REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. 8 OF 2017 AND ELC MISC. 17 OF 2017

BENNET EZEKIEL OKUMU UDOTO.....APPLICANT

VERSUS

CLASSIS INTERIORS LIMITED..... RESPONDENT

RULING

There are two applications before this court leading to the following ruling. The first application is dated 1st April 2017 and is brought under Section 1A, 1B and 3A of the Civil Procedure Act order 46 rule 20 of the Civil Procedure Rules seeking the following orders:-

1. That the award dated 10th March 2017 by J.J. Mukavale Advocates – Arbitrator in the matter between Bennet Ezekiel Okumu Udoto versus Classic Interiors Ltd. Attached to the supporting affidavit marked BU-10 be adopted by this court as judgment of this court.

2. That upon granting prayer 1 above, a decree be issued in terms of the award.

3. That costs be provided for.

The application is grounded on the affidavit of Bennet Ezekiel Okumu Udoto. The grounds are briefly that, the parties herein executed a sale of land agreement dated 22nd March 2016 in which in clause 5.7 the parties agreed on an alternative dispute resolution. That it was agreed the decision of the arbitrator was conclusive and binding on the parties. The parties agreed and appointed J.J. Mukavale Advocates, the arbitrator. The parties further agreed on how to conduct the hearing, the matter proceeded. The arbitrator heard the dispute and delivered his award on 10th March 2017. That the applicant's Advocates vide letter of 20th March 2017 did request for the settlement of the amount awarded, to date there has been no response. It is now necessary to adopt the award to enable the parties move forward. The relief sought meets the ends of justice.

The second application is dated 22nd May 2017 and is brought under Section 35 (2) (iv) of the Arbitration Act as revised in 2012 seeking the following orders;

1. THAT the award made herein on 10th March 2017 be and is hereby set aside on the ground that the arbitral award dealt 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 or does not render itself on the contentious issues in the arbitration.

2. THAT the dispute be remitted to another arbitration Tribunal to be agreed between the parties.

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

The application is premised on the following main grounds; that an amendment of the map to include parcels BUTSOTSO/INDANGALASIA/5325 and 5879 shifts the location of the aforesaid plots from the actual position shown to the applicant by the respondent. The said amendment shows that the said parcels are occupied by 3rd parties. That the new title numbers assigned to the location showed to the applicant by the respondents i.e. BUTSOTSO/INDANGALASIA/5880 and 5320 are registered in the names of 3rd parties and significantly differ in size with the plots being purchased by the applicant. That therefore, applicant will be unable to take possession of the mixed up plots. That the foregoing issue which was at the centre of the arbitration proceedings was not dealt with by the arbitrator.

On the application dated 1st April 2017, the applicant submitted that, the parties herein entered into a sale agreement on 22nd March 2016 which is annexed marked BU-1. It was expressly agreed in clause 5.7 as follows:-

> "In the event that the parties are unable to solve their disputes amicably, the said dispute shall be referred to arbitration under the provisions of the Arbitration Act No. 4/1995 or any such modification or amendments that may be made from time to time before a single arbitrator agreed between the parties in case of failure to be appointed by the chairman of the local chapter of Law Society of Kenya and the decision of such Arbitrator shall be conclusive and binding between the parties".

The parties being unable to amicably resolve their dispute agreed/mutually appointed an arbitrator and agreed to refer the dispute for arbitration. The applicant has explained in the supporting affidavit aforesaid the events that led to the decision of 10th March 2017, which he seeks to be adopted to enable a decree to be extracted. The applicant is seeking to enforce terms agreed on. The parties agreed that "the decision of such arbitration shall be conclusive and binding between the parties."

The respondent filed a replying affidavit sworn by Moses Namayi Anyangu on 17th July 2017 in which he raises the issue that the application is premature and should be stayed in view of the application dated 22nd May 2017. It is clear when the application dated 1st April 2017 was filed, there was no other application pending. The application dated 22nd May 2017 in Misc. 17 of 2017 was filed much later. Until their application is allowed and the arbitration award is adopted, there is nothing to stay.

On the application dated 22nd May 2017 the respondent – Bennet Ezekiel Okumu Udoto opposes the application and relies on the replying affidavit sworn on 20th June 2017. The respondent states that, the applicant preferred appeal – Kakamega HCCA 28 of 2017 – annexure BU-6 is a copy of the memorandum of appeal. This appeal was filed prior to this application and the appeal is pending. In the appeal as shown in the memorandum of appeal – the appellant therein (now applicant herein) seeks that the award be set aside ant that the matter be remitted to a set of two arbitrators for hearing and determination. The reliefs sought in the appeal are identical to the reliefs sought in this application. This application offends the principles of duplicity review and settling aside – see sections 3A, 6 and 80 of the Civil Procedure Act. Both sections 6 and 80 stops this court from entertaining the application as the appeal was filed earlier, seeking same orders.

On the application dated 22nd May 2017 the respondent submitted that the parties agreed in clause 5.7 aforesaid to refer any dispute for arbitration to a single arbitrator – whose decision was to be conclusive and binding between the parties. The applicant is now asking this court to do an illegality – rewrite an agreement for them instead of interpreting or enforcing the same. The role of the court in regard to the agreement is to interpret and enforce the same.

It is clear from clause 5.7 of the sale agreement the respondent submitted, that the parties agreed that the decision of such arbitration "shall be conclusive and binding." These are clear English words assigned the ordinary meaning. The reliefs sought if allowed shall amount to rewriting a fresh agreement for the parties. The applicant has not in anyway challenged or raised an issue that render the sale agreement or

any term/condition unenforceably. No allegations of fraud, mistake are adduced. He is not seeking to avoid the agreement.

The respondent states that the three properties were duly transferred to the applicant as evidenced from the searches and copies of title deeds. The applicant only paid 2,200,000/= out of 22,000,000/= the agreed purchase price. The balance has not been paid to date. This is what the arbitrator ordered to be paid. The applicant has both the land the property purchased and the balance. The applicant wants this court to set aside award to pay the balance but remain with the purchased property. The applicant cannot have both the purchased property and the purchase price. The application dated 22nd May 2017 therefore, lacks merit and they pray it be dismissed with costs.

On the application dated 22nd May 2017 Classic Interiors Ltd, the applicant submitted that an agreement was entered between ourselves and the respondent for purchase of three plots land title numbers BUTSOTSO/INDANGALASIA/825, 5325 AND 5879. These plots were shown to the applicant by the respondent to be adjacent to each other and were treated as whole in the negotiations and subsequent agreement. That the purchase price was agreed at Ksh. 22,000,000.00 and upon execution of the agreement 10% down payment of Ksh. 2,200,000/= was paid. That the balance was to be paid upon successful transfer and the amendment of BUTSOTSO/INDANGALASIA EAST REGISTRATION MAP SHEET NO. 46 to reflect titles BUTSOTSO/INDANGALASIA/5325 and 5879 which were not on the map. That the respondent took up this responsibility but was unable to finish in good time. That as per the terms of the agreement when the dispute arose both parties agreed on a single Arbitrator J.J. Mukavale and proceedings were taken together with all exhibits and an arbitral award was made. Unfortunately the said award did not address in detail or at all the heart of this dispute being the location, position and size of BUTSOTSO/INDANGALASIA/5325 and 5879. That the location on the ground of the aforesaid parcels interferes with 3rd parties who are strangers to this transaction and some have even developed permanent houses thereon. That they therefore ask for their application to be allowed and the one dated 1st April 2017 dismissed.

This court has carefully considered the applications, the submissions and annextures therein. On the issue that application offends the principles of duplicity review and setting aside (see sections 3A, 6 and 80 of the Civil Procedure Act). That both sections 6 and 80 stops this court from entertaining the application as the appeal was filed earlier, seeking same orders. Be that as it may, this court has inherent powers to ensure that the ends of justice are met and I will proceed to determine the applications.

The brief facts are that, an agreement was entered between the applicant and the respondent for purchase of three plots land title numbers BUTSOTSO/INDANGALASIA/825, 5325 AND 5879. That the purchase price was agreed at Ksh. 22,000,000.00 and upon execution of the agreement 10% down payment of Ksh. 2,200,000/= was paid. That the balance was to be paid upon successful transfer. The amendment of BUTSOTSO/INDANGALASIA EAST REGISTRATION MAP SHEET NO. 46 to reflect titles BUTSOTSO/INDANGALASIA/5325 and 5879 was also to be undertaken. This was not done and was the cause of the dispute. The parties being unable to amicably resolve their dispute agreed/mutually appointed an arbitrator and agreed to refer the dispute for arbitration. The parties agreed that “the decision of such arbitration shall be conclusive and binding between the parties.” The Arbitrator after hearing both parties ordered the applicant to pay the balance but remain with the purchased property. The respondents being dissatisfied with the award brought this application brought under Section 35 of the Arbitration Act as revised in 2012 seeking the orders that the award made on 10th March 2017 be set aside on the ground that the arbitral award dealt 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 or does not render itself on the contentious issues in the arbitration. Under Article 159 (3) of the Kenyan Constitution the respondent stated, traditional disputes resolutions mechanisms shall not be used in a way that is repugnant to justice and morality and this award is against public policy. He relied on the case of National Agriculture Export Development Board v Cargill Kenya Limited Mombasa Misc Applic No 390 of 2012.

