



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE No. 1225 OF 2013

KIFARU INVESTMENTS LIMITED.....1ST PLAINTIFF/APPLICANT

WANJIRU SHINGA.....2ND PLAINTIFF/APPLICANT

KISHORKUMAR DHANJI VARSANI.....3RD PLAINTIFF/APPLICANT

HARJI DHANJI VARSANI.....4TH PLAINTIFF/APPLICANT

SAMUEL WAMBU MWANGI.....5TH PLAINTIFF/APPLICANT

MOHAN SINGH PANESR.....6TH PLAINTIFF/APPLICANT

WILLIAM PIKE.....7TH PLAINTIFF/APPLICANT

=VERSUS=

KIHINGO VILLAGE (WARIDI GARDENS) LTD

KIHINGO VILLAGE (WARIDI GRADENS...1ST DEFENDANT/RESPONDENT

MANAGEMENT LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the chamber summons dated 19th September 2016 brought under order 46 rules 10 and 18 (1) of the Civil Procedure Rules 2010, Section 36(1) and (3) of the Arbitration Act, 1995 and Rules 4(1) and (2), 6 and 9 of the Arbitration Rules, 1997.

2. It seeks order:-

(1) Spent

(2) Judgment be and is hereby entered in favour of the plaintiffs as against the defendants in terms of the sole arbitrator's final award published on 28th July, 2016 by Mr. John M. Ohaga FCI Arb.

(3) That costs of this application and this suit be borne by the Defendants.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 5.

4. The application is supported by the affidavit of Samuel Mwangi Wambu the 5th plaintiff sworn on the 19th September 2016 and supplementary affidavit sworn on 14th November 2016.

5. Upon being served with the chamber summons dated 19th September 2016, the defendants filed a notice of preliminary objection dated 17th October 2016. The grounds are:-

(1) The arbitrator's award sought to be converted into a court judgment has not determined the issue of costs of the arbitration reference.

(2) The arbitrator has not completed his tasks under the arbitration proceedings to warrant turning to the Court by the applicant

(3) Section 32(B) (1) of the Arbitration Act, CAP 49 specifically states with regard to the issue of costs in arbitration proceedings "unless otherwise agreed by the parties, the costs and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5)"

There is also a replying affidavit sworn by James Ndungu Gethenji on 8th March 2017.

6. On the 16th November 2016, the court directed that the chamber summons dated 19th September 2016 and the preliminary objection be heard and determined together. The court further directed that the parties do file and exchange written submissions.

The Plaintiff's submissions

7. The replying affidavit of the 5th plaintiff sworn on the 14th November 2016 gives a chronology of events commencing 7th November 2014 when the dispute was referred to arbitration to 28th July 2016 when the award was published. On 5th August 2015 the Arbitrator recorded a consent order for the filing of pleadings and directed that a pre hearing review meeting be held on 15th October 2015. On the said date the defendant had not complied and requested postponement of the meeting to 18th November 2015. On the said date there had been no compliance. The defendants' advocates sought and were granted leave to cease acting. On 17th February 2016. The Arbitrator directed the plaintiffs to serve the defendants personally to which they still did not comply. The Arbitrator then adjourned to write the Award.

8. The have relied on the case of **National Oil Corporation of Kenya Ltd vs Prisko Petroleum Network Ltd [2014] 2 EA 163. Habo Agencies Limited vs Wilfred Odhiambo Musingo [2016] eKLR.**

9. The defendants were given an opportunity to participate in the arbitration reference but failed to present their case before the Arbitrator. They relied on the case of **Nyutu Agrovet Ltd vs Airtel Network Ltd [2015] eKLR.** Section 35 of the Arbitration Act, Cap 49 permits a request for the setting aside of an Arbitration Award only where parties to the Arbitration Agreement preserved the right to judicial intervention. The dispute culminating in the publication of the Award herein was determined on the agreement by the parties that the same would be final.

10. Courts will be slow to intervene and set aside an Arbitral Award unless the alleged breach of public policy is proven and prejudice established by the party seeking such an order. They have also put forward the case of **Erad Suppliers & General Contractors Ltd vs National Cereals & Produce Board H. C. Misc Civil Application No. 639 of 2009 (UR).**

The threshold for setting aside the Award on grounds of public policy has not been met herein. The defendants having failed to give cogent proof. They have also relied on the cases of **Anne Mumbi Hinga vs Victoria Njoki Gatharu [2009] eKLR** where the principle of finality was upheld.

11. The costs will of necessity be recovered through this suit by way of filing a Bill of Costs to be taxed. Section 27 of the Civil Procedure Act, Cap 21 provides that costs follow the event with the result that the successful party in this suit should be awarded costs. The defendants challenge to the courts jurisdiction to enforce the Award on the claim that the issue of costs has not been determined is without merit.

The plaintiffs pray that the preliminary objection dated 17th October 2016 be dismissed with costs to the plaintiff and the chamber summons dated 19th September 2016 be allowed in its entirety.

The defendants submissions

12. In the course of the Arbitration the 1st and 2nd defendants changed the advocates representing them causing an inadvertent delay in filing their responses and submissions. The defendants made a formal application to be allowed to file their responses and submissions which the Arbitrator refused rendering the Arbitration unfair and biased in favour of the plaintiffs. By a ruling dated 30th June 2016 the Arbitrator locked out the defendants from the arbitration process. They have relied on the case of **Joyce Bochere Nyamweya (suing as legal representative of Tabitha Moige Nyamweya (Deceased) vs Charles Ratemo Nyamweya (sued as the legal representative of Honourable James Nyamweya (Deceased) and also in his personal capacity and 9 others [2016] e KLR.**

13. The Arbitrator failed to accord a fair hearing to the defendants contrary to public policy; he failed to address his mind to the real facts in issue and question of law and only considered one sided submissions while making a final decision.

They have also put forward the Case of **Murlidhar Agarwal and Another vs State of U. P and others [1974] 2 SCC 473 as quoted in Evangelical Mission for Africa & Another vs Kimani Gachuhi & Another [2015] eKLR.**

14. The Award was in violation of clear statutory provisions and Articles 50 (1) and 159 (2) (d) of the Constitution. The plaintiffs application dated 19th September 2016 should be dismissed as it lacks merit owing to the procedural faults as submitted herein regarding the issuing of the final Arbitral Award. The cost of the arbitration reference have not been determined and the parties have not agreed. The costs are to be determined by the arbitral tribunal in its final award. They have put forward the cases of **Kenfit Limited vs Consulata Fathers**

[2005] eKLR. They pray that the award be set aside and the matter referred afresh for determination before a new Arbitrator.

15. I have considered the chamber summon dated 19th September 2016, the preliminary objection dated 17th October 2016 and the replying affidavit. I have considered the written submissions of counsel, the authorities cited and the relevant provisions of law. The issues for determination are:-

(i) Whether the defendants were denied a fair hearing before the Arbitrator.

(ii) Whether the Award ought to be set aside.

(iii) Whether the court lacks jurisdiction to enforce the Award on alleged ground that the Arbitrator did not award costs of the arbitration.

(iv) Whether the chamber summons dated 9th September 2016 ought to be allowed.

16. A brief background of this dispute is that by a chamber summon dated 18th November 2013 the defendant sought an order staying the proceedings filed herein pending a reference to arbitration of the disputes arising between the plaintiffs and the defendants. By ruling dated 7th November 2014 Honourable Lady Justice Gitumbi allowed the application and referred the matter to arbitration. I have gone through the ruling of the Arbitrator dated 30th June 2016. Paragraph 5, 6, 7 and 8 of the said ruling confirms what transpired during the arbitration process.

17. The defendants were represented by the firm of H H M. On 15th October 2015. The said firm sent a letter to the Arbitrator citing lack of instructions from their clients hence their failure to file the pleadings. The said counsel sought an extension to which the Arbitrator granted fifteen (15) days. By 21st January 2016 the defendants had not instructed another advocate nor had they filed a statement of response. Later the defendants sought to be given time to file their statement of response with the arbitration found to be undeserving and dismissed the application.

