



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 320 OF 2016

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

ISABELLA NYAGUTHII WANJOHI.....2ND APPLICANT

GUMBA INVESTMENTS LIMITED.....3RD APPLICANT

VERSUS

ACORN PROPERTIES LIMITED.....RESPONDENT

RULING

[1] The three Applicants moved the Court under **Section 35(1)** and **35(2)(a)(iv)** of the **Arbitration Act**, and **Rules 3, 4** and **7** of the **Arbitration Rules, 1997** for the following orders:

[a] spent

[b] spent

[c] That the Court be pleased to set aside the arbitral award made by **Eng. Paul T. Gichuhi** on **27 May 2016** in the arbitration between **Acorn Properties Ltd** and **Eng. Isaac Gathungu Wanjohi, Isabella Nyaguthii Wanjohi** and **Gumba Investments Ltd**;

[d] That the Court be pleased to order that another arbitration do take place de novo before an Arbitrator other than **Eng. Paul T. Gichuhi**;

[e] That the execution of the said award in [c] above be stayed until further orders of the Court;

[f] spent

[g] That the costs of the application be provided for.

[2] The grounds upon which the application was based are set out at pages 8 to 11 of the Originating Motion thus:

[a] the arbitral award made on **27 May 2016** deals with a dispute not contemplated by or not falling within the terms of reference to the arbitration; and contains decisions on matters beyond the scope of the reference to arbitration within the meaning of **Section 35(2)(a)(iv)** of the **Arbitration Act**;

[b] That the arbitrator deduced a written agreement from the submissions of the Respondent herein and its Statement of Claim whose effect was to re-write the agreement dated **1 August 2009** and thereafter apply the same to the parties;

[c] The arbitration purported to award the Respondent herein a relief not provided for in the said agreement, thereby going outside the scope of the arbitration agreement;

[d] the arbitrator purported to introduce a measure of remuneration which was not provided for in the contract and contradicted himself as to what the dispute was between the parties;

[e] the arbitrator purported to make to the Respondent herein an award of *quantum meruit* which had not been specifically pleaded for contrary to the rule in **Provincial Insurance Company of East Africa vs. Nandwa [1995-1998] 2 EACA 288**;

[f] the arbitrator made a mistake of fact by misinterpreting the terms of Schedule VI to mean that it was to be added to; contrary to the rule of interpretation of contracts;

[g] That according to the contract which the arbitrator made for the parties, the Respondent herein did not need to satisfy a condition precedent set out in Rule 1 of Schedule VI of the Developer Management Agreement;

[h] That unless the stay sought is granted, the Applicants will suffer substantial loss; granted that they were ordered to pay **Kshs. 75,553,177** within 45 days, with a penalty interest of 16% per annum.

[3] The application was supported by two affidavits sworn by the 1st Applicant on **27 June 2016** and **26 August 2016** in which it was deponed that the 3rd Applicant is the owner of the property known as **LR 209/10194** in Nairobi West, which the Applicants decided to develop; and that to that end they entered into two agreements both dated **1 August 2009** with the Respondent for the development of the property, and with the Respondent's sister company, **Acorn Management Limited**, for the management of the said property. It was deponed by the 1st Applicant that Schedule VI of the Developer Management Agreement (the Agreement) described the way in which the Respondent would earn remuneration for the services it rendered in connection with the property development, whose completion is said to have taken place on **30 November 2012**.

[4] It was further the contention of the Applicants that, according to Clauses 1, 2 and 5 of Schedule VI of the Agreement, the Respondent was to let the premises to tenants for a period of one year, during which it would be ascertained as to whether or not it earned the remuneration provided for under that Schedule; and that the period of one year ended on **30 November 2013**. Consequently, on **16 December 2013**, the Respondent, which claimed it had satisfied conditions precedent to enable it earn its remuneration, submitted to the Applicants an invoice in which it claimed to be entitled to remuneration in kind in the form of legal transfer of units generating a rental income equivalent to **Kshs. 80,543,177**. The Applicants denied the claim, contending that remuneration had not been earned as provided for in Schedule VI. Thus, in consequence of the disagreement, attempts were unsuccessfully made by the parties at mediation; whereupon the matter was referred to **Eng. Paul T. Gichuhi**, who was appointed by the Chairman of the Chartered Institute of Arbitrators on **2 September 2014**, for arbitration pursuant to **Clause 13.4** of the Agreement, which reads:

