



Riverbank Solutions Limited v County Government of Kiambu (Miscellaneous Civil Application 104 of 2023) [2023] KEHC 27392 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 27392 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

MISCELLANEOUS CIVIL APPLICATION 104 OF 2023

DO CHEPKWONY, J

NOVEMBER 23, 2023

IN THE MATTER OF SECTION 36 OF ARBITRATION ACT 1995 AS

AMENDED BY ACT NO. 11 OF 2009

IN THE MATTER OF ENFORCEMENT AND RECOGNITION OF THE ARBITRAL AWARD OF EUNICE LUMALLAS, FCIARB ARISING FROM THE ARBITRATION BETWEEN RIVERBANK SOLUTIONS LIMITED AND COUNTY GOVERNMENT OF KIAMBU

BETWEEN

RIVERBANK SOLUTIONS LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU RESPONDENT

RULING

1. Before the court is Chamber Summons Application dated 3rd July, 2023 filed under Section 36 (1) of the *Arbitration Act*, 1995 as amended by the *Arbitration (Amendment) Act* no 11 of 2009 and Rules 6, 9 and 11 of *Arbitration Rules* 1997 and all other provisions of the law.
2. The Applicant is seeking the following orders:-
 - a. Spent;
 - b. The Final Award of Eunice Lumallas, FCIArb published on April 11, 2023 in the arbitration between Riverbank Solutions Limited (Applicant) and County Government of Kiambu (Respondent) be recognised as binding be adopted as a Judgment of this court and accordingly, be enforced as a decree of this Honourable court save for the unassessed Applicant's legal fees awarded by the Hon. Arbitrator.
 - c. The costs of this application be borne by the Respondent.



3. The Application is based on the following grounds:

- i. By an Agreement for Revenue Collection Solution and Services on November 7, 2014, ("the First Agreement") the Respondent contracted the Applicant to provide an electronic revenue collection system and payment system for all the revenue streams within Kiambu County through inter alia the provision of software and hardware components required to execute the revenue collection services at an agreed fee.
- ii. This Agreement ran its full term and by an Agreement for Extension of Contract for Electronic Revenue Collection Solution and Payment Services dated November 6, 2016 ("the Second Agreement"), the Parties extended the terms of the First Agreement for a further period of five (5) years) terminating on November 6, 2021;
- iii. It was an express term of the Agreements that the Respondent would, at expiry of the Second Agreement, settle all outstanding amounts due and owing to the Applicant but the Respondent failed to honour that express term and a dispute arose in respect of invoices totaling to kes 40,042,166.03 raised and duly submitted to the Respondent as per the Agreements on diverse dates between the years 2019 and 2022.
- iv. The Agreements provided for Arbitration as the mode of dispute resolution through Clause 24 of the First Agreement and the Applicant having followed all the requisite pre-arbitration steps stipulated in the Arbitration Agreement, finally referred to the dispute to the Chartered Institute of Arbitrators, Kenya Chapter on April 20, 2022 requesting for the appointment of a sole arbitrator to handle and resolve the dispute.
- v. On April 26, 2022 the Chairperson of the CIArb, Kenya
- vi. proposed and appointed Ms. Eunice Lumallas, FCIArb as the sole arbitrator and the parties subsequently accepted her appointment on the first Preliminary meeting of May 23, 2022 and arbitral proceedings commenced with effect from April 20, 2022.
- vii. By a Final Award published on April 11, 2023, the Sole Arbitrator found in favour of the Applicant as against the Respondent and thus far, the Respondent has not expressed any opposition, dispute or challenge against the said Final Award but may not comply with the award unless decreed by this Honourable Court.
- viii. That the Applicant desires to enforce the Arbitrator's Final Award but this Honorable Court must first recognize and adopt the final award as its own judgment and decree, as by law provided, and in that regard this application has been made.
- ix. This application has been brought timeously and it is merited.

4. The Respondent filed Grounds of Opposition dated 12th July, 2023 on the following grounds:-

- a. That the recognition and enforcement of the Arbitral Award of Eunice Lumallas, FCIARB, the Arbiter in the matter is inconsistent with Section 35(2) (i) of the *Arbitration Act* as the same is contrary to public policy, inimical to the national interest of Kenya and contrary to justice and morality.
- b. That the Arbiter failed to recognize that the agreement in dispute was tripartite and involved three parties Riverbank Solutions Limited, Kenya Commercial Bank and the County Government of Kiambu.



- c. That the Respondent filed an application dated 5th August 2022 to enjoin the third party in the arbitration where the arbiter allowed to enjoin the Kenya Commercial Bank. This was pursuant to Clause 7 of the Contract where there was to be a joint report of two officials from the applicant and the Kenya Commercial Bank.
- d. That despite the same being compromised, the Applicant herein admitted to not having any joint reports with the third party and thus the award targets to impoverish the citizens of Kiambu by failing to observe all key issues pertaining to the contract.
- e. That failure to enjoin the third party at the behest of the Riverbank Solutions rendered the award unfair and unmeritorious despite there being an obligation set upon the applicant herein to provide the joint reports.
- f. That the pending bill owed to the applicant herein was subjected to audit owing to the gaps in the implementation of the contract where the same was communicated to the applicant herein. Public audits are part of public policy and therefore the applicant herein failed to await the reports and outcomes of public audits as required by the *Public Finance Management Act* and the *Public Audit Act* 2015.
- g. That further, the invoices raised by the applicant from 2019 to 2022 were not payable as the applicant through its own admission could not continue performing its obligations under the contract stating reasons that they had not been paid. The Applicant deliberately failed to provide consumables for the implementation of the contract under Article 4 and 7 of the Contract. This was communicated to the applicant via a letter dated 19th March, 2020 before commencing arbitration.
- h. That the said letter above was responded to by the applicant herein in a letter dated 10th August, 2020 stating that they would not supply the same as it had not received its quarterly payment. However, the applicant did not purge the performance of its obligations under the contract.
- i. That in light of the above, the respondent was forced to prematurely procure the said consumables despite there being a contract in place. This translated to occasioning the County losses at the expense of public policy.
- j. That in light of the foregoing, the enforcement and recognition of the arbitral award would go against public policy as the applicant refused to await the outcome of audit reports, report of the illegible and ineligible pending bills as the classification of the same would ensure that public funds are not wasted and unmeritorious paid.
- k. That the many gaps identified i.e. the failure of the applicant in two instances failing to perform its obligations under the contract are a demonstration of going against public policy which the arbiter did not put into consideration despite stating the same during the hearing of the matter.
- l. That as it stands, the pending bills that have been cleared are those that have been verified and confirmed for payment and the applicant herein is still undergoing audits since it was a system that had been put in place for revenue collection. It is trite to note that the contract was terminated on November 6, 2021 and the system audit began sometime in June, 2022.
- m. That the Court is urged to consider that public policy dictates that audits must be done in line with the *Public Finance Management Act* and the *Public Audit Act* 2015 so as to ensure that public funds are not wasted especially in settling pending bills that are ineligible for payment.



- n. That the Applicant should therefore await the report on pending bills for this particular transaction so as to actualize the enforcement and recognition of the arbiter's award.
5. The Court directed the parties to file written submissions in respect of the application and the Applicant filed its submissions on 14th July, 2023.

Analysis and Determination

6. To determine the application dated 3rd July, 2023, the court has considered the prayers sought in terms of the grounds upon which they are premised and the grounds of Opposition raised by the Respondent alongside the Applicant's written submissions. For determination by this court is whether the Arbitral Award published on 11th April, 2023 can be recognized as final and binding upon the parties, to be adopted as a Judgment and enforced as a decree of the court.
7. It is trite law that under Section 32A of the *Arbitration Act* an arbitral award is final and binding. It states:-
- “Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”
8. The purpose of the limitation of the court's intervention is to protect the autonomy of the arbitration process and to promote it as a tester/guide of dispute settlement. (See the decision of the Supreme Court in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR.
9. The Application herein is seeking to have the Final Award published on 11th April, 2023 recognized and enforced as Judgment and decree of the court, which process is established under Section 36 of the *Arbitration Act* as follows:-

“ 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)



10. In the case of *Samura Engineering Limited v Don-Wood Co Ltd* [2014] eKLR it was held:-

“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...”

11. It is common ground that the Applicant has produced certified copies of the Agreement and the Final Award, hence has fulfilled the conditions for recognition and enforcement of the Award under Section 36 of the Act. The burden of proof now shifts to the Respondent to show why the Application should not be allowed or rather why the Award should not be recognized and enforced as a Judgment and decree of this court.

12. Section 37 of the *Arbitration Act* provides for grounds which the court should consider in declining an application for recognition of an arbitral award as follows:-

“37. 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 the High Court proof that;
 - (i) a party to the arbitration agreement was under some in capacity; 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 decision 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 recognized 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 awards 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.”

13. The court has taken into consideration the Grounds of Opposition filed by the Respondent in opposing the prayers being sought and finds the main ground relied upon in opposing the recognition of the Final Award being that it is against public policy and the national interest of Kenya. The concept of public policy was explained in the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, Ringera J. (as he then was), observed as follows:-

“I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that as the common law Judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you. An award could be set aside under section 35(2) (b) (ii) if the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* of Kenya or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality. The first category is clear. In the second category I would without claiming to be exhaustive include the interest of the national defence and security good diplomatic relations with friendship nations and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive include such considerations as whether the award was induced by corruption, fraud or whether it was founded on a contract contrary to public morals.”

14. Based on the decision above, it is clear that the award herein is not inconsistent with *the Constitution* of Kenya or other laws whether written or unwritten as the same is not contrary to national or public interest or even contrary to justice or morality so as to qualify for it to be said that it is against public policy. This ground therefore fails.
15. This court also finds that the issues that were raised in the grounds of opposition were discussed by the Arbitrator in making the Final award so that if the Respondent was aggrieved by the decision or final award, it ought to have filed an Appeal against it or even filed an application to have it set aside.
16. In conclusion, this court finds that the Respondent has failed to discharge the burden or indeed proven that the Final Award delivered on 11th April, 2023 by the Arbitrator is contrary to public policy and



that the Applicant has met the conditions to warrant the recognition and enforcement of an award under Section 36 of the *Arbitration Act*.

17. The upshot is that the Chamber Summons dated 3rd July, 2023 be and is hereby allowed on the following terms:-
- a. The Final Award of Eunice Lumallas, FCIArb published on April 11, 2023 be and is hereby recognized and adopted as a Judgment of this court.
 - b. That the Applicant is granted leave to enforce the said award as a decree of this court.
 - c. The respondent shall bear the costs of this application.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF NOVEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Olala holding brief for Mr. Omwebu counsel for Applicant

Court Assistant - Martin

