



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 95 OF 2011

(IN THE MAIN SUIT)

GIFTED HANDS FURNISHINGS AND FABRIC LIMITED.....PLAINTIFF

VERSUS

KIBUWA ENTERPRISES LIMITED.....DEFENDANT

CYCLO SYSTEMS KENYA LIMITED.....INTERESTED PARTY

AND

(IN THE ARBITRATION)

IN THE MATTER OF THE ARBITRATION ACT, NO.4 OF 1995

AND

IN THE MATTER OF RECOURSE TO HIGH COURT AGAINST ARBITRAL AWARD

GIFTED HANDS FURNISHINGS AND

FABRIC LIMITED.....PLAINTIFF/CLAIMANT

VERSUS

KIBUWA ENTERPRISES LIMITED.....DEFENDANT/RESPONDENT

CYCLO SYSTEMS KENYA LIMITED.....INTERESTED PARTY

RULING

Background:

The plaintiff, Gifted Hands Furnishings and Fabric Limited and the defendant, Kibuwa Enterprises Limited, entered into an agreement for sale dated 17th April, 2009 with respect to all that parcel of land known as L.R No.209/494/1 (hereinafter referred to as “the suit property”) pursuant to which the defendant agreed to sell to the plaintiff the suit property at a consideration of Kshs. 40,000,000/= on the terms and conditions that were contained in the said agreement. On 8th March, 2011, the plaintiff brought this suit against the defendant seeking among others, an injunction to restrain the defendant from selling the suit property to any other person and an order for specific performance of the said agreement. The plaintiff contended that the defendant had breached the said agreement for sale by refusing to release to its advocates the completion documents even after being given a professional undertaking to secure the balance of the purchase price. The plaintiff sought and obtained an interim order of injunction on 23rd March, 2011 restraining the defendant from selling the suit property to any other person.

The agreement for sale between the plaintiff and the defendant had an arbitration clause. On 17th March, 2011, the defendant filed an

application seeking stay of proceedings pending reference of the dispute between the parties to arbitration. On 20th February, 2012, the interested party which also claimed to have purchased the suit property from the defendant at a consideration of Kshs. 50,000,000/= pursuant to an agreement for sale dated 4th March, 2011, filed an application to be joined in the suit as interested party. The interested party's application to be joined in the suit as interested party was allowed on 18th June, 2012. The plaintiff claimed to have paid to the defendant a sum of Kshs. 12,000,000/= on account of the purchase price for the suit property leaving a balance of Kshs. 28,000,000/=. The interested party on the other hand claimed to have paid to the defendant a sum of Kshs. 30,000,000/= on account of the purchase price leaving a balance of Kshs. 20,000,000/=.

On 13th October, 2014, the court made an order by consent of the parties staying the proceedings in this suit and referring the dispute between the parties to arbitration. The parties thereafter appointed Justice (Rtd) J.B. Havelock as the sole arbitrator. Justice (Rtd) J.B. Havelock (hereinafter referred to only as "the arbitrator") accepted the appointment through a letter to the advocates for the parties dated 3rd June, 2015. The plaintiff lodged its amended statement of claim with the arbitrator on 11th August, 2015 in which it sought an award for among others:

1. An order for specific performance of the agreement for sale dated 17th April, 2009;
2. An order for a permanent injunction restraining the defendant and the interested party from selling, transferring or in any manner interfering with the plaintiff's right to quiet possession of the suit property;
3. Special damages in the sum of Kshs. 3,000,000/= per annum(revisable) together with interest at 14% per annum from September, 2009 until payment in full;
4. General damages for breach of contract and fraud;
5. A declaration that the sale agreement dated 4th March, 2011 between the defendant and the interested party was null and void; and
6. Costs of the arbitration as against the defendant and the interested party.

The defendant lodged with the arbitrator a defence and counter-claim dated 18th September, 2015 in response to the plaintiff's statement of claim. In its counter-claim, the defendant sought an award for:

1. A declaration that the sale agreement dated 14th April, 2009 between the plaintiff and the defendant was rescinded by the plaintiff through its advocates' letter dated 15th October, 2009;
2. Damages or mesne profits for lost rental income together with interest at 18% per annum from 1st February, 2013 until payment in full;
3. Damages on the purchase price of Kshs. 50,000,000/= in terms of the agreement for sale dated 4th March, 2011 between the defendant and the interested party;
4. Costs; and
5. Interest until payment in full.

The plaintiff filed a reply to defence and defence to counter-claim on 12th October, 2015. The arbitrator heard the parties and rendered his award on 5th July, 2016. In his award, the arbitrator made the following findings:

1. That the agreement for sale between the plaintiff and the defendant dated 17th April, 2009 was rescinded by the plaintiff and the rescission was accepted by the defendant;
2. That since the agreement for sale dated 17th April, 2009 had been rescinded as aforesaid, the defendant was at liberty to proceed with the sale of the suit property to the interested party;
3. That as a result of this suit and the arbitral proceedings, the defendant had been kept out of the revenue it would have earned on the sum of Kshs. 50,000,000/= that was payable to it by the interested party under the agreement for sale dated 4th March, 2011.

In conclusion, the arbitrator made the following award on the plaintiff's claim and the defendant's counter-claim:

1. Prayers (a), (b), (c), (d) and (e) in the plaintiff's statement of claim were rejected.
2. The defendant was directed to refund to the plaintiff the sum of Kshs. 12,000,000/= which the plaintiff had paid towards the purchase price of the suit property together with interest at the rate of 12% per annum from 7th October, 2009 until payment in full;
3. Prayer (a) in the defendant's counter-claim was allowed while prayers (b),(d),(e) and (f) were rejected;

4. With regard to prayer (c) in the counter-claim, the plaintiff was directed to pay to the defendant interest at the rate of 12% per annum from 4th March, 2011 until payment on the sum of Kshs. 20,000,000/= which was the balance of the purchase price payable by the interested party to the defendant on the agreement for sale dated 4th March, 2011.

5. The plaintiff was also directed to lift the caveat it had registered against the title of the suit property.

Through a letter dated 29th September, 2016, the plaintiff's advocates sought the interpretation of clause 52 of the award that contained the decision of the arbitrator pursuant to section 34 (i) (b) of the Arbitration Act, 1995. The plaintiff sought to know particularly the quantum of interest that was payable on Kshs. 12,000,000/= which the defendant was to refund to the plaintiff and the interest that was payable by the plaintiff to the defendant on the sum of Kshs.20,000,000/= which was the balance of the purchase price due from the interested party to the defendant. In a supplementary award dated 30th October, 2016, the arbitrator gave his interpretation of clause 52 of the award dated 5th July, 2016. In the said supplementary award, the arbitrator averred that section 32 (c) of the Arbitration Act, 1995(hereinafter referred to only as "the Arbitration Act") gave him power to make an order for the payment of simple or compound interest on any amount awarded and to determine the commencement date for such payment. The arbitrator stated that since the agreement for sale dated 17th April, 2009 between the plaintiff and the defendant had been rescinded by the parties, it could not provide any basis for determining the interest payable on the sum of Kshs. 12,000,000/= that was refundable by the defendant to the plaintiff. The arbitrator stated that the said sum of Kshs. 12,000,000/= would be refunded to the plaintiff by the defendant together with simple interest at the rate of 12% per annum from the date the said amount was paid to the defendant by the plaintiff until the date of refund. The arbitrator calculated the interest payable on the said amount to the plaintiff as at 31st October, 2016 to be Kshs. 10,595,515.85. The parties were put at liberty to verify the computation.

Through a letter dated 31st October, 2016, the plaintiff's advocates pointed out to the arbitrator that he had forgotten to comment on the interest that was payable by the plaintiff to the defendant on the sum of Kshs. 20,000,000/= which was the balance of the purchase price payable by the interested party to the defendant. In his e-mail dated 1st November, 2016, the arbitrator in response to the said letter by the plaintiff's advocates stated that since the defendant to whom the interest accruing on Kshs.20,000,000/= was payable had not raised any issue regarding the same, he did not think that there was a dispute over the same. He reiterated what he stated in the award dated 5th July, 2016 that the plaintiff was to pay to the defendant interest on the said sum of Kshs. 20,000,000/= at the rate of 12% per annum with effect from 4th March, 2011 until payment in full. He clarified that interest payable was simple interest.

The application before the court:

What is before the court is the plaintiff's Notice of Motion application dated 27th October, 2017 brought under Sections 1A, 1B and 59 of the Civil Procedure Act, Order 46 Rule 16 and Order 51 Rule 1 of the Civil Procedure Rules, sections 35 and 39 of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997. In the application, the plaintiff sought among others the following orders:

- 1. THAT the Arbitration Award dated 5th July, 2016 be varied or set aside.**
- 2. THAT in the alternative paragraph 52 of the Award ordering the plaintiff to pay to the defendant interest on Kshs. 20,000,000/= be struck off or set aside**
- 3. THAT the costs of the application be in the cause.**

The application was brought on the grounds set out in the body thereof and on the affidavit sworn by the plaintiff's director, Cyrus Nyori Ndungu Mbugua on 27th October, 2016. The application was opposed by the defendant through a replying affidavit sworn by Patrick Kibuchi on 12th October, 2017 and by the interested party through a replying affidavit sworn by Ajit Shah on 2nd October, 2017.

The plaintiff's case:

The plaintiff challenged the arbitral award dated 5th July, 2016 on several grounds. The plaintiff contended that the arbitral award was contrary to the established principles of law and justice and that the same was tainted with gross *mala fides*. The plaintiff contended that the arbitrator failed to determine the dispute in a just and fair manner and that the arbitrator acted arbitrarily, irrationally and capriciously. The plaintiff contended that the arbitrator determined the issues that were not before him for determination and that the award was designed to enrich the defendant. The plaintiff contended that the arbitrators' jurisdiction and terms of reference were derived from clause 14 of the agreement for sale dated 17th April, 2009 between the plaintiff and the defendant. The plaintiff contended that the arbitrator had no business determining a dispute that concerned the agreement for sale dated 4th March, 2011 between the defendant and the interested party and condemning the plaintiff to pay to the defendant interest at the rate of 12% per annum on the sum of Kshs. 20,000,000/= being the balance of the purchase price that was payable by the interested party to the defendant. The plaintiff contended that the interpretation and enforcement of the agreement for sale dated 4th March, 2011 was not raised as an issue by any of the parties to the arbitration. The plaintiff contended that it was unfair for the arbitrator to punish it for exercising his constitutional right to file this suit and obtain the orders that were issued on 22nd March, 2011 restraining the defendant from selling the suit property to any other person. The plaintiff contended that the arbitrator was wrong in his finding that the defendant had been kept out of the revenue it would have earned on the sum of Kshs. 50,000,000/= that was payable to it under the agreement dated 4th March, 2011. The plaintiff contended that this finding did not take into account its right to seek fair administrative action and to access justice. The plaintiff contended further that the arbitrators award to the defendant of interest on the said sum of Kshs. 20,000,000/= was contrary to the earlier finding that the said arbitrator had made to the effect that the plaintiff was not liable for any loss that was occasioned to the defendant. The plaintiff contended that the arbitrator was guilty of misconduct for making a finding that was inconsistent with the evidence on record. The plaintiff contended further that the arbitrator erred in his finding that the agreement for sale between the plaintiff and the defendant was rescinded and in his failure after reaching that finding to restore each party to their pre-contractual position. The plaintiff contended that it was absurd for the arbitrator to reward the defendant for entering into a fresh sale agreement with the interested party while still negotiating with the plaintiff. The plaintiff contended that the interested party had

admitted to having engaged in fraud and that to the extent that the arbitrator rewarded the defendant and the interested party for engaging in fraud the award was made in bad faith.

