



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO. 49 OF 2018

ENSI INVESTMENTS LIMITED.....APPLICANT

VERSUS

- 1. VINYA WA AKA GROUP**
- 2. VINYA WA AKA INVESTMENT COMPANY LTD**
- 3. JANE WANZA MUTINDA**
- 4. JOYCE NTHENYA KIITI**
- 5. NDUNGE KIITI**
- 6. RHODA MUENI MUSYOKA**
- 7. FLORENCE NTHAMBI MUTHUSI**
- 8. DOLLY WANZA KIVUVANA**
- 9. RUTHY KAMENGELE WAKI**
- 10. LOIS MUTANYA WAMBUA**
- 11. FLORENCE MWKALI KIITI**
- 12. ALICE MANG'ELI MBINDU**
- 13. FLORA NDUKU MUTISO**
- 14. RUTH NDANU GICHOHI**
- 15. DORIS MUTINDI KIOKO**
- 16. CHRISTINE M. WASANGA**
- 17. ANCHOR BUILDING TECHNOLOGIES LTD**
- 18. APEX HOLDINGS LIMITED**
- 19. NAMAKAO CAPITAL LIMITED.....RESPONDENTS**

RULING

1. The Applicant was aggrieved by portions of the award and elected to file this application pursuant to Section 35 of the Arbitration Act.

The Applicant contended that the Arbitrator misconducted himself by failing to deal with all the issues submitted by the parties and in particular the issues framed on 2/4/2014. It faulted the Arbitrator firstly, for framing his own issues and added that he misconducted himself by determining matters which were not submitted to him including the determination in order (d) of Kshs. 500,000/= per plot yet the consideration was set out in the individual agreements. Secondly, that the determination he made of Kshs. 27,300/= per plot for professional fees was erroneous since the members had agreed at the meeting held on 3/9/2011 on the legal fees, stamp duty and survey fees leaving out other consultants such as the engineers and quantity surveyor. Thirdly, it faulted the Arbitrator for awarding plots to the 3rd to 17th claimants when some of them had outstanding balances and had rejected the plots allotted to them. Fourthly, that the Arbitrator awarded plots under order (g) (i) to the 2nd claimant who had no contractual relationship with the Applicant and who had failed to adduce evidence to justify the award of plot numbers 13918, 13199, 13200, 13201 and 13202 in L.R. No. Mavoko Town Block 3/2359. It also faulted him for awarding plots to the 1st claimant in (g) (i) which it had rejected and had not paid for. Lastly, it faulted the Arbitrator for forming an opinion regarding plot number 13202 in order (g) (ii) of the award which it contended was not supported by any technical evidence.

2. The Applicant further contended that the Arbitrator misconducted himself by making order (g) (iii) which it argued was in conflict with Section 3 (3) of the Law of Contract Act since the 1st Claimant failed to produce two sale agreements to support its claim for the additional four plots awarded by the Arbitrator. Additionally, that there was no evidence to support the declaration by the Arbitrator that the Applicant was the trustee for the claimants. It added that the award was contrary to Article 159(3) (c) of the Constitution and was against public policy. It faulted the Arbitrator for making an award which affects third parties who were not heard in the proceedings. It contended that the arbitral award ignored the surveyors report dated 9/9/2015 which showed that the parcels allocated to the 1st claimant were bigger in size except plot number 13202.

3. Mr. Nyamboki averred that the arbitrator misconducted himself when he dismissed the Applicant's counterclaim yet there was ample evidence on record to support the counterclaim and that as a consequence the Applicant had suffered substantial injustice. Further, that the arbitrator failed to take proper account of the evidence adduced by the Respondents in favour of the Applicant and erroneously decided that 21 days' notice should have been given before clause 7 of the sale agreement could be invoked. Mr. Nyamboki concluded that the overall objective of arbitration to do justice to both parties would not be achieved unless the award was set aside. He added that the award was prejudicial and likely to cause substantial injustice to the Applicant. He attached copies of the claim, defence and counterclaim, reply to defence and defence to the counterclaim, proceedings, submissions and the final award. He also attached a copy of the survey report.

4. Teresiah Mutinda, the Chairperson of the 1st Respondent swore the Replying Affidavit in opposition to the Applicant's motion. She contended that her name was omitted in the application yet she had participated in the arbitral proceeding. The final award excluded her name which was rectified through the correction of the award dated 29/3/2018 after the Respondents raised the issue of the omissions and errors in the award. She averred that the Applicant had failed to mention that it declined to commence arbitration until the Respondents filed **ELC Case No. 366 of 2012** and an order was made from 7/8/2013 for the arbitration proceedings to commence. She produced copies of the claimant's further list of documents which the Applicant left out and which formed part of the evidence and record before the arbitral tribunal.

5. Ms. Mutinda contended that the application had no merit since the grounds set out do not fall under Section 35 of the Arbitration Act. She contended that the Applicant was seeking to appeal against the decision of the Arbitrator by faulting the Arbitrator for his analysis of the evidence that was placed before him. She averred that the Arbitrator dealt with the issues that arose from the pleadings and the proceedings and that there was no set of issues signed by both parties which gave the Arbitrator the leeway and liberty to frame the appropriate issues. She maintained that all the issues on which the parties based their submissions were covered by the Arbitrator in the final award and added that there were no issues that the arbitrator dealt with which were not submitted on the parties. She contended that the Applicant had not identified the issues which were not submitted for arbitration. In her view the award did not affect third parties. She concluded that the principle of finality of an award should apply in this case.

6. Parties filed submissions which the court has considered. The Applicant submitted that the Arbitrator ignored issues number 6, 7, 8, 10 and 11 when he went ahead to frame his own issues and that his conclusion lacked merit. It submitted that in the absence of a determination of the omitted issues the award cannot be said to be final even though it conceded that the Arbitration Act only referred to a final award in relation to determination of proceedings under Section 33 (1) of the Arbitration Act (1995). It relied on Russell on Arbitration, 23rd Edition

at page 272 paragraph 6–004 which defines a final award in the three senses which include that it determines all the issues in arbitration and is a complete decision on the particular aspects to be dealt with subsequently or by a third party.

7. The Applicant contended that issue number 4 was framed as what was the consideration for the agreement for sale. It challenged the Arbitrators finding at order (d) that the entire consideration was Kshs. 500,000/= per plot and Kshs. 50,000/= for membership while asserting that for the 1st Respondent that was the consideration but for the 18th Respondent it was 700,000/= per plot together with membership fee for 50,000/=. For the 17th Respondent it was Kshs. 550,000/= per plot together with the membership fee. The Applicant submitted that issue number 11 was whether the professionals or consultants were engaged with the knowledge and consent of the claimants. This in the Applicant's view did not invite the Arbitrator to determine the fees payable to professionals since no evidence was led in the proceedings as to how much was payable to the consultants. The Applicant contended that the finding that the consultants were engaged since they were necessary in implementing the project and the members were fully aware of this which in their understanding terminated the Arbitrator's mandate once he made that finding. It added that the sum of Kshs. 27,300/= per plot was fixed by the members on 3/9/2011 for lawyers, surveyors and stamp duty. It contended that the Arbitrator misconducted himself when he imposed a figure of Kshs. 27,300/= for professional fees without demonstrating how he arrived at this figure and without being invited to make a finding on the fees payable to the professionals. It contended that the Arbitrator breached Section 29 (5) of the Arbitration Act and that he acted contrary to clause 9 of the sale agreement which required every beneficiary to pay all the expenses on account of the subdivision and transfer.

8. The Applicant contended that the Arbitrator's jurisdiction was limited to the sale agreement yet the Arbitrator dealt with issues which were not referred to him and which were not contemplated by the parties contrary to Section 35 (2) (a) (iv) of the Arbitration Act. The Applicant submitted that the 4th, 5th, 17th and 18th claimants had outstanding balances of Kshs. 122,000, Kshs. 50,000, Kshs. 122,000 and Kshs. 5,000 respectively. The Applicant relied on clause 9 of the agreement and contended that the Arbitrator should have made his determination in accordance with the terms of the sale agreement and taken into account the trade usages applicable to the particular transaction. It faulted the Arbitrator for awarding plots to the 3rd to 17th Respondents when they had not paid the full purchase price and other expenses. It contended that the 2nd Respondent did not enter into any sale agreement with the Applicant and that there was no privity of contract. It faulted the Arbitrator for awarding the 1st Claimant plots in order (g) (i) which it had rejected and not paid for yet the Respondents had sought cancellation of all titles and fresh balloting. It pointed out that the 1st Respondent had an outstanding balance of Kshs. 609,999/= and had not paid professional fees.

