



Elite Westlands Limited & another v Kiama (Environment and Land Miscellaneous Application E003 of 2024) [2024] KEELC 7317 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2024
LN MBUGUA, J
OCTOBER 30, 2024**

BETWEEN

ELITE WESTLANDS LIMITED 1ST APPLICANT

VAAL REAL ESTATE LIMITED 2ND APPLICANT

AND

WILLIAM KANYUA KIAMA RESPONDENT

RULING

1. The Notice of Motion dated 26.6.2024 is for determination. The Applicants seeks to set aside the arbitral award published by the sole arbitrator, William Edward Kosar, MCI Arb on 19.6.2024 plus costs. The application is premised on grounds on its face and on the supporting affidavit sworn on 26.6.2024 by Nuru A Said, the 2nd Applicant's former chief legal officer.
2. She avers that the parties herein entered into an agreement dated 27.8.2021 for the purchase of a 1 bedroom apartment on the 15th floor of a building erected on LR No 209/2144/1 (hereinafter the suit property) for ksh 12 million which was to be paid as per a payment schedule set out in the sale agreement.
3. That the Respondent defaulted in making the payments prompting the 1st Applicant to issue him with a completion Notice dated 21.6.2022 of which at the time of the Notice, he had only paid ksh 6,500,000. The respondent requested for extension of time as he sought mortgage financing, but this was not agreeable to the applicants, prompting them to rescind the contract and resold the suit property.
4. That the Respondent was aggrieved by the rescission and resale of the property, thus he initiated arbitration proceedings via a statement of claim dated 24.5.2023 for the following orders;
 - i. A finding that the Respondents are in breach of the agreement for sale dated 27.8.2021.



- ii. General and exemplary damages thereupon.
 - iii. Refund of the remainder of ksh. 3,921,9579/=.
 - iv. Interest on (iii) above to be calculated from the date of payment.
 - v. Costs of this suit together with interest at court rates.
 - vi. Any other relief that this Honourable Tribunal may deem fit.
5. The applicants contend that the claim was heard by the sole arbitrator who published an arbitral award on 19.6.2024. The applicants pray that the said award be set aside as it is illegal in accordance with section 35 of the *Arbitration Act* for the following reasons.
 6. Firstly, it is averred that the arbitrator was not properly appointed as the applicants were not given a proper notice of his appointment.
 7. Secondly, that the award is in conflict with public policy for reasons that the arbitrator relied on a letter dated 13.12.2022 allegedly from Nairobi City County produced by the respondent who was not the maker against the provisions of section 35 of the *Evidence Act*. Further, the arbitrator awarded ksh 2 million as compensatory damages on allegations of fraud which were not pleaded and proven and that the arbitrator had concluded that the Applicants had waived their right to rescind the contract by accepting part payments.
 8. Thirdly, it is averred that the Applicants were unable to present their case as the Respondent withheld the proper letter addressed to their advocates dated 19.4.2023 which confirmed that an occupation certificate on the property was issued on 26.8.2022.
 9. Fourthly and finally, it is averred that the award contains decisions on matters beyond the scope of the reference to arbitration as the arbitrator based his decision on allegations of forgery.
 10. The application is opposed by the Respondent vide his replying affidavit sworn on 30.7.2024. He avers that the application is an appeal on the legal merits of the arbitral award. He contends that the Applicants had the chance to raise an objection on the procedural and substantive jurisdiction of the arbitrator but failed to do so and that no finding on fraud was made by the arbitrator.
 11. That additionally, the proceedings were conducted in utmost probity, integrity and impartiality, ensuring that each party had equal opportunity to exhaustively present their case and a final decision was made.
 12. The court has considered the rival arguments raised herein. The issue for determination before this court is whether the award published by the sole arbitrator, William Edward Kosar, MCIArb on 19.6.2024 should be set aside.
 13. The provisions of Section 35 of the *Arbitration Act* stipulate that;
 - “(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;”

14. The threshold for setting aside an arbitral award was stated in the case of *Synergy Industrial Credit Limited v Cape Holdings Limited* SC Petition No 2 of 2017 [2019] eKLR in which the Supreme Court stated that;

“Generally, therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds. And hence, the purpose of section 35 is to ensure that courts are able to correct specific errors of law, which if left alone would lead to a miscarriage of justice. Therefore, even in promoting the core tenet of arbitration which is a quicker and efficient way of settling commercial disputes, that should not be at the expense of real and substantive justice.....”

15. And in all instances, courts intervention must be provided for in legislation, see the cases of; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR and *Isolux Ingeniera, S A v Kenya Electricity Transmission Company Limited & 5 Others* [2018] eKLR as well as section 10 of the *Arbitration Act*. The said section “exemplifies the recognition of the policy of party’s autonomy” which underlie the arbitration generally and in particular the Act See- *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling).



16. This far, I pose the question; Which specific errors of law should this court correct, which if left alone would lead to a miscarriage of justice?. A perusal of the documents filed by the applicant reveals that they filed a statement of the defence way back on 26.6. 2023 as a response to the statement of the claim. Nowhere in the said pleading did the applicants question the validity of the arbitrator or the arbitration proceedings on the basis that they were not given proper notice or that the arbitrator was not competent. The issues relating to the notice of appointment of the arbitrator are factual ones which ought to have been raised in limine, before the arbitration body. As it were, the records indicate that the applicants wholly submitted themselves to the jurisdiction of the arbitral body and the validity of the arbitral proceedings were not made a subject of contest before that body.
17. In the case of *Kiplangat Korir v Dennis Kipngeno Mutai* [2006] eKLR, the court stated that;

“Substantial Justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent.”
18. Similarly, in the case at hand, the applicant is only crying foul after a decision was given by the tribunal which decision they are rather unhappy with. The grounds proffered in the application, that the appointment of the arbitrator was irregular, or that they (applicants) were not given a proper notice have no merits.
19. As for the other grounds, again it is apparent that the applicant fully participated in the arbitral proceedings, called witnesses and even filed submissions. The issues framed by the applicant for determination before the arbitrator related to “breach of contract as well as damages for breach of contract”. The award given was confined to these issues. The claims now being raised by the applicant that it was unable to present its case, that the award is against public policy or that the arbitrator went beyond the scope of reference are issues in the realm of an appeal.
20. In the end, I find that the application dated 26.6.2024 is not merited, the same is hereby dismissed with costs to the respondent. A copy of this ruling is to be placed in the file L Misc E115 of 2024.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30th DAY OF OCTOBER, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Wanja holding brief for Hassan for Plaintiff

M/s Achieng holding brief for Wanyama for Defendant

Court assistant: Vena

