



Greenhills Investments Limited v Kenya Airports Authority (Arbitration Cause E013 of 2023) [2024] KEHC 9200 (KLR) (Commercial and Tax) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E013 OF 2023
JWW MONG'ARE, J
JULY 30, 2024**

BETWEEN

GREENHILLS INVESTMENTS LIMITED APPLICANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

RULING

Introduction And Background

1. On 28th April 2021, this court, in HC Misc. Application No. 397 of 2018; Kangethe & Co. Advocates v Kenya Airports Authority, Greenhills Investments Limited & Another, ordered that an arbitral tribunal be appointed to resolve the dispute as to who between the parties herein was bound to cater for the advocates' legal costs arising out of the tender that was floated by the Respondent for the lease of land for development and management of "Lot 1: A fuel service station" and "Lot 2: a retail complex" at Moi International Airport, Mombasa.
2. By an arbitration award dated 2nd November 2022 it was determined by the arbitral tribunal that it was the Applicant who was to cater for the said advocates' legal costs ("the Award"). The Award was recognized and adopted by the court in HC Misc. Application No. 397 of 2018 as an order of the court seeing as no party opposed the adoption and recognition application. As at the time of the order of recognition and adoption of the said award, the present application had already been filed but was not considered at the same time.
3. The Applicant has now moved the court by way of the Notice of Motion dated 31st January 2023 and made under inter alia section 35(2)(b)(ii) of the *Arbitration Act* (Chapter 49 of the Laws of Kenya) and Rules 7 and 11 of the *Arbitration Rules* seeking to set aside the Award for the reason that it is contrary to public policy. The application is supported by the grounds set on its face and the supporting affidavit



sworn by its director Sanjay Ramniklal Shah on 31st January 2023. It is opposed by the Respondent through the replying affidavit sworn by its Corporation Secretary, Munene Margaret on 17th May 2023. To support their positions, the parties have also filed written submissions which I have carefully considered and will make relevant references to in my analysis and determination below.

Analysis and Determination

4. Whereas I note that in their response, the Respondent's argues that the present application has been overtaken by events considering that the Award has already been adopted as an order of the court, it should not be lost that this court has the power and discretion to review and set aside its orders *ex debito justitiae* for reasons of an irregularity or because they are tainted with breach of statutory provisions. Courts have on several occasions held that a court's hands are not tied simply because an award has already been adopted as an order of the court (See [*Samura Engineering Limited v Don-Woods Company Limited*](#) ML HC Misc. No. 714 of 2012 [2014] eKLR). I note that the Applicant raises valid questions of alleged breach of the repealed Public Procurement and Disposals Act ("the PPDA) by the Respondent which questions this court is called upon to make a determination in substance.
5. The Applicant stated that the Award required it to pay legal fees for an advocate who was appointed by the Respondent contrary to the procurement rules and regulations set out in the PPDA and therefore contrary to public policy. It avers that it never issued any instructions to the firm of Kangethe & Co. Advocates ("the firm") and that the letter purporting to appoint the said firm was never served on the Respondent at all. Further, that the firm could not have been appointed on 18th March 2015 to act in the matter when by its own documents, it only signed a service level agreement on 31st January 2016. That by the time the impugned instructions were being issued, the firm was not in the Respondent's panel of service providers. It further accused the Respondent of not competitively sourcing for an advocate as per the PPDA regulations.
6. On its part, the Respondent deponed that the tender documents and offer letter for the same provided that the Applicant was to incur all legal costs and expenses relating to the tender. That the Applicant was aware of the appointment of the firm and that it even worked with them from the onset, during the drafting phase and even attended meetings with them and that the Applicant never objected to the fee notes received from the firm. The Respondent further states that irrespective of the law firm appointed, the Applicant was still bound to cater for the legal costs and expenses flowing from the tender. In respect of the procurement process, the Respondent avers that this is not the correct forum to adjudicate the same and that the Applicant has never raised any issue with the Public Procurement Administrative Board.
7. Under section 35(2)(b)(ii) of the [*Arbitration Act*](#), an award can be set aside if it is found to be contrary to public policy. Contrary to the Respondent's submission, once the court in HC Misc. Application No. 397 of 2018 referred the parties to arbitration, the parties were now subject to the [*Arbitration Act*](#), which is the complete code on matters arbitration and not the Civil Procedure Rules or any other set of laws. This position has been affirmed in several decisions including [*Nyutu Agrovet Limited v Airtel Networks Limited*](#) NRB CA Civil Appeal (Application) No. 61 of 2012 [2015] eKLR, [*Kamconsult Ltd v Telkom Kenya Ltd and Another*](#) NRB CA Civil Appeal No. 92 of 2009 [2016] eKLR and [*Ann Mumbi Hinga v Victoria Njoki Gathara*](#) NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR.



8. Both parties rightly submit that the term “public policy” was broken down by the court in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 E.A 366, where Ringera J., explained the scope of public policy as a ground for setting aside an arbitral award as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the *constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.....”

9. The Applicant’s case is that the firm was irregularly appointed by the Respondent as it was not prequalified at the time by the Respondent to provide legal services contrary to the PPDA. It is common ground that the Respondent, as a public entity, was guided by the repealed PPDA in the procurement of its goods and services.

10. I note that the Respondent did not seriously respond to the allegation that the firm was appointed and yet it was not prequalified as a service provider by the Respondent and that it was not competitively sourced. Instead, the Respondent brushed off this allegation by stating that the Applicant ought to have complained to the Public Procurement Administrative Board and yet it was an issue that was central to the arbitral tribunal’s determination. In the absence of a cogent and substantive response, the court can only presume that the firm was appointed without being prequalified to provide such services as was required by law and that there was no tendering process for the advocate to carry out the legal services which then leaves the Court to conclude that the appointment process was contrary to the laws on procurement found under the then legislation the PPDA. This meant that the Respondent was in direct violation of the law and thus contrary to public policy and as a consequence, the Award as is cannot stand.

Conclusion and Disposition

11. In sum I am satisfied that the Applicant has established that the Award herein violates the *Public Procurement and Asset Disposal Act* and i therefore find merit in the Applicant’s Notice of Motion dated 31st January 2023. The said Award is therefore set aside with costs to be borne by the Respondent. Subsequently the order of this court in HC Misc. Application No. 397 of 2018; Kangethe & Co. Advocates v Kenya Airports Authority, Greenhill’s Investments Limited & Another is hereby vacated.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JULY, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Ouma for the Applicant in Arb. No. E013 of 2023 and the 2nd Respondent in Misc. No. 397 of 2018.

No appearance for the Respondent.

Amos - Court Assistant

