



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: W. KARANJA, KIAGE & SICHALE, JJA]

CIVIL APPEAL NO. 340 OF 2013

BETWEEN

LUCY WAITHIRA MWANGI.....1ST APPELLANT

JOHN IRUNGU GITHINJI.....2ND APPELLANT

JULIUS KARIUKI MWANGI.....3RD APPELLANT

AND

STEPHEN KIMANGA.....1ST RESPONDENT

PAUL KIMARI..... 2ND RESPONDENT

FREDRICK NJORA.....3RD RESPONDENT

JACKSON MUCHOKI.....4th RESPONDENT

PATRICK GITHINJI.....5TH RESPONDENT

MOSES KIMANGA.....6TH RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court at Nairobi-Milimani (Khaminwa, J) dated 3rd February, 2012. In

HCCC NO. 454 OF 2008

JUDGMENT OF THE COURT

The appellants, *Lucy Waithira Mwangi, John Irungu Githinji* and *Julius Kariuki Mwangi* were dissatisfied with the ruling and orders of *Khaminwa J.* (as she then was) delivered on 3rd February, 2012 and hence this appeal.

A brief background to this appeal is that the appellants filed suit on 11th August, 2008. *Stephen Kimanga, Paul Kimari, Fredrick Njora, Jackson Muchoki, Patrick Githinji* and *Moses Kimanga*, the respondents herein were named as the then defendants. In the plaint, it was averred that the respondents had invited the public to bid for shares in Fig Tree Hotel Limited, a company where they were all shareholders by virtue of inheritance from their parents.

Contemporaneous with the filing of the plaint, the appellants filed a Chamber Summons application premised on the then **Order XXXIX Rules 2, 3 and 9 of the Civil Procedure Rules**. Following this application and by consent of both parties an order of injunction was granted as well as an order:

“That the issue of the disputed shareholding of members of

Fig Tree Hotel Limited be determined by an arbitral process to be chaired by Mr. Kyalo Mbobu within a period of sixty (60) days from the date of this order.”

In a statement of defence (of which the date of filing cannot be ascertained), the respondents admitted having invited the public to bid for shares but that this action was in “*good faith.*”

Thereafter the parties proceeded with the arbitration conducted by **Mr. Kyalo Mbobu** as indicated above. On **28th April 2009**, the appellants’ advocate **Messrs Njuguna** and Co. Advocates (having filed a Notice of Appointment of Advocates) wrote to the Arbitrator informing him that they had taken over the brief from the appellants’ former counsel, **E.K. Njagi & Co Advocates**. In the letter the appellants wanted to know the position of the arbitration proceedings and to be availed the “*proceedings, claim, defence, submissions by parties and any correspondence.*” In his letter of **30th April 2009** **Mr. Kyalo Mbobu** (the Arbitrator) declined to grant the appellants’ request as he was “*... not a court of law*”. Thereafter, the appellant’s counsel filed a notice of change of advocate and effected service upon the Arbitrator on **18th May, 2009**. It is then that the Arbitrator responded and indicated that the Award had been collected by the parties on **12th May, 2009**.

In the meantime the appellants had moved to court on **20th May, 2009** and obtained the following orders:

“1. That the arbitrator is hereby to deliver a signed copy of the final Arbitral Award to each party within the next (sic) on or before 25th May, 2009.

2. That this order be served upon Mr. Kyalo Mbobu Esq. by Mr. Njuguna.

3. That this case be and is hereby adjourned to 25th May, 2009 for mention.

4. That interim orders be and are hereby extended.”

The award having been filed in court, the respondents filed an application dated **24th August, 2009** seeking to have the award adopted as the judgment of the court. The appellants, on their part filed an application dated **11th September, 2009** to set aside the arbitral award. In a ruling dated **23rd September, 2010** and read on **3rd February, 2012**, **Khaminwa, J.** confirmed the arbitral award and dismissed the appellants’ application for its setting aside.

The appellants were dissatisfied with the said outcome and in a memorandum of appeal dated **2nd December, 2013** listed 13 grounds of appeal. The learned judge (Khaminwa, J.) was faulted for failing to consider the issues raised in the appellants’ application dated **11th September, 2009** seeking to set aside the award; erred in considering the application for adoption before determining the application for setting aside the award; erred in finding that the arbitration was solely governed by the Arbitration Act 1995; erred in finding that in order to vitiate an award, one has to prove misconduct that amounts to a criminal offence; that the Arbitrator had acted outside his jurisdiction; that there was evidence of misconduct on the part of the Arbitrator; that the award was delivered out of time and, finally, that the learned judge failed to consider and rule on the preliminary objection raised by the appellant in respect to the appellants’ application dated **24th August, 2009**.

