of its powers under the *Arbitration Act*, is not permitted to interfere with an arbitrator's interpretation of the law and/or interpretation of a contract or reverse the decision even if it takes different opinion on the findings. In *Kenya Oil Company Limited and Another v Kenya Pipeline Company NRB CA Civil Appeal No. 102 of 2012 [2014]eKLR*, the Court of Appeal accepted the position that the arbitrator is the master of facts and cited with approval the decision in *Geogas S. A. v Trammo Gas Ltd ("the Baleares") [1993] 1 Lloyds LR 215* as follows;

- (40) The court in that case was dealing with an appeal under section 1 of the English *Arbitration Act*, 1979. It is necessary to quote at length the words of Lord Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:

"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.....

- (41) ----- Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged."

17. In light of the aforesaid principle, the court will exercise great circumspection in interrogating the Arbitrator's factual findings and will confine itself to the grounds set out in section 37 of the *Arbitration Act*. Therefore, the thrust of the opposition to the Award is that the arbitration agreement is not valid, that Peter was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, that the Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration and that the Award is in conflict with the public policy of Kenya.



## Validity of the Arbitration Agreement

18. Peter's case is that the arbitration agreement is not valid as he never signed the Agreement as it lacked the basic ingredients for a valid contract; the offer, acceptance and consideration that Peter received from the Applicants. From the Award, the Arbitrator heard the testimony of the advocate who drafted the Agreement. He confirmed that Peter and Albert were present at the signing of the Agreement which indicated at Clause 5 that Peter, as the vendor, had appointed his son, Albert to receive the purchase price for and on his behalf and to "deal with any issues that might arise in connection with the sale of the said parcel of land." Albert did not deny this testimony by the advocate. The Applicants also gave uncontroverted evidence that money was remitted to Albert who received it as the purchase price for the Plot on behalf of Peter as the Agreement envisaged.
19. Peter does not deny that he instructed Albert to sell the Plot on his behalf meaning he intended to be bound by a contract for its sale. This contract was thus consummated at the advocate's office when the Agreement was signed in the presence of Peter and the consideration paid to Albert on behalf of Peter. The Arbitral Tribunal thus considered the evidence before it and concluded that a valid contract existed between the parties. As a brief of summary of the issues and evidence shows, whether or not the Agreement was valid and whether Peter was bound by the Agreement were issues considered by the Arbitral Tribunal and the findings and conclusions were within its jurisdiction hence the court cannot intervene on this otherwise factual issue. This ground of opposition therefore fails.

## Public Policy, Notice of appointment of an arbitrator and proceedings and inability to present case

20. Peter submits that since the arbitral proceedings took place *ex parte*, he was not accorded an opportunity to be heard, which was a violation of the right to fair hearing provided for by Article 50 of *the Constitution*. That if he was truly part of the Agreement then the Applicants would have served him with a notice of the appointment of an arbitrator or of the arbitral proceedings. That they intentionally did not serve him with process as he would have brought up the issue of the validity of the Agreement and that no award would have been made in favour of the Applicants as the Agreement and the attendant arbitration clause did not exist and that therefore the Arbitrator lacked jurisdiction to resolve the dispute.
21. On this issue, the Arbitrator observed that there was no response to the Statement of Claim but that Albert, who was designated as Peter's Agent in the Agreement, appeared before the Tribunal and corresponded with the Applicants' advocates. Although Peter was not present at a preliminary meeting held on 27.04.2022, Albert was in attendance. The Applicants' advocate informed the Tribunal that Peter had been duly served with the documents preceding the arbitration and the advocate drew the Tribunal's attention to the provision of the Agreement at clause 5 which designated Albert an agent who then became responsible for the performance of acts under the Agreement and the fact that all the impugned acts were by Albert.
22. The Applicants stated that their advocates issued and served a demand letter dated 07.02.2022 upon the Respondents where the Applicants evinced their intention to refer the matter to arbitration if their claim was not addressed. The Respondents through the firm of Stanley Nthiwa & Co. Advocates acknowledged the demand and notice to arbitrate through a letter dated 15.02.2022 and stated that they were strangers to the Agreement and that they were ready to defend the claim. In their response dated 08.03.2022, the Applicants nominated the Arbitrator to handle the dispute and gave the Respondents 14 days to respond to the nomination. The Respondents, in a letter dated 10.03.2022 through the firm of Onyango & Aywa Advocates, confirmed receipt of the demand notice.



23. The Applicants also annexed an affidavit of service sworn on 21.07.2022 which indicates that on 16.06.2022, the process server served Peter with the statement of claim, list of witnesses, statements and documents at his home and in the presence of his wife but that he declined to sign after receiving the same. Peter has admitted this position in his deposition sworn on 14.02.2023 where he depones that he only came to learn of the arbitration proceedings after he was, “.... served with incomplete pleadings by the Applicants’ agent”. Peter also claims that he never instructed the two firms of Stanley Nthiwa & Co. Advocates and Onyango & Aywa Advocates to represent him in any matter and reiterated that he was never been served with pleadings by a Court Process server as claimed by the Applicants as he would have appended his thumbprint on the supposed pleadings.
24. However, as stated, Peter has already admitted that indeed he was served with the arbitration pleadings by the Applicants’ agent. To then go ahead and contradict himself that he never received the same pleadings because he never appended his thumbprint on them is attempting to mislead the court and is short of an outright lie. A reading of the responses by the aforementioned firm of advocates above indicate that they expressly state that they had been instructed by the Respondents. The Applicants could not thus be faulted for presuming that the said advocates represented the Respondents and as such had real, ostensible or apparent authority and instructions to deal on their behalf. Peter cannot therefore now claim that he never instructed the advocates when the said correspondences from the advocates state otherwise. In addition, the firms of Stanley Nthiwa & Co. Advocates and Onyango & Aywa Advocates, while acting for the Respondents were aware of the impending arbitration proceedings. The preponderance of the evidence shows that Peter had proper notice of appointment of the arbitrator and the arbitration proceedings and that he therefore had an opportunity to present his defence to the claim. That he failed to participate can only be blamed on him.
25. Accordingly, the issue that Peter was denied the opportunity to be heard cannot arise since section 26 (c) of the *Arbitration Act* is explicit that when a party to an arbitration fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. To encourage such ill-advised conduct to thrive amongst parties to a proceeding will defeat the purpose of adjudication of cases and the duty to comply with court summons or process. Indeed, arbitration will be hurt most by such discordant conduct of parties to an arbitration agreement (see *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited* ML Misc. Civil Case No. 27 of 2014 [2014] eKLR).
26. Albert, on the other hand, contends that the Award is against public policy on the ground that the Arbitrator departed from the doctrine of privity of contract by finding against him when he was not party to the Agreement. The Arbitrator stated that in as much Albert was not a signatory to the Agreement, he is alleged to have performed acts, as a named agent at clause 5 of the Agreement that gave rise to a dispute on the rights of the Applicants under the Agreement. The determination of disputes on the rights of the Applicants was stipulated to be subject to arbitration and the agency created at clause 5 of the Agreement which is actual, explicit and delegating power from Peter to Albert with the intention to have all actions undertaken in performance of the Agreement fall within the arbitration purview. There is therefore evidence that Albert was aware of and consented to the terms of the Agreement in so far as testimony was adduced by the advocate who drafted the Agreement.
27. The Court of Appeal, in *William Muthee Muthoni v Bank of Baroda NRB CA Civil Appeal No. 21 of 2006* [2014] eKLR, held that once it is demonstrated that there exists an agency relationship, then the doctrine of privity of contract and the general rule that a contract cannot confer rights on persons who are not party to it, does not apply. In this case, there was an explicit agency relationship between Peter and Albert known by all the parties to the Agreement and as such, Albert could not plead or invoke to the doctrine of the privity of contract to avoid his obligations expressly provided for



under the Agreement. The Arbitrator considered all the evidence and came to a conclusion supported by the law and evidence. This finding also disposes of Albert's contention that he was not supposed to be subject to the arbitration proceedings and that therefore the Arbitrator dealt with a dispute not contemplated by the parties such as those of third parties.

28. Although he participated in the arbitral proceedings, Albert never opposed or objected to his inclusion as a respondent and his participation in the arbitration proceedings and as such it was deemed that he waived such an objection in accordance with section 5 of the Arbitration Act which provides as follows:

5. Waiver of the right to object

A party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

29. Albert cannot be seen or heard to be assailing the appointment and jurisdiction of the Arbitrator at this point. His opposition to participation in the arbitration proceedings at this point when he never raised the same earlier on in the arbitration as required by the Arbitration Act when he had an opportunity to do so is clearly an afterthought. This ground of opposition is therefore devoid of any merit.

30. On issues of public policy, Ringera J., in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366 stated as follows:

"I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality....."

31. Nothing in the Award demonstrates that it violates any of the tenets of public policy elucidated above. Moreover, the issues resolved by the arbitral tribunal relate to contractual matters between the parties which it analysed and made conclusion within the permissible limits of the law. On this aspect of public policy, the court in *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR observed as follows:

"Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy."

32. In sum, I find that the Respondents have failed to demonstrate and satisfy the court as to why it ought to refuse to recognize and enforce the Award published on 07.10.2022.



**Disposition**

33. I therefore allow the Applicants' application dated 31.10.2022 on the following terms:

- a. The Award published on 07.10.2022 be and is hereby recognized as a judgment of this court and leave be granted to the Applicants to enforce the said Award as a decree of the court against the Respondents.
- b. The Respondents shall pay the costs of the Award assessed at Kshs. 150,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2023**

**D. S. MAJANJA**

**JUDGE**