The defendant's case:

The defendant termed the plaintiff's application as frivolous, vexatious and a waste of judicial time. The defendant contended that the application was designed to delay the defendant in the enjoyment of the fruits of the arbitral award. The defendant contended that the only issue the plaintiff had with the arbitral award concerned the interest that was payable to the defendant and that the issue was resolved by the arbitrator through the interpretation that he made on 30th October, 2016. The defendant contended that apart from the issue of interest aforesaid, the plaintiff was in agreement with the arbitral award. The defendant contended that the plaintiff's application was brought in bad faith in that the plaintiff had failed to disclose in the application that the arbitrator had given an interpretation on the issue of interest. The defendant contended that the application did not meet the threshold set out in section 35 of the Arbitration Act. The defendant contended that the grounds put forward by the plaintiff to challenge the arbitral award are not substantiated and that the plaintiff seems to be challenging only part of the award that was against it. The defendant contended that the issues that were determined by the arbitrator were pleaded by the parties and urged before him and that the award did not in any way unjustly enrich it. The defendant contended that there was no basis put forward by the plaintiff to warrant the setting aside of the arbitral award dated 5th July, 2016.

The interested party's case:

The interested party contended that the fact that the plaintiff was dissatisfied with the arbitral award was not a ground for setting aside the same. The interested party contended that the plaintiff's application was intended to delay the registration of the arbitral award. The interested party urged the court to dismiss the application. The submissions by the parties:

The parties filed written submissions which they were given an opportunity to highlight. The plaintiff filed its submissions on 23rd November, 2017. The defendant and interested party filed their submissions on 17th November, 2017 and 6th December, 2017 respectively.

The plaintiff's submissions:

In its submissions, the plaintiff contended that its application was grounded on section 35(2) (a) (iv) of the Arbitration Act. The plaintiff reiterated that the arbitral award dealt with a dispute that was not contemplated by or not falling within the terms of the reference to arbitration or contained decisions beyond the scope of the reference to arbitration. The plaintiff submitted that the dispute between the plaintiff and the defendant was referred to arbitration pursuant to clause 14 of the agreement for sale dated 17th September, 2009 between the plaintiff and the defendant. The plaintiff submitted that the arbitrator was bound to determine the dispute in accordance with the terms of the said agreement for sale. The plaintiff submitted that the arbitrator awarded the defendant interest on the sum of Kshs. 20,000,000/= being the balance of the purchase price that was payable by the interested party to the defendant under the agreement for sale dated 4th March, 2011. The plaintiff contended that it was not a party to the agreement for sale dated 4th March, 2011 between the defendant and the interested party and as such the defendant could not incur any loss or derive any benefit from the plaintiff in respect of the said agreement. The plaintiff reiterated that the agreement between the defendant and the interested party was not an issue for determination before the arbitrator.

The plaintiff submitted that the arbitral award was unfair and unjust to it in that the interest that was awarded to the defendant on the said sum of Kshs. 20,000,000/- completely wiped out the substantive award that was made in its favour. The plaintiff submitted that the award was contrary to section 29(4) of the Arbitration Act in that the decision of the arbitrator was not in accord with justice and fairness. In support of its submissions, the plaintiff relied on the cases of, Dilshad Sadruddin Mohamed v. KSA Self Selection Stores Limited & others, Winding Up Cause No. 57 of 2001(unreported), Airtel Networks Kenya Limited v. Nyatu Agrovet Limited [2011] eKLR, Air East Africa v. Kenya Airports Authority [2012] eKLR, and Tony Mark Tanui v. Andrew Stuart & Another [2012] eKLR.

The defendant's submissions:

In its submissions, the defendant submitted that an arbitral award can be set aside on very limited circumstances only. The defendant submitted that the court cannot interfere with an arbitral award unless the grounds set out in section 35(2) of the Arbitration Act and Order 46 Rule 16 of the Civil Procedure Rules are established. The defendant submitted that the defendant had failed to establish any of the grounds set out in the said provisions of the Arbitration Act and the Civil Procedure Rules for setting aside an arbitral award. In support of its submissions, the defendant relied on the cases of Evangelical Mission for Africa & Another v. Kimani Gachuhi & Another [2015]eKLR and Anne Mumbi Hinga v. Victoria Njoki Gathara[2009]eKLR on the requirements to be met before an arbitral award can be set aside and the principle of finality of arbitral process.

