



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC. CAUSE NO.14 OF 2019

IN THE MATTER OF THE ARBITRATION ACT 1995 (AMENDED 2009, 2012) AND THE RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH)

AND

IN THE MATTER OF ARBITRATION

BETWEEN

KENARD LIMITEDAPPLICANT

AND

JULIUS MWANGI KIHARA.....RESPONDENT

RULING

1. The matter concerns the validity of the arbitral award dated **13th August 2019**, in favour of the Applicant, **KENARD LIMITED** against the Respondent, **JULIUS MWANGI KAHARA**. The Applicant is a Limited Liability Company and the proprietor of a parcel of land known **Mitumbiri/Wempa Block 1/6803**, situated in Thika. The Respondent leased the parcel of land from the Applicant through an Agreement of Lease dated **1st May 2010**.
2. Conflict arose between the Applicant and the Respondent on matters concerning overdue rent arrears. The parties had the dispute determined by way of arbitration as provided for in **Clause 7.10.2** of the Agreement to lease.
3. The Sole Arbitrator, **Mr. Charles Kanjama**, awarded the Applicant a total sum of **Ksh. 2,110,000/=** for the unpaid rent arrears against the Respondent on the **13th August 2019**.
4. In a letter dated **15th August 2019**, the Applicant, through their advocates **Meraka & Company Advocates**, requested the Respondent through their advocates **Dola, Magani & Company Advocates** to pay the said sums awarded in the arbitral award and the arbitration costs within 14 days from the date of the Award. The Applicant further requested the Respondent to remove **caveat** on the property **LR. No. Mitumbiri/Wempa/Block 1/6803**.
5. The Applicant vide Chamber Summons dated **4th September 2019**, sought for Orders that the final award be binding and enforceable by the Court, and the costs of the application be borne by the Respondent.
6. The Chamber Summons was supported by an affidavit dated **4th September 2019** sworn by **Esther Wangui Mbugua**, who described herself as the **Director** of Kenard Limited.
7. The Respondent in a Replying Affidavit dated **25th October 2019**, averred that the arbitral award was not validly awarded. This stems from the argument that the Agreement of Lease signed between the Applicant and Respondent was not properly executed and thus invalid.
8. The Respondent argued that the Agreement to Lease was signed under seal by only one director. This is allegedly in contravention of the Applicant's Company's Articles of Association which states in **Article 23** that:-

“The seal shall not be affixed to any instrument except by the authority of a resolution of two directors or at least one director and the secretary or some other person appointed by the Board and the Director or the Director and the Secretary or the other person as the case shall be, shall sign every instrument to which the seal is so affixed in their presence.”

9. The Respondent thus argued that the arbitration process and consequently the arbitral award was not valid on the premise that the Agreement to Lease was improperly executed.

10. In a Supplementary Affidavit dated **21st January 2020**, **Esther Wangui Mbugua**, swore it on behalf of Kenard Limited in response to the Replying Affidavit by the Respondent. She averred that the Respondent does not have **locus** in the matter, as he failed to challenge the Arbitrator's decision and further that he has no right to raise a new issue which was previously not brought before the Arbitrator.

11. The Applicant further raised the following issues in the affidavit:

i) The Court is constrained from interfering with the Arbitrator's decision as provided for by Section 10 of the Arbitration Act unless otherwise authorised by the Arbitration Act.

ii) The Respondent was estopped from claiming invalidity of the Agreement to lease as he had relied on it to claim possession of the premises.

iii) The Respondent erroneously interpreted Article 23 of the Company's Articles of Association which provides for a single director to sign an instrument where the seal is affixed on behalf of the Company. The Applicant further argued that in any case, the signature of a Director would be binding with or without a seal as provided for in Section 34 of the Companies Act CAP 486 (now repealed).

iv) The Respondent is further precluded from interfering with the internal processes of a Company and thus cannot raise issue that a Director did not have powers to sign a document.

v) The Applicant further pointed out that the Defendant is yet to remove the Caveat on the premises as earlier indicated on the letter dated 15th August 2019.

12. The Respondent vide submissions dated **11th March 2020**, argued that the arbitral award should not be recognised as provided under Section 37 of the Arbitration Act as the agreement to lease was executed in contravention of the Company's Articles of Association.

13. The Respondent reiterated the contents of Article 23 of the Company's Articles of Association that requires more than a sole director to sign a covenant under seal.

14. The Respondent further argued that the articles of association are binding upon the Company and should accurately represent the Company's regulations.

15. In response to the Applicant's claim that the Respondent did not have the right to raise issue on the Company's internal affairs, the Respondent relied on the case of **Gondho Enterprises Limited v Concord Insurance Company Limited [2008] eKLR**. This case affirmed that a person doing business with a Company can only be assumed to be aware of certain public documents.

16. The Respondent submitted that the Articles of Association become public documents upon registration of the same and should therefore have been binding and accurately reflective of the Company's internal affairs.

17. The Respondent thus prayed for the court to dismiss the Applicant's Chamber Summons filed herein with costs and not recognise the arbitral award under Section 37 of the Arbitration Act.

