



**Illuminator Limited v Nairobi City County (Arbitration Cause 354 of 2017)  
[2023] KEHC 1678 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE 354 OF 2017  
PN GICHOHI, J  
FEBRUARY 28, 2023**

**BETWEEN**

**ILLUMINATOR LIMITED ..... APPLICANT**

**AND**

**NAIROBI CITY COUNTY ..... RESPONDENT**

**RULING**

1. By Chamber summons dated July 20, 2022 and filed through firm of Billy Amendi & Co Advocates, the Applicant/Claimant and brought under Section 36 of the [Arbitration Act](#) No 4 of 1995 and Rule 4 (1), (2), 6 and 9 of the [Arbitration Rules 1997](#), the Applicant seeks orders that:-
  1. The Arbitral Award made by the Sole Arbitrator Hon R O Kwach (J) on May 17, 2017 be recognised, adopted and enforced as the judgment of this court.
  2. The Applicant be granted leave to enforce the said Award as the decree of this court.
  3. The Respondent be ordered to pay all costs and expenses incidental to the enforcement and execution of the Award.
  4. The costs of the application be provided for.
2. In support of that application is the affidavit sworn on July 20, 2022 by Billy Amendi Advocate for the Applicant mainly that the parties had entered into a contract on September 17, 2008 but a dispute arose in the course of execution of the said contract where upon the matter went to High Court . However, the parties opted to invoke dispute resolution clause 8 of the Contract. The dispute was finally heard and determined on May 17, 2017 by the duly appointed Sole Arbitrator Hon RO Kwach.



3. He states that the statutory period for setting it aside lapsed with no step taken by the Respondent toward that end. The Appeal filed in High Court by the Respondent against the Award was dismissed. Thereafter, there is no further appeal against the Award and therefore, the Applicant should be granted the orders sought.

### **Submissions**

4. In his submissions dated January 12, 2023, counsel for the Applicant gives the history of this matter leading to this application and while urging the court to grant the Applicant's application, counsel submits that there was a contract between the parties herein which contained an arbitration clause should a dispute arise between the parties. That a dispute indeed arose between the parties and the claimant moved to High Court in Civil Suit No 11 of 2012. However, both parties agreed to have the matter stayed as the contract contained an arbitration clause.
5. Parties ultimately submitted themselves to the jurisdiction of the Arbitrator and he did determine the dispute by awarding the Claimant Ksh 5,000,000/- with interest at 12 % from the date of the Award until payment in full. An appeal against it was dismissed and the Award has not been set aside.

### **Determination**

6. I have considered the application, the affidavit in support together and the submissions by the Claimant /Applicant. There are no submissions by the Respondent herein. I have also perused the court record and the Final Award by the Sole Arbitrator. There is no doubt that the Sole Arbitrator heard both parties to the dispute and rendered his determination on May 17, 2017.
7. Whereas it is not the duty of this court to re- evaluate the evidence before the arbitrator, it is critical to note that after evaluating the evidence before him, the Arbitrator found that:-

“...there was no agreement dated September 17, 2008 made between the Claimant and the Respondent. That document is fake and the persons who drew it and signed it knew as much. There is no special concept which the Claimant was selling to the Respondent. Perhaps if the officials from the City Planning Department had given evidence, they would have clarified the position. This was a racket involving the entire Department plus the legal Department and even the Mayor of the day.

From Mr Kabinda's letter to Jeff Kefa dated July 10, 2008, it is clear that he was falsely representing to the Claimant that an Agreement would eventually be signed that would give the Claimant 5-year contract. During the period the Claimant was performing the pilot project, they were given security by the Respondent to protect them hostile owners. It is my view that the Respondent cannot be allowed to rely on its own breach of procurement laws to defraud the Claimant. The Claimant completed the pilot project with the support and protection of the Respondent. The Respondent cannot be allowed to assert that the Claimant performed that bit of the contract free of charge.”

8. Flowing from the above, the Arbitrator made the Final Award on all the claims before him as follows:-
  1. The Claimant's claim for general damages for breach of contract is dismissed.
  2. The Claimant's Claim for Kshs 821,250,000/- for loss of expected earnings is dismissed.
  3. Claim for Kshs 30,876,000/- for loss of costs is also dismissed.



4. Claim for damages for infringement on the concept is dismissed.
  5. Under any other relief that the Arbitrator may find just to offer, I have found as a fact that the Claimant was unauthorised by the Director of City Planning, Mr PM Kibinda, to carry out a pilot project. The Claimant undertook the plot project and is entitled to be paid for it. On principle of quantum meruit, I assessed the reasonable value of that work at Kshs 5,000,000/-, for which I enter judgment for the Claimant, together with interest at 12% per annum from the date of the Award until payment in full.”
9. Lastly, the Arbitrator found that as most of the claims by the Claimant did not succeed, the Claimant was not entitled to costs. Section 36 of the [Arbitration Act](#) provides: -
- “(1) A domestic arbitral award, shall be recognised 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. I confirm that the Respondent’s application dated August 17, 2017 seeking orders for setting aside of the Award was dismissed by vide ruling dated April 29, 2020 by Kasango J.
11. The grounds upon which High Court may decline to recognise and enforce the Award are provided for Section 37 of the [Arbitration Act](#) as follows;
- “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 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 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.”

12. From the history of the dispute leading to the Award, I see the fairness with which the Arbitrator arrived at the Award herein bearing in mind that there was no agreement between the parties as the document was false. That however did not render the work by the Claimant in the circumstances without redress particularly where the Claimant had sought any other relief the Arbitrator may find just to offer the Claimant.

13. With no competent objection to this Arbitral Award , the same is final. I am satisfied that the Applicant/Claimant has met the conditions for recognition and enforcement of an award under section 36 of the Act. There is no reason not to deny him the orders sought. I therefore allow the application dated July 20, 2022 in the following terms;

1. The Arbitral Award made by the Sole Arbitrator Hon R O Kwach (J) on May 17, 2017 be and is hereby recognised, adopted and enforced as the judgment of this court.
2. The Applicant is granted leave to enforce the said Award as the decree of this court.
3. The Respondent is hereby ordered to pay all costs and expenses incidental to the enforcement and execution of the Award.
4. The costs of the application be borne by the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**PATRICIA GICHOHI**

**JUDGE**



**In the presence of:**

**Ms Kamara for Applicant**

**Ms Ojienda for the Respondent**

**Kevin Isindu , Court Assistant**

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