REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 106 OF 2016

JACOB CHERUIYOT.....1ST PLAINTIFF

JANE CHEPKORIR BALIACH.....2ND PLANTIFF

VERSUS

JOSEPH GITAU MWANGI.....1ST DEFENDANT

SOPHIA WANJIRU GITAU.....2ND DEFENDANT

PETER GITHIRWA WAWERU T/A IDEAL AUCTIONEERS.....3RD DEFENDANT

RULING

Background:

The plaintiffs and the 1st and 2nd defendants entered into an agreement of sale dated 13th November, 2014 with respect to all that property known as House No. M-29, Hazina Estate, Nairobi situated on L.R No. Nairobi Block 93/1620 (hereinafter referred to as "the suit property"). Under the said agreement, the 1st and 2nd defendants agreed to sell to the plaintiffs the suit property at a price of Kshs. 20,000,000/= on terms and conditions contained therein. The plaintiffs brought this suit against the defendants on 10th February, 2016 seeking among others; an injunction to restrain the defendants from levying distress for rent against them and/or interfering with their quiet possession of the suit property, an order for specific performance of the said agreement of sale dated 13th November, 2014 and general damages. The plaintiffs contended that the 1st and 2nd defendants had breached the said agreement of sale by refusing to release to their advocates the completion documents on the completion date and thereafter despite several promises on the part of their advocates that they would do so.

The plaintiffs averred that the 1st and 2nd defendants insisted on being paid the balance of the purchase price before releasing the completion documents to the plaintiffs' advocates a demand that was contrary to clause 8.1 of the agreement of sale between the parties. The plaintiffs averred that the 1st and 2nd defendants thereafter purported to rescind the said agreement of sale claiming that the plaintiffs had breached the same by failing to pay the balance of the purchase price. The plaintiffs averred that after the purported rescission of the agreement of sale aforesaid, the 1st and 2nd defendant demanded from the plaintiffs the payment of rent in the sum of Kshs. 65,000/- per month for the plaintiffs' occupation of the suit property. The plaintiffs averred that the 1st and 2nd defendants thereafter instructed the 3rd defendant to levy distress for rent against the plaintiffs for the recovery of a purported rent arrears amounting to Kshs. 845,000/- as at January, 2016. The plaintiffs averred that the purported distress that was levied against them by the defendants was illegal, null and void since the plaintiffs were not the 1st and 2nd defendants' tenants on the suit property and did not owe them rent. The plaintiffs averred that the suit property was lawfully handed over to them by the 1st and 2nd defendants pursuant to the sale agreement aforesaid and that the purported rescission of the said agreement by the 1st and 2nd defendants did not convert the plaintiffs to tenants on the suit property.

The agreement of sale between the plaintiffs and the 1st and 2nd defendants had an arbitration clause which provided that:

"**Dispute Resolution**

In the event, either party fails to observe its part of the obligations under this Agreement which failure causes financial

harm to the other, then the parties shall first explore amicable means failure to which the matter will be forwarded for Arbitration as provided for by the Arbitration Act Cap 4 of 1995 and its subsequent amendment; by reference to a single Arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter).”

On 29th June, 2016, the 1st and 2nd defendants filed an application pursuant to the said arbitration clause seeking a stay of the proceedings before this court pending reference of the dispute between the parties to arbitration. On 24th November, 2016, the court made an order by consent of the parties staying the proceedings before this court and referring the dispute between the parties to arbitration. On application by the 1st and 2nd defendants' advocates, the Chairman of the Chartered Institute of Arbitrators, Kenya Branch appointed Justus M. Munyithya advocate as a sole arbitrator in the dispute. Justus M. Munyithya (hereinafter referred to only as "the arbitrator") accepted the appointment and there being no objection to his appointment by the plaintiffs proceeded with the arbitration.

