



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 354 OF 2013**

**REBECCA NANDU MUNGUTI.....PLAINTIFF**

**(Suing through her Attorney SUSSANAH MUKII MATEE)**

**=VERSUS=**

**ACHER DRAMOND MORGAN LIMITED.....DEFENDANT**

**Consolidated with ELC Misc.Application number 96 OF 2017**

**RULING**

1. On 13/3/2013, Rebecca Ndanu Munguti (the plaintiff) brought Nairobi ELC Case Number 354 of 2013 against Acher Dramond Morgan Limited (the defendant) seeking orders of specific performance and *mesne profits* pursuant to a house purchase contract relating to a house described as Unit Number 63, Phase One, which the defendant had undertaken to develop in 2006 on Land Reference Number 27317, Hillcrest Park Estate, Mavoko, at a purchase price of Kshs. 3,500,000. The plaintiff contended that the defendant had failed to develop the house despite receiving a total of Kshs 1,900,000. She further contended that the defendant's default had constrained her to incur house rental expenses.

2. The defendant filed a statement of defence dated 29/4/2013 in which it admitted existence of the contract and receipt of the payment but denied the loss alleged by the plaintiff and the claim for orders of specific performance and *mesne profits*. The defendant further contested the jurisdiction of this court and asserted that the forum for adjudication of the subject dispute was arbitration.

3. While the above suit was pending, and without reference to the court, the parties to the suit, through a joint letter dated 12/9/2013, invoked the arbitration clause in the contract and invited the Chairman of the Chartered Institute of Arbitrators –Kenya Chapter, to appoint a single arbitrator to adjudicate the dispute and render an award. Consequently, Mr Petterson Munene Kamaara FCI Arb, was appointed. The plaintiff as claimant presented a statement of claim dated 15/9/2014 in which she sought the following reliefs:

*(i) an order of specific performance;*

*(ii) in the alternative, an order directing the defendant to hand over the unit for completion by the plaintiff;*

*(iii) mesne profits at the rate of Kshs 25,000 per month; and*

*(iv) costs of the arbitration.*

4. The defendant as the respondent presented a response dated 6/10/2014 in which it stated that although the plaintiff had paid a sum of Kshs 2,600,000, there was no time-frame within which construction of the unit was to be completed and time was not expressed to be of essence in the contract, hence the plaintiff's claim was premature. The defendant further denied loss on part of the plaintiff and contended that the plaintiff was not entitled to the orders sought in the statement of claim. Subsequently, the parties filed their respective written submissions before the arbitrator on 7/5/2015 and 28/5/2015 respectively.

5. On 25/4/2017, the arbitrator rendered an award in favour of the plaintiff in the following terms:

***a) I order and direct that the Respondent shall undertake to carry out construction, build, erect and complete the construction of house No 63 on Land Reference Number 27317, Mombasa Road, situated in the estate known as Hillcrest Park within a period of Ninety (90) days of the date hereof, in accordance with the building plans, and show house shown to the Claimant.***

***b) I order and direct that the Respondent shall perform its obligations, covenants, terms and conditions in the Agreement dated 8th November 2006 and in particular shall sign transfer and all relevant documents and provide all approvals, consents and***

authorizations, and do all things and acts necessary to deliver a good and valid right title and interest over house Number 63 on Land Reference Number 27317 to the claimant within ninety (90) days of the date hereof.

c) I further order and direct that the Respondent shall do all things and acts necessary to ensure that vacant possession of a completed house number 63, Hillcrest Park, is delivered to the claimant, within ninety (90) days of the date hereof.

d) I order and direct that the respondent is bound to pay mesne profits to the claimant worked at the rate of Kshs 27,500/- per month with effect from 1st August 2011. The amount immediately due and payable by the respondent to the claimant for mesne profits for the period 1st August 2011 to 30th April 2017 is Ksh 1,870,000/-. This amount shall be recovered forthwith from the respondent by the application of the balance of the purchase price of Kshs 900,000/- towards payment of mesne profits so that the amount due to claimant is reduced from Kshs 1,870,000/- to Ksh 970,000/-. This amount is due to the claimant by the respondent immediately without waiting for completion of title and possession and continues to accrue at the same rate until possession is delivered to the claimant.

e) In default of performance and compliance by the respondent on the orders (a) (b), and (c) above, I order and direct that upon expiry of the ninety (90) days the claimant shall be at liberty to take possession of house number 63 on Land Reference number 27317, Hillcrest Park and take steps to erect, build, construct and complete the house, at her expense which expense shall be a debt due and recoverable from the respondent. The claimant shall also be at liberty to enforce order (a), (b) and (c) above through such legal means as she shall be advised.

f) I must state here that though this award was written and ready for publishing in August 2015 the parties were only able to comply with arbitrator's directions as to payment of arbitrator's fees in April 2017, a delay of nearly 20 months.

g) I further order and direct that the party and the party costs of this arbitration to include his arbitrator's expenses and appointment costs to be borne equally by both parties but the claimant's half share shall be recoverable from the respondent

h) The claimant has paid on behalf of the respondent Kshs 103,000/- part of arbitrator's costs. The amount of Kshs 103,000 she paid shall be recoverable from the respondent by the claimant in addition to the claimant's half share of costs.

i) The arbitrator's costs of this arbitration are hereby assessed at Kshs 425,000/- inclusive of 16% VAT.

6. Aggrieved by the award, the defendant brought **Nairobi ELC Miscellaneous Application Number 96 of 2017** (Notice of Motion dated 24/5/2017) seeking an order setting aside the award in the following terms:

**“This honourable court be pleased to set aside all that part of the arbitral award which contains matters beyond the scope of the reference.”**

7. Happy with the award, the plaintiff brought a notice of motion dated 29/5/2017 in Nairobi ELC 354 of 2013 seeking the adoption and enforcement of the arbitrator's award. The two applications are the subject of this ruling.

8. It is noted that referral of the dispute to arbitration was not procured through an order of the court. The parties through a joint letter initiated arbitration proceedings without reference to the court. Secondly, subsequent to the filing of the applications under consideration, on 29/11/2017, the plaintiff, made an oral request to have the two files consolidated on the ground that they related to the same dispute. The defendant did not object to the request. Consequently, a consolidation order was issued on the same day.

9. The two applications were canvassed through written submissions. The defendant, firstly, contended that because the plaintiff did not file a replying affidavit or grounds of opposition to the application for an order setting aside part of the award, the said application was technically unopposed. Secondly, it contended that the award of *mesne profit* was completely *ultra vires* the arbitrator's jurisdiction because the relevant agreement which gave rise to the arbitration proceedings specifically ousted the arbitrator's jurisdiction to consider any claim related to damages outside the remedies stipulated in the contract. On the plaintiff's application for an adoption order, the defendant contended that the application was unprocedural because it was brought in Nairobi ELC Number 354 of 2013 yet there was no referral order in the said suit and the said suit had been abandoned. It faulted the plaintiff for not bringing a miscellaneous application.

10. The plaintiff submitted that the defendant's grievance and challenge only related to the award of *mesne profits*. She submitted that the claim for *mesne profits* was contained in the pleadings presented to the arbitrator by the parties and one of the issues for determination by the arbitrator was the question as to whether the plaintiff was entitled to recover *mesne profits* from the defendant.

11. I have considered the two parallel applications together with the parties' rival submissions. I have also considered the relevant statutory framework and jurisprudence. The single issue falling for determination in the application for an order setting aside the arbitral award is whether the applicant has satisfied the criteria set out in Section 35(2) of the Arbitration Act. Put differently, the issue to be determined is whether the impugned arbitral award deals with a dispute not contemplated by or not falling with the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference.

12. The single issue falling for determination in the application for adoption of the award is whether **Nairobi ELC Number 354 of 2013** is the proper forum for adoption and enforcement of the award in the absence of a referral order in the same suit. I will determine the two issues sequentially in that order.

**Application for setting aside the Award**

13. The issue in this application is whether the impugned arbitral award deals with an issue 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. In determining this issue, it is to be borne in mind that Section 35 (1), (2) and (3) of the Arbitration Act deliberately restrict the jurisdiction of this court to interfere with the award of an arbitrator. Consequently, it sets out specific statutory grounds upon which this court may interfere with an arbitral award. It provides thus:

**35. Application for setting aside arbitral award**

**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).**

**2) 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 No. 4 of 1995 Arbitration**

**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.**

14. The impugned award was procured through consensual arbitration proceedings initiated through a joint letter dated 12/9/2013, addressed to the Chairman of the Chartered Institute of Arbitrators-Kenya. The letter read thus:

**Our Ref: EMW/CC/A/42/13      12/9/2013**

**The Chairman**

**Chartered Institute of Arbitrators – Kenya**

**Kindaruma Lane, Off Ngong Road**

**Nicholson Drive**

**P.O. Box 50163**

**NAIROBI.**

**Dear Sir**

**RE: DISPUTE BETWEEN REBECCA NDANU MUNGUTI (PURCHASER) AND ARCHER DRAMOND MORGAN LIMITED (VENDOR) RELATING TO SALE AND PURCHASE OF UNIT NUMBER 63 ON LAND REFERENCE NUMBER**

*The above matter refers.*

*Whereas the above parties entered into an Agreement for Sale of the above premises dated 3/11/08.*

*And whereas a dispute has arisen on issues touching on the said Agreement. And further, whereas Article 13.2. of the said Agreement for sale provides for arbitration in the event of any dispute arising out of or in connection with the said Agreement and such arbitration to be referred to a single arbitrator appointed by consent of the parties or by the Chairman of the Chartered Institute of Arbitrators.*

*Now we hereby humbly request you to make an appointment of a single arbitrator to arbitrate on the apparent dispute and render his/her award.*

*Kindly notify both parties of your appointment.*

*Yours faithfully,*

*For: EM Wachira & Co. Advocates For: AMUGA & Co. Advocates*

*Signed signed*

EVANS WACHIRA PAUL AMUGA

15. It is significant to note that the arbitration was procured through advocates who were acting for the parties in a dispute that was before court. The advocates did not frame the specific questions which were to be determined by the arbitrator. They simply invoked Article 13.2 of the agreement which provided as follows:

***“Any dispute arising out of or in connection with this Agreement shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.”***

16. Secondly, upon appointment of the single arbitrator, parties were invited to present their pleadings and duly presented them. The claimant made a plea for, among other prayers, *mesne profits*. The respondent opposed the claim in its entirety. The arbitrator was accordingly invited to make a determination on the claim. Indeed, in his award, the arbitrator framed the plea for *mesne profits* as one of the issues falling for determination in the arbitral dispute. The arbitrator proceeded to render a determination that the defendant was liable to pay the plaintiff *mesne profits* and proceeded to assess the *mesne profits*. The arbitrator having made that determination, the applicant now challenges the merits of the award on the ground that the material contract did not contemplate the relief of *mesne profits*.

17. In my view, this objection is coming too late in the day and is being raised in the wrong forum. The parties had the opportunity to frame the questions which were to be answered by the arbitrator. They invoked Article 13.2 of the agreement, presented pleadings to the arbitrator and invited the arbitrator to render a determination. One of the issues flowing from their pleadings was whether or not the plaintiff was entitled to *mesne profits* from the defendant. On that issue, the arbitrator found in favour of the plaintiff. The defendant is aggrieved by the finding. The defendant is in essence challenging the merits of that finding. Regrettably, lack of merit in the finding of the arbitrator on a particular issue cannot be a ground for setting aside an award under Section 35 (2) of the Arbitration Act.

18. It is therefore my finding that the dispute relating to *mesne profits* was a dispute within the meaning of Article 13(2) of the agreement and a determination and award thereon was properly within the scope of the reference. It is my further finding that lack of merit in the arbitrator's finding on the issue is not a ground for setting aside the award. Consequently, it is my finding that the applicant in the notice of motion dated 24/5/2017 has not satisfied the criteria for setting aside an arbitral award under Section 35 of the Arbitration Act. The notice of motion dated 24/5/2017 is therefore rejected for lack of merit.

#### **Application for Adoption of the Award as a Judgment.**

19. The single issue in this application is whether Nairobi ELC 354 of 2013 is the proper forum for adoption and enforcement of the arbitral award. It is clear from the court record and from the materials presented to the court that the subject arbitration proceedings together with the award, though initiated during the pendency of **Nairobi ELC Case Number 354 of 2013** were not procured through an order of the court. The defendant objects to the adoption and enforcement of the award in the said suit. In my view, in the absence of a referral order or a consent on the forum of adoption and enforcement of the arbitral award, the avenue open to the party seeking to adopt and enforce the arbitral award is a miscellaneous application. Nairobi ELC Case Number 354 of 2013 cannot be the forum for adoption of the award unless both parties consent to that. Consequently, I decline to grant the adoption order in Nairobi ELC 354 of 2013. The party seeking to enforce the award is free to bring a miscellaneous application for adoption and enforcement of the award.

20. Lastly, it is apparent from the above background and from the positions taken by the parties that the consolidation order issued on 29/11/2017 on an oral request by the plaintiff was unnecessary and cannot stand in the absence of a consensus by the parties. I say so because the present suit was brought by way of plaint and parties have not recorded a settlement in the suit. The arbitral proceedings which determined the issues in dispute was not procured through an order made in the suit. It is upon the initiator of the suit to cause the suit to be marked as settled. Accordingly, without prejudice to the joint ruling and findings in the two applications. I hereby vacate the consolidation

order made on 29/11/2017. I direct that a copy of this ruling shall form part of the record in **Nairobi ELC Miscellaneous Application Number 96 of 2017**:

**Disposal Orders**

21. In light of the above findings, I make the following orders in relation to the notice of motion dated 24/5/2017 in Nairobi ELC Miscellaneous Application Number 96 of 2017 and the notice of motion dated 29/5/2017 in Nairobi ELC Case Number 354 of 2013 and in relation to the consolidation order made on 29/11/2017.

**a) The Notice of Motion dated 24/5/2017 brought on 26/5/2017 in Nairobi ELC Miscellaneous Application Number 96 of 2017 seeking the setting aside of part of the arbitral award dated 25/4/2017 is rejected for lack of merit.**

**b) The Notice of Motion dated 29/5/2017 brought in Nairobi ELC Case Number 354 of 2013 seeking adoption and enforcement of the said award is declined on the ground that, in absence of a consent, Nairobi ELC Case Number 354 of 2013 is not the proper forum for adoption and enforcement of the award**

**c) Any party desirous of enforcing the award is at liberty to bring a miscellaneous application for the adoption and enforcement of the award.**

**d) The consolidation order made on 29/11/2017 in relation to Nairobi ELC Case Number 354/2013 and Nairobi ELC Miscellaneous Application Number 96 of 2017 is vacated and their respective folders are separated.**

**e) Each party shall bear their respective costs of the two applications.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Sussana Mukii Matee present in person

Court Clerk - June Nafula