



**Kenard Limited v Kihara (Miscellaneous Cause 41 of 2019)
[2024] KEELC 13745 (KLR) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS CAUSE 41 OF 2019**

JG KEMEI, J

DECEMBER 13, 2024

**IN THE MATTER OF THE ARBITRATION ACT 1995 (AMENDED 2009, 2012) AND
THE RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS
(KENYA BRANCH AND IN THE MATTER OF ARBITRATION)**

BETWEEN

KENARD LIMITED APPLICANT

AND

JULIUS MWANGI KIHARA RESPONDENT

RULING

1. The Applicant filed the instant Motion dated 3/7/2024 expressed under Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#) seeking Orders THAT;
 - a. Spent.
 - b. The Court be pleased to vary the decree issued on 10th June 2024 to contain figures in accordance with the Arbitral award entered on 13th August 2019.
 - c. Judgement be and is hereby entered for the Applicant against the Respondent as follows;
 - a. Kshs. 1,739,290/- together with interest at 12% from 1st November 2013.
 - b. Kshs. 311,850/- together with interest at 12% from 1st November 2013.
2. The Application is premised on the grounds that the Applicant filed an Application dated 4/9/2019 which inter alia sought adoption and enforcement of the Arbitral award dated 13/8/2019. That the Application was allowed vide a Ruling of this Court delivered on 20/9/2020 (or is it 24/9/2020) and



- a decree dated 10th June 2024 extracted. That the applicant has been unable to execute the said decree since it does not contain the actual figures indicated in the arbitral award hence the Application.
3. Rehashing the above grounds, the Applicant's counsel Nancy Njoroge swore her Supporting Affidavit on 3/7/2024. She annexed copies of the Arbitral Award dated 13/8/19 as NN - 1; Application dated 4/9/2019 as NN-2; Decree dated 10/6/24 marked NN-3 and the revised draft decree as NN-4.
 4. Resisting the Application, the Respondents filed Grounds of Opposition dated 16/9/2024 contending that the Ruling delivered on 20/9/2020 granted orders as sought by the Applicant; that the Court is being invited to reopen the hearing of the Chamber Summons dated 4/9/2019 and issue additional orders that were not sought and that the instant Application is asking the Court to grant reliefs that were not previously sought.
 5. Pursuant to directions issued on 30/9/2024 the parties elected to dispose of the Application by way of written submissions.
 6. Learned Counsel Nancy Njoroge filed submissions dated 8/10/2024 on behalf of the Applicant. A singular issue was drawn for determination; whether the Court should exercise its power and vary the decree to include the figures contained in the Arbitral award. Reliance was placed on the Court's powers as donated by Sections 80 (b) and 3A of the Civil Procedure Act. That the applicant is entitled to enjoy the fruits of his Judgment entered in 2019 as adopted by this Court's Ruling delivered on 24/9/2020. That the issue raised is in respect of the wording of the decree which is merely procedural and it is only fair and just that the Court allows the Application. The applicant denied that it is attempting to reopen the hearing of the Chamber Summons dated 4/9/2019 as claimed by the Respondent.
 7. Conversely the firm of Wachira Ndung'u & Co. Advocates filed the Respondent's submissions dated 9/10/2024. Two issues were framed for determination; whether the Court can revisit the Application dated 4/9/2019 and whether the Court can grant reliefs that were not specifically sought in the summons dated 4/9/2019.
 8. Answering the issues in the negative, the Respondent submitted that once a Court has pronounced itself on a matter it becomes functus officio especially in an Application filed pursuant to provisions of the Arbitration Act. That accordingly this Court lacks jurisdiction to entertain the current Application. That no apparent error or omission has been shown before the Court to warrant the instant orders sought.
 9. On the second issue the Respondent cited the case of Bernard Njoroge Kibaki T/A Njowa Njemu Enterprises Vs. Equity Bank Ltd & Anor. [2020] eKLR to support the proposition that a Court cannot award a relief which had not been sought in this case in the Chamber Summons dated 4/9/2019. The Court was urged to dismiss the Application.
 10. The singular issue for determination is whether the Application is merited.
 11. The Application is premised on Sections 1A, 1B & 3A of the Civil Procedure Act which collectively are referred to as oxygen principles or overriding objectives. The purpose of the oxygen principles is to urge Courts to determine matters with a view to meting out the ends of justice. This aim resonates with the provisions of Article 159 (2) d of the Constitution of Kenya, 2010 as well as Article 48 in ensuring access to justice.
 12. The record before me rightly and explicitly speaks for itself. NN-1 is a copy of the final arbitral award made on 13/8/2019 by Mr. Charles Kanjama as a sole arbitrator between the instant parties who were claimant and respondent respectively. The arbitration proceedings stemmed from a breach of the Lease Agreement entered into by the parties on 1/5/2010 concerning land parcel known as Mutubiri/



- Wemba Block 1/6803. At page 22 of the Final award the arbitrator reached a number of findings relevantly that the Respondent breached the Lease agreement entered into by the parties. To that end the claimant was awarded a sum of Kshs. 1,736,290/= with interest at Court rates of 12% p.a from the 1/11/2013 until payment in full. Further the Claimant was awarded costs of Kshs. 311,850/= with interest at 12% p.a from the date of the award (13/8/19) until payment in full. The award is signed by the Arbitrator in the presence of Veronica Kanyara.
13. One month later, the claimant moved the Court vide a Chamber Summons dated 4/9/2019 principally asking the Court to recognize the said final award as binding and enforceable and sought the following orders;
 - a. That the final award dated 13th August 2019 and issued by Mr. Charles Kanjama, Sole Arbitrator, be recognized as binding and enforceable by this Honourable Court.
 - b. That the costs of this application be borne by the Defendant.
 14. The Chamber Summons was opposed by the Respondent's Replying Affidavit sworn on 25/10/2019. In its Ruling dated 24/9/2020 the Court found the Chamber Summons merited and allowed it in its entirety.
 15. Dissatisfied with the Ruling, the Respondent filed a motion dated 13/11/2020 seeking stay of execution of the Ruling delivered on 24/9/2020. The Court dismissed the Application vide its Ruling delivered on 1/7/2021.
 16. Effectively absent any contrary order by a Court of competent jurisdiction, the Ruling of 24/9/2020 recognized the arbitral award as binding and enforceable on the parties. The said Ruling resulted in the decree (NN-3) dated 10/6/2024. Upon such recognition it suffices to state that the final award was adopted as an order of the Court.
 17. It is trite law and a well-known principle of equity that Court orders are not made and Courts do not act in vain. Equity, like nature, will do nothing in vain. On the basis of this maxim, Courts have held again and again that it cannot numb itself by making orders which cannot be enforced or grant an order which will be ineffective for practical purposes since to do so would be a pious farce.
 18. According to the Applicant, it is unable to execute that decree for want of figures as awarded in the final award dated 13/8/2019. The Respondent contends that the Application is untenable since the orders sought were already granted in the Ruling dated 20/9/2020(sic) and that now the Court is being urged to grant additional or alternative orders that were not pleaded nor sought in the Chamber Summons dated 4/9/2024 (sic).
 19. Having outlined the background of the instant Application, it emerges that the Hon Court in its Ruling of 24/9/2020 allowed the Chamber Summons dated 4/9/2019 in terms of prayer No. 1 and 2. For avoidance of doubt the prayers were coached as follows in the said Chamber Summons;
 - a. That the final award dated 13th August 2019 and issued by Mr. Charles Kanjama, Sole Arbitrator, be recognized as binding and enforceable by this Honourable Court.
 - b. That the costs of this application be borne by the Defendant.
 20. A glean of the said prayers vis-à-vis the Final award dated 13/8/2019 shows a variance in the tabulation of interest in respect to the costs of Kshs. 311,850/= awarded. The arbitrator awarded interest at 12% p.a from the date of the award being 13/8/2019 and not the 1/11/2013 as has been advanced by the Applicant even in the instant Application. See annexure NN-4, the draft decree attached herein. It is trite that parties are bound by their pleadings and in this case the Final Award of the arbitrator



is the Order that is valid and binding upon the parties. Unfortunately the current application being a departure from the arbitral award and the adoption order of the Court issued on 24/9/2020 is incompetent and untenable.

21. In the end I find that the Application is bereft of merit and it is for striking out.

22. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Njoroge HB Mereka for Plaintiff/Applicant

Odek HB F. N. Nganga for Respondent

Court Assistant – Phyllis

