



Mboleko Limited v Wamasaa Travellers Limited (Commercial Miscellaneous Application E034 of 2023) [2023] KEHC 18206 (KLR) (Commercial and Tax) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E034 OF 2023**

FG MUGAMBI, J

JUNE 2, 2023

BETWEEN

MBOLEKO LIMITED APPLICANT

AND

WAMASAA TRAVELLERS LIMITED RESPONDENT

RULING

Brief Facts

1. The applicant, a limited liability company, is in the business of providing emergency credit facilities to businesses and individual borrowers. The applicant and the respondent signed a Master Revolving Guarantee Agreement whereby the applicant would finance members of the respondent and in turn the respondent would guarantee the sums advanced to its members.
2. A dispute arose between the parties over the settlement of guaranteed loan amounts to the respondents' members. The dispute was referred to arbitration as per the Master Revolving Guarantee Agreement. An award was delivered on October 17, 2022. Subsequently the arbitrator wrote to the parties on November 18, 2022 informing them that the award was ready for collection upon payment of the arbitrator's fees, which the applicant paid and the award was released to the parties.
3. The applicant filed the Chamber Summons application dated January 20, 2023. It was brought under section 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya Order 46, Rule 20 of the *Civil Procedure Rules, 2010*; Sections 36(1) and (3) of the *Arbitration Act* No 4 of 1995, Laws of Kenya; Rules 4(1) and (2), 6 and 9 of the *Arbitration Rules, 1997* and all other enabling provisions of the law.
4. The application seeks the following orders;



- i. Spent
 - ii. That the arbitral award dated October 17, 2022 made by the arbitrator Ms Doreen Kibia in the arbitration between the applicant and the respondent, be and is hereby recognized and adopted as an order of this court.
 - iii. The costs of this application be borne by the respondent.
5. The application is premised on the grounds on the face of it, the supporting affidavit sworn by Theresa Kiarie Wijenje on January 20, 2023 and the submissions dated March 2, 2023. The totality of the applicant's case was that it was a judgment creditor by virtue of the arbitral award for Kshs 2,684,531/=. That following the delivery of the award, no application had been filed seeking to set aside the award and the applicant had therefore sought to have it recognized and adopted as an order of this court.
 6. The applicant submitted that it had fulfilled the provisions of section 36 of the *Arbitration Act* with respect to filing a duly certified copy of the award and arbitration agreement. Counsel faulted the respondent for challenging the award on points of merit and submitted that the jurisdiction of the court was limited to the grounds listed under section 37 of the *Arbitration Act*. In tandem with the finality of arbitral disputes the applicant noted that the arbitrator and not the court, was the master of facts.
 7. In opposition to the application, the respondent filed grounds of opposition and a replying affidavit sworn by Stephen Mukonza Mbolonzi, both dated February 22, 2023. The respondent raised three main points in opposition to the application.
 8. The respondent urged that the award failed to capture details of amounts advanced to its members, interest charged and amounts already repaid by the alleged borrowers. It was stated that the award was exaggerated and had failed to consider that some members had cleared their loans and others made substantial payments against their loans. Finally, the respondent took issue with the fact that there was no evidence of calculations to illustrate how the arbitrator arrived at the amounts stated in the award. The respondent argued that the award was therefore vague and blanket.

Analysis

9. I have considered the rival pleadings and submissions by counsel. The main issue is whether the award in question should be adopted and enforced as an order of this court.
10. The legal parameters governing enforcement and adoption of an arbitral award are set out in section 36 of the *Arbitration Act*. It provides as follows;
 36.
 - (1) An arbitral award, irrespective of the state in which it was made 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) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
 - a. The duly authenticated original arbitral award or a duly certified copy of it; and
 - b. The original arbitration agreement or a duly certified copy of it.
 - (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.



11. The latter requirement is a mandatory one as was held in *Samura Engineering Limited v Don Wood Co Ltd [2014] eKLR*. The Court stated in part that :-

' Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the *Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed.'

12. I have perused the application for enforcement of the award. I find that the applicant has complied by the provisions of the law required for adoption and recognition of the award. The applicant has furnished a certified copy of the Award published on October 17, 2022 and a certified copy of the Master Revolving Guarantee Agreement containing the arbitration clause. Having discharged this burden, it is therefore upon the respondent to demonstrate why the award should not be adopted and enforced as a judgment of this court.

13. Section 37 of the Act gives the court the power to refuse the recognition or enforcement of the arbitral award. It provides that;

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

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;

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.

14. The respondent did not demonstrate how the grounds fit within the limited jurisdiction that the court has to set aside the arbitral award. Instead, the respondent appears to take issue with the factual findings by the arbitrator. This seems to be an attempt to invite the court to exercise an appellate jurisdiction to determine whether or not the arbitrator was at fault in her finding.

15. I am well aware that this is not within the realm of the jurisdiction of this court. I concur with the observations made in [Anne Mumbi Hinga vs Victoria Njoki Gathara \[2009\] eKLR](#) to the extent that;

' That there is no right for any court to intervene in the arbitral process, or in the award except in the situations specifically set out in the [Arbitration Act](#) or as previously agreed in advance by the parties and simultaneously there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the [Arbitration Act](#).'

Determination and orders

16. For the reasons that I have stated, I find merit in the Chamber Summons application dated January 20, 2023 and allow it on the following terms;

- i. That the final award published on October 17, 2022 is hereby recognized and adopted as a decree of this court.
- ii. The applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2ND DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

