



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 109 OF 2019

REBECCA NDANU MUNGUTI.....APPLICANT

VERSUS

ARCHER DRAMOND MORGAN LIMITED.....RESPONDENT

RULING

1. The Applicant filed the Notice of Motion under Section 36(1) of the Arbitration Act number 4 of 1995, seeking to have the court adopt the final award given by Patterson Munene Kamaara, the Arbitrator published on 25/4/2017 as the court's judgment. The application was made on the grounds that the parties to this dispute moved to resolve the dispute through arbitration in line with the agreement for sale dated 8/11/2006. The arbitration was conducted between 11/7/2014 and 25/4/2017.
2. The application was supported by the affidavit of Susan Mukii Mate who deponed that the Applicant filed **ELC Case No. 354 of 2013** seeking specific performance of the contract for the sale of a house in Nairobi. Parties referred the dispute to arbitration pursuant to clause 13.2 of the agreement. Patterson Munene Kamaara was nominated to arbitrate over the dispute. The arbitral proceedings were concluded on 25/4/2017. The Applicant attached the copy of the final award.
3. The Applicant applied for entry of judgment in **ELC Case No. 354 of 2013** but in the ruling delivered on 24/6/2019, Eboso J directed that the proper procedure was that a miscellaneous application should have been filed. This prompted the Applicant to file the instant application. The Applicant attached a copy of the ruling which Eboso J. delivered on 24/6/2019. Eboso J recused himself from hearing the matter on the basis that he had previously dealt with two related applications and the Presiding Judge of the Environment and Land Court allocated the file to this court.
4. John Roki Waithaka swore the replying affidavit in opposition to the application and deponed that clause 11 of the sale agreement limited the scope of damages recoverable by the Applicant and that the arbitrator disregarded that limitation in arriving at his award. He averred that in making the award for mesne profits, the arbitral award dealt with a dispute that was not contemplated by or falling within the terms of reference to the arbitration hence the award contained a decision beyond the scope of the reference to the arbitration. The Respondent contended that the part of the award relating to mesne profits was illegal, irregular, biased and was made without lawful authority.
5. Parties filed submissions which the court has considered. During the highlighting of submissions Mr. Wachira advocate for the Respondent informed the court that the Respondent was only objecting to the adoption of paragraph (D) of the award published on 25/4/2017 on mesne profits and urged that it was outside the jurisdiction of the arbitrator since mesne profits were not contemplated by the parties as part of the special damages.
6. Mr. Amuga contended that the terms of reference to the arbitration included a claim for mesne profits which had been claimed as a relief for breach of contract. He submitted that Eboso J had already dealt with the issue of mesne profits and that this court cannot ignore his decision. Mr. Wachira had argued that Eboso J did not determine the issue of mesne profits with finality since he did not deal with the merit of that issue. He contended that this court had power to interrogate the application to see if it met the threshold for Section 36 of the Arbitration Act. He added that the court was not bound by the decision of Eboso J as it has concurrent jurisdiction and can arrive at its own decision.
7. The Applicant relied on the case of **George Kamau Kimani and 4 others v the County Government of Trans Nzoia** in which the court cited the decision in **Trade Bank Limited v LZ Engineering Construction Limited [2001] EA266** where the court adopted the definition of issue estoppel found at page 861 of Halsbury's Laws of England 4th Edition and stated thus:

“An estoppel which has come to be known as Issue Estoppel may arise where a plea of *res judicata* could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and

second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law”.

8. Looking at the ruling delivered by Eboso J on 24/6/2019, the court notes that Eboso J dealt with the issue the award of mesne profits by the arbitrator at paragraphs 15, 16, 17 and 18 of his decision. Eboso J found that the dispute relating to mesne profits was properly within the scope of the reference.

9. The court allows the application dated 1/7/2019 and enters judgement in terms of the final award given by Patterson Munene Kamaara, arbitrator dated 25/4/2017 as the final judgement of this court.

10. The Applicant is awarded the costs of the application.

Dated and delivered at Nairobi this 3rd day of March 2020

K.BOR

JUDGE

In the presence of:-

Mr. M. Nderitu holding brief for Mr. P. Amuga for the Applicant

for the Respondent

Mr. V. Owuor- Court Assistant