Njoroge (The Executor of the Will of John Njoroge Keige - Deceased) & 2 others v Thanawalla & 2 others (Civil Appeal E377 & E408 of 2021 (Consolidated)) [2024] KEHC 2900 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2900 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E377 & E408 OF 2021 (CONSOLIDATED)

A MABEYA, J

MARCH 21, 2024

BETWEEN

DORCAS NDUGI NJOROGE (THE EXECUTOR OF THE WILL OF JOHN NJOROGE KEIGE - DECEASED) ..... 1ST APPELLANT

MICHAEL ROBERT KARANJA ..... 2ND APPELLANT

SHAZA TWO LIMITED ..... 3RD APPELLANT

AND

TAJDIN THANAWALLA ..... 1ST RESPONDENT

JANE MULII KAMENE ..... 2ND RESPONDENT

VERONICA MULII KAMENE ..... 3RD RESPONDENT

RULING

1. This is an appeal against the decision of an Arbitrator Hon. Professor Paul Wambua published on 19/4/2021. Being dissatisfied with the arbitral award, the appellants filed the present appeal *vide* a memorandum of appeal dated 17/5/2021.

2. The grounds upon which the appeal is predicated upon can be summarized as follows: -

    a. That the Tribunal erred in not considering that the parties are bound by the terms of the Share Subscriptions Agreement dated 8/12/2014 and failing to find that the same did not supersede the letters of offer dated 15/9/2014.

    b. That the Tribunal erred in relying on the contra preferentum principle despite it not being applicable in the case.

c. That the Tribunal erred in failing to consider the fact that the appellants were ready to pay the full purchase price.

d. That the Tribunal erred in rejecting the appellants counterclaim despite the respondent's failure to pay consideration.

3. On the foregoing, the appellants sought that the appeal be allowed and the award published on 19/4/2021 be set aside and the respondents statement of claim be dismissed.

4. The appeal was canvassed by way of written submissions which I have considered.

5. The appellant submitted that the parties signed the offer documents and the share subscription agreements which upon execution of the agreement, superseded the offer documents. That the tribunal could not rewrite the terms of the offer as its function was to give effect to the intention of the parties. That the tribunal erred in holding that the offers and the share subscription agreements would be read together. That the parties had expressly agreed that the said agreements would supersede the offer.

6. It was further submitted that the tribunals use of the contra prefentum rule was a violation of the parties' freedom of contract and express provisions of clause 21 and 13.3 of the agreement. That the appellant was still ready to complete the transaction by paying the balance of the purchase price and accrued interest in compliance with the agreements. Counsel submitted that the principle of total payment was applicable where it was established that the vendor did not have any right to dispose the subject property.

7. On its part, the respondent submitted that the appellants did not dispute that the completion notice or certificate of occupation was not issued neither did they deny receipt of the several completion notices. That the appellants were issued with several completion notices which led to the rescission of the contracts. That the contract having been repudiated, the appellant had not raised any lawful ground of appeal.

8. It was the respondents' submissions that in line with section 39 of the *Arbitration Act*, the Court did not have jurisdiction to admit and receive or re-evaluate evidence on appeal. That the tribunal correctly applied the law and the facts.

9. I have considered the record of appeal and the submissions on record. The main issue for determination is whether the appellants have made out a case for setting aside the decision of the tribunal.

10. The brief facts to the case is that the parties agreed to purchase two shares from the 3rd appellant for the investment of 10 similar fully furnished apartments in the Shaza. The purchase price for the shares was Kshs. 6,625,000/-. The respondents paid part of the purchase price but not in full.

11. A dispute ensued when the appellants refused to transfer the apartment to the respondents or make a refund of the deposited amount. Before the tribunal, the issue that arose was whether the parties were bound by the share agreements or the offer letter, or whether the purchasers were entitled to a refund.

12. In its decision, the tribunal held that the contract between the parties could be fully deduced from the letters of offer as well as the share agreements as they complemented each other. It further held that any contradiction could be solved by the contra preferentum rule.

13. It is on this basis that the appellants lodged an appeal under section 39 of the *Arbitration Act* which provides that: -

"(1) Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall—

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)."

14. In the case of *Anne Mumbi Hinga –vs- Victoria Njoki Gathara* [2009] eKLR, the Court in establishing the threshold for an appeal under section 39 of the *Arbitration Act* held as follows: -

> " As stated elsewhere, the superior court had no business entertaining the application giving rise to this appeal as well and should have struck it out for lack of jurisdiction. Again the appeal to this Court is incompetent because it does not comply with the requirements set out in Section 39(1) and (3) of the *Arbitration Act*.
>
> 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 of 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 by Section 39 of the *Arbitration Act*."

15. Firstly, I doubt whether this Court has jurisdiction to entertain the appeal. This is so because, the parties did not show me that it had been agreed that any issues of law could be referred to this Court for determination under section 39 of the *Arbitration Act*. Neither did I see any such agreement in the agreements produced. My understanding is that an arbitral award can only be challenged under section 35 of the *Arbitration Act* and not by an appeal such as the present one.

16. Be that as it may, if I am wrong and the parties were entitled to appeal to this Court under their agreements, I will consider the matter on merit.

17. The gist of the appellant's appeal is that the tribunal had failed in considering the fact that parties are bound by the terms of their contract and erred in relying on the contra preferentum rule. This rule is a contractual interpretation provided that a contractual interpretation which holds that an ambiguous term will be construed against the party who made or drafted the contract. See *Horne Coupar v velletta & Company* 2010BCSC483.

18. With respect to the present appeal and application, the parties executed two sets of agreements, the offer letter and later the Share Subscription agreements. According to the appellant, the agreements under clause 13.3 provided that any representations or warranties given prior to the agreement had no effect. The use of the contra preferentum rule was introduced by the tribunal in determining whether the agreements and the letters of offer all constituted the contract or whether there was a contradiction.

19. It was the appellants assertion that in the present matter, the letter of offer was not applicable. However, based on the evidence on record, it is the letter of offer that gave the purchase price consideration for the shares. The other agreements were executed after the respondents had made the substantial payments for the shares and had therefor partly performed the contract.

20. In this regard, I am in agreement with the tribunal that the letter of offer could not be excluded from the contract on the basis of clause 13.3 of the share agreements. I further do not find it erroneous that the share agreements and letters of offer could be read together to determine the obligations of the parties.

21. In *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR, the Court of Appeal stated at page 507 that: -

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

22. In view of foregoing, the parties have the freedom to enter into binding contracts and the Court can only be called upon to interrogate the terms found in the contracts and give meaning thereto. My finding is that the share subscription agreements could not be construed in isolation of the letters of offer which formed the basis of the agreement. I find no error in the decision of the tribunal to warrant setting aside the arbitral award.

23. Accordingly, I find no merit in the appeal and the same is dismissed with costs.

Application dated 27/5/2021

24. The application was brought under sections 36 and 37 of the *arbitration Act*, rule 9 of the *Arbitration rules* 1997. It sought leave for the enforcement of the award dated 19/4/2021 as decree of the court. The applicant stated that since there was no application to set aside the arbitral award, the application should be allowed and the arbitral award adopted as an order of the court.

25. The respondent opposed the application vide grounds of opposition dated 4/10/2021. It was contended that the adoption of the arbitral award was against the public policy of Kenya and that the tribunal re-wrote the terms of the letters of offer dated 8/12/2014 and the share subscription agreements dated 15/9/2014.

26. Under section 32(A) of *the Act* an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by *the Act*. I have already found that the tribunal did not err in its decision.

27. Section 37 of *the Act* provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows: -

> " 37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—
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> (a) at the request of the party against whom it is invoked, if that party furnishes the High Court proof that;
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> (i) a party to the arbitration agreement was under some in capacity; or
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> (ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
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> (iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or
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> (v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
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> (vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or
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> (vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;
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> (b) If the High Court finds that;
>
> (i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or

(ii) The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya."

28. I have carefully considered the record. None of the foregoing grounds have been demonstrated to warrant rejecting the recognition sought.

29. The applicant has annexed copies of the agreements that is the letters of offer as well as the share subscription agreement. The certified copy of the arbitral award has also been annexed to the application. I am satisfied the applicant has met the precondition for enforcement of the award as prescribed by law.

30. I therefore allow the Chamber Summons dated 17/5/2021 with costs on the following terms: -

(a) That the Final Award Hon Prof. Paul Musili Wambua published on 19/4/2021 be and is hereby recognized and adopted as a judgment of this Court.

(b) That leave is granted to the Applicant to enforce an award as a decree of this Court.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE