



**Kamanda v Dinara Developers Limited (Miscellaneous Application E655 of 2020)
[2021] KEHC 96 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 96 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E655 OF 2020
MW MUIGAI, J
SEPTEMBER 21, 2021**

BETWEEN

GEORGE K. M. KAMANDA CLAIMANT

AND

DINARA DEVELOPERS LIMITED RESPONDENT

RULING

CHAMBER SUMMONS

1. The Applicant filed a Chamber Summons Application dated 11th March 2020 for orders that; -
 1. The Final Arbitral Award dated 27th November 2019 and filed herein on 10th March 2020 be recognized as binding and be enforced by this Court.
2. Which Application was supported by the sworn affidavit of George K. M. Kamanda dated 11th March 2020 and based on the grounds that; -
 - a. The parties entered into an Agreement for Sale dated 30th July 2015 that provided for Arbitration in the event of a dispute.
 - b. The Applicant purchased the said property on the following terms;
 - i. The Applicant was required to pay Kshs.2, 000, 000 and paid Kshs.800, 000 on 29th May 2015;
 - ii. Kshs.400, 000 on 30th June 2015;
 - iii. Kshs.200, 000 on 30th June 2015; and
 - iv. Kshs.600, 000 on 30th July 2015.



- c. The Applicant paid the entire purchase price on an undertaking that the project would be completed on or before 31st October 2016.
- d. Under the Agreement the Respondent undertook to erect 250 apartments together with parking spaces and related amenities on the suit property out of which it agreed to sell to the Applicant one of the apartments and the Applicant agreed to purchase a two-bedroom apartment in the foresaid parcel of land. The Respondent failed to develop or construct and defaulted on all the terms of the Sale Agreement. A subsequent Deed of Variation between the parties resulted in default by the Respondent to pay mesne profits. Consequently, the dispute was referred to arbitration.
- e. In the Deed of Variation dated 14th March 2017, the Respondent undertook to pay monthly mesne profits at Kshs.25, 000 from November 2016 to October 2018. The Respondent paid Kshs.425, 000 by cheque, Kshs.150, 000 of which was paid by cheque drawn by the Respondent's advocates. Thereafter, the Respondent defaulted on the balance.
- f. Despite the efforts to seek amicable resolution of the dispute since the service of the demand dated 30th June 2018 the Respondent refused to offer any compensation for the losses to date.
- g. Despite efforts by the Applicant's advocates to involve the Respondent in appointing a mutual Arbitrator as is required by the Arbitration Rules, the Respondent refused to participate in the process. Consequently, the Chartered Institute of Arbitrators appointed Ng'ang'a Munene as the Sole Arbitrator.
- h. The Arbitrator issued the Final Award on 27th November 2019 and the Final Award was filed by the Applicant and registered herein on 10th March 2020.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn affidavit of Andrew Kamau Muhiu dated 19th June 2020 and stated that; -
 - a. The Applicant entered into an Agreement for Sale with the Respondent for the purchase of an apartment from the Respondent's project of 250 apartments.
 - b. Unfortunately, the Respondent failed to handover the property in accordance with the Agreement for Sale, the parties entered into a Deed of Variation where the Respondent undertook to pay monthly mesne profits.
 - c. Later the Applicant sought arbitration and served the Respondent with a hearing notice dated 8th November 2019. Upon receiving the notice, the Advocates wrote to the Claimant and requested to be furnished with the details of the venue of the hearing of the arbitration. The letter was received by the Claimant's Advocates but no response was received to date.
 - d. Further, the Respondent requested to be served with the statement of claim so as to put in a defense but there was no response. Equally, the Respondent also sought to understand how the arbitrator was appointed since it was not involved in the process as required by the Arbitration Rules.
 - e. The Applicant misrepresented the facts to the court in stating that the Advocate's efforts to involve the Respondent in appointing a mutual Arbitrator proved futile as the Respondent refused to participate in the process.



- f. The Respondent was surprised to learn of the Final Award and the same was not annexed to the Application.
- g. The Application should be dismissed with costs.

APPLICANT'S FURTHER AFFIDAVIT

4. The Applicant filed a further affidavit sworn by George K. M. Kamanda dated 14th July 2020 and stated that; -
 - a. The Arbitrator wrote to both parties via email on 14th May 2019 advising both parties on the venue and proposed dates of the Arbitration. The Respondent's advocates responded via email on 21st May 2019 informing the Arbitrator that they were seeking instructions from the Respondent and would respond on a convenient date. (Marked GK 4)
 - b. The Arbitrator via a letter dated 28th May 2019 to all the advocates of the parties proposed dates for hearing and the venue and attached an agenda for the preliminary meeting in the said email. (Marked GK 3)
 - c. Following the Respondent's advocates silence, the Arbitrator ordered that the Respondent be served directly and the service was effected. Annexed are of Affidavits of Service by Jane Wanjiru Gitingu who effected service at Dinara Developers Ltd. (Marked GK 6)

RESPONDENT'S FURTHER AFFIDAVIT

5. The Respondent filed a further Affidavit sworn by Andrew Kamau Muhiu dated 12th August 2020 and stated;
 1. The Respondent avers that the ideal procedure would have been physical delivery of communications and notifications. The said email and the undersigned was not an advocate nor a client.
 2. The firm of K. Mberia Advocates was never on record to represent the Respondent before the Tribunal and the Tribunal never communicated with the Respondent at all.
 3. The Respondent is not aware of the costs of the Arbitral proceedings and the nature of the said proceedings. The Arbitrator had the responsibility of communicating the same to the Respondent which was never procedurally done.
 4. There are no annexures presented before this court that were physically received by the Respondent or their advocates on record.
 5. The Tribunal did not take responsibility to ensure that they provided fair hearing to the Respondent despite the Respondent's advocate's effort to seek information of the same as per the letter to the Applicant's advocates received on 14th November 2019 and the letter to the Arbitrator received on 2nd August 2019.
 6. It is only honorable that the Court refers the matter back to the tribunal for proper hearing.

APPLICANT'S FURTHER AFFIDAVIT

6. The Applicant filed a Further Affidavit sworn by George K. M. Kamanda sworn on 7th October 2020 and stated that; -
 1. Despite receipt of all correspondences from the Arbitrator and the Applicant's advocates, the Respondent chose to remain mum.



2. The Arbitrator directed that the Respondent be served in person with an Order for Directions dated 10th July 2019 which was evidenced by the Respondent's receipt stamp dated 16th July 2019. (Marked GK1)
3. The emails were copied to the Respondent's advocates' Managing Partner Mercy Mberia on her personal emails (mkmberia2090@gmail.com) and her office email (mercy@kemberia.co.ke). it is therefore a lie that no advocate from the subject law firm was appraised. (Marked GK2)
4. The firm of K. Mberia & Partners were on record and that is why they communicated to the Arbitrator. Thus they were served. Attached is a letter dated 1st July 2019 and delivered on 2nd August 2019 to the Arbitrator and copied to the Applicant. (Marked GK3)

APPLICANT'S SUBMISSIONS

7. The Applicant submitted that the Arbitration proceedings commenced with the Arbitrator's appointment by the Chartered Institute of Arbitrators through its letter dated 2nd May 2019 which was copied to the Respondent as well as its advocate. Neither the Respondent nor its advocate turned up for the preliminary meetings or the entire proceedings despite being served.
8. Further, the Applicant submitted that the Respondent has to date not filed for setting aside of the Arbitral Award as anticipated under Section 35(3) of the *Arbitration Act*. In the absence of the Respondent's Application the Applicant urged the court to recognize as binding the final arbitral award dated 27th November 2019.
9. It was the Applicant's submission that Section 10 of the Arbitration Act expressly stipulates that; -

Except as provided in this Act, no court shall intervene in matters governed by this Act.
10. In the case of; *Prof Lawrence Gumbo & Another versus Honourable Mwai Kibaki & Others* Nyamu, J. held that:

“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented...”
11. The Applicant urged the Court to find that the Arbitrator had jurisdiction and all the parties were informed of the proceedings and uphold the Arbitral Award as an order of the court.

RESPONDENT'S SUBMISSIONS

13. The Respondent submitted that the Applicant did not follow due process and this resulted in the infringement of the Respondent's rights contrary to Section 12 of the Arbitration Act and Article 50 of the *Constitution of Kenya, 2010*.
14. The Respondent urged the court to set aside the arbitral award as it was obtained in an unjust manner as the process was contrary to the rules of arbitration as well as natural justice. The Respondent relied on the provision of Section 35(2)(a)(ii) of the Arbitration Act and stated that through its Replying Affidavit and further affidavit as well as the annexures thereon had provided sufficient evidence to show that it was never part of the arbitration process.
15. It was the Respondent's submission that due to the injustice to the Respondent in this matter by failure to be accorded audience by the Arbitral Tribunal, this court should refer the matter back to arbitration for it to be heard and determined on merit.



DETERMINATION

16. The Applicant seeks to have the Final Award recognized as binding and enforced by the court. The Court considered the pleadings and submissions filed by the parties and the issues for determination are:
- a. Whether the Respondent was informed of the appointment of the Arbitrator?
 - b. Whether the Respondents were informed of the venue?
 - c. Whether the Respondent participated in the proceedings?
 - d. Whether the Final Award is binding?
17. The recognition and enforcement of Final Awards is guided by Section 36 of the Arbitration Act as follows;
- (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.
18. It is the Court’s observation that the Applicant has complied with the provision of Section 36 (3) of the Arbitration Act and the original Final Award was filed online and there is a physical copy of the same in the court file. The Applicant also availed a copy of the parties’ Agreement for Sale which provided the Arbitration Clause. Clause 21 of the Agreement for Sale provided as follows;

If any dispute shall arise whether during the continuance of this agreement or upon or after its determination between the parties hereto touching or concerning this Agreement or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement, such dispute shall in accordance with and subject to the provisions of the Arbitration Acts or any statutory modification or re-enactment thereof for the time being in force be referred to the arbitration and final decision of a single Arbitrator to be agreed between the parties or in default of agreement within 14 days to be appointed at the request of either party by the Chairman for the time being of the Institute of Chartered Arbitrators Kenya Chapter in accordance with the Arbitration Act.

Whether the Respondent was informed of the appointment of the Arbitrator?

19. The Respondent’s position was that it was not informed of the appointment of the Arbitrator and this resulted in the infringement of the Respondent’s rights contrary to Section 12 of the Arbitration Act and Article 50 of the Constitution.

Section 12 of the Arbitration Act provides; -

- (3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”)—
 - (a) has indicated that he is unwilling to do so;
 - (b) fails to do so within the time allowed under the arbitration agreement; or
 - (c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly



appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

- (4) If the party in default does not, within fourteen days after notice under subsection (3) has been given—
- (a) make the required appointment; and
 - (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
20. Vide a letter dated 26th February 2019(Marked GK1), the Applicant’s Advocates wrote to the Respondent asking the Respondent to propose three names of Arbitrators in a bid to instruct a mutual Arbitrator to determine the dispute. The Respondent has not produced any document to show that it indeed responded to the Applicant regarding this issue.
21. By a letter dated 23rd April 2019(Marked GK2), the Chairman of the Chartered Institute of Arbitrators wrote to the Arbitrator, Munene Ng’ang’a, on being nominated to handle the dispute and both parties including the parties’ advocates were copied in the said letter.
22. Going by the parties’ Arbitration Clause, failure to appoint the arbitrator would result in the Arbitrator being appointed by the Chartered Institute of Arbitrators. This is what transpired and upon the appointment of the Arbitrator by the Chartered Institute of Arbitrators all the parties were informed of the said appointment. Therefore, the Respondent cannot claim that it was not aware of the said appointment of the Arbitrator. It was not the responsibility of the Applicant to inform the Respondent of the Applicant as it had been done by the Chartered Institute of Arbitrators.

Whether the Respondent was informed of the venue?

23. The Arbitrator sent an email to both parties on 14th May 2019 and it read as follows;
- “We refer to the letter by the Chartered Institute of Arbitrators dated and copied to yourselves and the client. I now propose that we hold a meeting in my chambers for directions on any morning at 11:00am on any of the following days. 23rd May, 24thMay, 29th May, 30thMay 2019 or 11th//June or 13thJune 2019. Kindly consents and let me know the date that is convenient to you both.”
24. This clearly shows that the Respondent was made aware of the venue which was the Arbitrator’s Chambers. The Arbitrator’s Order for Directions No. 1 also noted that the Respondent did not appear even though served.

Whether the Respondent participated in the proceedings?

25. It was the Respondent’s contention that it did not participate in the Arbitration proceedings and was surprised to learn of the Final Award.
26. The annexures marked GK3 and GK5 show communication vide email from the Arbitrator to both parties. In annexure GK4, on 21st May 2019, the Arbitrator emailed the Respondent on 21st May 2019 which email read; - “Kindly confirm if the date suggested by Maina, Omore & Mwaura Advocates for Wednesday 29th May 2019 is convenient to you.” The Respondent replied to the Arbitrator’s email of 21st May 2019 stating that; - “We are seeking our Client’s instructions on the issue and we’ll revert in due course.”



27. The Arbitrator's Order for Direction dated 10th July 2019 was served upon the Respondent directly and the same was received by the Respondent on 16th July 2019 as evidenced by the Respondent's stamp.
28. The Respondent wrote a letter to the Arbitrator dated 1st July 2019 acknowledging the letter the above mentioned order while raising issues concerning the said order (dated 10th July 2019). The letter is shown to have been received on 2nd August 2019 as evidenced by the stamp of receipt. The Arbitrator acknowledged the letter and the belated delivery and wrote a response dated 5th August 2019 stating that the Respondent had been appraised of the proceedings all the time.
29. The Arbitral Award dated 27th November 2019 gives detailed information on how the Arbitrator was appointed and the Arbitrator also gives details of service on the Respondent.
30. In light of the above, the Respondent cannot argue that it was not involved in the whole process yet it was made aware of the Arbitration proceedings vide the letters mentioned above. The Respondent was aware of the process from the initial stage when the Chairman of the Chartered Institute of Arbitrators informed them of the nomination of the Arbitrator to determine their dispute. The Respondent was aware of the proceedings but chose not to be a part of it. A party is entitled to fair hearing but the Applicant has placed sufficient evidence that the Respondent was notified of Appointment of Arbitrator and Arbitration proceedings but waived its right to fair hearing by non- attendance or non-participation.
31. The Respondent also asked the Court to refer the matter back to the tribunal for proper hearing. Section 10 of the Arbitration Act provides that;

Except as provided in this Act, no court shall intervene in matters governed by this Act.
32. In addition, the matter can only be referred back to the Tribunal if there is application for setting aside the Arbitral Award and is filed within 3 months of notification and/or receipt of the Final Award. So far there is no Application filed by the Respondent seeking to set aside the Final Award under Section 35 of Arbitration Act so as to invoke Section 35(4) of the Arbitration Act to
 - (4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

Whether the Final Award is binding?

33. On the issue whether the Final Award is binding Section 32A of the Arbitration Act provides that;

Except as otherwise agreed by the parties, an Arbitral Award is final and is binding upon the parties. No recourse is provided against a Final Award except as in the manner provided for under the Act
34. The parties in execution of Arbitral Agreement Clause 21 agreed that the Arbitrator's decision is final.
35. The Court considered that parties contracted their choice of dispute resolution which is Arbitration as shown in Clause 21 of the Agreement for Sale.
36. Recourse to the High Court against the Arbitral Award is by virtue of Section 35 of the Act which provides for the Respondents to file an application for setting aside the Arbitral Award.



35. Application for setting aside arbitral award
- (2) An arbitral award may be set aside by the High Court only if—
- (a) the party making the application furnishes proof—
- (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;
37. Application for setting aside arbitral award may be made only by an application for setting aside the award under sub sections (2) and (3). The Respondent has not filed any Application seeking to set aside the Final Award even after becoming aware of its existence.
38. The Respondent's submission in opposing the award has no basis. The Respondent is also precluded from opposing the recognition of the Final Award by the lapse of time. There being no pending application before the Court challenging the award the Court finds find no reason not to recognize the Final Award as binding and enforceable.

DISPOSITION

39. The upshot of the foregoing is that the Applicant's application of 11th March 2020 to recognize and adopt the Arbitral award of 27th November 2019 as an order of this Court is granted.

DELIVERED SIGNED & DATED IN OPEN COURT ON 23RD SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO COVID-19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MAINA OMORE & MWAURA ADV-APPLICANT

ODANGA & PARTNERS ADV-RESPONDENT

