



Rajula v Castle and Gardens Designers Limited (Miscellaneous Commercial Application E077 of 2023) [2025] KEHC 1085 (KLR) (Commercial & Admiralty) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
MISCELLANEOUS COMMERCIAL APPLICATION E077 OF 2023**

PJO OTIENO, J

FEBRUARY 28, 2025

BETWEEN

DR. ALLAN RAJULA APPLICANT

AND

CASTLE AND GARDENS DESIGNERS LIMITED RESPONDENT

RULING

Background

1. The Chamber Summons dated 13th October 2023 is brought by the Applicant, Dr. Allan Rajula, under Section 36 of the *Arbitration Act* as well as Sections 3, 4 & 9 of the Arbitration Rules. It seeks that the Final Award given by MR Dominic M Mbigi and dated the 14th February, 2023, be recognised. Adopted and enforced as a decree of the court.
2. It is common ground that the Applicant and the Respondent entered into an Agreement on the 16th October 2019 by which the Respondent was to supply glass and aluminium works and install the same at the Applicant's residential project located in Runda Mae Ridge at a cost of Kshs. 6,500,000. Later, the parties thereafter on 4th December 2019 entered into another agreement where the Respondent would install gypsum on the same project.
3. A dispute arose as to the performance of the contract whereby the Applicant faulted the Respondent for breaching the terms of the Agreement by inter alia poor workmanship and employing substandard and inferior quality materials. He alleged that he was forced to incur an additional costs of Kshs. 1,150,000 to rectify the Respondent's undertakings.
4. The Applicant invoked the arbitration Clause, clause 17, of the Agreement, and initiated arbitral proceedings against the Respondent. The Respondent however never participated in the said arbitral



proceedings alleging lack of service upon him nor its Advocates on record with the notices of appointment of the Arbitrator as well as the arbitral proceedings to enable him participate in choosing or consenting to the picking of an arbitrator and presenting its case.

5. The Arbitrator on 14th February 2023 issued an award in favour of the Applicant. The Respondent filed an application dated 19th April 2023 seeking to set aside the arbitral award but the same was dismissed by court's Ruling delivered on 17th August 2023 paving way for the Applicant to seek the adoption and enforcement of the arbitral award as a Decree of the Honourable Court.

Applicant's Case

6. The Applicant's case is premised on the grounds on the face of the Chamber Summons as supported by Supporting Affidavit sworn by the applicant on 13th October 2023 and a Further Affidavit dated 29th March 2024 in response to the Respondent's Replying Affidavit.
7. The gist of the application is that as a consequent of breach of contract between the parties, the Respondent caused the Claimant to incur an additional cost of Kshs. 1,150,000/- to rectify the substandard work done by the Respondent and subsequently refused refund the sum of Kshs. 7, 063, 095/- claimed by the applicant. That the matter was referred to arbitration in terms of the agreement and on the 14th February 2023, the Arbitrator, one Dominic N. Mbigi (MClarb), determined the Final Award and awarded to him; special damages for breach of contract in the same sum of Kshs. 1, 150, 000/= and Interest on the accruing sums at the rate of 12% per annum computed from the 5th of October 2022 until payment in full. The Respondent was additionally ordered to pay their own cost and pay the Claimant's costs of this Arbitration in the sum of Kshs. 170, 000/= together with the cost of this Award of Kshs. 307, 400/= (inclusive of VAT).
8. It was pointed out that the Respondent applied to set aside the arbitral award in HCCOMMARB No. EO24 OF 2023: Nairobi (Castle & Garden Designers Limited vs Dr. Allan Rajula) but the application was dismissed vide a ruling delivered on 17th August 2023.
9. In his Further Affidavit, which ought to have been headed Supplementary Affidavit, sworn on the 29th February 2024, addressing the allegation of lack of service, the applicant asserts that the Respondent was all aware of the dispute and the arbitral proceedings and did in fact attend one meeting on 12th July 2022 but thereafter chose not to participate or to present his case in the proceedings and as such should not be permitted to allege misrepresentation or non-disclosure of facts.
10. He reiterates that in the Ruling delivered on 17th August 2023, dismissing the Respondent's Application to set aside the award, the court held that the Respondent had an opportunity to object to the appointment of the Arbitrator but had waived his right to do so stating that the Respondent's objection is an attempt to re-litigate its application dated 19th August 2023 and which was dismissed on 17th August 2023.
11. It is the Applicant's case in the Supplementary Affidavit that the Honourable Court is not clothed with powers under Section 37 of the [Arbitration Act](#) to determine issues of fact as they are solely within the domain of the Arbitrator and as such the court has no power to decline to adopt an arbitral award outside the provisions of Section 37 of the [Arbitration Act](#). It is stressed that the requirements of section 37 have not been met to warrant the Honourable Court to decline to recognize and enforce the arbitral award. In conclusion, the Applicant presents that the objection by the Respondent is devoid of merit and as such the Application dated 13th October 2023 is merited and the orders sought therein should be granted.



