



**Flexus Estates Limited v Trustees of Kenya Railways Staff Retirement  
Benefit Scheme (Miscellaneous Cause E593 & E627 (Consolidated) of 2021)  
[2021] KEHC 106 (KLR) (Commercial and Tax) (5 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 106 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CAUSE E593 & E627 (CONSOLIDATED) OF 2021  
A MABEYA, J  
OCTOBER 5, 2021**

**BETWEEN**

**FLEXUS ESTATES LIMITED ..... APPLICANT**

**AND**

**TRUSTEES OF KENYA RAILWAYS STAFF RETIREMENT BENEFIT  
SCHEME ..... RESPONDENT**

**RULING**

1. The Court is tasked with determining two applications. The first one is by the applicant and is dated 10/8/2021. It seeks the recognition, adoption and enforcement of the arbitral award dated 29/7/2021 by Hon. Kyalo Mbobu as an order of the court. The second application is by the respondent and is dated 24/8/2021. It seeks to set aside the said award.
2. The Court will first consider the second application that seeks to set aside the said award. That application is brought pursuant to sections 7 and 35 of the *Arbitration Act, 1995* and Rule 7 of the Arbitration Rules.
3. The background to the applications is that, sometimes in 2012, the respondent invited interested parties to tender for the purchase of Land Reference Number Nairobi Block 1/437 located at Kindaruma Road off Ngong Road. The applicant emerged the successful tenderer. However, the parties failed to finalize the sale due to an injunction issued in Nairobi Civil Case No. 294 of 2012.
4. The respondent therefore resolved that the suit property be substituted with an alternate property, Land Reference No. 1/420. The respondent contended that the sale of both properties failed and a dispute arose. The dispute was arbitrated by Hon. Kyalo Mbobu who by an award made on 29/9/2021, ordered for specific performance of the contract amongst other orders.



5. The respondent contended that there was no valid and enforceable contract and that the arbitrator erred by ordering specific performance. Further, that the arbitrator failed to address the issue of conflict of interest that was a pertinent issue when scrutinizing whether there existed a valid and enforceable contract and whether its existence would have affected the enforcement of the contract's object.
6. The application was opposed by the applicant vide a replying affidavit of Collins Ngetich sworn on 30/8/2021. It was contended that the tribunal's jurisdiction was invoked pursuant to Clause 3.6 of the Tender Document which provided that disputes arising therefrom would be resolved through direct negotiation and in default, arbitration.
7. That in dismissing the respondent's objection to the validity of the contract between the parties, the tribunal considered the general and special conditions of the tender document, the correspondence between the parties, the general conduct of the respondent and the express and implied representations of the respondent. The tribunal further considered the retention of the applicant's deposit of Kshs. 21,500,000.00 and the averments of the respondent made in High Court Civil Suit No. 294 of 2012 wherein it stated that it had sold the suit property to the applicant.
8. The applicant further contended that the relief of specific performance was granted because the tribunal found that there existed a contract between the parties for the sale and purchase of the suit property. That the respondent had breached the said contract.
9. That by virtue of section 10 of the *Arbitration Act, 1995*, the court is not allowed to undertake a merit review or to sit on appeal on the decision of the arbitrator. That the grounds for the setting aside of the award had not been met. The applicant therefore prayed that the respondent's application be dismissed and the award be recognized and enforced.
10. The Court has carefully considered the contestations of the parties as well as the submissions of Learned Counsel. It was the respondent's submission that there was no contract between the parties in terms of section 3 of the *Law of Contract Act*, Cap 23 Laws of Kenya. That the tribunal lacked jurisdiction as the contract had not been executed. That the award was contrary to public policy as there was conflict of interest. The cases of *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd* CA No. 50 of 1989 and *Leo Investment Ltd v. Estuarine Estate Ltd* [2017] Eklr, were relied on in support of those submissions.
11. The application seeks the setting aside of the arbitral award dated 19/7/2021. Section 35(2) of the *Arbitration Act, 1995* provides for the grounds for the setting aside of an arbitral award as follows: -
  - “(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 decision 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
- iv. 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
- (ii) the award is in conflict with the public policy of Kenya”.

12. In the case of *Kenya Bureau of Standards v Geo-Chem Middle East* [2017] eKLR it was held: -

“As regards the finding that the Kenya Bureau of Standards was liable for the payments to Geo-chem, that is a decision on the merits of the case. It is not the function nor the 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 an 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”.

13. In this regard, this Court is alive to the fact that it is not sitting on appeal on the tribunal’s decision. The respondent hinged its application on the fact that a valid contract and/or arbitral clause did not exist between the parties. In paragraph 89 of its award, the tribunal found that there existed a valid contract as inferred from the tender documents and the correspondence exchanged between the parties. Further, the tribunal found that the respondent itself had positively averred in court in HCC 294 OF 2012 that there was a sale agreement between it and the applicant. There was also an arbitral clause in the agreement between the parties. All these are matters and findings that are based on the evidence before the tribunal.

14. The Court finds that the invitation to tender formed a binding contract between the parties and disputes therein were to be solved through arbitration. The tribunal had jurisdiction, a valid contract and an arbitral clause existed and further the respondent willingly participated in the arbitral proceedings. As such, the Court cannot interfere with the tribunal’s findings.



15. As to public policy, the tribunal found that the allegation of conflict of interest had not been proved. The tribunal saw the witnesses who testified before it. It made its own findings and the Court cannot examine the award on merit.
16. Consequently, the court finds that the grounds upon which an arbitral award is to be set aside under section 35 of the Act have not been met. The application dated 24/8/2021 therefore fails.
17. The second application is the one dated 10/8/2021. It is brought under section 36 of the *Arbitration Act, 1995* 1995, Rule 9 of the Arbitration Rules 1997, sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Article 159(2) of the Constitution of Kenya.
18. The applicant seeks the recognition, adoption and enforcement of the award dated 29/7/2021 as an order of the Court. The application is supported by the affidavit of Collins Ngetich sworn on 10/8/2021.
19. The recognition, adoption and enforcement of awards are provided for under section 36 and 37 of the Act. Section 36(3) provides that a party applying for the enforcement of an arbitral award must furnish the original or certified copy of the arbitral award and the arbitration agreement.
20. The Court notes that the applicant did produce a certified copy of the Tender Document, wherein the arbitration clause is found, as 'CN-1' and a copy of the arbitral award as 'CN-5' in its supporting affidavit.
21. Section 37 of the Act provides for the grounds upon which the Court may refuse to recognize to enforce an arbitral award. These are akin to those set out in section 35 of the Act. The Court has already found that those grounds do not exist.
22. In the end, the Court allows the application dated 10/8/2021 with costs while the application dated 24/8/2021 is dismissed with costs.

It is so ordered.

**DATED and DELIVERED at Nairobi this 5<sup>th</sup> day of October, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**

