REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO.305 OF 2017

ACORN PROPERTIES LTD.....APPLICANT/RESPONDENT

VERSUS

ENG.ISAAC GATHUNGU WANJOHI.....1ST RESPONDENT/APPLICANT

ISABELLA NYAGUTHI WANJOHI.....2ND RESPONDENT/APPLICANT

GUMBA INVESTMENTS LTD.....3RD RESPONDENT/APPLICANT

RULING

(1) Before this Court are two Applications for determination. The first is the Chamber summons dated **15th June 2017** by which **ACORN PROPERTIES LIMITED** (hereinafter referred to as "**the Applicant**") sought for orders that:-

> **"1. This Honourable Court be pleased to adopt the Final Award delivered by Hon. Arbitrator, Eng. Paul T. Gichuhi on 27th May 2016 as a Judgment of this Honourable Court.**
>
> **2. The Honourable Court do give the Applicant leave to enforce the Final Award as a decree of this Honourable Court.**
>
> **3. The costs of this Application be borne by the Respondents."**

(2) The summons which was premised upon **Section 36(1)** of the **Arbitration Act, 1995** and **Rules 9** and **11** of the **Arbitration Rules 1997** and all other enabling provisions of the law was supported by the Affidavit dated **19th June 2017** sworn by **PETER NJENGA**, the Chief Operations Officer and Directors of the Applicant.

(3) Thereafter **ENG ISAAC GATHUNGU WANJOHI** (the 1st Respondent) **ISABELLA NYAGUTHI WANJOHI** (the 2nd Respondent) and **GUMBA INVESTMENTS LTD** (the 3rd Respondent) filed the Notice of Motion dated **25th September 2017** seeking orders:-

> **"1. THAT this Honourable Court be pleased to stay further proceedings in this suit pending the hearing and determination of this application.**
>
> **2. THAT this Honourable court be pleased to stay further proceedings pending the hearing and determination of the Respondents intended appeal.**
>
> **3. THAT costs of the application be provided for."**

(4) The Motion was premised upon **Order 42 Rule 6 and Order 51 Rules 1,3 and 4 of the Civil Procedure Rules** and **Sections 1A, 1B, 3A** and **6** of the **Civil Procedure Act,** and was supported by the Affidavit dated **25th September 2017** sworn by the 1st Respondent. The Applicant filed Grounds of Opposition dated **12th February 2018** to the Notice of Motion dated **25th September 2017** and also filed a Replying Affidavit on the same date. The Court gave directions that the two applications be canvassed together by way of written submissions. The Applicants filed their written submissions on **1st October 2018** whilst the Respondents filed their submissions on **26th October 2018**.

BACKGROUND

(5) On **1st August 2009** the parties herein entered into a Developer Management Agreement. Sometime in the year 2014 a dispute arose between the Applicant and the Respondents regarding the interpretation of Clause IV of the Agreement dated **1st August 2009**, which had been entered into by the parties. As per Clause 13 of the agreement that dispute was referred to arbitration on **2nd September 2014**. The Arbitrator **Eng. Paul T. Gichuhi** heard both parties and delivered his final award in favour of the Applicant on **27th May 2016.** The Award read inter alia as follows:-

> **"(d) The Respondent to therefore pay the Claimant Kshs.75,553,177 (Kenya Shillings Seventy Five Million, Five Hundred and Fifty Three Thousand, One Hundred and Seventy Seven) to be paid within 45 days and any amount not paid after that date to attract simple interest of 16% per annum.**
>
> **(e) ……"**

(6) The Respondents being dissatisfied by that award filed in the High Court the Application dated **27th June 2016** seeking to have the Arbitral Award set aside. That application was heard by **Hon Lady Justice Olga Sewe** who in her ruling delivered on **2nd June 2017** dismissed the application and declined to set aside the Arbitral Award.

(7) Thereafter the applicant filed the Chamber Summons dated **15th June 2017** seeking to have the Award adopted as a Judgment of the High Court; and seeking leave to enforce said Award. On **16th June 2017**, the Respondents filed an application before the Court of Appeal seeking leave to appeal the ruling of **Hon Justice Sewe** and also seeking orders to stay the proceedings in the High Court pending the lodging, hearing and determination of their appeal. That application is still pending before the Court of Appeal. The Respondent then moved to file before the High Court its application dated **25th September 2017**, seeking a stay of all proceedings pending the hearing and determination of their appeal.

SUBMISSIONS

(8) The Applicant submitted that the Civil Procedure Act and Rules would have no application whatsoever in a motion such as the present one which seeks a stay of further proceedings pending the hearing and determination of an intended appeal against an Arbitrator's decision. They submit further that to grant such an application would effectively deny the award its finality and speedy enforcement contrary to the objectives of the Arbitration Act. The Applicants point out that no leave to appeal has been granted by the Court of Appeal and further state that in any event an appeal from an Arbitral Award does not lie to the Court of Appeal. They submit that the application for stay has no merit and ought to be declined.

(9) In support of this prayer to have the Arbitral Award of **27th May 2016** enforced the Applicants submit that the Ruling delivered by **Hon Justice Sewe** on **2nd June 2017** dealt with and dismissed all the arguments raised by the Respondents in favour of setting aside the award. The Hon Judge declined to set aside the Arbitral Award. They contend that **Section 36(1)** of the **Arbitration Act** provides that a domestic arbitral award shall be recognized as binding and upon application in writing to the High Court shall be enforced subject to **Section 30** and **37**. That no persuasive grounds have been advance to incline the Court not to recognize the Award as the conditions set out in **Section 37(1) (a)** of the Act have not been met.

(10) On their part the Respondents submit that their prayer seeking a stay of proceedings is merited. They argue that they have a right of appeal to the Court of Appeal and submit that their matter remains pending awaiting the empanelment of a 3 judge bench. They submit that they stand to suffer irreparable harm if the award is enforced and that their intended appeal will be rendered nugatory if the subject matter of the appeal being the Arbitral Award is not preserved by way of a stay. The Respondents cite **Article 50** of the **Constitution of Kenya 2010**, which they contend grants them right of access to all courts of the land including the Court of Appeal. They urge that a decision of the High Court regarding Arbitral proceedings may be appealed to the Court of Appeal and in support of this the Respondents rely on the case of **DHL EXCEL SUPPLY CHAIN KENYA LIMITED –VS- TILTON INVESTMENTS LTD [2017]eKLR**. They submit that the court ought to maintain the Status quo pending the hearing and determination of their appeal.

ANALYSIS AND DETERMINATION

(11) I have carefully considered the submissions filed by both parties in this matter. I have also considered the relevant statute and case law. The main issue for determination is whether the court should stay the proceedings pending the hearing and determination of the Respondent's appeal. It is not for this court to determine the merits or otherwise of that appeal.

(12) As a general rule courts have acted to uphold the autonomy of the Arbitral process. Arbitration as a form of Alternative Dispute Resolution is promoted by **Article 159(2)** of the **Constitution of Kenya 2010**. The Arbitration Act is a complete code. **Section 10** of the **Arbitration Act** provides that:-

> **"Except as provided in this Act, no court shall intervene in matters governed by this Act."**

(13) Thus by dint of the above section courts are expressly forbidden from intervening in Arbitral matters other than as provided for in the Act or where there are issues involving a violation of constitutional rights. Indeed our courts have severally held that the Arbitration Act is a self-sufficient statute and there is no need to go beyond its provisions to determine questions relating to arbitration awards or processes. In **NATIONAL OIL CORPORATION OF KENYA LIMITED –VS- PRISKO PETROLEUM NETWORK LIMITED [2014]eKLR,** the Court held that the provisions of the Civil Procedure Act and Rules did not apply to matters that are subject to an arbitration process **except** as provided for in the Arbitration Act. This is also stipulated in **Section 11** of the Arbitration Rules.

(14) Likewise in **ANNE MUMBI HINGA –VS- VICTORIA NJOKI GATHARA [2009] eKLR,** the Court of Appeal observed thus:-

> **"Rule 11 of the Arbitration Rules, 1997 had not imported the Civil Procedure Rules, hook, line and sinks to regulate arbitration under the Arbitration Act….no application of the Civil Procedure Rules would be appropriate if its effect would be to deny an award finality and speedy enforcement, both of which are major objectives of arbitration."** [own emphasis]

Therefore it is only where the Arbitration Act is silent on an issue that recourse can be had to the Civil Procedure Act and Rules to fill in any gaps but not in such a way as to conflict with the aims and objectives of the Act.

(15) The question of whether or not a right to Appeal from a decision of the High court, revoking or endorsing an Arbitral Award exists is still a grey area in our law. The matter is currently pending determination before the Supreme Court of Kenya. Be that as it may it is imperative that this court uphold the principle of finality of Arbitral Awards. This award was made way back in May 2016 almost three (3) years ago. Despite a ruling from the High Court declining to set aside the Arbitral award the same is yet to be enforced. The award is for a liquidated sum. Even if the Court of Appeal were to render a decision in favour of the Respondents, any damage the Respondents may suffer is in my view quantifiable and can be compensated by an award of damages.

(16) The High Court having in its ruling of **2nd June 2017** rejected an application to set aside the award. I find that this court is now "**functus officio**." To grant a stay at this stage would be tantamount to a reviewing and/or sitting in appeal over the decision of a Judge of concurrent jurisdiction. It is noteworthy that vide prayer (e) of their Motion dated **27th June 2016** the Applicants sought a stay of the award. This prayer was rejected by the Hon Judge. Therefore the question of stay of the award has already been decided. This application for stay is nothing but a thinly disguised attempt to review the decision of **Justice Sewe**. For the above reasons I find that the application for stay lacks merit and the same is hereby dismissed.

(17) I will now move to consider the Application to enforce the Arbitral Award made on **27th May 2016.** It is trite law that where parties expressly agree to submit a dispute to arbitration, it is intended that any Arbitral Award flowing from that process will be final and binding on the parties. **Section 10** of the Arbitration act provides for this. In the case of **ANNE MUMBI HINGA –VS- VICTORIA NJOKI GATHARA [supra]** the Court of Appeal held as follows:

> **"We therefore reiterate that there is no right for any court to intervene in the arbitral process, or in the award, except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties, and similarly, there is no right of appeal to the High court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration act."**

(18) Likewise in **Nyutu Agrovet Limited Vs. Airtel Networks Limited [2015]eKLR** this position was reiterated thus:-

> **"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes incon-venient journey that commercial litigation entails. That is what party autonomy, concept that the courts treats with difference, is all about."**

(19) This is a matter in which the parties voluntarily referred their dispute to arbitration. The arbitrator made an award. The Respondent's application to dismiss that award has been heard on merit and was dismissed by a Court of competent jurisdiction. I therefore confirm the Arbitral Award and in so doing I do hereby grant prayers **(1)** and **(2)** of the Chamber summons dated **15th June 2017**. Each party to meet its own costs.

Dated in Nairobi this 04th day of October 2019.

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Justice Maureen A. Odero