



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI AT MILIMANI
COMMERCIAL, TAX & ADMIRALTY DIVISION
MISC. CIVIL SUIT APPLICATION NO 42 OF 2014

In the Matter of Arbitration Act and a Dispute

BETWEEN

MURITHIWANJAO (t/a Wanjao & Wanjau Advocates).....APPLICANT

AND

DR. SAMUEL MUNDATI GATABAKI.....1ST RESPONDENT

NANCY WANJA GATABAKI.....2ND RESPONDENT

Application to Set Aside Arbitration Award made by Mr. P Mwaniki Gachoka on 6/11/ 2014

DR. SAMUEL MUNDAT GATABAKI.....1ST APPLICANT

NANCY WANJA GATABAKI.....2ND APPLICANT

Versus

MURITHIWANJAO (t/a Wanjao & Wanjau Advocates).....RESPONDENT

RULING

Omnibus application

[1] The application before me is dated 27th June 2014 and carries several prayers. The application prays for the following orders:-

1. **THAT there be a stay of execution of the arbitral award dated 6th November 2013 and the decree given by this Honourable court on 7th March 2014 and all consequential orders thereto pending the hearing and determination of this application.**
2. **THAT the time be extended to the applicants for the setting aside of the arbitral award dated 6th November 2013 to such time as this Honourable court may deem just.**
3. **THAT pursuant to granting of prayer 3 above the judgment herein adopting the award**

together with all the consequential orders and or decree given on 7th March 2014 and the final award dated 6th November 2013 be set aside to the extent of the consideration and or findings and or awards in respect to the following:-

- i. An order to be issued setting aside the arbitration final award of Kenya Shillings Five Million Six Hundred and Ninety Two Thousand Nine Hundred (Kshs 5,692,944/-) inclusive of VAT.
 - ii. An order to be issued setting aside the arbitration final award requiring the applicants to pay the respondent simple interest at court rate of 12% from the time of the date of filing of the High Court suit HCCC No 509 of 2009 until payment in full.
 - iii. An order setting aside the award on costs.
4. The costs of the application be provided for.

[2] It is essentially an omnibus application. See what Ringera J (as he then was) said about Omni-bus applications in the case of **PYARALALMHANDBHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004** that;

“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff’s application incurably defective, and a candidate for striking out.”

Nonetheless, I will determine it on merit. The application is expressed to be made under the aegis of Order 21 Rule 7, Order 22 Rules 22 & 25, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Rules, Rules 6 & 7 of the Arbitration Rules 1997 and Sections 35(1), (2)(a)(iii), (iv), (b)(ii) and 35(3) of the Arbitration Act 1995 and Articles 159 (b) and (c) of the Constitution as well as other enabling provisions of the law.

The Applicants’ gravamen

[3] The application was premised on the grounds that; the award stands to occasion gross injustice to the Applicants; the 2nd Applicant was not given proper notice of the appointment of the arbitrator and as such did not execute the agreement for the appointment of the arbitrator signed on 15th May 2013 and therefore not bound by the terms of the arbitral award. It was contended that the 2nd Respondent was neither made aware of the final award nor notified of the filing of the award for adoption and enforcement by the Respondent and that in any event, there was no delay in the filing of the present application to set aside the arbitral award and consequential orders. According to the Applicants, there is no prejudice that would be occasioned upon the Respondent if the court stays the execution of the arbitral award. Further, it was averred that the Respondent’s legal fees had been fully settled and that the arbitral award amounted double settlement of the debt which was against public policy and contrary to the provisions of the law.

[4] The application was further supported by the affidavit of the 2nd Applicant sworn on 26th June 2014 which reinforces the grounds set out in the application. She averred that the Respondent’s legal fees were to be settled by Suraya Property Ltd, which debt was allegedly settled on diverse dates between 22nd April 2009 and 22nd May 2009. And that, the Respondent firm released the caveat and estopped from further claiming legal fees emanating from and with regards to services rendered in HCCC No 189 of 2009. Moreover, it was deposed that the Respondent misled the arbitrator on filing the claim for legal fees yet the same had been settled, and that the dispute that was to be forwarded to the arbitrator was with regards to the settlement of

the agreed legal fees of Kshs 4,907,710/- and not the claim for Kshs 9,428,927.5/- as per the arbitral award. Therefore, it is only fair and just that the arbitral award made on 6th November 2013 and all consequential orders and or decree made by the honourable court are set aside.

[5] In the submissions dated 10th October 2014, the Applicants posit that the appointment of the arbitrator was based on an invalid agreement; the agreement was contrary to the provisions of Section 46 of the Advocates Act. Further, they urged that the arbitral award was predicated upon the wrong application of terms of the agreement, which nonetheless was valid. This is contrary to public policy. On this exposition, they relied on the case of **Christ for All Nations v Apollo Insurance Co. Ltd (2002) 2 EA 366**. The cases of **Kenya Airways Ltd v Satwant Singh Flora Civil Appeal No 54 of 2005** and **Kenya Oil Co. Ltd v Kenya Petroleum Refineries Limited Civil Appeal No 782 of 2009** were cited in support of a proposition that there was no valid dispute to be referred to arbitration under the agreement dated 15th May 2013. They claimed that since the Respondent had received payment totaling Kshs 9,000,000/- from Suraya Properties Ltd as settlement of the legal fees owing from the Applicants, the award was tantamount to double payment of fees due to the Respondents in HCCC No 189 of 2009. In the interest of justice the award should be set aside and all consequential decree and orders.

The Respondent opposed the application

[6] The Respondent opposed the application as being misconceived, mischievous, bad in law, frivolous and vexatious. It filed Grounds of Opposition dated 9th July 2014 in which it stated that the application was tainted with falsehoods as the 1st Applicant had appeared and testified during the arbitral proceedings. And, therefore, the Applicants are undeserving of any equitable reliefs from this court. It was contended that it was by the Applicants own initiative that the parties agreed to settlement negotiations and further made a proposal for settlement of the settlement agreement as manifested in the agreement dated 15th May 2013. The Respondent reiterated that it would therefore be prejudicial for the court to stay the execution of the decree and or setting aside the same, without the Applicants furnishing any security deposited with the court in settlement of the decretal sum, and that in any event the orders, if any, issued by the court would be in vain as the execution process had already commenced.

[7] The Respondent cited the case of **Mahican Investments Ltd & 3 Others v Giovanni Gaida & 80 Others [2005] eKLR** that the court would not usually interfere with the decision of an arbitrator. They said that the arbitration was necessitated by the failure by the Applicants to comply with the terms of the agreement on fees agreed between the parties and dated 31st October 2004. They made reference to Clause 9 of the aforementioned agreement, and stated further that the issue of violation of Section 46(a) of the Advocates Act was succinctly dealt with by the arbitrator. Having agreed to settle the Respondents fees, it is unkind to later try to claim the agreement was illegal or was not made in good faith. On this proposition, they relied on the case of **Eldo City Ltd v Corn Products Limited & Another (2013) eKLR**. They also cited the case of **Transwood Safaris Ltd Eagle Aviation Ltd & 3 Others HC Misc. Application No 238 of 2003** in support of the argument that the Respondent were fully aware of the arbitral award and that for all intents and purposes the same was communicated to them in accordance with Section 9 of the Arbitration Act.

DETERMINATION

[8] I have considered the application and carefully perused the pleadings filed by parties. The following issues arise for determination;

(a) **Whether I should enlarge time for the Applicants to file an application under section 35 of the Arbitration Act**

(b) **Whether the 2nd Applicant was at all times aware of the arbitration and**

the final arbitral award; and

(c) Whether the application to stay and/or set aside the arbitral award is meritorious.

As for the 1st Applicant

[9] This application, however, presents some unique facts. There are two applicants; 1st and 2nd Applicant who are spouses-husband and wife respectively. The 1st Applicant participated in the entire process of the arbitral proceedings as well as the recognition and enforcement of the award thereto; from the appointment of the arbitrator, during the arbitral proceedings to the recognition and enforcement of the award. He received the award and through his lawyer Mr. Okello he consented to its adoption and enforcement. I have considered the affidavit of the 1st Plaintiff sworn on 6th October 2014 as well as the submissions by counsel in respect of the 1st Applicant. Needless to say that, the law availed the 1st Applicant the benefit of section 35 and section 37 to apply for the setting aside of the award but he consented to its adoption and enforcement on 7th March 2014 without any reservation. Therefore, in respect of the 1st Applicant, the question of enlarging time or staying or setting the award or staying execution of the decree arising from the award does not arise. The decree herein, in so far as it relates to the 1st Applicant is perfect and executable against him. That distinction should be made while I deal with the request by the 2nd Defendant.

As for the 2nd Applicant

[10] Given the way the application before me has been styled, I must deal with all the three issues I have formulated above together as they are inextricable. I must decide whether I should enlarge time, and if so, whether I should set aside the award herein on the basis of the grounds argued before me. The 2nd Applicant in her affidavit contended that; she had not agreed to the agreement appointing the arbitrator; she was not present or made aware of the arbitral proceedings and hearing; she was not aware of the final arbitral award; and she is therefore not bound by its terms. She urged further that the agreement dated 31st October 2004 contravened section 46 of the Advocates Act and therefore the award was contrary to public policy of Kenya. One thing should be dispelled quickly here. The 2nd Applicant signed the agreement dated 31st October 2004 (marked as "NWG-2"). The arbitration agreement was contained in the said agreement. She was bound by it. In any event, the invalidity of the contract may not necessarily invalidate the arbitration clause contained therein as the law treats the arbitration clause to be independent of the other terms of the contract. See section 17 of the Arbitration Act on this. The original suit number NBIHCCC NO 523 OF 2009 was against the two Applicants and were represented in the matter when the dispute was referred to arbitration by Musinga J (as he then was) on 19th October 2012. The 2nd Applicant has only feigned ignorance of the said suit just conveniently to suit this application. More is yet to come. At Clause 4.1 of the Final Award marked as "NWG-1" at pg. 19 thereof, the 1st Respondent testified on behalf of himself and that of the 2nd Applicant, and therefore any disposition made was on authority of the 2nd Applicant. The 2nd Applicant was therefore, at all times, aware of the arbitral proceedings; a firm of advocates represented the two in the hearings. There is really no merit or truth in stating that she was unaware of all that her husband was doing including testifying on behalf of both Applicants. The 1st Applicant was fully involved in the entire process and received the award. Therefore, no further notice needed to be issued to the 2nd Applicant on the arbitral award. In the circumstances of this case, non-attestation of the document of appointment of the arbitrator by the 2nd Applicant is neither here nor there. No objections were ever raised to the appointment of the arbitrator. In sum, the contention that she was neither aware of any of the arbitral proceedings nor the final arbitral award are convenient averments to delay the enforcement of the decree. The 2nd Applicant neither pleaded that the 1st Applicant did not keep her apprised of the arbitral proceedings, nor the reasons

why the husband had to keep the arbitral proceedings hidden from her when the proceedings entailed payment of money. The 1st Applicant too did not state categorically that he kept the arbitral proceedings hidden from the 2nd Applicant and the reasons for doing so when he knew the proceedings related to an agreement they executed with the 2nd Defendant and may result into liability. For those reasons I reject the arguments being put forth by the 2nd Applicant that she was unaware of the arbitral proceedings.

[11] I should also state here that the agreement dated 31st December 2004 was between the parties in this suit. It was not assigned to Suraya Property Group Limited who the Applicants averred paid the fees that are now subject of these proceedings. The arbitral proceedings which gave rise to the decree herein can only bind the parties to the arbitration agreement. In any case, Suraya Property Group Limited is the only person who can claim on the money it paid to the Respondent. Such claims cannot be dealt with in or act as a ground for an application to set aside an award. I reject the arguments.

[12] Ringera, J (as he then was) in the case of **Christ for All Nations v Apollo Insurance Co. Ltd** (supra), set out explicitly the grounds on which an application to set aside an arbitral award under the provisions of Section 35(2)(b)(ii) of the Arbitration Act in the following manner;

“I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award could be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the with the public policy of Kenya if it was shown that it was either; (a) if it was inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.”