18. It is therefore not in doubt that it is the defendants who moved this court to refer the matter to arbitration. The replying affidavit of the 5th plaintiff sworn on the 14th November 2015 gives the chronology of the events as they transpired before the Arbitrator. It is clear from the ruling of the Arbitrator dated 30th June 2016 that the defendants were given several opportunities to present their case but they failed to do so. In this affidavit, sworn on 17th October 2016, James Ndung'u Gethenji, a director of the 1st and 2nd defendants, do not give an explanation as to why they did not present their case before the Arbitrator in time.

19. The defendants are the ones who moved the court to refer the dispute for arbitration. They ought to have acted diligently. Their advocates previously on record cited lack of instructions as the reasons for failure to file a statement of response. I find no fault in the Arbitrator's ruling dated 30th June 2016. The defendants had been accorded several opportunities to present their case but they neglected to present their case. I rely on the cited authority of **National Oil Corporation of Kenya Ltd vs Prisko Petroleum Network Ltd [2014] eKLR**.

20. The defendants rely in Article 50 (1) and 159 (2) (a) of the Constitution of Kenya 2010 but this court is also alive to the fact that Arbitration is one of the dispute resolution mechanisms recognized by Article 159(2) (c) of the Constitution of Kenya, 2010. Section 1A and 1B of the Civil Procedure Act mandates the court to expeditiously dispose of cases before them. From the foregoing, I find that the defendants were accorded an opportunity to be heard by the Arbitrator but they failed to present their case.

21. Section 35(1) of the Arbitration Act Provides that:-

“Recourse to the High Court against the arbitral award may be made only by an application for setting aside the award under subsection (2) and (3), subsection 2 provides, that: “An arbitral award may be set aside by the High Court only if:-

(a) the party making the application furnishes proof:-

(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

(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

(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.”

One of the grounds relied on by the defendants is that the said Award made in favour of the plaintiff is against public policy as to fairness and justice.

22. In the case of **Christ for All Nations vs Appollo Insurance Company Limited [2002] EA 366** Ringera J (as he then was) held that,

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law 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 interest of national defence and security good diplomatic relation with friendly nations and economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive, include such consideration as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals”

23. As I stated earlier, the main ground relied on by the defendants is that the Arbitral Award was made in favour of the plaintiffs against public policy as to fairness and justice. It is trite law that he who alleges must prove. The burden of proof was on the defendants to prove that the Award herein is against public policy. They have failed to give cogent proof. The defendants who being indolent and failed to present their case before the Arbitrator in time cannot turn and claim the award is against public policy. I am guided by the case of **Victoria Furnitures Ltd vs Zadock Furnitures Systems Ltd [2017] eKLR**. I am also guided by the cited case of **National Oil Corporation of Kenya Ltd vs Prisko Petroleum Network Ltd [2014] eKLR** where the court held:

“However public policy being an elastic ground it would require cogent proof if an award is to be set aside on that account. I see nothing has been presented to satisfy the test of public policy as a ground to set aside the award herein”

I have considered the circumstances prevailing on the instant case and find that the threshold for setting aside the Award on grounds of public policy has not been met. I find that this ground fails.

The third issue for consideration is to costs. Section 32 (b) (i) of the Arbitration Act provides that:-

“Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).”

Sub section (2) provides that:-

“Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.”

24. I have looked at the Award by the Arbitrator dated 28th July 2018. The last paragraphs states’ *“The 1st and 2nd respondents shall bear costs of the reference and the Award”*.

I am guided by Order 46 rule 13 of the Civil Procedure Rules and Section 27 of the Civil Procedure Act. I agree with the plaintiffs counsel’s submissions that the defendants challenge of the Award on the issue of costs is without merit. The Arbitrator directed that costs of the arbitral reference be borne by the defendants.

25. The upshot of the matter is that the preliminary objection dated 17th October 2016, together with the chamber summons dated 17th October 2016 is without merit and each is dismissed. I make no orders as to costs.

26. In conclusion, I find merit in the chamber summons dated 19th September 2016 and the same is allowed in the following terms:-

(a) That Judgment be and is hereby entered in favour of the plaintiffs as against the defendants in terms of the Sole Arbitrator’s Final Award published on 28th July 2016 by Mr. John M. Ohaga FCI Arb.

(b) The cost of this application and the suit be borne by the defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 6TH day of FEBRUARY 2019

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant