



**Bridge International Academies Limited v Lekasi (Commercial Cause E046 of 2021)  
[2022] KEHC 11841 (KLR) (Commercial and Tax) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11841 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CAUSE E046 OF 2021**

**DAS MAJANJA, J**

**MAY 13, 2022**

**BETWEEN**

**BRIDGE INTERNATIONAL ACADEMIES LIMITED ..... APPLICANT**

**AND**

**ROSEMARY NYAGUTHI LEKASI ..... RESPONDENT**

**RULING**

1. The issue before the court is whether the court should recognize and enforce an arbitral award. In order to resolve the issue, a background of the matter is necessary.
2. The parties herein entered into a Development Agreement on 20<sup>th</sup> December 2013 (“the Agreement”) where the Applicant was to acquire rights from the Respondent and relevant government regulatory authorities to build, maintain and operate an educational institution on the Respondent’s properties known as Plot Number 381 and 413/Business- Isinya Trading Center situated in Isinya, Kajiado District, Kajiado County (“the Properties”).
3. The Agreement provided, inter alia, that the Respondent was to grant a lease to the Applicant within seven (7) days following the approval of the Planning Application, the Applicant being satisfied that the Properties are fit for the development including but not limited to proprietorship, access, vacant possession and size, as required for the development and as provided in Schedule C of the Agreement. The Respondent was to receive a monthly ground rent payment of KES 11,000.00 which was subject to an increment of 5% percent every two (2) years and that upon execution of the Agreement, the Respondent was to receive the ground rent payment for the first two (2) years in advance, without any increment factored into such first payment, subject to any deductions under Schedule C of the Agreement, or any subsequent deductions. Thereafter, subsequent ground rent was to be payable every two (2) years in advance for the term of the lease, which term was to be fifteen (15) years with a renewal



- option for a further term of fifteen (15) years on similar terms and conditions. The Applicant also had the right to assign the lease under the Agreement.
4. A dispute arose when the Applicant claimed that having subsequently applied for and obtained development permission from the County Government of Kajiado at a cost of KES 181,000.00, the Respondent failed to execute the lease as provided for by the Agreement and as a result, did not grant it the 15-year lease upon approval of the planning application and development. In accordance with Clause 7.3 of the Agreement, the Applicant declared a dispute citing frustration of the Agreement by the Respondent, which led to the appointment of one Mr. Gichinga Ndirangu, FCI Arb as the sole arbitrator (“the Arbitrator”) on 6<sup>th</sup> June 2014 to hear and determine the dispute.
  5. In its claim, the Applicant sought various declaratory and monetary reliefs including a declaration that the Respondent had breached/frustrated the Agreement, a declaration that as of 20<sup>th</sup> December 2013, the Respondent had agreed to enter into a lease with the Applicant, an order to the Respondent to execute the lease agreement and refrain from frustrating the Agreement, an award of specific performance of the Agreement, in the alternative, a declaration that the Applicant is entitled to KES 1,000,000.00 being penalty for loss of business as agreed under section 6.1.2 of the Agreement, an award of KES 1,000,000.00 for loss of business and an award of KES 181,000.00 being the sum expended by the Applicant in procuring approvals of development plans and actual development.
  6. The Respondent replied to the claim stating that the application for development permission was never made since it would have been made by the Respondent under her hand and therefore, no approval and application was obtained from the relevant authorities and the Respondent’s requests to be shown the purported approval was denied. The Respondent further stated that she was not in a position to issue a lease/sub-lease being a mere allottee who had to fulfill certain conditions or obtain certain exemptions from the head lessor before title could be issued to her and that the Planning Application included several components including environmental impact assessment applications to the Land Control Board alongside other planning applications for land use and development. That since the area that is the subject of the dispute touched on two plots — one of which was complete and the other partly - the adequacy and suitability of this space for the development of the institution needed to be obtained and approved by NEMA, the Ministry of Education and the County Government.
  7. The Respondent further argued that her execution of the lease was of no consequential effect and was done on a without prejudice basis since the subject property had not vested in her and was subject to the regularization of rights to the title. She stated that because there was no consensus on certain terms, no agreement was reached and that it was not fully seized of all rights over the subject Properties. The Respondent pointed out that she also advised the Applicant that the County Government of Kajiado had placed a ban on all transactions or dealings in land. As a result, the Respondent thus averred that there was no loss since the risk of loss in dealing with matters which were inchoate was apparent to the Applicant and that there was no contract but a mere invitation to treat since certain terms had to be fulfilled as conditions precedent. The Respondent thus urged the Arbitrator to dismiss the claim with costs.
  8. In its response, the Applicant reiterated that under the terms of the Agreement, the Respondent agreed to grant it authority to acquire rights and approvals from the government and to cooperate in such applications and the Applicant was to submit planning applications for the development of the Properties. The Applicant stated that the Respondent was not precluded from leasing out the Properties provided that the Applicant obtained the necessary approvals and that an application for NEMA approval had been made and granted but was subsequently cancelled after the Applicant informed NEMA that the Respondent had withdrawn her consent to lease the Properties. That by executing the Agreement, the Respondent warranted and represented to the Applicant that she was the



- beneficial owner of the Properties with good title and the execution of the Agreement evidenced the existence of a contract and served as an acceptance of offer and crystallized the contractual relationship specifying the term of lease and the consideration payable to the Respondent.
9. At a meeting held on 31<sup>st</sup> October 2014 before the Arbitrator, the parties were unable to agree on the list of issues and it was accordingly agreed that each party files the proposed list of issues for consideration and determination by the Arbitrator. The issues that were identified by the Arbitrator included the following; Whether or not the Respondent possessed legal rights in the Property capable of being transferred to the Applicant. Whether or not the grant of development permission was one of the issues in dispute between the parties immediately before or on the date of issuing notice of intention to declare a dispute. Whether or not the grant of development permit can form any of the issues at all material times to these proceedings, Was the document referred to as “the lease” an agreement complete and capable of being executed by both parties. Whether or not the material terms of the lease agreement had already been consented to by the Respondent when she executed the Agreement. Whether or not the Respondent was in, has breached and/or frustrated the Agreement. Whether or not the Applicant was entitled to damages for breach of contract. Whether or not the Applicant was entitled to the penalty for loss of business of KES 1,000,000.00 as agreed in section 6.1.2 of the Agreement. Whether or not the Applicant was entitled to KES 181,000.00 expended in procuring approvals. Was the Applicant entitled to damages and if so, what was the quantum? Was the Applicant entitled to special damages and if so, how much? Was the Respondent totally liable for the injury occasioned to the Applicant and if so, to what extent? Who should bear the costs of the suit?
  10. The parties agreed that the arbitration would incorporate both pleadings and oral presentation of evidence including opening and closing oral statements and that they would be entitled to call witnesses. Both parties called two witnesses each at the hearing.
  11. The Arbitrator published the final award on 23<sup>rd</sup> June 2016 (“the Award”). The Arbitrator determined that the Respondent had sufficient legal capacity, as warranted in the Agreement and throughout the negotiations leading to its signing, to sign the lease as per the Agreement, that the parties having intended to enter into a lease agreement subsequent to the execution of the Agreement, were not incapacitated from signing the lease and that the contract between them was not inchoate. Further, that there was no contention over the modus of obtaining development permission and that the process of obtaining this was clearly not in issue before or at the time of issuing notice of intention to declare a dispute and that the question on the grant of development permit could not form a material issue in the arbitration proceedings.
  12. The Arbitrator further held that in executing the Agreement, the Respondent consented to the material terms of the lease which were clearly set out and there was no evidence that the Applicant introduced any terms that were materially different from those outlined under the Agreement and that in so doing, the Respondent breached and/or frustrated the Agreement. The Arbitrator was also satisfied that the ban imposed by the Kajiado County Government on land transactions was not a blanket one as it affected specifically enumerated transactions. That the memorandum issued by the County Government and dated 30<sup>th</sup> August 2013 imposed a ban on the following specific transactions; all consents for sub-division and transfer of land by the previous Land Control Boards pending the establishment of the County Land Control Board, numbering of new sub-divided parcels by the District Surveyor and all consents to new plots allocation, sub-division and transfer.
  13. The Arbitrator held that leases, as contemplated under the Agreement were not covered nor affected by the County Government ban hence the Respondent was not incapacitated. She could therefore fulfil her contractual obligations under the Agreement which included, inter alia, signing a lease agreement subsequent to the execution of the Agreement. The Arbitrator awarded the Respondent



KES. 1,000,000.00 for loss of business and found that the Applicant was entitled to a refund of KES 181,000.00 expended in securing development approvals and as receipted. On the prayers for specific performance, the Arbitrator ordered the Respondent to execute the lease agreement as drafted and pursuant to the Agreement.

14. The Arbitrator awarded the Applicant to pay the Applicant's reasonable legal costs and expenses and in the event of a failure to agree on legal costs, the Arbitrator was to tax the costs and issue an additional award on costs pursuant to Section 34 (5) of the [Arbitration Act](#).
15. The Applicant has now approached the court by the Chamber Summons dated 12<sup>th</sup> November 2021 seeking an order that the court to recognize and adopt the Award as a binding order and decree of the court. The application is supported by grounds set out on its face and deposed in the supporting affidavit and further affidavit of Dandace Gande Chalako, an Administrative Paralegal of the Applicant, sworn on 12<sup>th</sup> November 2021 and 31<sup>st</sup> January 2022 respectively. It is opposed by the Respondent through her affidavit sworn on 25<sup>th</sup> January 2022 and the Grounds of Opposition dated 24<sup>th</sup> January 2022.

### **Analysis and Determination**

16. As I stated at the beginning, the issue for consideration is whether the Award should be recognized and enforced. Under section 32(A) of the [Arbitration 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 [Arbitration Act](#). The High Court, under section 36 of the [Arbitration Act](#), has the power to recognise and enforce domestic arbitral awards in the following terms:

36 (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37

(2) ...

(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish

(a) the original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(4) .....

(5) .....

17. There is no dispute the Applicant has met the formal requirements for the recognition. At any rate, the Award is not disputed and it is the subject of the next consideration, whether the Applicant has established grounds upon which the court may refuse to recognize it. Section 37 of the [Arbitration Act](#) sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award as follows:

37. Grounds for refusal of recognition or enforcement

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—



- (i) 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, under the law of the state where the arbitral award was made;
  - (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 decisions 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 recognised and enforced; or
  - (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
  - (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
  - (vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;
- (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.

(2) .....

[My Emphasis]



18. The Respondent urges the court to refuse the application on the grounds that the Award is contrary to the public policy of Kenya, that the Arbitrator went beyond the scope of arbitration and the Respondent was under some legal incapacity. The Respondent also complains that the application has been brought after undue and unreasonable delay. I shall now consider those grounds separately.

### **Legal Incapacity**

19. The Respondent contends that she was under some legal incapacity at the time of entering into the Agreement as the same was only executory. When the Respondent states that she was ‘legally incapacitated’ at the time of entering into the Agreement, then I can only construe it to mean that she did not have the ability or capacity to enter into legally binding relations for vitiating reasons such as being a minor or of unsound mind or such other physical incapacity which is recognized by law as disabling or depriving legal capacity.
20. Our courts have held that the incapacity referred to in section 35 and 37 of the *Arbitration Act* is the inability of a contracting party to enter into legally binding relations but not difficult situations that a party might face (See *Dorothy Seyanoi Moschioni v Andrew Stuart & another ML* HCCC No.312 of 2012 [2014] eKLR and *Lalji Meghji Patel & Company Limited v Presbyterian Foundation* MSA HC Misc. Application No. E113 of 2020 [2021] eKLR).
21. There is no evidence that the Respondent suffered any legal incapacity such as being of unsound mind or being a minor or such other physical incapacity which is recognized by law as disabling or depriving legal capacity at the time of entering into the Agreement. In any case, it is apparent that this ground is an afterthought as it is a fundamental issue which ought to have been raised at the earliest opportunity before the Arbitral as a decision in favour of the Respondent would terminate the proceedings. This ground by the Respondent lacks merit.

### **Award beyond the scope of arbitration**

22. The Respondent further stated that the Arbitrator went beyond the scope of arbitration more so on the award of specific performance and penalty of KES. 1,000,000.00. As stated in the introductory part, the parties were in concert that their dispute arose from the Agreement which stipulated that such were to be determined by way of arbitration if the parties could not mutually settle those disputes.
23. It is also common ground that the Agreement, at Clause 6.1.2 provided for a penalty compensation of KES. 1,000,000.00 for loss of business opportunity on the occurrence of any events of default by the Respondent resulting in early termination by the Applicant. The Applicant specifically sought for an award of this penalty owing to default by the Respondent and the Arbitrator made a determination on the same.
24. It is now a settled principle that in order to succeed in showing that the matters objected are outside the scope of the reference to arbitration, it must be demonstrated that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute (see *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others* [2005] eKLR). This is clearly not one of those instances where the Arbitrator can be said to be in a dreamland of his own facts or issues. The matter of the penalty was specifically provided for by the Agreement, was specifically prayed for by the Applicant and specifically raised by the parties and identified by the Arbitrator as an issue for determination. Further, specific performance is one the remedies that was sought and whether it was granted or not is a matter within the jurisdiction of the Arbitrator. I do not find any merit in this ground.





### **Award offending Public Policy**

25. The Respondent urges the court to halt the recognition and enforcement of the Award on the ground that it offends the public policy of Kenya as the Arbitrator misunderstood the law in respect of ‘inchoate and executory contracts’ and the effect of the ban on land transactions by the County Government of Kajiado. This, the Respondent argues resulted in an Award that violates the public policy of Kenya.
26. An award will be contrary to the public policy of Kenya if it is shown that it was either inconsistent with *the Constitution* or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality. This grounds must not be interpreted so broadly as to undermine the very purpose of the reference to arbitration. In that regard, not every infraction of precedent or misinterpretation of law falls within the scope of the public policy exception. Further, public policy must have a connotation of national interest (see *Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366* and *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR).
27. I have gone through the Award and I am unable to find that it is offensive to the public policy of Kenya as contended by the Respondent. The Award shows that the Arbitrator was very circumspect in the manner he interpreted and treated the Agreement as he was aware that the *Arbitration Act* does not countenance illegal agreements. The Arbitrator did not find any illegality in the Agreement, held that the Respondent had sufficient legal capacity, as warranted in the Agreement and throughout the negotiations leading to its signing, to sign the lease as per the agreement between the parties. In coming to this conclusion, the Arbitrator made reference to, inter alia, the *Land Act* and authorities on the manner of illegal contracts and how the execution of the Agreement affected the obligations of the parties.
28. Further, the Arbitrator resolved the issue whether the Agreement was inchoate as contended by the Respondent and held in the negative. A reading of the Award on this issue demonstrates that the Arbitrator understood what an inchoate contract was and based on the evidence, he made a determination that the Agreement was not inchoate. It cannot be said that this was against public policy merely on the ground that the finding that was not favourable to the Respondent. An arbitral tribunal has the authority to interpret an agreement and the parties’ arguments and evidence in a manner which makes the agreement more effective, without re-writing the agreement (see *Equity Bank Limited v Adopt a Light Limited* ML HC Misc. Application 435 of 2013 [2014] eKLR). This means that the Arbitrator was entitled to review the evidence and come to his own conclusion and the court cannot intervene even if that conclusion was wrong as the Respondent suggests, or this court takes a different view of the findings.
29. I find and hold that the Respondent’s case is an attempt to reopen and re-litigate her case in the hope that the court can re-analyze and re-evaluate the evidence and come to a different conclusion as an appellate court. However, this is not what the court is enjoined to do in matters arbitration and doing so will be going against the very tenets of arbitration which is to ensure a speedy resolution of disputes by a process the parties voluntarily bound themselves to and was intended to exclude the court’s involvement as much as possible.

### **Laches and delay**

30. Finally, the Respondent has raised the issue of laches. She argues that the issue of adoption has been delayed beyond a reasonable period and such enforcement would be injurious to the Respondent. It is true that it has taken five years for the Applicant to make this application, however, the court can refuse



recognition on specific grounds. Laches or delay is not one of the grounds upon which the court may refuse the application for enforcement. Further, under section 4(1)(c) of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya), the limitation period for actions to enforce an award is six years. There is therefore no basis to refuse the application on this ground.

### **Disposition**

31. The Respondent has failed to prove any grounds why the Award should not be recognized and enforced as an order and decree of the court. I therefore allow the Applicant's Chamber Summons dated November 12, 2021 by making the following final orders:

(a) The Arbitral Award dated June 23, 2016 by the sole arbitrator Mr. Gichinga Ndirangu, (FCI Arb) be and is hereby recognised and adopted as a judgment of this court and leave be and is hereby granted to the Applicant to enforce it as an order and decree of this court.

(b) The Respondent shall bear the costs of this application which is assessed at KES 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2022.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr Michael Onyango**

**Mr Mugodo instructed by Wilbur Antony and Company Advocates for the Applicant.**

**Mr Masese instructed by Masese and Company Advocates for the Respondent.**

