



**Jivraj v Ramzan (Commercial Arbitration Cause E038 of 2023)
[2023] KEHC 24066 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E038 OF 2023**

**DAS MAJANJA, J
OCTOBER 27, 2023**

BETWEEN

SUMAYA INAYAT ALI JIVRAJ APPLICANT

AND

YASIN JUMA MOHAMED RAMZAN RESPONDENT

RULING

Introduction and Background

1. On 20.02.2023, the Arbitral tribunal (“the Arbitrator”) published an award where it issued an order of specific performance compelling the Respondent to transfer Malindi/Fundisa/183 (“the Plot”) to the Applicant upon payment of Kshs 660,000.00 being the balance of the purchase price. It was further ordered that the Deputy Registrar of the Court be granted authority to sign the documents for and on behalf of the Respondent which will be necessary to give effect of specific performance in the event that the Respondent fails to do so after payment of the balance of the purchase price of Kshs 660,000. Further, the Arbitrator’s fees and costs assessed at Kshs 162,400.00 less the deposit of Kshs 122,800.00 were to be settled within 30 days of the publication of the award failure to which they would accrue interest at 12% per annum until paid in full. Each party was to bear its own costs and the parties were to bear the fees and costs of the Arbitrator equally (“the Award”).
2. The Applicant has now filed the Chamber Summons dated 26.05.2023 made inter alia under section 36(1) of the *Arbitration Act* (“the *Act*”) seeking to enforce and recognize the Award as an order and decree of the court. This application is supported by the Applicant’s affidavit sworn on 26.05.2023. It is opposed by Respondent through his undated replying affidavit and the Notice of Preliminary Objection dated 29.06.2023. In addition to their pleadings, the parties have also filed written submissions.



Analysis and Determination

3. 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. This court, under section 36 of the 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)
4. Section 37 of the Act sets out the grounds upon which this court can 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) 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) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

5. The substance of the Respondent's Preliminary Objection is the application is incompetent, misconceived and an abuse of the court process as it ought to have been lodged at the High Court at Malindi which has territorial jurisdiction over the subject Plot which is located in Malindi within Kilifi County and not Nairobi County. At the time of giving directions for resolution of the matter, I dismissed the Respondent's preliminary objection on the ground that the High Court is not limited by territorial jurisdiction and more particularly the Commercial and Tax Division of the High Court at Nairobi has jurisdiction to handle matters of and concerning arbitration. Finally, there is nothing in the Act, which has been invoked in this matter, that limits the court's jurisdiction by reference to the location of the subject matter within Kenya.
6. It is not in dispute that the parties entered into an agreement for sale of the Plot on 31.05.2017 ("the Agreement"). The completion date of the Agreement was to be 90 days from the date of the Agreement or the date on which the Respondent was to surrender the completion documents to the Applicant's advocates, whichever came earlier. The Respondent contends that upon the expiry of 90 days, that is 31.08.2017 from the date of execution of the Agreement, the Applicant failed to pay the full balance of the purchase price but made partial payment of the purchase price thus breaching the Agreement. As a result, the Respondent states that he exercised his remedies under the Agreement by leasing the Plot to a third party, Giraffe Bioenergy Limited, on 11.03.2022 for a term of 15 years and that on 23.08.2022, the Applicant issued the Respondent with a notice to complete the transaction after negotiations failed and upon the Respondent declining to adhere to the same, proceeded to refer the matter for arbitration.
7. The Respondent states during the arbitration proceedings, he produced the copy of the Land Rental Agreement. That upon consideration of his evidence, the Arbitrator erroneously held that the Respondent chose to lease out the land to a third party and based on that as well as "securing, maintaining and developing" the land, he revised the purchase price. The Respondent states that neither of the two Actions are remedies for failure to complete under clauses 9 and 19 of the Agreement. The Applicant contends that the Arbitrator having made an erroneous award, he ought to be granted leave to set aside the Award under section 35(3) of the Act, as three months have elapsed since he received the Award.



8. The Respondent states that the Arbitrator failed to address the issue of the third party who currently has a right over the Plot and the Applicant's move to execute the Award shall be condemning the unheard and unaware third party contrary to Article 50 of the Constitution on his right to a fair hearing. The Respondent states that it is in the interest of justice that he be allowed to set aside the Award to enable all parties to reach an amicable and conclusive solution as execution of the Award shall cause an injustice to part of the parties involved.
9. When reviewed the grounds advanced by the Respondent above, I find that they are not reflective of the grounds for the court to refuse to set aside an award as set out in section 37 of the Act. It is now settled that the Act is the complete code on matters arbitration and this position has been affirmed in several decisions including Nyutu Agrovet Limited v Airtel Networks Limited NRB CA Civil Appeal (Application) No 61 of 2012 [2015] eKLR, Kamconsult Ltd v Telkom Kenya Ltd and another NRB CA Civil Appeal No 92 of 2009 [2016] eKLR and Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No 8 of 2009 [2009] eKLR. Section 10 of the Act provides that 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. Therefore, the court can only make such orders that are in conformity with the Act and if a ground is non-existent in the Act, then the court will not give any due consideration to it. I also find the Applicant's plea to be permitted to set aside the Award under section 35 of the Act lacks any legal basis as an application under section 35 that is time barred is fatal and there is no provision in the Act that can salvage such an application either by seeking leave or otherwise (see University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR and University of Nairobi v Nyoro Construction Company Limited & another [2021] KEHC 380 (KLR). This position is fortified by the Court of Appeal in Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No 8 of 2009 [2009] eKLR where it was stated that, "Section 35 of the Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award."
10. The Respondent seeks to stop the enforcement of the Award by faulting the Arbitrator's factual conclusions and appreciation of the evidence. This court cannot interfere with an arbitrator's interpretation of the law and/or interpretation of a contract as the court's jurisdiction to accept or decline to enforce an award under section 36 of the Act does not allow it to sit as an appeal on the merits of the Award. The arbitral tribunal remains that master of facts and it is irrelevant whether the court, would upon consideration of the same facts, reach a different conclusion. It also does not matter how obvious a mistake by the arbitrator on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be as parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts (see Kenya Oil Company Limited & another v Kenya Pipeline Company NRB CA Civil Appeal No 102 of 2012 [2014] eKLR). I therefore find and hold that the Respondent has failed to assail the Award.
11. On the other hand, I find that the Applicant has fulfilled the procedural requirements for an award to be recognized and enforced as a decree of the court by annexing copies of the arbitration agreement and the Award, contents which are common to the parties. Further, contrary to the Respondent's assertion, there is no mandatory requirement for the Applicant to fulfil the orders or directions in the Award prior to the recognition and enforcement of the same.

Disposition

12. I therefore allow the Applicant's application dated 26.05.2023 on the following terms:



- a. The Final Award published on 20.02.2023 and corrected by the Correction of Final Award published on 08.03.2023 is duly recognised as a judgment of this court and leave is granted to the Applicant to enforce it.
- b. The Respondent shall bear the costs of the application assessed at Kshs 50,000.00.

SIGNED AT DUBAI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2023

A. MABEYA

JUDGE

Court Assistant: Mr M. Onyango

