

NOTE: The names of parties and all critical details have been changed. The parties have in writing allowed me to put this version of the case on my website and to use the award in my arbitration classes.

REPUBLIC OF KENYA

IN THE MATTER OF THE ARBITRATION ACT 1995 (REV. 2010)

**IN THE MATTER OF THE CHARTERED INSTITUTE OF ARBITRATORS
(KENYA BRANCH) ARBITRATION RULES 2012**

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

KENYA ARCHITECT.....CLAIMANT

AND

MR KAREN DEVELOPERRESPONDENT

FINAL AWARD ON AGREED TERMS

**ARBITRATOR: Paul Ngotho FCIArb, Arbitrator
7th Floor, Tower A
Eden Square
Chiromo Road
P O Box 1870 - 00606
Nairobi**

A. THE PARTIES AND ADDRESSES

1. The Claimant is Mr Kenya Architect of P. O. Box 10000, 00100, Nairobi.
2. The Respondent is Mr. Karen Developer of P.O. Box 20000, 00200 Nairobi.

B. BACKGROUND, ARBITRATION AGREEMENT & ARBITRATOR APPOINTMENT

3. The Respondent engaged the Claimant, who is an architect, for architectural services with respect to development of an office block at property LR. No. 1160/3412 in Karen, Nairobi.
4. A document titled "Terms of Agreement" between the parties was drafted and discussed but it was not signed. The unsigned contract contains the following clause in particularly small print,

"13. Adjudication of Disputes

If a dispute arises between the Parties, which they agree to refer to adjudication, either Party may send to the other Party the name of a person to act as adjudicator. If the Parties fail to agree upon a person within five working days, the Chairman of XYZ shall act as the nominating body and select a person to act as adjudicator. This Clause shall not prejudice the Parties' rights to refer disputes to litigation"

5. For clarity, this is an arbitration under the Kenya Arbitration Act of 1995 (Amended), and not an adjudication as contemplated in the unsigned contract.
6. Once a dispute arose, the parties ignored that adjudication clause and wrote jointly to the Chairman of XYZ on 21st February 2013 stating,

"Arbitration Request

The relationship of the above named in one of potential client and architect. Mr Karen Developer has expressed dissatisfaction with the architect and decided to appoint another architect. The parties do not agree on the fees due to the architect. We request that an arbitrator hears out the parties in an attempt to resolve the matter"

7. That clause is, for all practical purposes, the applicable "arbitration agreement".
8. The first person appointed as arbitrator by the Chairman of XYZ did not take up the appointment or communicate with the parties.
9. I, Paul Ngotho, was appointed Sole Arbitrator by the Chairman of XYZ on 6th March 2014. I accepted the appointment on 10th March 2014.
10. Nether I nor the parties were aware then, or later, of circumstances which could

lead to justifiable doubts about my independence and impartiality.

C. THE DISPUTE

12. The Respondent terminated the Claimant's services citing various grounds. The Respondent demanded fees for the services he claims he had rendered up to that point. The Respondent refused to pay the demanded sum. Efforts to resolve the matter amicably failed.

13. This dispute is about those fees. The Claimant's claim is for Kshs 5,000,000/= plus VAT and interest at commercial rates average (20% p.a compounded) from 11th January 2013.

14. The Respondent has not submitted a substantive counter-claim. His defence, in brief, is that the Claimant had not been carried out the work to his satisfaction and that he had appointed a new architect for the work. The Claimant insists that he carried out the work to the required standard.

15. It is not disputed that the Respondent engaged the Claimant for the provision of architectural services, that the Claimant commenced the work or that the Respondent terminated the relationship prior to the completion of the Claimant's assignment.

D. PROCEDURE

16. By consent, the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules of 2012 are applicable in these proceedings.

17. By consent, the parties did not to engage legal or other representatives as that would have increased the costs.

18. I conducted a "preliminary meeting" and consulted the parties by email. I have not held any meeting with the parties or otherwise met either of them.

19. My procedural directions required the parties to consider negotiation because my fees for a full arbitration would be disproportionate to the amount in dispute. The parties complied and reached an agreement on all issues.

20. The measures in paragraphs no. 17 - 19 above greatly simplified this arbitration. I reciprocated by charging a discounted fee.

E. TERMS OF SETTLEMENT

21. The terms of settlement were as follows:

(i) The Respondent paid the Claimant and the Claimant accepted Ksh. 4,000,000/= in full settlement of the dispute between them.

(ii) Each party paid Ksh. 75,000/= to me being its agreed share of my nominal

fee of Ksh. 150,000/=.

(iii) The parties also agreed that there were no outstanding issues in this matter since the entire dispute had been settled and that there would be no future claims between the Claimant and the Respondent. Consequently, this award is merely for the record.

F. TYPE OF AWARD

22. This is a Final Award on Agreed Terms in accordance with s. 31.(1) of the Arbitration Act, which states as follows:

“If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.” (emphasis added)

23. I am not required to give reasons in this award because I do not know the basis on which the settlement was reached. I refer to s. 32.(3)(b) of the Act:

“The arbitral award shall state the reasons upon which it is based, unless ... the award is an arbitral award on agreed terms under section 31”. (emphasis added)

24. The parties indicated they required an arbitration award to formally put the dispute to an end. I agreed to prepare a brief award of maximum 4 pages on agreed terms.

G. FINAL ORDERS

25. For the record, as requested, I declare that the dispute between the Claimant and the Respondent is fully settled on agreed terms and that the terms have been complied with.

26. Seat of arbitration: Kenya

Date of the Award: 18th June 2014

**Paul Ngotho, FCI Arb.
Sole Arbitrator**