18. The Court has now carefully considered the instant application and the grounds in support of the same together with the annexures thereto. The Court too has considered the grounds in opposition to the instant application and the rival submissions.

19. There is no doubt that the parties herein had entered into an agreement to lease on **1st May 2010**. The Respondent herein was to lease **100 acres** in **Mitumbiri/Wempa Block 2/6803 Thika**, from the Applicant herein. The said lease was to run for 8 years.

20. There is also no doubt that in clause **No. 7.10.2**, the parties had consented to the fact that any dispute arising out of the said agreement **shall or should** be referred for final determination by a single Arbitrator, appointed by agreement between the parties.

21. Further clause **No. 7.10.3** of the said lease agreement was to the effect that the determination of the arbitrator shall be final and binding upon the parties.

22. It is evident that a dispute did arise and the parties submitted themselves before the single arbitrator – **Charles Kanjama**. A final award was given on **13th August 2019**.

23. It is also evident that vide a letter dated **15th August 2019**, the Law Firm of **Mereka & Co Advocates** for the Applicant forwarded the final award to **Dola, Magani & Company Advocates**, who represented the Respondent in the arbitration proceedings. The said letter demanded for payment of **Kshs.3,246,180/=** on or before **30th August 2019**. Further, the applicant requested for the removal of the **caveat** registered by the Respondent on the suit property **LR. No. Mitumbiri/Wempa Block 1/6803**.

24. It is evident that the Respondent did not comply with the said demand, because on **5th September 2019**, the Applicant filed the instant application seeking for orders that the final award dated **13th August 2019**, issued by the sole arbitrator be recognised as binding and enforceable by this Court.

25. The Respondent has opposed the said application and alleged that the lease agreement that gave rise to the arbitral award was not valid and therefore the arbitral award cannot be enforced.

26. What is not in doubt is that the parties herein had agreed to subject themselves to a single arbitrator and had bound themselves to the effect that the determination of the single arbitrator would be final. It is trite that parties are bound by the terms of their agreement and a court or tribunal cannot re-write the contract for the parties. See the case of *National Bank of Kenya Ltd ...Vs... Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503*, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

27. The parties herein consented to subject themselves to a single arbitrator and that the determination of the said single arbitrator would be final. The parties did subject themselves to the said single arbitrator being **Charles Kanjama** and therefore as per the parties own agreement, the said determination is final.

28. The Respondent has alleged that the arbitral award emanates from an arbitration process conducted under an arbitral agreement that is **not** valid under the law. The Respondent averred that the agreement to lease was not properly executed and therefore is not valid in law.

29. However, the court has noted that the Respondent submitted himself before the single arbitrator and did not raise that issue. This is a new issue which this court finds that it cannot be raised at this stage. The Respondent has not appealed against the decision of the said single arbitrator wherein he would have raised such issue.

30. The Respondent ought to have raised this issue at the first instance before the arbitrator wherein the issue of competence of the matter before the arbitrator could have been canvassed and determined.

31. The Court will rely on the decision made in the case of *Chania Gardens Limited v Gilbi Construction Company Limited & Another (2015) eKLR:-*

“The first port of call to challenge the jurisdiction of an Arbitrator is the Arbitral tribunal in line with the principle that is commonly referred to in arbitration parlance in the German phrase, Kompetenz. Therefore, the jurisdiction of this Court on matter of challenge of an Arbitrator is not original in nature. The High Court is expected to hear appeal or review application or arbitral tribunal’s decisions on challenge.” (emphasis ours).

32. Since the issue of validity of the agreement to lease was not raised before the arbitrator, the Court finds that it cannot be raised in the instant application. This is a new issue and it is clear that in the said agreement to lease, the parties had agreed to refer any dispute arising from the said agreement to a single arbitrator. The parties did that and a final award was issued on **13th August 2019**.

33. The Respondent failed to appeal against the said award as provided by **Section 35** of the **Arbitration Act**. As submitted by the applicant, if this court is to start considering whether the agreement to lease was valid or not, then this court will be opening up the matter for litigation which would be contrary to the very reason why the parties had submitted themselves before the Arbitration process.

34. It is evident that the Respondent submitted himself before the single arbitrate as provided on **clause 7.10.2** of the agreement to lease. The Respondent did not challenge the said lease agreement before the arbitrator. As provided by **clause 7.10:3** of the said agreement to lease, the determination of the single arbitrator **shall** be final and binding upon the parties.

35. The parties herein being bound by their own agreement, cannot expect the court to rewrite the contract for them.

36. For the above reasons, the court finds that the applicant’s Chamber Summons dated **4th September 2019**, is merited. Consequently, the court dismisses the Respondent’s objection and allows the applicant’s **Chamber Summons** entirely in terms of **prayers No. 1 and 2** respectively.

It is so ordered.

Dated, signed and Delivered at Thika this 24th day of September, 2020

L. GACHERU

JUDGE

24/9/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference

Mr. Mola for the Applicant

M/s Wahome holding brief for Mr. S. N. Nganga for the Respondent

L. GACHERU

JUDGE

24/9/2020