Response

12. In response to the Applicant's Chamber Summons, the Respondent through its representative Risley Nelson Kavu swore the Replying Affidavit on the 1st December 2023. In the Affidavit, he concedes to have entered into a contractual agreement for the supply of glass and aluminium works and subsequent installation of the same at the Applicant's residential project in Runda Mae Ridge, vide Agreement dated 16th October 2019 and another agreement of 4th December 2019 for installation of gypsum.
13. The Respondent, however, denies the Applicant's allegation of having breached any of the terms of the said contract asserting to have completely and satisfactorily fulfilled its obligations towards the agreement to the Applicant's specifications. The Respondent presents that if any loss occurred to the Applicant, then the same is solely attributable to either the Applicant's own negligence or to force majeure. The Respondent further contend that the allegation of contractual breach against it are false because, it completed works on the 1st floor and 2nd floor as well as fixing the stainless-steel balustrade at the rooftop at a cost of Kshs. 1,200,000/=, gratis, and that the Applicant's representatives by name Esther Muna, signed off in presence of its representative Charles Kariuki signifying satisfaction as to the completion of the said works.
14. The respondent further asserts that whereas Clause 17 of the agreement provided for Arbitration in case of a dispute arising from the contract, the Applicant neither served it or its advocate with a demand letter nor notice referring the matter to Arbitration to enable it participate in appointment of the arbitrator.
15. It is then reiterated that the allegations by the Appellant are false and unfound in that all the works were properly done and particularly the installation of louvers on the sliding doors for ventilation at Kshs. 298,000/= gypsum works were properly completed but extra works were necessitated when the Applicant conducted a flood test and damaged the gypsum. Even the stairways were done as an extra work outside the original scope of works agreed hence a sum of Kshs. 888,095/= remain unpaid and due from the Applicant. It is thus asserted and contended that the arbitral award was obtained on the basis of misrepresentation by the Applicant and failure to disclose material facts on the true status of accounts between the parties.

Applicant's Submissions

16. In its submissions dated 29th February 2024, the applicant raises and identify two issues it considers available for determination by the Court to be; -
 - a. Whether the Respondent was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings?
 - b. Whether the Court has the jurisdiction to review the merits of the Arbitral Award?
17. On whether the Respondent was given proper notice of the appointment of an arbitrator or of the arbitral proceedings, the Applicant submits that the said allegation was addressed by the court in the Ruling delivered by Majanja J. dismissing the application to set aside the award. The Applicant submits that the Respondent was well aware of the dispute and the arbitral proceedings and even attended one meeting on 12th July 2022 convened for the appointment of the Arbitrator.
18. It is the Applicant's case that the Respondent did admit in its application to set aside the award, to have received notice that an Arbitrator was appointed and thereafter appeared before the Arbitral Tribunal in a meeting where it never raised any objections as to the appointment of the arbitrator as well as the service of a demand notice. The Applicant submits that Section 17 of the Arbitration Act provides



that a party has a right to raise an objection as to the jurisdiction of the arbitrator, an objection which would be determined by the arbitrator whereupon an aggrieved party by the said decision has a right to appeal to the High Court. The Applicant further submits that the Respondent having failed to raise any objection was deemed under Section 5 of the Arbitration Act, he waived his right to object hence the said objections cannot be raised before the court at this stage.

19. On whether the Court has the jurisdiction to review the merits of the Arbitral Award, the Applicant submits that arbitral awards are final and no appeal lies therefrom adding that where the parties have agreed to resolve their disputes by arbitration, they are bound by their contract. The Applicant submits that where a party refuses to participate in the arbitral proceedings under Section 26(c) of the Arbitration Act, the proceedings may continue and the Arbitrator shall make an award on the evidence before it.
20. The decision in Miscellaneous Case 27 of 2014 (National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited) is cited where the Court in rejecting the objection on jurisdiction raised a Respondent held as follows:

“The Respondent failed to participate in the proceedings. No plausible reasons were offered as to why the Respondent elected not to participate in the proceedings. Accordingly, the issue that the Respondent was denied the opportunity to be heard cannot arise since section 26 (c) of the Act is explicit that when a party to an arbitration fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. To encourage such ill-advised conduct to thrive amongst parties to a proceeding will defeat the purpose of adjudication of cases and the duty to comply with court summons or process. Indeed, arbitration will be hurt most by such discordant conduct of parties to an arbitration agreement.”
21. On the Respondent’s accusations that the arbitral award was obtained on the basis of misrepresentation and the failure to disclose material facts regarding the costs that remained unpaid for works done, the Applicant submits that such is an attempt by the Respondent to engage the court in a merit review of the Award by the Arbitrator. It is submitted that the allegations raised should have been placed before the Arbitrator for determination and cannot now be placed before the Court. Reliance was then placed on the decision in D. Manji Construction Limited vs. C & R Holdings Limited (2014) eKLR.
22. The Applicant further submits that a review of the merits of the arbitral award is strictly prohibited under Section 10 of the Arbitration Act and that the Court cannot delve into issues which properly belonged to an arbitral tribunal for determination. The Applicant further points that Section 37 of the Arbitration Act does not clothe the court with jurisdiction to engage in a review of the merits and/or an appeal on the merits of the Arbitral Award citing the cases of Miscellaneous Civil Application 792 of 2004 (Mahican Investments Limited and 3 others vs Giovanni Gaida & Others) and Civil Application No. 931 of 2018 (Kenyatta International Convention Center vs Congress Rental South Africa).
23. In conclusion, the Applicant submit that none of the objections raised by the Respondent are grounds for refusal of the adoption of the arbitral award under Section 37 of the Arbitration Act insisting that the Application dated 13th October 2023 is merited and pray that the same be allowed.

Respondent’s Submissions

24. For the Respondent, it is submitted that only two issues isolate themselves for determination by the court. It isolates the two issues to be; whether the Respondent was given proper notice of the



- appointment of an arbitrator and of the arbitral proceeding; and whether it is in the interest of justice for the award to be set aside?
25. On whether the Respondent was given proper notice of the appointment of an arbitrator or of the arbitral proceedings, it is submitted that the Applicant did not serve the Respondent or his advocate with a demand letter nor was the notice referring the matter to Arbitration to enable him participate in appointing, concurring on the appointment of the arbitrator and the arbitral proceedings.
26. It is the Respondent's further submissions that the failure to issue notice upon him, thus denying him his right to participate in the appointment of an Arbitrator and to participate in the proceedings, rendered the Arbitrator not properly clothed with jurisdiction to hear and determine the matter. While citing the case of *Associated Engineers Co vs Government of Anhra Pradesh & Anor* [1992] AIR 232, the Respondent submits that the Arbitrator had no power on the matter being he had been given power by only one party in the absence of the other party and as such the resulting arbitral award thereof is subject to challenge.
27. On whether it is in the interest of justice for the award not be recognised and enforced, the Respondent submits that the arbitration proceedings proceeded ex-parte without its participation. It is thus the Respondent's case that the dispute was not heard and determined on its own merits being its case was never canvassed at the Tribunal following lack of service by the on the same by the Applicant. The Respondent submits to be entitled to a fundamental right to be heard as enshrined under Article 50 of *the Constitution* in line with Section 19 of the *Arbitration Act* and which he was denied by not being heard citing the case of *Patriotic Guards Ltd vs James Kipchirchir Sambu* (2018] eKLR reiterated in *Mbaki & Others vs Macharia & Anor* (2005) where it was held that:
- “The right to be heard is a valued right, it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
28. The Respondent submits inconclusion that the arbitral award was obtained on the basis of misrepresentation by the Applicant and failure to disclose material facts on its costs that remained unpaid for works done and that had he been granted an opportunity to be heard, all the information would have been laid out and the arbitrator would have had a chance to give a fair and just determination. The Respondent thus posits to have made out a case for refusal of an arbitral award under section 37 (1) (a) (i) & (iii) of the *Arbitration Act* and prays that the Applicant's Chamber Summons dated 13th October 2023 be dismissed with costs.