[13] I will also cite the case of **Profilati Italia SrL v PaineWebber Inc (2001) 1 All ER (Comm) 1965, (2001) 1 Lloyd’s Rep 715**, where Moore- Bick J stated that where a party alleges the way in which an award was procured was contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the part of the successful party has contributed in a substantial way to an award being made. In this instance, the Applicants have not shown how either Respondent or the arbitrator acted in any manner that would lead the court to the determination that there was an interference with the final arbitral award. The scope and mandate of the arbitrator is governed by the statement of claim as filed by the Claimant, in this instance the Respondent, and determines the issues as raised in the pleadings. It was the 2nd Applicant’s contention that the arbitrator acted contrary to the terms of reference of the arbitration and that the award was predicated on enforcing an illegal and invalid contract. In **Mustill & Boyd’s Commercial Arbitration 2nd Edition at page 641** and **Halsbury’s Laws of England Vol. 11 4th Edition at para 622**, the role and conduct of an arbitrator is clearly set out. See the following excerpt from the aforementioned references that;

“An Arbitrator who acts in manifest disregard of the contracts acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialized branch of law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from the Contract amounts not only a manifest disregard to his authority or misconduct on his part but may be tantamount to a malafide action.”

See also a work of Mustill J in **Bremer vs Ets Soules**[1985]1 Llyod's L.R.160, is apt on this subject of misconduct of an arbitrator. He stated that;

“There are three material situations in which the High Court has power to remove an arbitrator for ‘misconduct’ under section 23 of the Arbitration Act, 1950.

(1) **where it is proved that the arbitrator suffers from what may be called ‘actual bias’. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavorably towards him, for reasons peculiar to that party, or to a group or of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.**

(2) **where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of ‘imputed bias’**

(3) **where the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect.**

[14] The 2nd Applicant has not shown how the arbitrator conducted himself in a manner that was capricious, irrational or independent of the terms of reference under the statement of claim, or under Clause 9 of the agreement marked “NWG-2” dated 31st October 2004. The sole function of the arbitrator is to arbitrate in accordance with the terms of the contract. Therefore, any party basing its application to set aside on reneged functions and obligations by the arbitrator must show there was misconduct on the part of the arbitrator, or the arbitrator acted, omitted or committed certain acts which are contrary to the said function and obligation. Nothing to that end was established here. See **Associated Engineering Co vs. Government of Andhra Pradesh (1991) 4 SCC 93 (AIR 1992 Sc. 232)**.

[15] Courts are always reluctant to interfere with the decision of the arbitrator especially where the application to set aside the award contravenes the Arbitration Act or it does not meet the threshold set out in Section 35 of the Arbitration Act. The application is hopelessly out of time as the award was made on 6th November 2013. There is nothing which would even propel the court to enlarge time to file this application. And when the court does not enlarge time, the other requests fall by the way side. I would have started with the request for enlargement of time. But, that course may have denied the Applicants occasion to have their entire grievances determined on merit. This court is a true believer of substantive justice served only by weighing all the issues on the legal scale and makes a sanctified decision thereon. This application is asking this court to interfere with the arbitral award outside the parameters set in the law. The court is not prepared to go that way. See **Mahican Investments Ltd & 3 others v Giovanni Gaida & 80 Others** (supra) and section 10 of the Arbitration Act which prohibits court's intervention in arbitration except as permitted by the Act. All other intervention other than permitted by law would be interference.

[16] Before I close, I must state that upon recognition of and leave to enforce the award; those proceedings becomes proceedings of this court and are enforceable as such. Any party wishing to stay execution should meet the threshold which recognizes the right of the successful party to the

decree. In view of the findings of the court above stated, nothing would impel the court to stay execution of the decree. I reject that request. I decline to set aside the award and decree. Accordingly, having considered the submissions by the Applicants, the pleadings and the entire circumstances of this case, the application to set aside the arbitral award issued on 6th November 2013 and the decree made by this court on 17th March 2014 is not meritorious. In the premise, I dismiss the application dated 27th June 2014 with costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 4th day of June 2015.

F. GIKONYO

JUDGE