



**CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH LIMITED
SUMMARY CASE LAW**

HCOMMISC E596 OF 2019

NANDA PROPERTIES LTD. VS AMREEK SINGH MUDHER & NILESH JAYANTILAL KOTEDIA

- Applicant – Nanda Properties Ltd.
- 1st Respondent – Amreek Singh Mudher
- 2nd Respondent – Nilesh Jayantilal Kotedia
- Judge(s) – M.W. Muigai
- Date of delivery of the Ruling:
- Court: High Court of Kenya at Nairobi City (Milimani Commercial Courts Commercial and Tax Division)

SUMMARY OF FACTS

The parties herein entered into an Agreement for the sale and purchase of shares. Eventually, a dispute arose and in accordance with the Agreement, the dispute was referred to arbitration.

The Arbitrator heard and determined the dispute, and published the award in favour of the Applicant. The Applicant then filed an application seeking for the court to recognize and adopt the award as a binding order of the court and as a decree of the court.

The Respondents subsequently filed grounds of opposition to the application averring that:

- i) The application was not tenable in law as it was brought in breach of Section 36(3) of the Arbitration Act and Rules 4 and 5 of the Arbitration Rules 1997.
- ii) The award contained decisions on matters that were beyond the scope of the reference to arbitration contained in the Agreement.
- iii) The award was in conflict with public policy.

Thus, the Respondents submitted that the award ought not to be recognized or enforced by the court.

In response, the Applicant submitted that the dispute was within the scope of the reference and in terms of the express provisions of the Agreement between the parties. The Applicant claimed that the Respondent did not point out which part of the award was beyond the scope. It was the Applicant's view that the clause in the Agreement between the parties intended to refer any and all disputes between the parties to arbitration.

ISSUES

Whether the final award ought to be recognized and enforced as an order of the court or be set aside.

ANALYSIS AND DETERMINATION

The court held that the Applicant indeed complied with Section 36(3) of the Arbitration Act as the Applicant presented and attached both the final award in its original form and the arbitration agreement/clause housed in the Agreement for the sale and purchase of shares. Moreover, the court held that the Applicant complied with the Arbitration Rules 1997 and

Section 35 of the Arbitration Act by adhering to the stipulated timelines in which an application for the recognition and enforcement of an award ought to be filed and served.

The court stated that pursuant to Section 35(3) of the Arbitration Act, the Respondents did not file an application to set aside the award within the stipulated timelines. Furthermore, the Respondents could not get recourse from Section 37 of the Act as the award was not an international/foreign arbitral award, but a domestic arbitral award.

The court then went on to hold that the entire award did not contain decisions within the scope of the reference as arbitration clauses are deemed to include any and all disputes between the parties to an arbitration unless expressly excluded.

Regarding whether the award was contrary to public policy on the basis that it was unjust, oppressive, unfair and punitive, the court held that the Respondents failed to spell out the exact contraventions of any written law.

Ultimately, the court held that the actual bone of contention raised by the Respondents was the Arbitrator's finding that was in favour of the Applicant which restrained the court as it ought not to sit on appeal. It held the view that the court in arbitration matters, is bound by Section 10 of the Arbitration Act to deal only with the jurisdiction donated by the Arbitration Act pursuant to Sections 35,36 and 37 of the Act.

RULING/HOLDING

The court allowed the Applicant's application while dismissing the Respondent's grounds of opposition. 3

RATIONALE

The Judge arrived at this ruling by adopting a narrow interpretation of Section 35 of the Arbitration Act regarding the setting aside of an arbitral award. According to the court, the Respondent did not provide any sufficient grounds to satisfy the requirements of Section 35 of the Arbitration Act.

CASE RELEVANCE

- Section 37 of the Arbitration Act strictly relates to international/foreign arbitral awards. Parties seeking to set aside a domestic award cannot rely on it.
- Section 10 of the Arbitration Act provides that no court shall intervene in matters governed by the Arbitration Act.
- For an arbitral award to be adopted as an order/judgment/decreed of the court, the requirements under Section 36 of the Arbitration Act must be satisfied i.e., furnishing of the original arbitral award or a duly certified copy, and the original arbitration agreement or a duly certified copy of it.
- Courts narrowly interpret the public policy ground for setting aside an arbitral award present in Section 35 of the Arbitration Act.
- It is not the role of the court to review and/or sit on appeal over the decision of an arbitrator. The leading precedent for this perspective is *Nyutu Agrovat v Airtel Network Limited & Others* [2019] eKLR.
- Arbitration clauses are deemed to include any and all disputes between parties to an arbitration unless expressly excluded.