

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E013 OF 2024

BETWEEN

ELVIS **AFTHAB**
NJUGUNA..... **APPLICANT**

AND

DAVID MUREITHI KANYI.....
RESPONDENT

RULING

Introduction and Background

1. This matter is in respect of an Arbitral Award dated 20th December 2023 where the arbitral tribunal (“the Arbitrator”) allowed the Applicant’s claim by declaring that the Respondent had breached his obligations under the Agreement of Sale dated 12th October 2021 and awarding the Applicant Kshs.1,500,000.00/- together with interest and costs of the arbitration (“the Award”). The Respondent seeks to set aside the Award through the Notice of Motion dated 11th March 2025. The application has been canvassed by way of written submissions which together with the pleadings I have

considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

2. The Respondent's application seeking to set aside the Award is supported by his affidavits sworn on 11th and 28th March 2025. He depones that he was never notified of the arbitration proceedings and was medically incapacitated during that period. He claims that he was served with warrants of attachment by Auctioneers on 4th March 2025 and that this was the first time he learned of an arbitration process against him, the Award and a subsequent court decree adopting that Award issued on 27th June 2024.
3. The Respondent avers that the arbitration and the court proceedings were conducted without his knowledge for reasons that he was never served with any notice of arbitration or the application to adopt the award. He claims that during the arbitration period which between April and October 2023, he was medically incapacitated and that he suffers from chronic hypertension associated with cardiomyopathy with renal insufficiency and was on bed rest. The Respondent states that the process violated the rules of natural justice because he was condemned unheard and since he did not participate, he was unable to raise defenses, including a challenge to the Arbitrator's

jurisdiction noting that the suit property is in Mtwapa, Kilifi County, which affects the proper seat of arbitration. For these reasons, the Respondent prays for an order to set aside the Award and the court's decision to adopt it and a direction for the parties to start the arbitration process afresh so he can participate and present his case.

4. In response, the Applicant depones that the Applicant's application is devoid of merit, vexatious, brought in bad faith and should be dismissed with costs. The Applicant contends that the Applicant was duly served throughout the arbitration process but chose not to participate. He claims that the Applicant was copied in the letter from the *Chartered Institute of Arbitrators* dated 1st December 2022 and the Arbitrator's acceptance letter of 16th January 2023 was sent to his postal address P.O. Box 87912-80100, Mombasa. That a letter dated 23rd March 2023 inviting parties to a virtual meeting on 31st May 2023 was sent to the same address but the Respondent did not respond. The Applicant claims that he provided the Arbitrator with a postage receipt dated 8th May 2023 proving he served the Statement of Claim via registered post to the same address. He further claims that other directions and notices for meetings including one on 28th August 2023 were served via the same postal address, with postage receipts provided as evidence.

5. The Applicant states he was never made aware of the Respondent's medical condition and that even if the condition existed, he has provided no evidence that he attempted to inform the Applicant or the Arbitrator of his inability to participate. The Applicant argues he will suffer great prejudice if the Award is set aside because he has already paid the full purchase price of Kshs.1,500,000.00/= for the property, he solely bore the costs of the arbitration and incurred significant legal fees for the arbitration and the adoption of the Award. That ordering a fresh arbitration would force him to incur further costs.
6. However, while opposing the application, the Applicant suggests that if the court is inclined to grant it, conditions should be imposed in the interest of justice. That the Respondent should deposit the Kshs.1,500,000.00/= purchase price in a joint interest-bearing account as security, the Respondent should reimburse the Applicant for all costs incurred to date, totaling Kshs.583,400.00/= and the Respondent should be ordered to bear all costs of the new arbitration.
7. Under **section 35(2)(a)(iii)** of the **Arbitration Act**, an award may be set aside if the party making the application furnishes proof that it *"...was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to*

present his case." This court has consistently held that the right to be heard is a fundamental principle of natural justice that goes to the root of an arbitration and that an award will be set aside if it is demonstrated that one of the parties was condemned unheard (see **Ligwaras Enterprises Limited v County Government of Migori; Aluochier Dispute Resolution (Interested Party) [2025] KEHC 17411 (KLR)**)

8. Whereas the Respondent contends that he was never served with any notice of the appointment of the arbitrator or arbitral proceedings, the Applicant has provided extensive documentary evidence of service by registered post to P.O. Box 87912-80100, Mombasa together with certificates of posting. The Respondent did not dispute the authenticity or correctness of this postal address. It is now trite and settled that a certificate of posting indicating a recipient's correct address is prima facie proof that service was effected and documents were received (see **Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others [1996] KECA 205 (KLR)**). The Applicant did all that was required of him to effect service. The postal address was the known address of the Respondent and postage receipts prove service. The Arbitrator even noted on 23rd March 2023 that despite dispatching letters, he had "*received no communication at all from the*

Respondent despite having dispatched the previous letters by registered post to his address". It is therefore my finding that proper notices of the appointment of the arbitrator and the arbitration proceedings were served upon the Respondent.

9. Despite service, the Respondent contended that he still could not have been able to attend the proceedings as he was medically incapacitated during this period. However, I find this argument problematic for several reasons. First, as correctly pointed out in by the Applicant, the Respondent never informed him or the Arbitrator of his condition. A party cannot remain silent about an incapacity and later use it as a ground to nullify proceedings. Second, there is no evidence that the Respondent or anyone on his behalf attempted to contact the Arbitrator to explain his absence or request an adjournment. Third, the medical records show the diagnosis dates back to January 2022. If the Respondent was capable of day-to-day activities for over a year before the arbitration, he would need to explain why the condition specifically prevented him from instructing counsel or responding to postal notices during the arbitration period, which explanation he has not given.

Conclusion and Disposition

10. It is for the above reasons that I decline to set aside the Award and dismiss the Respondent's application dated 11th March 2025 with costs assessed at Kshs.30,000.00/=. The interim orders in place are hereby discharged.

DATED SIGNED and DELIVERED virtually at NAIROBI this 2nd

DAY OF MARCH 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Ngui holding brief for Mr. Kimathi for the Applicant.
2. N/A for the Respondent.
3. Amos- Court Assistant