Under Section 35 of the Arbitration Act the grounds a court can interfer with an arbitration award are as

follows;

1.***The Arbitral Award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration.***

2. ***The arbitration award contains decisions on matters beyond the scope of the reference to arbitrate.***

3. ***The composition of the tribunal was not in accordance with the agreements of the parties and was not in accordance with the Arbitration Act.***

4. ***The making of the Award was induced or affected by Fraud, bribery, undue influence or corruption.***

5. ***The Award was in conflict with the public policy of Kenya.***

6. ***The award was contrary to the Laws of Kenya.***

7. ***The Award was in violation of the Constitution of Kenya.***

In the case of **Nyutu Agrovet Limited v Airtel Networks Limited, Civil Appeal (Application) No. Nai 61 of 2012** the decision of a five judge bench unanimously laid out the following principles:-

"An arbitral award is final and binding on the parties; the intervention of the Court as regards an award delivered by an arbitral tribunal is limited strictly to the grounds set out in Section 35 of the Arbitration Act and no more; the authority of the court in dealing with an application under Section 35 does not confer upon it an appellate jurisdiction meaning that the court is not entitled to review the decision of the arbitrators for the purposes of substituting its own view or conclusions with that of the arbitral tribunal. The court will respect the fact that the parties opted to go to an arbitral tribunal instead of going to court and therefore except for the grounds set out in Section 35, it will not interfere with an arbitral award even if the court itself, on the facts as proven, might have reached a different conclusion; that our Arbitration Act is in keeping with the UNCITRAL Model Law to which Kenya is a signatory and so in keeping with its international obligations, it must uphold, respect and enforce the arbitral process; that the intervention of the court must be in furtherance, and not in hindrance of the arbitral process. In arriving at the above findings, the Court of Appeal considered, among others, arguments in relation to the provisions of the Constitution and specifically Article 164 of the Constitution".

This court also looked at the decision of the Court of Appeal in the case of **Anne Mumbi Hinga v Victoria Njoki Gathaara, [2009] eKLR** where the Court had stated as follows:-

> **"**We therefore reiterate that there is no right for any Court to intervene in the arbitral process, or in the award, except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties, and similarly, there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act … We are concerned that contrary to the broad principles of finality of arbitral awards as set out in the Arbitration Act, the Superior Court all the same entertained incompetent Applications which have in turn resulted in the 10 years delay in the enforcement of the award."

The court is therefore in my opinion allowed to intervene in very limited circumstances. Indeed, in **National Cereals & Produce Board v Erad Suppliers & General Contracts Limited (2014) eKLR**, the court explained that:-

> "... one of the principles underlying our … Arbitration Act is the severe restriction on the role of the court in the arbitral process. That principle finds expression in section 10 of the Act. Section 35 of the Arbitration Act is underpinned by that principle. Our courts have since the coming into force of that statute observed and given effect to that principle."

Counsel for the respondent submitted that the said award did not address in detail or at all the heart of this dispute being the location, position and size of BUTSOTSO/INDANGALASIA/5325 and 5879. Their application is brought under Section 35 of the Arbitration Act as revised in 2012 seeking the orders that the award made herein on 10th March 2017 be set aside on the ground that the arbitral award dealt 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 or does not render itself on the contentious issues in the arbitration. The award is also repugnant to justice and morality and against public policy. I find that the arbitrator did address himself on this point. His determination was that the amendment of the map sheet was purely the purview of the regional lands office and that the issue of amendment was underway. He determined that the time frame for the amendment of the map was not specific and the purchaser having transferred the land in their name is now estopped from rescinding the agreement. Important to the arbitral process and to the parties before the court was whether or not the agreement was performed. This court will not go into the details of evidence and facts on how the issue was determined by the arbitrator. What is clear to this court is that the arbitrator had a duty to deliver justice to the parties, using the sale agreement and the land in question.

The narrow nature of setting aside of an arbitration award was further defined in **National Cereals & Produce Board v Erad Suppliers & General Contracts Limited**, the court held;

> " … section 35 of the Arbitration Act permits the setting aside of an arbitral award. It does not permit an appeal. Setting aside is a narrower avenue for challenging an award than an appeal. The grounds for setting aside an award are restricted under the Act."

I have also carefully considered the issue of public policy raised in this matter and in the case of **Rwama Farmers Co-operative Society Limited versus Thika Coffee Mills Limited [2012] eKLR,** Justice Mabeya, defines public policy as provided in Section 35 of the Arbitration Act. He states that:

"From the foregoing, it is quite clear that the term "conflict with the public policy" used in Section 35(2) (b) of the Arbitration Act, is akin to "contrary to public policy", "against public policy", "opposed to public policy". These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society".

I do not find any evidence in the arbitral process that it was injurious to the public, offensive, had an element of illegality or that which is unacceptable and that violate the basic norms of society. This court finds that the Arbitrator's award did consider the issues alluded to by the applicant and interfering with them will be sitting on appeal over the same. I do not intend to depart from the severe restriction on the role of the court in the arbitral process. I see no reason to set aside this ward. Pursuant to the foregoing, this court makes the following orders:-

a. The Application by way of Notice of Motion dated 1st April 2017 succeeds.

b. The Notice of Motion application by the respondent filed in court on 22nd May 2017 fails.

c. Each party is to bear its own costs of the applications.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11TH DAY OF OCTOBER 2017.

N.A. MATHEKA

JUDGE