



Mburu & another v Longhorn Publishers PLC; Mbohu & another (Proposed Interested Parties) (Commercial Miscellaneous Application E447 of 2021) [2023] KEHC 112 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E447 OF 2021**

**A MABEYA, J
JANUARY 20, 2023**

BETWEEN

STEPHEN NG'ANG'A MBURU 1ST CLAIMANT

GEOFFREY WEKESA CHEMWA 2ND CLAIMANT

AND

LONGHORN PUBLISHERS PLC RESPONDENT

AND

KYALO MBOBU PROPOSED INTERESTED PARTY

MUTHOMI THIANKOLU PROPOSED INTERESTED PARTY

RULING

1. Before Court is an application dated November 2, 2021. It was brought under Order 1 Rule 10 of the *Civil Procedure Rules*, and Sections 1A and 1B of the *Civil Procedure Act*.
2. The application sought orders that the proposed 1st & 2nd interested parties be enjoyed in these proceedings as the 1st & 2nd interested parties, respectively.
3. The grounds for the application were set out on the face of it and in the Supporting Affidavit sworn by Maxwell Wahome on November 2, 2021. It was averred that the parties were engaged in arbitral proceedings in which the proposed 1st & 2nd interested parties were the arbitrators.
4. That the Arbitrators issued an Arbitral Award dated February 19, 2021 which the claimants sought to have adopted as an order of the Court vide the application dated June 2, 2021.



5. That in the respondent's Replying Affidavit dated September 16, 2021, the respondent raised several issues including the jurisdiction conferred on the proposed 1st & 2nd interested parties, unprocedural merger of several Arbitration Agreements and undisclosed conflict of interest by the proposed 1st interested party.
6. That the claimants had informed the arbitrators of the issues raised by the respondent vide correspondence attached as MW1, MW2 and MW3, but their response was that they were not parties to these proceedings. That it was therefore imperative to join the arbitrators to enable them address those issues.
7. The 1st and 2nd proposed interested parties (the arbitrators) filed grounds of opposition dated January 28, 2022. They stated that; the arbitral tribunal had no adversarial or any other interest in the subject matter of the dispute between the parties to warrant their joinder in the proceedings; that the tribunal had no role or any other role to play post-award proceedings under Section 35 of the Arbitration Act ("the Act").
8. The arbitrators also opposed the application vide the Replying Affidavit sworn by Kyalo Mbobu, the 1st proposed 1st interested party. He is an advocate of the High Court and a Chartered Arbitrator. He averred that the tribunal enjoys immunity from anything done in good faith in the discharge of its duty, and no bad faith had been demonstrated by the applicant.
9. That save for section 14(4) of the Act which expressly provides for appearance of an arbitrator whose appointment has been challenged, the Act did not expressly provide for appearance or joinder of an arbitrator in any other section. That the application was under section 35 of the Act to adopt the award an appearance of the arbitral tribunal was not provided for.
10. That the arbitral tribunal was *functus officio* and could not reopen the arbitral proceedings save for correction of an error. That the instant application was an attempt to set aside the award out of time and no useful purpose would be served by joining the arbitrators to the suit.
11. The application was canvassed by way of written submissions. The Court has considered the record.
12. Section 10 of the Arbitration Act provides that: -

“Except as provided in this Act, no Court shall intervene in matters governed by this Act”.
13. Further, section 32A of the Act, provides: -

“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”.
14. The main application dated June 2, 2021 seeks the recognition and adoption of the Arbitral Award dated February 19, 2021 under section 36 of the Arbitration Act. Nothing in that section provides for joinder of parties and specifically joinder of the arbitral tribunal.
15. As contended by the 1st and 2nd proposed interested parties, nowhere does the Act provide for joinder of the Tribunal. The only mention of the possibility of arbitrators to join proceedings is where there is a challenge of the arbitrator's appointment under section 14 of the Act. And even then, the language used may signify that it is not mandatory that the arbitrator joins such proceedings that challenge his appointment. His position is privileged and immunized.



16. Further, the applicants did not cite any section under the Act under which an order for joinder can be made. The applicant cited *Civil Procedure Act* and Rules which are not applicable to arbitral proceedings before this Court.
17. In any event, the grounds advanced for the joinder of the tribunal are those meant for setting aside an award under section 36 of the Act. There is no such application before Court. Even if there was, the Tribunal would not be required to attend and defend the same.
18. Further, the same grounds can be advanced in opposition to the application for adoption of the award and not to drag the arbitrators to such proceedings. This is so considering that the tribunal becomes functus officio upon publishing its award. The present application is akin to joining the High Court to Court of Appeal proceedings for it to defend its judgment! That wont do!
19. The upshot is that the application is found to be unmeritorious and the same is dismissed with costs to the 1st and 2nd proposed interested parties.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A MABEYA, FCIArb

JUDGE