The parties filed their respective pleadings before the arbitrator after which the arbitrator conducted a hearing and rendered a final arbitral award on 13th November, 2018. The arbitrator made a finding that the 1st and 2nd defendants were in breach of the agreement of sale between the parties by their failure to furnish the plaintiffs' advocates with the completion documents which was a condition precedent to the release of the balance of the purchase price to the 1st and 2nd defendants. On whether the plaintiffs became the 1st and 2nd defendant's tenants after the 1st and 2nd defendants' purported rescission of the agreement of sale, the arbitrator found that the parties intended to enter into an agreement for the sale of the suit property and not into a tenancy agreement and that the plaintiffs took possession of the suit property pursuant to an agreement of sale. The arbitrator held that the plaintiffs were not the 1st and 2nd defendants' tenants at will on the suit property and as such the 1st and 2nd defendants were not entitled to any rent from the plaintiffs that could be recovered through distress for rent. On whether the 1st and 2nd defendants lawfully rescinded the agreement of sale with the plaintiffs, the arbitrator found that since it was the 1st and 2nd defendants who breached the agreement of sale by failing to provide the completion documents, they could not validly rescind the said agreement. The arbitrator held that the agreement of sale was not lawfully rescinded by the 1st and 2nd defendants and that the purported rescission was null and void. On whether the plaintiffs were liable to pay service charge that had accrued on the suit property from the time they took possession, the arbitrator held that pursuant to Condition 6(2) (c) of the Law Society Conditions of Sale (1989 Edition), the plaintiffs had obligation to meet those expenses. In conclusion, the arbitrator made the following orders;

1. The plaintiffs were to pay service charge of Kshs. 1,700/- per month for the suit property from 1st January, 2015.

2. The 1st and 2nd defendants were to deliver to the plaintiffs the completion documents within 7 days of the order for inspection.

3. Upon being satisfied with the completion documents, the parties' respective advocates were to open an "on call" fixed escrow interest earning account in their joint names in a commercial bank of their choice to be agreed upon within 7 days after the inspection of the completion documents upon which the plaintiffs were to deposit the balance of the purchase price in the sum of Kshs. 10,000,000/- within 7 days of the opening of the said bank account.

4. The 1st and 2nd defendants through their advocates were thereafter to submit all the completion documents duly signed to the plaintiffs' advocates including Capital Gains Tax Certificate or its exemption within 21 days.

5. The plaintiffs' advocates were to take steps to register the transfer documents within 30 days from the date of delivery of the same to them.

6. In the event that the plaintiffs deposited the balance of the purchase price as aforesaid and the 1st and 2nd defendants failed to deliver the completion documents; the Land Registrar was to execute the instrument of transfer in respect of the suit property in favour of the plaintiffs.

7. Upon successful registration of the suit property in favour of the plaintiffs, the money deposited in the escrow account in the joint names of the advocates for the parties was to be released to the 1st and 2nd defendants together with accrued interest.

8. Each party was to bear its own costs of the arbitration.

9. The parties were to share the arbitrators' costs in the sum of Kshs. 578,000/-.

10. Parties were at liberty to apply.

<u>The applications before the court:</u>

What is now before the court are two (2) applications; one by the plaintiffs and the other by the defendants. In their application dated 12th February, 2019 which was brought under section 59 of the Civil Procedure Act, Section 36(1) and (2) of the Arbitration Act, 1995, Order 46 Rule 18(1)(a), (2) and (3) and Order 51 Rule 1 of the Civil Procedure Rules, the plaintiffs sought the following orders;

1. THAT the court be pleased to grant leave for the arbitral award made by Justus M. Munyithya on 13th November, 2018 to be filed in these proceedings.

2. THAT the said arbitral award be deemed as duly filed and adopted by the court and judgment be entered for the plaintiffs against the defendants in terms thereof.

3. THAT the costs of the application be provided for.

The plaintiffs' application was brought on the grounds set out on the face thereof and on the affidavit of the 2nd plaintiff sworn on 12th February, 2019. The application was brought on the grounds that following the reference of the dispute between the parties to arbitration, the arbitrator delivered his award on 13th November, 2018 and that leave was required for the said award to be filed and adopted as a judgment of this court.

The 1st and 2nd defendants' application was dated 25th February, 2019. The application which was brought under Order 46 Rules 14, 16(1) (b) and (3), and 17 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and sections 35(2) (a) (ii) and (iv), 35(4), and 37 of the Arbitration Act, 1995 sought the following orders;

1. THAT the court be pleased to stop and set aside the arbitral award delivered by Justus M. Munyithya on 13th November, 2018 on the grounds that the same was impossible to implement and that the arbitrator misdirected himself on the issues that were referred to arbitration.

