



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. MISCELLANEOUS CASE NO. 306 OF 2014**

**MONICA AKINYI SEWE MACHANI.....APPLICANT**

**VERSUS**

**KIZITO CHARLES MACHANI..... RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 26<sup>th</sup> August 2015 in which the Applicant seeks for an order reviewing the ruling delivered by this court on 17<sup>th</sup> August 2015 (hereinafter referred to as the “Ruling”) by considering the Applicant’s attachment “MASM1” in the Applicant’s Further Affidavit dated 2<sup>nd</sup> February 2015 (hereinafter referred to as the “Further Affidavit”) which clearly sets out the terms of reference of the arbitration as per the Statement of Claim therein attached and the same be accepted as evidence before this court.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Wangui Kathryn Kimani, sworn on 26<sup>th</sup> August 2015 in which she averred that she is an advocate of the High Court of Kenya with the conduct of this matter. She averred that this matter was heard by way of written submissions culminating in the Ruling and that the issues raised herein are purely law in nature. She averred further that an application for objection of the arbitral award was never filed in this suit as per Rule 2 of the Arbitration Rules and further that no such application was served on the Arbitrator in accordance with **Rule 7 of the Arbitration Rules**. She further averred that the review sought by the Applicant does not introduce new matters but raises a fundamental application of the law as regards pleadings and prayers as sought by the Applicant. She stated that the Ruling failed to consider the timeline for filing an objection to the arbitral award as stipulated in **section 35(3) of the Arbitration Act**. She further averred that the Ruling failed to consider the Statement of Claim forming part of “MASM1” of the Further Affidavit which outlined in clear terms the dispute referred to arbitration. She added that the terms of reference are clearly set out in the Statement of Claim and the court should review its decision and grant the Applicant the prayers sought in this Application. She annexed a brief statement marked “MASM2” and titled “Arbitration” and stated that it is similar to the Statement of Claim annexed to the Further Affidavit and sought for the same to be admitted into evidence and a review of the Ruling be made.

The Application is not contested. Despite being duly served with this Application, the Respondent did not attend court or file any response thereto.

The issue that I am called upon to determine in this Application is whether or not to review the Ruling after considering the annexure marked as “MASM1” attached to the Further Affidavit which the Applicant contends contains the terms of reference of the arbitration by Mr. Mangerere. The applicable law is to be found in **Section 80** of the **Civil Procedure Act** which provides as follows:

*“Any person who considers himself aggrieved-*

- a. *By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
- b. *By a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

It is also to be found in **Order 45 rule 1(1)** of the **Civil Procedure Rules, 2010** which provides as follows:

*“Any person considering himself aggrieved by ... an order ... but from which no appeal has been preferred and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the ... order, may apply for a review ... to the court which ... made the order without unreasonable delay.”*

In the Ruling, I made the finding that both the Applicant and the Respondent had agreed that the terms of reference of the arbitration were contained in the document entitled “Ad Hoc Arbitration Agreement” dated 24<sup>th</sup> May 2014. The said document, which I shall hereafter refer to as the Ad Hoc Arbitration Agreement, was signed by both the Applicant and the Respondent. I also found that the Applicant annexed the Ad Hoc Arbitration Agreement but did not annex the letter of reference to arbitration dated 15<sup>th</sup> May 2014 or the “attachment” referred to therein. I found that this notwithstanding, the Respondent did annex a copy of the letter of 15<sup>th</sup> May 2014 to his Replying Affidavit which was to the following effect:

**“The purpose of this letter is, on behalf of Mr. K.C. Machani and on my own behalf, to appoint you as sole arbitrator to arbitrate on our dispute with finality.**

**Attached is the scope of our dispute, in the form of a brief statement.**

**I shall be most grateful if you would kindly get back to us with the terms, modalities and timelines in respect of the dispute.”**

My main finding in the Ruling was that neither the Applicant nor the Respondent annexed the “attachment” referred to in the Ad Hoc Arbitration Agreement. I found that in the absence of that “attachment”, a simple reading of the Ad Hoc Arbitration Agreement and the letter of 15<sup>th</sup> May 2014 failed to set out clearly the terms of reference of the arbitration. I further found that in her responses, the Applicant failed to address the issue of the missing “attachment”. I concluded that in the circumstances, the terms of reference of the arbitration are unknown and to assert that the issue of the sale of the suit property was one of the terms of reference placed before Mr. James Mangerere was incorrect as this issue was clearly not a term of reference of the arbitration.

In this Application, the Applicant now seeks for me to consider the undated document entitled “Statement of Claim” attached to the Further Affidavit claiming that this is the missing attachment which I referred to in the Ruling. The Applicant wants me to admit it as evidence herein and to find that that Statement of Claim contains the terms of reference of the arbitration and included the issue of the sale of the suit property which the arbitrator, Mr. Mangerere allowed in the Arbitral Award. Is the missing attachment

the “Statement of Claim” annexed to the Further Affidavit? In making this determination, the input of the Respondent would have been very critical in assessing whether or not it is. Unfortunately, the Respondent made no response to this Application. That leaves me only with the assertion by the Applicant that this indeed was the missing attachment. The said Statement of Claim is not dated or signed but it bears a stamp of receipt by the arbitrator Mr. Mangerere in May 2014. The Statement of Claim refers to arbitration between the Applicant and the Respondent and sets down as one of the prayers sought being consent to dispose the suit property. In the absence of any controverting evidence, I find that the Statement of Claim formed part of the terms of reference of the arbitration concluded by the arbitrator, Mr. Mangerere and that his arbitral award, permitting the sale of the suit property, is valid. Accordingly, I hereby adopt the arbitral award as an order of this court.

The Ruling is therefore reviewed on these terms.

It is so ordered.

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH 2016.**

**MARY M. GITUMBI**

**JUDGE**