9. The Arbitrator was faulted for forming an opinion regarding plot number 13203 under order (g) (ii) which was not supported by any technical evidence. It contended that the Respondents had produced a surveyor's report dated January 2012 in which the surveyor formed the opinion that plot number 13201 was too small for any development. The Applicant contended that order (g) (iii) referred to plot number 13203 as being in the gully which was not the case. The Applicant contended that the Arbitrator referred to a wrong parcel of land and urged that order (g) (iii) was erroneous and should be vacated. The Applicant made reference to the report dated 9/9/2015 prepared by Geosite Systems which stated that all the plots were found to be on good ground except plot number 13203 which had a small gully measuring about 0.009 hectares running through it. The Applicant contended that the award was uncertain and ought to be set aside because it was not clear which between plots 13201 and 13203 the Arbitrator was dealing with. The Applicant added that being a lawyer by profession the Arbitrator did not possess any special knowledge on land matters that would have enabled him conclude that the plot was incapable of any development.

10. The Applicant faulted the Arbitrator for failing to base his final award on the law of contract when he allowed the 1st Respondent's claim for four additional plots yet according to the Applicant it had failed to produce two sale agreements. The Applicant contended that order (g) (iii) which awarded 10 plots to the 1st Respondent was erroneous and unlawful. The Applicant contended that the Arbitrator was influenced by the mere fact that the 1st Respondent had paid for two plots and yet ignored the law of contract which requires a contract to be in writing and to be executed by parties and their witnesses.

11. The Applicant contended that even though the terms 'trustee' and 'beneficiary' were used in the sale agreement, the transaction did not constitute a trust because for a trust to exist there must be an intention to create a trust coupled with a trust deed executed by the parties to the trust. He contended that the Respondents had a duty to lead evidence to show that the parties to the sale agreement intended to create a trust.

12. The Applicant submitted that the Arbitrator failed to deal with its counterclaim in which it set out the particulars of breach of the sale agreement by the Respondents. It contended that it was mandated to identify property for purchase, enter into a sale agreement with the owners and thereafter subdivide the land and cause a transfer to the members. It added that it was to form a management company and develop the common facilities. On their part, the purchasers were required to enter into individual sale agreements with the Applicant, pay the purchase price and membership fees, subscribe to the management company and pay all expenses including legal fees and stamp duty. The Applicant faulted the Arbitrator for making order (e) vide which the stamp duty and registration fees were payable by the Respondents. The Applicant added that during cross examination, Haron Osoro Nyamboki stated that subscription for membership in the management company was Kshs. 1,000/= and the professional fee was Kshs. 60,000/=. The Applicant faulted the Arbitrator for dismissing its counterclaim without first ascertaining whether the Respondents had discharged their obligations under the sale agreements.

13. The Respondents submitted that the concept of finality of an arbitration award was something shared worldwide and that permitting the review of arbitral awards would basically render arbitration a prelude to the cumbersome and time consuming judicial review process. The Respondents submitted that the Applicant entered into an agreement dated 14/7/2009 with Mary Mueni Mulandi for the purchase of Mavoko Town Block 3/2359 measuring 16.18 ha, which agreement was not produced before the Arbitrator. The Respondents maintained that the Applicant purchased the land in trust for them and other purchasers, a fact which the Applicant denied. Upon purchase of the land, the Respondents and other purchasers entered into sale agreements with the Applicant for the sale of plots measuring $\frac{1}{4}$ acre each on diverse dates between 1/10/2009 and 21/12/2010. A dispute arose over the completion of the sale transaction and the matter was referred to arbitration. The Arbitrator rendered his award on 2/2/2018 and corrected it on 29/3/2018. The Respondents contended that each party filed its own issues and added that the Arbitrator was guided by the issues summarised by the parties. The Respondents contended that the Arbitrator reproduced the issues filed by the parties at clause 10 of the award before framing the issues for determination. The Respondents submitted that by ordering the Applicant to transfer the subdivided plots to the Respondents, the Arbitrator determined issues number 6 and 7 as to whether the Applicant was in breach of the sale agreements. The Respondents submitted that the Arbitrator made a determination at page 21 of the award that the claimants had paid the purchase price. On the engagement of the professionals, the Respondents submitted that this was adequately covered under paragraph 13.6 of the award. The Respondents submitted that the Applicant had not pointed out with certainty which issues were never dealt with and what prejudice it had suffered as a result of the alleged omission.