On **28th November 2018** the appeal came before us for plenary hearing. Learned counsel **Mr. Njuguna**, appeared for the appellants whilst learned counsel **Mr. Omangi** appeared for the respondents. **Mr. Njuguna** contended that the arbitrator misconducted himself in failing to supply the proceedings to the appellant when the latter applied for the proceedings; in disobeying court orders of **20th May, 2009**; in filing the award in excess of the stipulated 60 days hence out of time; that the arbitrator had acted in excess of his jurisdiction; erred in entertaining an application for adoption of the award and yet there was pending an application seeking to set aside the award and that the learned judge erred in finding that only misconduct that amounts to a criminal offence is what can lead to setting aside an award. Counsel relied on this Court’s decision of **Nyangau V. Nyakwara [1985] eKLR** for the proposition that an award that is filed out of time and without an application for extension of time is a nullity.

In opposing the appeal, **Mr. Omangi** for the respondents contended that both parties had by consent agreed to refer the dispute to arbitration; that the parties were bound by the Arbitration Act of 1995; that no misconduct was established on the part of the Arbitrator and that the 60 days period for the determination of the dispute was severally extended by the court during mentions in presence of the parties’ counsel.

In a brief rejoinder, **Mr. Njuguna** maintained that the application for adoption ought to have awaited the outcome of the application to set aside the award. Further, it was counsel’s contention that the learned judge considered issues not before her.

We have considered the record, the grounds of appeal, the rival oral submissions, the authorities cited by the appellant in their bundle of authorities and digest thereof dated **28th November 2018** as well as the law.

The appeal before us is a first appeal. Our mandate therefore, is to reconsider the evidence, re-evaluate it and draw our own independent conclusion. In so doing however, we shall bear in mind that unlike the trial court, we did not have the benefit of seeing and hearing the witnesses. (See **Selle & Another versus Associated Motor Board Company Ltd and Others [1968] 1 EA 123**).

As stated above, the suit the subject of this appeal was commenced by way of a plaint filed by the appellants on **11th August 2008**. Contemporaneously with the filing of the plaint, the appellants filed a Chamber Summons seeking injunctive reliefs. In the main, the appellants prayed that the respondents be restrained from:

“(d) Disposing off their respective Shares in Fig Tree Hotel Limited scheduled for on or before 15th August 2008.

(e) Interfering in any manner whatsoever with the smooth running of and operation of the Fig Tree Hotel Limited.”

The motion was supported by the affidavit of **Lucy Waithera Mwangi**, the 1st appellant herein sworn on **11th August, 2008**. The appellant’s motion was resisted by the respondents by a replying affidavit sworn on **13th August, 2008** by **Stephen Maina Kimanga**, the 1st respondent.

On **14th August, 2008**, **P.K. Kariuki, J.** (as he then was) was seized of the matter.

He recorded the following consent:

“1. That the defendants be and are hereby restrained from disposing of their respective shares in Fig Tree Hotel Ltd for a period of sixty (60) days from the date of this consent order.

2. That the Defendants be and are hereby restrained in whatever manner whatsoever manner, whatsoever from interfering with the smooth running and operations of Fig Tree Hotel Ltd for a period of sixty (60) days from the date of this consent.

3. That the issue of the disputed share holding of members of Fig Tree Hotel Ltd be determined by an arbitral process to be chaired by Mr. Kyalo Mbobu within a period of sixty (60) days from the date of this order.

4. That the title documents of Fig Tree Hotel Ltd be kept in the safe custody of the appointed arbitrator who should not release them to any party until the finalization of the arbitration.

5. That this matter be mentioned on the 14th October, 2008 for purposes of adoption of the arbitral award by the court.

6. That the parties do appear before the arbitrator, Mr. Kyalo Mbobu on or before the 26th August, 2008 for the purpose of seeking his direction on the arbitration.”

Thereafter the parties submitted themselves before the arbitrator. On **10th September, 2008**, the Arbitrator drew up the order of business. In order for directions No. 1 it was agreed, by consent that:

“The Arbitration Act No. 4 of 1995 and the Chartered Institute of Arbitrators Rules, 1998, shall apply in these proceedings”.

Having agreed on the preliminaries including the applicable statute, hearing commenced in earnest. The appellants called 3 witnesses and the respondents called 4 witnesses. The parties having closed their respective cases, the arbitrator deferred the making of the award. On **14th October, 2008** the parties appeared in court and informed the court that the award was not ready. An order was made that the matter be mentioned on **14th November, 2008** on which date the matter was stood over to 8th December, 2008. As the award was still not ready a further mention date of **27th January, 2009** was taken.

On **27th January, 2009** parties informed the court that although the award was ready, the Arbitrator’s fees had not been paid and the award was not taken. Consequently, the matter was stood over to **18th March, 2009** and thereafter it was stood over generally. One of the grievances of the appellant is that the Arbitrator misconducted himself as he unilaterally expanded the scope of the issues in dispute. Reliance was placed on the decision of **Josephat Waweru Miano & Another vs. Samuel Mwangi Miano & Another [1997] eKLR**, for the proposition that an award can be set aside if an arbitrator expands the scope of issues in dispute. However, whereas that may be a true statement of the law, we were not told how the Arbitrator expanded the scope of the issue before him.

The other contention by the appellants is that the Arbitrator was guilty of misconduct. The learned Judge was faulted for raising the bar on what constitutes misconduct. The appellants placed reliance on **Mustill & Boyd, The Law of Commercial Arbitration in England, 2nd Ed, page 550-553** wherein the appellant

summarized the following as constituting misconduct by an arbitrator:

“

(a) If the arbitrator behaves in a way that is not fair or gives the appearance of unfairness,

(b) That the misconduct includes such mishandling of arbitration as to amount to miscarriage of justice,

(c) If the Arbitrator acts in a manner contrary to public policy,

(d) Where arbitrator decides on matters not included in the reference,

(e) Where there has been irregularity in proceedings,

(f) Where arbitrator has acted in breach of the rules of natural justice”.

In construing misconduct the appellants contended that the Arbitrator had refused to avail their counsel “...**proceedings, claim, defence, submissions by parties and any correspondence.**” However, the record shows that the firm of Njuguna & Partners Advocates initially filed a notice of appointment of Advocate dated **22nd April, 2009**. Upon Service of the said notice on the Arbitrator, the latter declined, rightly so in our view, to substantially deal with Messrs Njuguna & Partners Advocates until a Notice of Change of Advocates dated **23rd April, 2009** was filed and served upon the Arbitrator on **15th May, 2009**. Given that the firm of Njuguna & Partners Advocates had regularized its position and was properly on record, the Arbitrator, in his letter of **18th May, 2009** informed the said firm that the award had been collected on **12th May, 2009**. In our view, the appellants’ contention that the Arbitrator misconducted himself is not supported by the chronology of events leading to the release of the Award.

As regards the contention that the Arbitrator erred in dealing with the application for adoption before determining the application to set aside the arbitral award, again, we find that nothing turns on this. The respondent’s Chamber Summons application dated **24th August, 2009** was filed on the same day (**24th August, 2009**). On the other hand the appellant’s application to set aside the award is dated **11th September, 2009** and filed on the same day (**11th September, 2009**). In terms of time, the respondent’s motion was 1st in time. In our view, the learned Judge cannot be faulted for adopting a policy of ‘first-in-first-out’ as she did.

The other contention by the appellants was that the arbitral award was filed outside the 60 days period. The decision of **Nyangau vs. Nyakwara [1985] eKLR**, was cited in proposition of the contention that an award that is filed out of time and without extension of time being sought is a nullity. As stated elsewhere in this judgment, the parties appeared before court severally and by consent extended the period of 60 days. Indeed, in the last appearance on **18th March, 2009**, the matter was stood over generally on account of the fact that the Arbitrator’s fees had not been paid and the latter could not release the Award until and unless his fees was paid. In view of this finding, we do not find merit in the appellants’ contention that the Award was filed outside the 60 days period and the authorities cited in support of the proposition that an award filed outside the stipulated period do not avail the appellants.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

However, be that as it may, we think it would be remiss of us not to mention that the appeal herein has been determined solely on the grounds raised in the Memorandum of appeal dated **2nd December, 2013**. We were not called upon to determine whether an appeal can lie to this Court under Section 35 of the Arbitration Act. The issue was not raised by the respondent and we do not deem it fit to consider the issue of jurisdiction. We say this in the light of conflicting decisions emanating from this Court on the issue. We are cognizant that the Supreme Court is yet to make a determination on whether an appeal arising out of application under Section 35 of the Arbitration Act can be heard by us. We shall say no more.

Dated and delivered at Nairobi this 21st Day of June, 2019.

W. KARANJA

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JUDGE OF APPEAL

P. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR