



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS CAUSE NO. 187 OF 2018

GOLDEN REAL ESTATE LIMITED.....APPLICANT

-VERSUS-

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

RULING

1. Before me is a **Chamber Summons** dated **16th April 2018**. It is filed by **Golden Real Estate Limited** (the Applicant). The Respondent is **First Community Bank Limited**. The Applicant's prayer is for recognition of an Arbitral Award dated 2nd January 2015.
2. There is controversy between the parties on whether there was an arbitration and whether an award was made.
3. There is a bank/customer relationship between the Applicant and Respondent. The Respondent is licenced, under Central Bank of Kenya Act, to operate as a bank. It is admitted that the Respondent extend various loan facilities to the Applicant from time to time and the Respondent obtained securities in the form of legal charge over the Applicant's immovable property and personal guarantees of the Applicant's Directors.
4. The Applicant contends that parties submitted to arbitration process and the award of that Arbitration Tribunal determined that in lieu of the Applicant repaying the loans afforded by the Respondent that the Respondent would acquire an equal proprietary interest in the apartments constructed by the Applicant. That the equal proprietary interest translated to 14 apartments. That on that award being issued the Respondent relinquished its right to exercise its statutory power of sale of the charged property.
5. The Respondent through its legal officer stated in her affidavit that the Respondent was indebted to the respondent for Kshs. 100,033,202.83 as at 24th April 2018 – having been granted Diminishing Musharaka Facility in September 2011. That the purpose of diminishing Musharaka Facility was to facilitate construction, by the Applicant, of 28 apartments for sale. It was an express term of the agreement that the Respondent's contribution, to that project, would be Kshs. 40,000,000 while the Applicant's contribution was to be minimum of Kshs. 42,000,000.
6. According to the Respondent the Applicant was unable to raise its contribution for that project. The Respondent advanced more financing to the Applicant. That however the Applicant was in constant default in its obligation to repay the facility.
7. Respondent contends that because there arose a serious dispute of the Applicant's contribution over the construction that dispute, over the value of contribution, was referred for mediation before the Respondent's Sharia Supervisory Board (SSB). That the narrow mandate of the SSB was captured in the advisory opinion they delivered.

ANALYSIS AND DETERMINATION

8. Although the parties have attempted to get this court to entertain their dispute on whether there has been default by the Applicant in settling the loan facility, I am very clear in my mind that to entertain that would be going in beyond the province of the application before me. The application before me only requires me to either recognize or not recognize what the application refers to as an Arbitration Award.
9. There are three issues for my determination in this matter. They are:

a) Was there an arbitration hearing?

b) If so did it issue an enforceable award?

c) Who shall bear the costs?

ISSUE (a)

10. An arbitration is defined in the black's law dictionary 8th edition as:

“A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”

11. For an arbitral process to commence the law requires that there be an Arbitration Clause/Agreement. Such an agreement has to meet the legal standards set in Section 4 of the Arbitration Act Cap 49. That Section provides:

“Section 4

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in –

a. A document signed by the parties;

b. An exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

c. An exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

12. In this case the Applicant has not presented an arbitration clause or agreement, in writing or otherwise. What the Applicant relies on, as an Arbitration Agreement is some statements made in the SSB's decision. I will reproduce pertinent parts of that decision, which the Applicant relies upon as arbitration agreement:

“Financing department referred the following case for arbitration and guidance to the Sharia Supervisory Board...

After listening to both parties on 31st December 2014 and subsequent enquiries and discussion the SSB ruled as follows:-

...”

13. Arbitration agreement is defined in section 3 of cap 49 as:

“... an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

14. Bearing in mind that definition the Applicant failed to show to this court any arbitration agreement or clause and considering the provisions of section 4, cap 49, which requires such an agreement to be in writing I find the arguments advanced by the Applicant to be unsound. The words relied upon by the Applicant, in the SSB's ruling do not constitute an arbitration agreement.

15. The Respondent is emphatic that there was no Arbitration Agreement and that there was no arbitral process. That rather, what SSB did was to mediate on the issue of contribution each party made in the project.

16. Arbitration process is consensual. This was the holding in the case **NYUTU AGROVET LIMITED VS AIRTEL NETWORKS LIMITED [2015] eKLR** viz:

“Arbitration as a dispute resolution mechanism is not imposed on parties. They chose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here.”

17. Arbitral process cannot be imposed on the Respondent in the absence of an arbitration agreement.

18. In the absence of an arbitration agreement there could not have been an arbitral process. The answer, therefore, to issue (a) is that there was no arbitral hearing. There could not even have been a hearing when there was no appointment of Arbitrators as provided under Section 12 of Cap 49.

19. Having responded to issue (a) is the negative it follows that issue (b) does not fall for determination, because if there was no arbitral hearing then there cannot have been an enforceable award.

20. The application is unmerited and is dismissed. The Defendant having prevailed it will be awarded costs.

21. In the end the Chamber Summons dated 16th April 2018 is dismissed with costs to First Community Bank Limited.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....COUNSEL FOR THE APPLICANT

.....COUNSEL FOR THE RESPONDENT