



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL CASE NO. 227 OF 2017

KIBIWUA LEASING & MANAGEMENT LIMITED.....APPLICANT

VERSUS

JADALA INVESTMENT LIMITED.....1ST RESPONDENT

NGONG LANE MANGEMENT LIMITED.....2ND RESPONDENT

RULING

This is a ruling on two Applicants. Application dated 15th May 2017 was filed by the KIBIWUA LEASING & MANAGEMENT LIMITED (hereinafter referred to as Applicant) seeking to set aside Arbitral Award dated 14th December 2016. The second application dated 11th September 2017 was filed by JADALA INVESTMENT LIMITED and NGONG LANE MANAGEMENT LIMITED (hereinafter referred to as Respondents) seeking Adoption of the said award and for judgment in favour of the claimant against the Respondent in terms of the sole Arbitrators award published on 14th December 2016.

Grounds on application dated 15th May 2017 are as follows:-

1. That the award is in conflict of public policy of Kenya.
2. That it is an attempt to rewrite contract between parties.
3. That the Arbitrator adopted inquisitorial approach in favour of the Respondent and reached an award on matters neither pleaded nor canvassed by either party.
4. That the award is grounded on marketing brochure not constituting the contract.
5. That the award is speculative and deal with matter outside the scope of the arbitration.
6. That the award adopted submissions of the Respondents.

The Respondent's application is supported by Affidavit sworn by John Muriuki Kibuchi its Managing Director. He averred that the 1st Respondent erected for sale a building consisting of 46 units on its property LR No.209/409/.The rooms were intended for use as offices, showrooms and retail space commonly called Jadala Place.

The 2nd Respondent was incorporated to manage the said Jadala Place.

He averred that the claimant purchased 2 retail spaces 01 and 02 on the ground floor of Jadala Place at a combined consideration of Kshs. 51,523,620; that the purchase was an investment solely for the purpose of generating rental income.

He averred that upon payment of the purchase price, the Respondents granted to the Applicant a long term lease of space for 999 years from 1st October 2013 for 02 and from 1st June 2014 for space 01. He attached copies of lease agreements.

He stated that under the long term lease the Applicant is required to pay Kshs. 20 per square foot per month to the Respondent for purposes of maintaining the said retail spaces.

The upon acquisition of the space in 2014 the Applicant instructed Ornital Consultants Ltd to market the retail spaces who got a tenant Dou Xiangju Kenya Ltd for monthly rent of Kshs. 521,761 for a period of 6 years. The lease is attached to the Respondent's Affidavit.

He averred that upon the Applicants tenant taking possession, he was blocked and driven out by the Respondent's alleging that the said tenants were setting up a butchery and supermarket leading to the present dispute. Following the incident, the Applicant was forced to refund the rent paid.

The Applicant contends the Arbitrator failed to make a decision under the terms of the signed contract but relied on brochure used to market Jadala Place.

The Applicant further argued that the award takes away the Applicants proprietary rights in the rental spaces 01 and 02 and subjects the Applicant to whims and prejudices of the Respondents; that award while elevating the comforts and conveniences of the tenants of Jadala Place makes no mention of acquired economic rights of the Applicants.

The Applicant further state that, if the spaces were to be reserved for uses that complement the activities of office occupants ought to have been set out in the contract. He added that use of the 2 spaces to compliment use of offices by other occupants was neither relief sought nor an issue canvassed by the parties; that the award is a speculative analysis of the sustainability of the retail spaces to be used as supermarket, the adequacy of parking spaces and possibilities of discomfort of tenants of Jadala Place but not a solution to actual dispute that has arisen between the parties; that the award is founded on perceived future occurrences and that potential infringements alleged by the Respondents had not arisen.

That the narrow interpretation that the retail space accorded to the lease and particularly that a supermarket cannot be run in a building housing a fashion designer, dental surgeon, insurance firm is the an attempt to rewrite the contract between parties.

The Applicant's contention is that the award allows Respondents to keep the purchase price of Kshs. 51,523,620 and demand monthly billings while denying the Applicant opportunity to rent and get monthly income from retail spaces.

That the award violates the Applicant's right to property, right to fair hearing and fair administrative action under the Constitution.

Grounds on the Respondent's application are that, the Arbitrator Collins Namachanja was appointed by the Law Society of Kenya following a letter by Advocates for the Applicant; the arbitral reference was concluded on 14th December 2016 and leave is required to enforce the award as the judgment of the Court.

The application is supported by Affidavit sworn by Counsel for the Respondent.

He averred that dispute arose over interpretation of 2 leases dated 21st June 2013. He restated grounds on the face of the application.

In response, the Applicant filed Replying Affidavit dated 6th April 2018 indicating that the application for recognition and enforcement of award is premature as the Notice of Motion dated 11th September 2017 seeking to set aside the award has not been determined and Respondents had not filed response to it.

The respond contend that the orders sought should not be granted as the award is challenged on grounds set out in the application to set aside.

This Court gave directions that the two applications be argued together

I will start by considering whether KIBUWA LEASING AND MANAGEMENT LIMITED (Applicant) in the application dated 15th May, 2018 has raised sufficient grounds to set aside the arbitral ward herein.

Upon that determination application by the Applicant, I will proceed to consider application dated 11th September 2017 filed by JADALA INVESTMENT LIMITED and NGONG LANE MANAGEMENT LIMITED (Respondents) seeking to adopt and enforce the award.

In essence, grounds set out by the Applicant herein are ground upon which it seeks to urge the Court to refuse to adopt and enforce the award. Section 37 of the Arbitration Act provide grounds upon which the Court may refuse to adopt and enforce an arbitral award.

I consider the following to be in issue:

- 1. Whether award by the Arbitrator relied on contents of brochure marketing Jadala Place which were not incorporated in the lease agreement. Whether the Arbitrator considered matters beyond the scope of reference/Whether, suitability of space 1 & 2 leased by the Respondent was dispute contemplated or falling within the terms of reference.*
- 2. Whether award is against public policy.*

Section 10 of Arbitration Act allows Court to intervene in Arbitration matters only in in instances provided by the statute.

Section 35 of the Arbitration Act Kenya provide grounds upon which an arbitral award may be challenged in the High Court.

In the instant case, the Applicant has cited two grounds; one being that the arbitral tribunal acted beyond scope. That the Arbitrator in making his decision went beyond the term as of reference agreed by the parties herein.

The Applicant's contention is that the Arbitrator relied on information on the brochures used while advertising Jadala Place instead of confining his decision to the agreement of the parties herein.

The second ground is that the award is contrary to public policy of Kenya; that it denies the Applicant constitutional right to use and let property while allowing the Respondent to retain Kshs. 51,523,620 paid for the property.

The Arbitration Act gives autonomy to parties to agree on what matters to refer to arbitral tribunal for determination. The role of the Arbitrator will be to determine matters within scope of reference as agreed by the parties.

It is therefore the duty of the Arbitrator to make determination on disputes referred which fall within the contract of the parties.

If a doubt arises as concern jurisdiction doubt, Section 17 of the Arbitration Act gives the Arbitral Tribunal powers to determine their jurisdiction. If parties are not satisfied with the Arbitrator's decision, they have a right to challenge in the High Court either before or after final determination of the dispute.

On perusal of the lease agreement between the parties herein, I note that under Clause 5.2 parties herein agreed to refer all disputes and questions that may arise touching on the lease or the application or application thereof of any clause or things contained or to the rights or liabilities of any party under the lease to decision of a single Arbitrator to be appointed by the Chairman of Law Society of Kenya.

It is evident that a dispute arose concerning use of the 2 spaces that were leased to the Applicant herein.

Clause 2.10 of the lease agreement provide for limitation of use of the premises. It provide as follows:

“not to use or permit use of the premises for any purpose other than as offices and not for any purposes or any manner which may at any time be or become a nuisance or annoyance to owners or occupiers of any offices/showrooms or retail outlets in the premises or to be injurious or detrimental to the reputation of the premises...”

The Applicant has indicated that the Arbitrator has based his decision on what was stated in the brochure advertising Jadala Place. From my reading of clause 2.10, it is evident that the lease clearly gave limitation on use of the space leased. It is not therefore correct to say that the Arbitrator relied on what was indicated in the brochure; on the contrary, the determination is based on terms of the lease executed by the parties herein.

The Applicant has not disputed executing the lease agreement, which gives conditions for use of property. By executing the lease, the Applicant agreed to comply with requirement of use of the space as offices/showrooms and not to use it in a manner, which results in causing annoyance to the other occupants.

It is not disputed that the Applicant intended to have the space used as supermarket. That does not fall within the description of use indicated in clause 2.10 of the lease agreement.

It has also come out clearly that use of space as supermarket may cause double parking, which would occasion annoyance to other occupants of the premises contrary to provision of clause 2.10 of the lease agreement.

From the foregoing, I find that the Arbitrator made a determination within the scope of the contract and on terms of reference to him.

I now wish to consider whether the award go against public policy?

Public policy was defined by Court in the case of **Glencore Grain Limited Vs TSS Grain Millers Limited (2002) eKLR 606** as follows:-

“A contract or Arbitral award will be against public policy in my view, if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenya society...against public policy would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.”

The Applicant argued that after making huge payments of Kshs. 51,523,620, it has been denied the right to lease the property for use as a supermarket on the ground that it will affect use of premises by the occupants running businesses, which include fashion designer, dental surgeon and insurance firm.

The Applicant contend that by allowing the Respondent to keep the purchase price while denying the Applicant the right to use the premises, the award is manifestly unjust and against public policy of Kenya. That the award inhibits the Applicant from using the property for the remainder of 999 years.

From averments and documents attached, it is evident that the Applicant has not been denied use of the space for activities indicated in the lease agreement. At the time of making the said payments, the Applicant knew the kind of use he agreed to.

The Applicant has failed to comply with agreed terms. It is not therefore correct to say that the Applicant has been denied use of space; on the contrary, the Applicant was acting against terms of the contract. The use of the space leased to the Applicant was controlled as per the agreement for the benefit of other occupants. This was clearly consented to by Applicant. I do not see any illegality in the terms of the contract nor in the Respondent's steps to ensure compliance with the said terms.

The Arbitrators decision cannot therefore be unjust, unfair, illegal or immoral. The Applicant has failed to demonstrate how the award is against public policy.

From the foregoing, I find that the Applicant has failed to demonstrate that there are sufficient grounds to set aside the award herein. No reason has been advanced to warrant refusal to to adopt and enforce the award herein.

FINAL ORDER

1. **Kibuwa Leasing & Management Limited** application dated 15th May, 2017 is hereby dismissed.
2. **Jadala Investment Limited & Ngong Lane Management Limited** application dated 11th September 2018 is hereby allowed.
3. That the Arbitral Award by Collins Namachanja dated 14th December 2016 is hereby adopted as the judgment of this Court. The award to be enforced as the judgment of the Court.
4. Costs to the Respondents Jadala Investment Limited & Ngong Lane Management Limited.

Ruling, Delivered, Dated and Signed at Nairobi this 1st day of November, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

Jasmine: **COURT ASSISTANT**

Kamau H/B for Okulo: **COUNSEL FOR 1ST & 2ND RESPONDENTS**

Makumbo H/B for Ojiambo: **COUNSEL FOR APPLICANT**