Issues Analysis and Determination

29. The court has duly considered the grounds in support of the Chamber Summons dated 13th October 2023 and reiterated in the Applicant's Supporting Affidavit, the Respondent's Replying Affidavit in opposition to the Application as well as the parties' respective submission.
30. From that analysis, the court identifies only two issues to present themselves for determination by the court. The issues are; -
- a. Whether the respondent was notified of the dispute and afforded an opportunity to participate in the appointment of the tribunal and the ensuing proceedings?
 - b. Whether there exists a section 37 set condition for refusal to enforce the award?
31. The court appreciates the Application to seek orders that would effectuate the parties' desire that they be bound by the outcome of the chosen dispute resolution forum. The desire by the applicant is that



the Final Award dated 14th February 2023 issued by Mr. Dominic N. Mbigi be recognized, adopted and enforced as a decree of this court. The applicant further seeks orders that the Respondent do pay the costs of this Application and all such costs and expenses that are incidental to the enforcement and execution of the said Award. The premise of seeking such order is that after the award was made, the respondent sought setting aside of the award but the application was dismissed by a ruling of 17th August 2023, in HCCOMMARB No. E024 of 2023.

32. On its side, the Respondent opposes the Application on grounds that it was not having been given the opportunity to participate at the appointment of the tribunal nor a proper notice of the appointment of the arbitrator and of the arbitral proceedings. The Respondent avers that the arbitral proceedings proceeded ex-parte without its participation because Applicant never serve it with demand letter as well as notice referring the matter to Arbitration to enable him participate in consenting to the choosing of the arbitrator and that such failure denied him his right to participate in the choosing of an Arbitrator and to participate in the proceedings.
33. The Respondent further submits that the arbitral award was obtained on the basis of misrepresentation by the Applicant for failure to disclose material facts to wit the costs that remained unpaid for works done and that would he have been granted an opportunity to be heard, all this information would have been laid out and the arbitrator had a chance to give a fair and just determination. The Respondent takes the position that the Arbitrator herein was not properly clothed with jurisdiction to hear and determine the matter and that the dispute was not heard and determined on its own merits hence the Applicant's Application is subject to dismissal in line with Section 37 (1) (a) (i) & (iii) of the Arbitration Act. It thus contends that such failure is sufficient to refuse recognition. The respondent however says little about the fact that an attempt at setting aside on the same facts failed and the decision remains standing.
34. In answer to such opposition, the Applicant submits that the allegation by the Respondent of not having been given proper notice of the appointment of an arbitrator and of the arbitral proceedings was addressed by this court in the Ruling by Majanja J. that dismissed the Respondent's Application to set aside the impugned award. The Applicant then adds and presents that the Respondent was well aware of the dispute and the arbitral proceedings and even attended one meeting on 12th July 2022 that was slotted for the appointment of the Arbitrator and where it never raised any objections as to the appointment of the arbitrator or as regards the alleged failure by the Applicant to serve a demand notice and as such was deemed by provisions of Section 5 of the Arbitration Act to have waived his right to object hence the said objections cannot be raised before the court at this stage.
35. from the foregoing, the court notes that the Respondent had earlier on applied to set aside the arbitral award in HCCOMMARB No. EO24 OF 2023, Nairobi in Castle & Garden Designers Limited vs Dr. Allan Rajula. That Application was dismissed vide a ruling delivered on 17th August 2023, Majanja J. in that decision, the court, at Paragraph 14, found the Applicant's case in setting aside the impugned award to have been premised on one main ground of not having been given proper notice of the appointment of the Arbitrator or of the arbitral proceedings and was thus unable to present his case and that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.
36. At Paragraph 20 of the said Ruling, the judge found that the record of the proceedings before the Arbitral Tribunal indicated that the Respondent and its Advocates attended the meeting on 12.07.2022 and did not raise any objection to the jurisdiction of the arbitrator. The Court noted that as per the Arbitrator's "Order for Directions No. 2" both parties confirmed, and I quote:

“...they have no jurisdictional challenge to the Arbitrators appointment, and that they do not intend to file any preliminary applications. The Arbitrator, with the concurrence of the



parties, proceeded to give directions on the exchange of pleadings, discovery of documents and or ancillary matters. As regards the hearing, the Arbitrator noted at para. 20 of the Award that, The Tribunal is satisfied that the Respondent was duly served and was aware of the hearing date, hearing of the claim proceeded on 28th October 2022, but they did not attend the hearing or engage any further in the arbitration proceedings.”

37. The court then proceeded to dismiss the said Application under Paragraph 22 of the said Ruling by rendering that: -

“This is not a case where the Applicant was not aware of the fact that an Arbitrator had been appointed. It was aware that the Respondent had exercised its right to request the appointing the authority to make an appointment and that the appointment had been made. When the Applicant appeared before the Arbitral Tribunal, it did not object to the appointment or composition of the Arbitral Tribunal. In fact, it made it clear, on record, that it would not raise any preliminary applications on jurisdiction. In such a case therefore, the Applicant is deemed to have waived such an objection in accordance with section 5 of the *Arbitration Act*...