2. THAT the costs of the application be in the cause.

The 1st and 2nd defendants' application was brought on the grounds set out on the face thereof and on the affidavit of the 1st defendant sworn on 25th February, 2019. The 1st and 2nd defendants averred that the parties referred the dispute between them to arbitration so that the arbitrator could resolve the standoff between the parties that was caused by the failure by the plaintiffs to pay the balance of the purchase price. The 1st and 2nd defendants averred that the parties appeared before the arbitrator, adduced evidence and produced correspondence and other documents in support of their respective cases.

The 1st and 2nd defendants averred that in his award, the arbitrator failed to consider the material that was placed before him as a result of which he misdirected himself on the reference and made an award that was impossible to implement. The 1st and 2nd defendants averred that the arbitrator failed to take into consideration the fact that the suit property was to be transferred directly from the National Social Security Fund (NSSF) to the plaintiffs. The 1st and 2nd defendants averred further that the plaintiffs had not deposited the balance of the purchase price into a joint account as directed by the arbitrator to warrant the recognition and enforcement of the award. The 1st and 2nd defendants averred further that the mechanism proposed by the arbitrator for resolving the dispute was unworkable.

The 1st and 2nd defendants averred that the arbitrator also ignored the terms of reference and dealt with issues that were outside the reference before him. The 1st and 2nd defendants averred that the entire arbitral award could not be implemented and as such it was necessary that the same be set aside so that the court determines the matter in a fair and just manner. The 1st and 2nd defendants averred that the entire process of transferring the suit property to the plaintiffs had to start afresh and that the same would involve costs that the 1st and 2nd defendants could not bear. In their response to the plaintiffs' application the 1st and 2nd defendant's reiterated the foregoing grounds and added that the arbitrator was biased against them.

The submissions.

The plaintiffs' and the 1st and 2nd defendants' applications were heard together by way of written submissions. The plaintiffs filed their submissions on 15th October, 2019 while the 1st and 2nd defendants filed their submissions on 22nd January, 2020. The plaintiffs submitted that an arbitral award can be set aside only on the grounds set out in section 35 of the Arbitration Act, 1995 and that the 1st and 2nd defendants had neither relied on any of the said grounds nor proved the existence of the same. The plaintiffs submitted that even if the court was to find that the arbitrator had exceeded his jurisdiction, the court had the power under section 35(2)(a)(iv) of the Arbitration Act to severe part of the award that was within the arbitrators' mandate from that which was not. The plaintiffs argued further that the 1st and 2nd defendants' application to set aside the award was made outside the time prescribed in section 35 of the Arbitration Act without leave of the court. The plaintiffs submitted that the arbitral award complied with section 37 of the Arbitration Act and as such should be adopted as a judgment of the court. In support of their submissions, the plaintiffs relied on Nyutu Agrovet Limited *v* Airtel Networks Limited [2015] eKLR and Heva Fund LLP *v* Katchy Kollections Limited [2018] eKLR. The plaintiffs submitted that they had satisfied the grounds for the adoption of the award as a judgment of the court while the 1st and 2nd defendants' application fell short of establishing the grounds for the setting aside of the award. The plaintiffs urged the court to allow their application and to dismiss the 1st and 2nd defendants' application with costs.

In their submissions in reply, the 1st and 2nd defendants submitted that the plaintiffs should have complied with the award of the arbitrator before seeking the adoption of the same by the court. The 1st and 2nd defendants submitted further that in any event, the arbitral award in question would be impossible to implement even if the same is adopted as an order of the court for a number of reasons. The 1st and 2nd defendants submitted that the arbitral award had been overtaken by events and had become obsolete. The 1st and 2nd defendants contended further that the arbitrator failed to address the issues that were raised before him for determination and proceeded to provide a mechanism for resolving the dispute that was impossible to implement. The 1st and 2nd defendants submitted that the implementation of the said arbitral award would be prejudicial to the 1st and 2nd defendants due to time lapse. The 1st and 2nd defendants submitted that while imposing timelines for the transfer of the suit property to the plaintiffs, the arbitrator failed to appreciate the fact that the suit property was registered in the name of NSSF and had to be transferred from NSSF directly to the plaintiffs or first to the 1st and 2nd defendants before the same could be transferred to the plaintiffs. The 1st and 2nd defendants averred further that there was no order compelling NSSF to transfer the suit property to the plaintiffs and as such it was impossible to implement the award.

The 1st and 2nd defendants submitted further that the arbitrator did not consider the fact that the process of registering the transfer could take

longer than the timelines provided in the award. The 1st and 2nd defendants submitted further that the arbitrator failed to provide for what was to happen if the plaintiffs failed to deposit the balance of the purchase price as directed in the award or remedies for breaches of the other terms of the award. The 1st and 2nd defendants submitted that although the plaintiffs had sought the adoption of the award, they had not fulfilled any part thereof neither had they explained to the court how the award was going to be implemented. The 1st and 2nd defendants urged the court to either set aside the award to allow the parties to explore an amicable way of resolving the dispute or set aside the award and have the dispute determined by the court.

Analysis of the parties' respective cases and determination of the issues raised:

I have considered the plaintiffs' and the 1st and 2nd defendants' (the defendants) applications together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavits filed in opposition to the applications. Finally, I have considered the submissions by the parties' respective advocates and the authorities cited in support thereof. The plaintiffs' application is seeking the adoption of the arbitrators' award while the 1st and 2nd defendants' (the defendants) application is seeking the setting aside of the award. I will consider the 1st and 2nd defendants' application first because if it succeeds then it will not be necessary to consider the plaintiffs' application.

This court's jurisdiction to set aside a domestic arbitration award is provided for in section 35(1) and (2) of the Arbitration Act which provides as follows:

> **"35. Application for setting aside arbitral award**
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> **(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).**
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> **(2) An arbitral award may be set aside by the High Court only if—**
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> **(a) the party making the application furnishes proof—**
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> **(i) that a party to the arbitration agreement was under some incapacity; or**
>
> **(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**
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> **(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
>
> **(iv) 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; or**
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> **(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or**
>
> **(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;**
>
> **(b) the High Court finds that—**
>
> **(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
>
> **(ii) the award is in conflict with the public policy of Kenya".**
>
> **(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.**
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> **(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.**

Before considering the merit of the defendants' application, I wish to deal with a preliminary issue that was raised by the plaintiffs that touches on the competency of the defendants' application. The plaintiffs had contended that the defendants' application was filed out of time and as such the same was untenable. Section 35(3) of the Arbitration Act provides that an application for setting aside of an arbitration award shall be made within 3 months from the date of receipt of the award. It is common ground that the award was delivered on 13th November, 2018 in the presence of the advocates for both parties. An application to set aside the award should have been made by 13th

February, 2019. The defendants' application was filed on 7th March, 2019. The application was therefore filed out of time. The defendants did not respond to this issue in their submissions although it was expressly raised by the plaintiffs in their submissions. Due to the foregoing, it is my finding that the defendant's application to set aside the arbitration award delivered on 13th November, 2018 was filed out of time. The application is in the circumstances incompetent.

Despite that finding, I wish to consider the application on merit in case I am wrong in my finding on the issue of the competency of the application. On the merit of the application, I am in agreement with the plaintiffs' submission that for the defendants' application to succeed, the defendants had to prove the existence of any of the grounds set out in section 35 of the Arbitration Act. Section 10 of the Arbitration Act limits the court's intervention in the arbitral proceedings to the extent permitted by the Act. In Christ for All Nations *v* Apollo Insurance Co. Ltd. [2002]2 E.A.366, the court stated that:

> **"….the public policy of Kenya leans towards the finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."**

The defendants' application was principally brought under section 35(2) (a) (ii) and (iv) and (4) of the Arbitration Act. The defendants had also relied on Order 46 of the Civil Procedure Rules which I find irrelevant since the arbitration between the parties was not pursuant to a reference by the court but to an arbitration clause in an agreement between the parties. The burden was on the defendants to prove that the arbitral award violated the provisions of section35(2) (a) (ii) and (iv) and (4) of the Act.

The parties did not place before the court for perusal the pleadings that they filed before the arbitrator. I have perused the award by the arbitrator in which he referred to; the pleadings that were filed before him, the issues framed by each party for determination, the submissions by the parties on those issues, his summary of the issues, his findings on the issues and final orders. I am not persuaded that the arbitration agreement was invalid under the laws of Kenya or that the arbitral award dealt with any issue that was not contemplated by or did not fall within the terms of reference to arbitration or that the same contains decisions that were beyond the scope of the reference to arbitration.

