Case Number:	Environment and Land Case 248 of 2018
Date Delivered:	23 Feb 2022
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Lucy Ngima Mbugua
Citation:	Jitihada Furniture Limited &2 others v Asad Anwar [2022] eKLR
Advocates:	Esami for the Applicant M/S Athman for the Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 248 OF 2018

JITIHADA FURNITURE LIMITED.....1ST PLAINTIFF

JITIHADA SHOPPING COMPLEX LIMITED.....2ND PLAINTIFF

ALLY I. MWANGI.....3RD PLAINTIFF

VERSUS

ASAD ANWAR.....DEFENDANT

RULING

1. Before me is an application dated 10th March 2021 in which the Plaintiff seeks the following orders:

i. Spent.

ii. THAT pending the hearing and determination of the application herein, the Honourable Court be pleased to stay enforcement of the arbitral award published on 14th December, 2020.

iii. THAT the Honourable Court be pleased to set aside the arbitral award published on 14th December, 2020.

iv. THAT the Honourable Court be pleased to order that the Arbitrator exceeded his jurisdiction in seeking to determine claims outside the declared dispute.

v. THAT in the alternative to prayer [4] above, the Court be pleased to make such further or other order(s) as it may deem fit with regard to all or part of the Award published on 14th December, 2020 including remitting the Award for corrective action on any aspect the Court may deem appropriate and on such condition as it will impose so as to eliminate the grounds for setting aside the arbitral award;

vi. THAT the costs and incidentals to the application be provided for.

2. This application supported by the undated affidavit of **Ally I. Mwangi** Managing Director of the Applicant is premised on the grounds that following a disagreement on the renewal of the lease agreement entered between the 1st Plaintiff and the Defendant as well as the amount of rent payable for the parcel of land, the suit was filed. It was however referred for arbitration as stipulated in the lease agreement vide a court order dated 13th February 2019. The Applicant aggrieved by the arbitral award issued on 14th December 2020 filed the current application on grounds that the arbitral award addressed issues beyond the reference and issues that were not pleaded by the parties.

3. The Applicant claims that the tribunal issued orders for a dispute that had not been contemplated by stating that the Applicant would hand over the suit property to the respondent upon the termination of the renewed lease. And that the arbiter did not take into consideration that the arbitration was to ascertain rent payable on the undeveloped land and whether the Respondent ought to have

renewed the lease term.

4. The Applicant highlighted circumstances which led to the dispute stating that on 1st August 2008, they entered into a 10 year lease agreement with the Respondent for LR No. 209/289/8 undeveloped at the time. According to the agreement, the Applicant was to construct semi-permanent structures on the land where it would carry out its business and leave the said semi-permanent structures on the land upon termination of the lease. The lease was to be automatically renewed for a further 10 years should the Applicant satisfy conditions set out in the lease and give a notice of intention to extend the lease within a three month period prior to its expiry.

5. The Applicant avers that the parties verbally agreed that the Applicant would build **a business complex** instead of semi-permanent structures, of which the Applicant proceeded to put up a five storey business complex with a loan facility of Kshs. 145,000,000 from Chase Bank Kenya Limited.

6. In January 2017, the Applicants requested for an extension of the lease both informally and vide a formal notice in writing but only received a response in March 2017 when they were informed that the land was up for sale. They expressed their intention to purchase the land but the Respondent did not respond. Once again in March 2018 the Applicants wrote another notice of intention to extend the lease which was responded to in May 2018 with the Respondent indicating that they would only extend the lease by two years. When they engaged lawyers for a demand of renewal, the Respondent stated that the Applicant had not complied with the conditions for renewal however, the lease could be renewed on a monthly rent of Kshs. 2,000,000.

7. The Respondent opposed the application vide his replying affidavit dated 21st June 2021 averring that the tribunal did not overstep its mandate because it only restated what the parties had agreed to in the lease agreement. The Respondent also claimed that the Applicant had not approached the court with clean hands because part of the prayers in their statement of claim dated 18th July 2019 attempted to rewrite the contract by asking for an order directed at the Respondent to grant a lease of 60 years whereas the dispute was on renewal of lease. The Respondent also stated that the Applicant had not met requirements set out in **Section 35** of the **Arbitration Act** noting that the Applicant should have moved court under Section 34 of the Arbitration Act and as such was time barred.

8. However, the Respondent also prayed for the award to be set aside on grounds that: The arbitral award was contrary to public policy since it did not take into account the principle of separate legal entity and operated as though Jitihada Furniture Centre Ltd and JF Centre Limited were one and the same by allowing the lease extension notice issued by JF Centre Limited to stand. Another issue raised by the Respondent is that the arbitral award took into account incomplete expert evidence which did not give a rental projection. Adding that the arbiter did not take into consideration that at the expiry of the original term, the lease would be Kshs. 235,835 and provided that the Applicant should pay the respondent Kshs. 108,900. The Respondent also deponed that the arbiter erred in ratifying the construction of permanent structures which was contrary to the agreement and as such, the applicant would benefit from unfair enrichment. Thus the arbiter exceeded jurisdiction by making determinations on issues not in dispute such as making a finding on the issue of permanent structures while the issue for determination was renewal of lease.

Analysis and determination

9. I have duly considered the application, the response thereof as well as the rival submissions. ***Whether the Applicant has made out a case for setting aside the arbitration award dated 14.12.2020*** is the key issue for determination.

10. Section 35 of the **Arbitration (Amendment) Act 2009** provides for grounds of setting aside an arbitral award as follows:

" (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if-

(a) the party making the application furnishes proof-……

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or 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, only those part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; …."

11. The Court of Appeal in the case of **Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR** held that;

" In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical."

12. I find that in paragraph 90 of the award, it is stated that; *"The lease agreement at clause 3 (f) is to my mind clear beyond peradventure. It stipulates for good measure…."*. The Arbitrator then went ahead to extract the aforementioned clause word for word from the lease agreement into the award, thus I need not rehash the contents thereof. There is no rocket science needed to discern that the elephant in the room is the five storey building complex which was put up on the suit premises and which had not been factored in the lease agreement. The Arbitrator candidly dealt with this issue in paragraph 81 and 82 of the said award, where it was stated that the respondent had acquiesced in the erection of the building which was named JF Centre. *" Quicquid Plantatur Solo Solo Cedit"* is a latin maxim which means that what is affixed to the land is part of the land. Thus the parties have to live harmoniously with the elephant which they allowed to enter the room and the issue of the dispute being only rent on an undeveloped land is now water under the bridge.

13. Somewhere in the middle of the relevant **Clause 3 (f)** of the agreement, it is stated that;

" the lessor shall grant the lessee a lease of the Demised premises for a further period of 10 years to commence at the expiration of the said term".

That being the case , the Arbitrator was only stating the inevitable as to what was to happen after the expiration of the further extended lease period of 10 years since the renewal of the lease was not to be in perpetuity. The award as is expected of any decision of a court or tribunal was made with the element of certainty in its execution. This far, I find that the Arbitrator did not go beyond the scope of his mandate.

14. In **County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR**, the court stated that;

" The tenor and import of *Article 159(2) (c) of the Constitution as read together with Section 6(1) of the Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement…."

15. In the Supreme Court of Kenya case of **Cape Holdings Limited v Synergy Industrial Credit Limited (Application 5 (E007) of 2021) [2021] KESC 4 (KLR) (Commercial and Tax) (8 October 2021),** it was stated that;

" The legal position as regards this court's jurisdiction to hear and determine appeals arising from Section 35 of the Arbitration Act Judgment of the High court was settled in the Geo Chem Middle East Case**, wherein this Court found as follows:**

Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of courts has been greatly diminished notwithstanding the narrow window created by sections 35 and 39 of the Act. "

16. In the UK case of **R Durtnell & Sons Ltd v Secretary of State for Trade and Industry [2001] 1 All ER (Comm) 41** : it was stated as follows;

"We started from the principle that if parties have chosen arbitration rather than let the courts resolve their dispute this

decision must be respected. We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the Court is clearly necessary to move the arbitration forward or where there has been a manifest injustice…"

17. What resonates from the above jurisprudence is that parties in a dispute as well as the courts should embrace arbitration as a process of dispute resolution mechanism as envisaged in the Constitution of Kenya. It is the finding of this court that the setting aside of the award would only create a conundrum in view of the fact that the land belongs to the Respondent while the building complex standing thereon was put up by the Applicant and the arbitrator had steered clear of re-writing the contract between the protagonists. I therefore find that the application is not merited.

18. The Respondent in the replying affidavit also elucidated grounds for setting aside the award. However, this court shall not make pronouncements on the same as the court has not been moved appropriately and in any event, he is now time barred.

19. Disposal orders are that the application dated 10.3.2021 is DISMISSED. In order to promote some semblance of equity, and noting that the Respondent had for his own reasons sought for the setting aside of the award too, I direct that Each party bears their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Esami for the Applicant

M/S Athman for the Respondent

Court Assistant: Eddel Barasa