



**Isaac's Investments Co.Ltd v First Community Bank Ltd (Civil Suit E536 of 2020)  
[2021] KEHC 338 (KLR) (Commercial and Tax) (14 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E536 OF 2020  
A MSHILA, J  
DECEMBER 14, 2021**

**BETWEEN**

**ISAAC'S INVESTMENTS CO.LTD ..... APPLICANT**

**AND**

**FIRST COMMUNITY BANK LTD ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 2<sup>nd</sup> November, 2021 brought under the provisions of Sections 12(2) (3) (4) of the *Arbitration Act*, Order 46 Rule 5(2) of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act*; the Applicant prayed for the following Orders;
  - a. That this Honorable Court be pleased to issue an Order appointing Hon.Sukyan Omar Deputy Chief Khadi as an arbitrator in this dispute in accordance with the ruling/order issued by Hon,Lady Justice Ngenye Macharia on 22/07/2021 as well as the provisions of the said Finance Agreement;
  - b. The court be pleased to issue any further orders and directions as it may deem fit in the interest of dispensing justice in this suit;
2. At the hearing hereof, the matter proceeded in the absence of the Respondent bank which had been served with the court order dated 18/11/2021 as well as the instant application. The Applicant filed an Affidavit of Service dated 12/11/2021 made by Henry Muli Nzuki confirming that the Respondent was indeed served with the court order as well as the application. The Respondent filed no response and therefore the application is unopposed. Hereunder is a summary of the Applicants' submissions.

**APPLICANTS SUBMISSIONS**



3. The application is premised on the grounds on the face of the application and the Supporting Affidavit of Ali M. Isaac dated the 2/11/2021; the deponent stated that the court vide its Ruling made by Hon. Lady Justice Ngenye ordered that the parties agree within 60 days on an arbitrator knowledgeable and competent in Shariah Law in view of the unique nature of the finance agreement signed between the parties.
4. On 24/08/2021, the Applicants counsel wrote to the respondents advocates with a proposal of its preferred arbitrator being Hon. Sukyan Omar the Deputy Chief Kadhi. The Applicant's counsel gave the Respondents advocates 14 days to respond in case it had any objections to the proposal. The Respondent and its advocates failed/neglected/ignored to respond to the above mentioned letter.
5. The application was unopposed as the Respondent did not file a response to this application. The Applicant prayed that the application be allowed and the order sought be granted.

#### **ISSUES FOR DETERMINATION**

6. After taking into consideration the above submissions this court has framed only one issue for determination;
  - i. Whether the applicants' application for appointment of Hon. Sukyan Omar the Deputy Chief Kadhi as the Arbitrator is merited.

#### **ANALYSIS**

7. The court record reflects that on the 22/07/2021 Lady Justice Ngenye directed as follows;

‘An order be and hereby issued that the parties agree on an Arbitrator knowledgeable and competent in Sharia law in view of the unique nature of the Finance Agreement signed between the parties within 60 days’.
8. Thereafter the Respondent sought a review of the said order and on 13/10/2021 the court made a determination as follows;

‘I find that this is not a proper case for the court to grant review. Accordingly, the applicants Notice of Motion dated 19<sup>th</sup> August, 2021 is hereby dismissed with costs to the respondent.’
9. On the same date after the ruling was delivered the respondent herein sought for an order for stay of execution pending appeal. The court made the following orders;

‘The Applicant is granted 30 days Right of Appeal. As for stay it appears that the orders I have granted are not capable of being stayed given that it was a review application, consequently recourse falls in the Court of Appeal.’
10. Upon careful perusal of the whole court record there is no indication of an appeal having been preferred against the Order made on 22/07/2021; neither is there any indication that the orders had been set aside, vacated and or varied and therefore the order is still in force.
11. The Applicant also stated that on 24/08/2021 the applicants counsel wrote to the Respondent's advocates with a proposal of its preferred arbitrator being Hon. Sukyan Omar the Deputy Chief Kadhi. The Applicant's counsel gave the Respondents advocates 14 days to respond in case it had any objections to the proposal. The Respondent and its advocates failed/neglected/ignored to respond to the above mentioned letter and the 60 days given by the court for the parties to agree on the single arbitrator have since lapsed.



12. In such circumstance's the applicable law is found under the provisions of Section 12(4) of the Arbitration Act which reads as follows;

‘If any party in default does not within 14 days after notice in Section 12(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 and the award of the Arbitrator shall be binding on both parties as if he had been so appointed by agreement.’

13. By filing the Affidavit of Service, the Applicant has provided satisfactory evidence of service of this instant application upon the Respondent. This court reiterates that there was no objection or response raised to the application by the respondent and it is therefore deemed to be unopposed.

14. For those reasons, the application is found to conform to the provisions of Section 12(4) of the Arbitration Act and it is also found to have merit.

#### **FINDINGS AND DETERMINATION**

15. For the forgoing reasons this court finds that the application for the appointment of Hon. Sukyan Omar the Deputy Chief Kadhi as the Arbitrator is merited and it is hereby allowed.

16. The Hon. Sukyan Omar the Deputy Chief Kadhi is hereby appointed as the Arbitrator.

17. The matter be mentioned after sixty (60) days from the date hereof.

18. Mention on 1<sup>st</sup> March 2022. Mention Notice to issue to the Applicant’s Advocates.

Orders accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2021.**

**HON.A.MSHILA**

**JUDGE**

In the presence of;

Kairu for the defendant/Respondent

No appearance for the plaintiff/Applicant

Lucy-----Court Assistant