The submissions by the interested party:

The interested party submitted that courts should be slow to interfere with arbitral awards. In support of this submission, the interested party relied on the case of Rashid Modelina v. Noima Ginnes(1967) E.A 645. The interested party submitted that the arbitrator had the discretion and jurisdiction to award interest as he deemed fit and reasonable. The interested party submitted that the issue of loss that was occasioned as a result of the defendant's inability to complete the sale of the suit property to the interested party was captured in the defendant's counter-claim in which it sought damages. The interested party submitted that the defendant had in its submissions before the arbitrator stated that it was as a result of being deprived of the purchase price that it was to receive from the interested party that it was claiming damages from the plaintiff. The interested party submitted that the issue of damages was rightly before the arbitrator and it was within his scope to address it in the award.

The interested party submitted that since the defendant suffered loss as a result of the plaintiff filing a suit and obtaining an injunction that stopped it from concluding the sale of the suit property to the interested party, the arbitrator was justified in condemning the plaintiff to pay

interest to the defendant on the balance of the purchase price that remained unpaid by the interested party to the defendant. The interested party submitted that there was no evidence that the arbitrator had misconducted himself and that the mere fact that the arbitrator had arrived at a different outcome other than that which was being advocated by a party is not a ground to set aside an award. In support of this submission, the interested party cited the case of Nairobi Golf Hotels Limited v. Linotic Floor Company Limited[2015]eKLLR. The interested party submitted that the authorities that were cited by the plaintiff were all distinguishable. In conclusion, the interested party submitted that the plaintiff had not met the threshold for setting aside an arbitral award under section 35 of the Arbitration Act and urged the court to dismiss the application.

The advocates for the parties highlighted their written submissions on 13th December, 2017. In their oral submissions, they reiterated the written submission and did not add anything new.

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

I have considered the plaintiff's application together with the affidavit and submissions filed in support thereof. I have also considered the defendant's and the interested party's replying affidavits and submissions in opposition to the 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

(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

(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”.

I am in agreement with the defendant's and the interested party's submissions that for the plaintiff's application to succeed, the plaintiff had to prove the existence of any of the circumstances set out in section 35 of the Arbitration Act. As submitted by the interested party, section 10 of the Arbitration Act limits the court's intervention in the arbitral proceedings to the extent permitted by the Act. In the case of 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.”

According to the plaintiff's submissions, its application was principally brought under section 35(2) (a) (iv) of the Arbitration Act. The burden was on the plaintiff to prove that the arbitral award violated the provisions of section 35(2) (a) (iv) of the said Act. I am not satisfied that the plaintiff discharged this burden. I am not persuaded that the arbitral award dealt with any dispute that was not contemplated by or did not fall within the terms of reference to arbitration or that the same contains decisions which 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 herein. I have also set out the particulars of the pleadings that were filed before this court and before the arbitrator. I am in agreement with the plaintiff that the dispute between the parties herein was referred to arbitration pursuant to clause 14 of the agreement for sale between the plaintiff and the defendant dated 17th April, 2009. I am of the view however that clause 14 of the said 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 nature of 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. In his submissions before the arbitrator as summarised in the arbitral award, the plaintiff framed the following issues for determination by the arbitrator:

- 1. Did the parties agree to rescind the sale agreement dated 17th April, 2009 by the claimant's letter dated 5th October, 2009 and the respondent's letter dated 7th October, 2009?**
- 2. Was the claimant ready and willing to complete the sale transaction and therefore deserving of the remedy of specific performance?**
- 3. Did the respondent enter into the agreement dated 4th March, 2011 with the interested party with the intention to frustrate and defeat the agreement with the claimant?**

On its part, the defendant framed the following issues for determination by the arbitrator:

- 1. Did the claimant and the respondent enter into a sale agreement and what were the salient terms?**
- 2. Was the claimant ready to complete the sale transaction by the completion date?**
- 3. Was the sale agreement dated 17th April, 2009 rescinded?**
- 4. Was the sale agreement dated 17th April, 2009 revived or did the claimant and the respondent enter into a subsequent sale agreement?**
- 5. Was there a deed of assignment substituting the purchaser?**
- 6. Did the respondent have a right to enter into a sale agreement with another party?**
- 7. Was the letter dated 6th November, 2009 forged?**
- 8. Is the claimant liable for the loss occasioned to the respondent?**
- 9. Does the claimant have locus standi to refer the dispute to arbitration?**
- 10. Who is to pay the costs of the arbitration?**

The interested party framed the following issues:

- 1. Did the claimant and the respondent enter into a valid sale agreement on 17th April, 2009?**
- 2. Was the said agreement for sale rescinded by a letter dated 5th October, 2009?**
- 3. After the said agreement for sale was rescinded could it be varied and assigned to Cyrus Mbugua?**
- 4. Assuming that the agreement for sale could be assigned, was the assignment valid in the absence of a written deed of assignment?**
- 5. Did Cyrus Mbugua and the respondent enter agreement for sale and if so on what terms?**
- 6. Is the agreement for sale between Cyrus Mbugua and the respondent invalid for want of writing?**
- 7. Does the claimant have locus standi to file suit?**
- 8. Is the claimant entitled to specific performance?**
- 9. Who will pay the costs?**

The parties made submissions before the arbitrator on the said issues. 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 concerning the agreement for sale dated 17th April, 2009 between the plaintiff and the defendant but also the agreement for sale dated 4th March, 2011 between the respondent and the interested party. It is also clear that amongst the issues that the arbitrator was to determine was the loss if any that was suffered by the defendant. Due to the foregoing, I am not in agreement with the plaintiff that the award of interest that the arbitrator made in favour of the defendant on the sum of Kshs. 20,000,000/= being the balance of the purchase price that was payable by the interested party to the defendant was not a dispute that was contemplated by or falling within the terms of the reference to arbitration or that the decision was beyond the scope of reference to arbitration.

I wish to add that, under section 17(1) of the Arbitration Act, the arbitral tribunal has power to decide on its own jurisdiction and any party aggrieved by such determination has a right to appeal to this court within 30 days to determine the matter and the decision of the court on the issue is final. I am of the view that a party who has failed to challenge the jurisdiction of the arbitral tribunal before the tribunal cannot be allowed to wait until after the arbitral tribunal has rendered its final award to raise the issue of jurisdiction as a ground for setting aside the final award.

The plaintiff had also contended that the arbitral award was unjust, contradictory, absurd and designed to unjustly enrich the defendant. These allegations were not established by the plaintiff. Even if the plaintiff had established the same, the same could not constitute valid grounds for setting aside the arbitral award herein. The fact that an arbitrator has made an erroneous or wrong decision is not a ground for setting aside an arbitral award. That can only be a ground of appeal under section 39 of the Act. I am not considering an appeal from the arbitral award and as such cannot entertain merit review of the same. This court has no jurisdiction to re-open the findings of fact made by the arbitral tribunal. In the case of Nairobi Golf Hotels Ltd. v. Linotic Floor Company Ltd. [2015] eKLR the court stated as follows;

“We agree with the finding of the High Court of Tanzania in DB Shapriya and Co. Ltd. v. Bish International BV (2)(2003) 2 EA 404, (cited by the learned counsel for the appellant) to the effect that;

“Courts cannot interfere with the findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct. The court’s intervention is limited to errors of law which are apparent on the face of the award”.

I also find the plaintiff’s claim that the arbitrator misconducted himself and acted in bad faith unfounded. The upshot of the foregoing is that the plaintiff has failed to establish grounds for setting aside an arbitral award. The plaintiff’s application dated 27th October, 2016 is without merit. The same is dismissed with costs to the defendant and the interested party.

Delivered and Signed at Nairobi this 20th day of September, 2018.

S. OKONG’O

JUDGE.

Ruling read in open court in the presence of:

Mr. Wandago for the Plaintiff/Claimant

Mr. Karanja for Defendant/Respondent

Mr. Kiragu for the Interested Party

Catherine Court Assistant