"If the dispute has not been settled pursuant to the mediation within (21) days from when the mediation was instituted, upon filing of a Request for Arbitration by any one party, it shall be referred to and finally determined by arbitration in accordance with the Kenya Arbitration Act 1995 and the Rules of the Kenya branch of the Chartered Institute of Arbitrators which

Rules are deemed to be incorporated by reference to this clause."

[5] The Arbitrator convened the preliminary meeting on **3 October 2014** for the purpose of setting the timelines for the filing of pleadings . Thereafter, upon hearing the parties and their Counsel, the Arbitrator, made his award on **27 May 2016** in the following terms:

[a] The Claimants claim against the Respondent of **Kshs. 80,543,177** is payable in the amount of **Kshs. 80,543,177** exclusive of 16% VAT which should be paid to KRA;

[b] The Claimants claim against the Respondent of **Kshs. 26,322,703** is not payable;

[c] The Respondents claim by Counterclaim of **Kshs. 200,186,108** is payable in the reduced amount of **Kshs. 4,940,000**;

[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] Each party shall pay its own Arbitration Costs;

[f] Parties to share equally the Arbitral Tribunal's fees of **Kshs.3,627,210**;

[g] The Arbitral Tribunal's fees does not include VAT and this should be paid directly to KRA.

[6] The award has been faulted by the Applicants on the grounds that the Arbitrator rejected the contract which the parties made for themselves and purported to make another contract which in his judgment, expresses their commercial intention; and that in consequence thereof, the Arbitrator granted a remedy which is neither provided for in the Arbitration Agreement, nor in the Claimant's Memorandum of Claim. It was further averred that the **Kshs. 75,553,177** that was awarded to the Respondent by the Arbitrator was not computed in the manner provided for by **Clause 5 of Schedule VI** of the Agreement. It was further averred by the Applicants that, in contravention of **Schedule VI, Clause 4**, the Arbitrator purported to award the Respondent a relief not provided for in their agreement by making an award for the remuneration in cash and not in kind as was contemplated by the Agreement, hence the instant application.

[7] In response to the application, the Respondent relied on the Replying Affidavit sworn by its Chief Operations Officer and director, **Mr. Peter Njenga**, on the **22 July 2016**. While it was conceded by the Respondent that the Arbitrator, **Eng. Paul T. Gachuhi** published an Arbitral Award on **27 May 2016** awarding the Respondent herein the sum of **Kshs. 75,553,177**, it was its contention that the Arbitrator interrogated the evidence placed before him and applied the law and legal principles pertinent to the facts presented by the parties in coming to the conclusion he made.

[8] It was averred by the Respondent that the parties filed separate lists of issues for determination before the Arbitrator, one of which was, what constituted the Developers' Remuneration in terms of **Schedule VI** of the Agreement; and therefore that the Arbitrator was invited by the Respondent to interpret **Schedule VI** of the Agreement on remuneration. It was further contended that the parties made extensive submissions on the canons of interpretation of contract with particular reference to **Schedule VI** of the Agreement. It was thus the averment of the Respondent that, from the diametrically opposed standpoints taken by the parties regarding the construction of **Schedule VI** of the Agreement, it behooved the Arbitrator to determine whether the parties' interpretation of the said clause was reasonable and commercially sensible.

[9] It was further averred by the Respondent that the Arbitrator's determination that the Applicant's interpretation did not make commercial sense, was well within the terms and scope of reference to arbitration, granted that in the Respondent's Statement of Claim filed with the Arbitrator, one of the

prayers sought against the Applicants jointly and severally was for Special Damages arising from the breach of the Agreement as follows:

"Remuneration in kind in the form of legal transfer of units generating a rental income equivalent to Kshs. 80,543,177 subject to valuation report on the value of the units based on the rental income."

[10] It was further the contention of the Respondent that, the Arbitrator's findings of fact are final and cannot be interfered with by the Court; and that, if anything, the Arbitrator's order of payment in cash rather than '**in kind**' is an irregularity capable of being remedied by remission of that aspect of the Arbitral Award to the Arbitrator for reconsideration; and that such remission is unlikely to cause any injustice whatsoever to the Applicants. Thus, the Respondent posited that the instant application for stay and setting aside award is misconceived and ought to be dismissed with costs.

[11] The Applicants, vide their second affidavit filed on **29 August 2016**, responded to the Respondent's averments aforesaid and urged the Court to note the admission by the Respondent that the Arbitrator's award went beyond the terms of reference; as well as their proposal for remission of the award for the purpose of correction. The Applicants reiterated their stance that the award be set aside as no arbitrator or court is allowed to grant relief which was not prayed for and which was unavailable on the basis of the contract between the parties. It was further deposed by the Applicants that, instead of interpreting the Agreement of the parties, the Arbitrator chose to make what he deemed to be a "better" contract for them. The 1st Applicant urged that the objective of a just, expeditious and economical procedure described by the Respondent in paragraph 20 of the Replying Affidavit cannot be achieved in disregard of the clear provisions of **Section 35(2)(a)(iv)** of the **Arbitration Act**; and that this is a situation that calls for the setting aside of the award, which in their view is an illegal award.

[12] It is now trite that whenever parties expressly agree to submit to the arbitral process, it is intended that the award would be final and binding on the parties; for by dint of **Section 10** of the Arbitration Act, the Court is precluded from interposing in the arbitral process in any other manner except as provided by the Act and the rules made thereunder. In **Anne Mumbi Hinga vs Victoria Njoki Gathaara [2009] eKLR**, the aforesaid provision was underscored as follows by the Court of Appeal:

"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."

[13] And in **Nyutu Agrovat 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 inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."

[14] Accordingly, **Section 35 (1) and (2) (a) (iv) of the Arbitration Act**, pursuant to which the Applicants have approached the Court, provides as follows:

"(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if-

(a) the party making the application furnishes proof-

(iv) that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;"

In the premises, there being no dispute that the application does fall within the strictures of **Section 35** of the Arbitration Act aforesaid, the questions that arise for determination are:

1) Whether the Arbitral Award herein dealt with a dispute not contemplated by or falling within the terms of the Reference;

2) Whether the Arbitrator granted a relief that was not envisaged by the Agreement and therefore not specifically pleaded before him.

[15] I have carefully considered the application, the affidavits filed in respect thereof as well as the submissions made herein by learned Counsel for the parties. In support of the application, Counsel for the Applicants, **Dr. Kamau Kuria, SC**, submitted that proof that the Arbitrator went beyond the scope of the reference is to be found, *inter alia*, in **paragraph 120** of the Arbitral Award in which the Arbitrator stated as follows:

"I too find that there no commercial sense in working for over three years, using all manner of resources so as to take a gamble that at the end you will get tenants (ghosts at the time of the contract) who will pay enough rent for you to make a profit and then you get some remuneration. That is not commercial sense, is an idler's gamble!"

[16] A perusal of the Respondent's Statement of Claim attached to the Applicant's application at **pages 107-121** of Volume I of the Bundle of Documents shows that the subject matter before the Arbitral Tribunal entailed the interpretation of the Agreement in so far as the Respondent alleged breach thereof. The Respondent's allegations of breach of the remuneration provisions are set out at **pages 118 -120** of the Applicants' Bundle, and in paragraph 53 thereof it was pleaded thus by the Respondent:

"In light of the above, the Claimant states that it issued an invoice dated 1st November 2013 requesting for the payment of a sum of Kshs. 80,543,177(exclusive of VAT) as Claimant's remuneration in accordance with the Agreement."

[17] References to **Schedule VI** are made in the Statement of Claim, and in particular at paragraphs 57, 58 and 59 on **page 120** of Volume I of the Applicants' Bundle; and the same is the subject of prayer (a) at **page 120** of the Statement of Claim. In view of the foregoing therefore, I have no hesitation in holding that the Award was well within the scope of the reference in so far as remuneration of the Respondent herein was concerned. I would thus agree with the expressions of the Court in **Kenya Tea Development Agency Ltd & Others vs. Savings Tea Brokers Ltd [2015] eKLR** that:

"...the jurisdiction of the Arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether a claim is based on tort was contemplated by the agreement or falls within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract..."

And going by the subject matter and the outcome of the Arbitrator's award, it is easy to see that the Arbitrator was well within its mandate.

[18] It was further the contention of the Applicants that the Arbitrator ignored the fact that **Clause 3 of Schedule VI** of the Agreement clearly expressed the parties agreement that the Developer's Remuneration was success-based and was therefore a profit sharing arrangement. It was the argument of Counsel that in so finding, the Arbitrator effectively re-wrote the Agreement for the parties by purporting to introduce a measure of remuneration, in **paragraphs 142, 143 and 144** of the Award, which was not provided for in the contract under the guise of the concept of "success" or "completion" of the project, irrespective of the quality of that development. The Applicants proceeded to fault the Arbitrator's interpretation of the terms aforementioned as is evidenced *inter alia*, by the averments at **paragraphs 8, 9, 10 and 11** of the Supporting Affidavit and **paragraph 10** of the Further Affidavit; which averments were reiterated by their Counsel at **page 15** of their written submissions as follows at paragraph 15(c):

"At paragraph 91 at page 28 of the ruling, the Arbitrator again admits that the interpretation of Clause 2 of Schedule VI of the Agreement was the source of the dispute as each party attributed different interpretations to its meaning resulting in two different interpretations and at paragraph 127 of the Award, the Arbitrator wrongly interpreted that to mean that the Respondent herein was to work hard to get tenants and get a project yield of more than 15% so as to get something to add to the base remuneration..."

[19] Quite a bit of effort was thus understandably applied towards explaining the canons of interpretation that ought to have guided the Arbitrator in interpreting the provisions of **Schedule VI**; which matter was evidently dealt with at length before the Arbitrator. It appears then that what the Court is being asked to do is to sit on appeal on the decision of the Arbitrator as to its correctness or propriety, and in particular, his interpretation of **Schedule VI** of the Agreement. In this regard, the Court of Appeal rendered itself thus in the Nyutu Agrovet Case:

"I will start with whether an appeal lies under Section 35 of the Act. I hold the view that there is no right of appeal under that section ... a right of appeal must be conferred by statute. It cannot be inferred for the only reason that it has not been expressly denied...the history of the law of arbitration I have given above clearly shows why no right of appeal was meant to be inferred from Section 35 of the Act - the concept of finality and certainty in the arbitral process as envisaged by the UNCITRAL model ... Moreover Section 35 does not exist in isolation and must be read together with Section 10..."

[20] Indeed, in his written submissions filed herein on **29 August 2016**, Counsel for the Applicants reinforced the foregoing position at page 11 thereof and summarized the principles laid in the Nyutu Agrovet Case as hereunder:

"This was a decision of a five judge bench in which they unanimously laid out the following principles:

An arbitral award is final and binding on the parties; the intervention of the Court as regards an award delivered by an arbitral tribunal is limited strictly to the grounds set out in Section 35 of the Arbitration Act and no more; the authority of the court in dealing with an application under Section 35 does not confer upon it an appellate jurisdiction meaning that the court is not entitled to review the decision of the arbitrators for the purpose of substituting its own view or conclusions with that of the arbitral tribunal. The Court will respect the fact that the parties opted to go for an arbitral tribunal instead of going to court and therefore except for the grounds set out in Section 35, it will not interfere with an arbitral award even if the court itself, on the facts proven, might have reached a different conclusion; that our Arbitration Act is in keeping with the UNCITRAL Model Law to which Kenya is a signatory and so in keeping with its international obligations, it must uphold, respect and enforce the arbitral process; that the intervention of the court must be in furtherance, and not in hindrance of the arbitral process..."

[21] I am thus of the considered view that the Award was squarely within the terms of the reference, and that it was within the mandate of the Arbitrator to interpret the Agreement in a manner which made it

More effective and commercially sensible. I would thus entirely endorse the position taken by **Ogola, J.** in this regard in the case of **Equity Bank Limited vs Adopt-A-Light Limited [2014]** in the following words:

"...an Arbitrator sitting as a Tribunal has the authority to interpret contractual documents. The law must give them enough latitude to interpret those documents in a manner which makes them more effective, without re-writing the contracts. This court will accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties...In order to succeed ... the Applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute..."

[22] Additionally, I am of the firm conviction that it is not within the jurisdiction of this Court to review the decision of the Arbitrator as to its soundness or propriety; and would in this respect endorse the reasoning of **Ransley, J.** in **Mahican Investments Limited and 3 others vs Giovanni Gaida & 79 Others [2005] eKLR** that:

"A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

I would therefore resolve the first issue in favour of the Respondents.

[23] As to whether the Arbitrator was within his remit in making a cash award when the Agreement provided for remuneration in kind, the parties were in agreement that their Agreement provided for payment in kind. In particular, **Clause 4 of Schedule VI** of the Agreement provide thus:

"The Developer shall be remunerated "in kind" rather than "in cash". The "in kind" consideration shall be in the form of units generating a rental income equivalent to the Developers remuneration when capitalized at the agreed rate illustrated above. In determining the units to be transferred to the Developer, the Parties shall be fair and reasonable in order to achieve equitable distribution; however it is hereby agreed that the units shall be contiguous to each other within their various classifications."

[24] It is noteworthy, however, that in its Statement of Claim, the Respondent's prayers were set out as hereunder:

a) Special damages arising from the breach of the Agreement as follows;

i. Remuneration 'in kind' in the form of legal transfer of units generating a rental income equivalent to **Kshs. 80,543,177.00** subject to valuation report on the value of the units based on rental income;

ii. In the alternative, payment of the sum of **Kshs. 94,430,085.32** (inclusive of VAT) in cash;

iii. Remuneration 'in kind' in the form of legal transfer of units generating a rental income equivalent to **Kshs. 26,322,703.00** being compensation for the loss of additional remuneration which would have accrued to the Claimant at a 100% rental, subject to valuation report on the value of the units based on the rental income;

iv. In the alternative, payment of the sum of **Kshs. 26,322,703.00** (exclusive of VAT) in cash;

b) Interest at the rate of 20% on (ii) and (iv) above to be calculated from the date of the breach;

c) Costs of this Arbitration.

[25] It is noteworthy from the foregoing that the Reference invited the Arbitral Tribunal to make a cash award in the alternative; and according to the Respondent's Statement of Claim, the alternative prayers for payment in cash were premised on **paragraphs 52 and 53**; the handwritten note marked **Annexure 28**, and the Invoice at **page 391 of Vol. 1** of the Applicant's Bundle of Documents. To the extent therefore that the Respondent made an explicit claim for a cash award in the alternative, it cannot be denied that the Arbitrator was thereby empowered to consider and if deemed apt, award that alternative relief. It is instructive that, at **paragraph 42** of the Applicant's Amended Reply to the Statement of Claim and Counter-claim, it was conceded that they had made an offer to pay the remuneration in cash but that the same was not accepted by the Claimant/Respondent. Moreover, the purport of **Clause 4 of Schedule VI** is that the cash value of the rental income would have to be determined in any event, granted that the transfer of the units thereunder would be premised on such a determination. Accordingly, it cannot be said that the award was in respect of relief that was not contemplated by the Agreement or the reference.

[26] In the result, it is my finding that the Applicants have failed to demonstrate that they are entitled to the orders sought. Accordingly, I would dismiss the Originating Notice of Motion dated **27 June 2016** with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2017

OLGA SEWE

JUDGE