In the circumstances, I find and hold that the Applicant cannot at this stage raise the issue as regards to the jurisdiction of the Arbitrator when it failed to raise the same earlier as required by the *Arbitration Act*. I also hold that the Applicant had an opportunity to present its case and the failure and or refusal to participate in the proceedings was purely voluntary. In the letter dated 26.07.2022 addressed to the Arbitrator, but not copied to the Respondent or his advocate, the Applicant’s advocate was categorical that;

“In the circumstances, our client instructed us to inform you that he will not be taking part in the arbitration proceedings yet until negotiations fail between the parties as stipulated in the contract. We shall reach out to the claimants advocate to establish the dispute and agree on the way forward. We can always come back for arbitration if the parties are unable to settle the issue amicably”.

The Applicant’s refusal to participate in the proceedings cannot be laid at the feet of the Arbitrator. It must now shoulder the burden of its default.” (emphasis added)

38. There has never been a challenge on the findings of the court dismissing the application to set aside. To the court, the wording of section 35 mirrors in every letter those of 37. In the opinion of the court, the grounds for setting aside and under section 35 are those for refusal under section 37 identical in all aspects. The only difference is that the court needs to be moved formally under section 35 while under section 37, no motion is necessary provided the court gets to know of the presence of the vitiating circumstances while considering an application for enforcement of the award.
39. In that context, therefore, once an application for setting aside has been disposed of by dismissal on specific grounds, those same grounds cannot be the basis of refusal to enforce the award. In the circumstances of this matter whether or not the respondent was involved in the appointment and if it was notified of the proceedings was urged by both sides and determined on the merits. It became res judicata and a no-go zone for the court by dint of section 7 of the *Civil procedure Act*. The court thus determines the first issue to be res judicata there being in existence a decision by the court of competent jurisdiction that the respondent was duly notified of appointment of the tribunal, recognised and submitted to the jurisdiction of the tribunal but voluntarily chose not to participate in the proceeding.



40. On the second argument by the Respondent, which the court consider as an integral part of the second issue for its determination, whether or not the award should not be enforced because the respondent alleges pending payment of works done, the court views the same to be in the merit determination of the dispute. The court is of the learning that the arbitrator is the master of the facts and this court in intervening in matters arbitration proceeds from the strict confines of the parameters set by the Act. The court is not exercising appellate mandate of rehearing to establish if the arbitrator was right in its apprehension and appreciation of the facts as applied to the dispute. The court should not be called upon to review the factual findings by the arbitrator. That will amount to challenging party autonomy by which the parties agreed to shun the court in favour of the arbitrator. It would be a way of the court insisting on hearing parties who do not wish to submit to its jurisdiction in the merit evaluation of the facts. It would essentially rubbish the authority of the *Arbitration Act* and its recognition under article 159 of *the constitution*.
41. In coming to the foregoing position, the court takes guidance from the decision of the Court of Appeal in Kenya Oil Company Limited vs Kenya Pipeline Company Limited (2014) eKLR where it was held that: -
- “The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators’ award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrator’s findings of fact.”
42. The same position was affirmed by the court’s decision in Independent Electoral and Boundaries Commission vs John Omollo Nyakongo (t/a H.R Ganjee & Sons) [2021] eKLR where the courts shed light onto the importance of the arbitration proceedings as espoused in *the Constitution* as follows: -
- “Arbitration is now constitutionally underpinned as a dispute resolution mechanism and the court must not only respect the process when it meets the law, but also promote. The principle of party autonomy decrees that a court ought never to question the arbitrator’s findings of fact.”
43. With the finding that there is no material to justify refusal to enforce the award, the court holds that there is no impediment standing in the way of the court from recognising the Award and granting to the Respondent orders to enforce it. The court must submit to the law and the public policy of Kenya which loudly pronounces the intention of giving finality to arbitral awards and must perform its duty to bring disputes and litigation to a close.
44. In conclusion, therefore, the court allows Applicant’s Chamber Summons dated 13th October 2023 with costs to be agreed of taxed by the taxing master. The effect is that the Final Award prepared and published by Mr. Dominic N. Mbigi, dated 14th February 2023, is hereby adopted as a judgement of this court and shall be enforced as a decree of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2025.

Patrick J O Otieno



Judge