14. The Respondents submitted that the issue of interpretation of the agreement of sale and the completion took center stage in the dispute between the parties and that in determining whether the consideration had been paid and whether a transfer was to be effected to the Respondents, it was necessary for the Arbitrator to determine whether or not professional fees were payable. The Respondents added that by resolving the issue of professional fees, the Arbitrator acted in line with Section 29 (5) of the Arbitration Act which enjoins the arbitral tribunal to decide in accordance with the terms of the contract and take into account the trade usage applicable to the particular transaction. The Applicant relied on the Case of **Mahican Investments Limited v Giovani Gaid and 80 others** which was cited in **Equity Bank Limited v Adopt a Light Limited [2014] eKLR** on the point that to succeed in showing that the matters were outside the scope of the reference to arbitration, an Applicant must show beyond doubt that the Arbitrator went on a frolic of his own and dealt with matters that were not related to the subject matter of the dispute. Further, that a court should not interfere with the arbitration decision even if there is misinterpretation of contract for this will place the court in the position of the Court of Appeal yet the purpose of the Arbitration Act was to bring finality to disputes between parties.

15. The Respondents submitted that the Applicant was inviting the court to interrogate the evidence and find that the Arbitrator was wrong. The Respondents submitted that the arbitral award was not contrary to the law since the 1st Respondent demonstrated that it paid for the portions of land pursuant to the agreement which specified the purchase price per portion of $\frac{1}{4}$ acre. The Respondents contended that it was the role of the Arbitrator to interpret the agreement and not the court. The Arbitrator evaluated the evidence and concluded that a trust relationship existed which they contended was also buttressed by the sale agreement which expressly used the term 'trustee'.

16. On the failure to allow the counterclaim, the Respondents contended that the Applicant was inviting the court to evaluate the evidence and conclude that it had proved its counterclaim. The Respondents contended that the Arbitrator considered all the issues which required determination. They added that failure by an arbitrator to arrive at a particular decision was not a ground for setting aside an award and that the difference in interpretation of the law of facts cannot amount to misconduct of an arbitrator under the Arbitration Act.

17. The Respondents contended that the Applicant had not explained in which manner the award was ambiguous, what procedure was violated and what third parties were affected by the arbitral award. The Respondents concluded that the Applicant had failed to present

evidence of misconduct on the part of the Arbitrator as envisaged by Sections 35 and 37 of the Arbitration Act and was instead seeking an appeal against the decision of the Arbitrator which does not fall within the scope of these two sections. They urged the court to dismiss the application dated 19/3/2018 and award them the costs.

18. The grounds upon which the court may set aside an arbitral award are set out in Section 35 of the Arbitration Act. It would seem from the particulars of misconduct on the part of the Arbitrator listed by the Applicant that the Applicant's claim is premised on Section 35 (2) (a) (iv) and (b) (ii); that the arbitral award dealt with a dispute not contemplated or not falling within the terms of the arbitration; or that the award contained decisions on matters beyond the scope of the reference to arbitration; and that the court ought to find that the arbitral award was in conflict with the public policy of Kenya. The Section adds that if the decisions on matters referred to arbitration can be separated from those not referred, the court may only set aside the part of the arbitral award which contains decisions on matters not referred to arbitration.

19. The background of this dispute is that the Applicant entered into sale agreements with some of the Respondents vide which they were to purchase $\frac{1}{4}$ acre plots to be subdivided from the land known as Mavoko Town Block 3/2359 at the initial consideration of Kshs. 500,000/= and membership fee of Kshs. 50,000/=. The Applicant contended that the consideration was adjusted upwards from time to time with the approval of members. The sale agreements contained arbitration clauses. A dispute arose and the Respondents invoked the arbitration clause following which Mr. Paul Mwaniki Gachoka was appointed the sole Arbitrator. Parties filed their pleadings and the dispute was heard following which they filed their submissions. The Arbitrator published his award in February 2018 which parties collected upon payment of the arbitrator's fees.

20. In a nutshell, the Applicant contends that the Arbitrator misconducted himself when he determined matters that were not submitted to him. The instances it cited included determining the consideration as Kshs. 500,000/= and the professional fees as Kshs. 27,300/=. Further, that the Arbitrator misconducted himself when he awarded plots to the 3rd to 17th Respondents yet some of them had outstanding balances or had rejected the plots the Applicant allotted to them. It also contended that the Applicant had not entered into contracts with some of the claimants who the Arbitrator awarded plots to. The gist of the Applicant's application is that the Respondents were in breach of the terms of the sale agreement and that the award ought not to have been made in the manner the Arbitrator did.

21. Looking at the statement of claim filed by the Respondents before the Arbitrator, they contended that the Applicant acted as their trustee when it purchased the suit land and was registered as the proprietor. The Applicant was to subdivide the land into 152 plots measuring $\frac{1}{4}$ acre each and sell the plots to the Respondents at the consideration of Kshs. 550,000/=. The Respondents claimed that the Applicant breached the terms of the sale agreements when it failed to subdivide and transfer the plots to the Respondents. They faulted the Applicant for incorporating a management company by the name Eldenite Gardens Management Limited; subdividing the land into $\frac{1}{8}$ acre plots instead of $\frac{1}{4}$ acre and unilaterally allocating the Respondents plots which were far from the utilities and infrastructure; alienating the suit land and engaging professionals to undertake the development of the suit land; failure to issue title deeds; and failure to account for the funds paid by the Respondents.

22. The Respondents sought various reliefs including a declaration that the Applicant acted as their trustee; that they were entitled to $\frac{1}{4}$ acre plots under the sale agreements which they wanted the Applicant directed to allocate to each one of them through balloting; an injunction directing the Applicant to provide a statement of account for the payments made by each Respondent; and damages.

23. The Applicant filed its response in which it contended that the Respondents were well aware that the term 'trustee' used in the project did not create a legal trust; that the incorporation of Eldenite Gardens Management Limited was in line with the sale agreements; that the subdivision of the plots into $\frac{1}{8}$ acre plots was done in consultation with the members; that the claimants did not meet the deadline for payment when balloting was to take place on 1/10/2011; that professionals were engaged as required under the law; that the land was subdivided and transferred to paid up members; that the Applicant acted professionally and with probity in utilising the funds raised by the members for the purchase of the suit land; and that the Respondents defaulted and failed to sign the transfer documents. It further contended that it would be against the rules of natural justice for the arbitration to determine issues affecting third parties who were not parties to the arbitral proceedings.

24. The Applicant counterclaimed for damages against the Respondents for the stalling of the project while contending that the Respondents breached the sale agreements and failed to meet the deadlines set. It sought a declaration that the Respondents were in breach of their respective agreements and that it was entitled to retain 10% of the purchase price paid by the Respondents.

25. Looking at the arbitral award, can it be said that it dealt with disputes not contemplated or not falling within the terms of the arbitration? Does it contain decisions on matters beyond the scope of the reference to arbitration? Is the award in conflict with the public policy of Kenya? The court notes from the bundle filed by the Applicant running into 850 pages that parties did not agree on the issues. During the hearing, Mr. Eric Mutua Advocate who appeared for the Respondents summed up 13 issues while mentioning that the Arbitrator had the leeway to condense the issues as he deemed fit since there could be an overlap between some of the issues framed by the parties. The Applicant contended that the Arbitrator did not deal with issues number 6, 7, 8, 10 and 11. These related to whether there was breach of the terms of the sale agreement by the Applicant or the Respondents; whether the project funds contributed by the Respondents were misappropriated by the Applicant; whether the agreements incorporated the component of development of the property and whether the professionals were engaged with the knowledge and consent of the Respondents.

26. The court notes that the Arbitrator determined issues touching on whether the Applicant entered into individual sale contracts with the Respondents; the size of the land that was being purchased by the Respondents; whether the Respondents performed their obligations under the sale agreements; whether the Respondents should claim the consultants' fees; and whether the counterclaim was merited. The Arbitrator went into great lengths to analyse the minutes of the meetings held and found that the Respondents ought to pay the professional fees;

27. The Arbitrator found that since the land had been subdivided, consultants such as lawyers, surveyors, physical planners and NEMA experts must have been involved yet the Applicant had not produced evidence of invoices or payment made to these professionals. He also noted at clause (vi) of paragraph 13.5 that the claimants (who are the Respondents) had paid money over and above the purchase price. In the court's view, the Arbitrator determined all the issues framed by the parties after he condensed those issues and framed them in his own words. The Applicant failed to demonstrate that the Arbitrator determined issues outside the scope of the dispute presented by the parties for arbitration in the Statement of Claim and the Defence and Counterclaim.

28. Apart from challenging the finding of the Arbitrator that the 1st and 2nd Respondents were not entitled to 10 plots, the Applicant failed to demonstrate how the arbitral award was in conflict with the public policy of Kenya. It did not show what written law or provisions of the Constitution the arbitral award contravened.

29. The upshot of this is that the Applicant failed to establish the grounds upon which the court may set aside an arbitral award under Section 35 of the Arbitration Act. The court declines to set aside the arbitral award dated 2/2/2018. The Applicant will pay the costs of the application for setting aside the arbitral award to the Respondents.

Dated and delivered virtually at Nairobi this 20th day of July 2020

K.BOR

JUDGE

In the presence of:-

Mr. V. Owuor- Court Assistant

No appearance for the Applicant and the Respondents