I have at the beginning of this ruling set out the background of the dispute between the parties. The dispute between the parties was referred to arbitration pursuant to clause 10 of the agreement of sale between the plaintiffs and the defendants dated 13th November, 2014. That clause in the agreement did not limit the nature of the dispute that the parties could refer to arbitration neither did it set out the scope of such arbitration. The dispute that was to be referred to arbitration and the scope of such arbitration was left for the parties to frame in their pleadings and statements of issues that were to be filed with the arbitrator.

The parties tendered oral evidence and made submissions before the arbitrator based on the pleadings and the issues that were framed by both parties for determination. It is clear from the issues that were framed by the parties and the submissions made thereon that the arbitrator was called upon not only to determine the issues and the claim that was made by the defendants but also the claim and issues that were raised before him by the plaintiffs. The issues before the arbitrator in summary were whether it was the plaintiffs or the defendants who had breached the agreement of sale dated 13th November, 2014 and what remedies were available to the aggrieved parties. As I have mentioned earlier in the ruling, the arbitrator made a finding that it was the defendants who had breached the said agreement of sale. The arbitrator made a further finding that the defendants were not entitled to any of the reliefs they had sought save for service charge and that the plaintiffs were entitled to specific performance of the agreement. The arbitrator then went ahead to spell out mechanism for completing the said agreement.

I am satisfied that the arbitrator ably dealt with all the issues that were referred to him by the parties and that he did not deal with extraneous matters that were not related to the reference. The defendants argued at length on the impossibility of implementing the arbitrators' award. This in my view is not generally a ground to set aside an arbitral award even if it is established which the defendants did not do in this case. In my view, this is an issue of enforcement of the award that can only be addressed after the award has been adopted and it is demonstrated that its enforcement is impossible. At this stage, the court cannot determine whether the award is enforceable or implementable. The process of implementation can only start after the arbitral award has been adopted as a judgment of the court. In any event, I have noted that the arbitrator had foreseen that challenges could arise during the implementation of the award. In his final orders, the arbitrator gave both parties liberty to apply. This liberty in my view was intended to deal with some of the issues such as the timelines given for taking action by the parties which may not be sufficient or failure by either party to comply with the orders given by the arbitrator. Once the arbitral award is adopted, the parties are at liberty to apply for further directions and orders in relation to the award. In the circumstances, I find no merit in the defendants' argument that the arbitral award herein should be set aside on account of impossibility of the implementation thereof.

The upshot of the foregoing is that the defendants have failed to establish grounds for setting aside an arbitral award. The defendants' application dated 25th February, 2019 fails both on the ground that it is incompetent the same having been filed out of time and for being without merit.

I will now consider the plaintiffs' application dated 12th February, 2019. As I mentioned earlier in the judgment, the plaintiffs' application was opposed by the defendants on several grounds. The grounds upon which the court can decline to recognise and enforce an arbitral award are set out in section 37 of the Arbitration Act. They are to a large extent the same grounds for setting aside an arbitral award. As I have held above, the defendants have not established any ground for setting aside the arbitral award delivered on 13th November, 2018. No basis therefore exists on which this court can decline to recognise and enforce the said award. For the foregoing reasons, I find merit in the plaintiffs' application dated 12th February, 2019.

Conclusion.

In conclusion, I hereby make the following orders:

1. The 1st and 2nd defendants' application dated 25th February, 2019 is dismissed.

2. The arbitral award by Justus M. Munyithya delivered on 13th November, 2018 is hereby recognised and adopted as a judgment of this court.

3. A decree shall issue accordingly in terms thereof for enforcement by the court.

4. Before a decree is issued in terms of order 3 above, the plaintiffs shall file in court an original arbitral award by Justus M. Munyithya dated 13th November, 2018 or a copy thereof certified by the said arbitrator.

5. The plaintiffs shall have the costs of the 1st and 2nd defendants' application dated 25th February, 2019 and their application dated 12th February, 2019.

Delivered and Signed at Nairobi this 8th day of October 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mwagi h/b for Mr. Ndege for the Plaintiffs

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant