



Mits Electrical Company Limited v Mitsubishi Electric Corporation (Civil Case 132 of 2016) [2023] KEHC 1298 (KLR) (Civ) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 132 OF 2016**

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

MIT'S ELECTRICAL COMPANY LIMITED PLAINTIFF

AND

MITSUBISHI ELECTRIC CORPORATION DEFENDANT

RULING

1. Mitsubishi Electric Corporation, the Defendant/Applicant herein, took out the chamber summons dated 10th June, 2019 whereof it sought for the arbitral award dated 28th November 2018 delivered by Mr. Yun-Jae Baek (sole arbitrator) in I.C.C. Case no. 22504/PTA between Mitsubishi Electric Corporation and MIT'S Electrical Company Limited be recognized and enforced as a decree of this court.
2. The defendant/applicant also sought for costs. The defendant/ applicant filed in support of the summons the affidavit sworn by Ryusuke Nishio. Mits Electrical Company Limited, the plaintiff/respondent herein on its part filed grounds of opposition and a replying affidavit sworn by Satya Gandhi to oppose the application. This court gave directions to have the summons disposed of by written submissions. At the time of writing this ruling the defendant/applicant was the only party which had filed its submissions.
3. I have considered the grounds set out on the summons plus the facts deponed in the rival affidavits. I have further considered the respondent's grounds of opposition plus the applicant's written submissions together with the authorities supplied.
4. The main issue which has been left to this court to determine is whether the arbitral award has met the threshold for recognition and enforcement in Kenya as the decree of this court.



5. It is the submission of the defendant/applicant that arbitration was conducted in Tokyo, Japan and an arbitral award was delivered on 28th November, 2018 and that the plaintiff/ respondent has not applied to have the award set aside and neither has it challenged the same in any other way. This court was urged to recognize the arbitral award as binding and proceed to have the same enforced as the decree of this court.
6. The plaintiff/respondent on its part urged this court to dismiss applicant's summons stating that the application is fatally defective. The respondent further argued that the arbitral award sought to be recognised was obtained in breach of public policy currently prevailing in Kenya hence it should not be recognized and enforced. The plaintiff/respondent pointed out that on 8/6/2018, three days before the hearing date, the firm of Muma and Kanjama issued to the court a notice to cease acting for the plaintiff/respondent and further issued a letter to the Tribunal informing it that the aforesaid law firm was no longer on record for the respondent and that the respondent should be served directly at its physical address in accordance with the rules of the ICC.
7. It is the submission of the plaintiff/respondent that despite the foregoing the Tribunal proceeded with the hearing as scheduled ex parte giving rise to the delivery of an ex parte decision which the defendant/applicant now seeks to enforce vide the instant application.
8. It is also pointed out by the plaintiff/respondent that the only surviving director of the respondent namely: Satya Gandhi suffered mental illness and was not therefore in a state to give instructions to the respondent's advocate and neither was he in a position to testify at the arbitral proceedings.
9. Having considered the proceedings put forward by both sides, it is not in dispute that on 28th November, 2018 Mr. Yun-Jae Baek the sole arbitrator in this dispute delivered his decision on 25th November 2018. Under Section 36(2) of the *Arbitration Act*, 1995 an international arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention in which Kenya is a signatory and relating to arbitral awards.
10. The plaintiff/respondent has raised one main ground, that its remaining director namely Satya Gandhi suffered mental health and that he was not in a position to attend the arbitral proceedings. It is also said that he was not in a position to give instructions to the respondent's counsel.
11. I have carefully perused a copy of the arbitral award and it is clear that the issues or grounds raised by the respondent through the replying affidavit and grounds of opposition, were actually raised before the Tribunal (sole arbitrator).
12. It is apparent that those issues were considered and rejected. The decision rejecting the respondent's grounds and arguments was equally communicated to the respondent before the arbitral proceedings commenced. In the award, it is clearly shown that the respondent was represented by Mr. Greg Karungo from the firm of Walker Kontos after the firm of Muma & Kanjama Advocates ceased from representing the respondent.
13. The sole arbitrator urged by a communication by email the respondent to cooperate with the arbitral proceeding without further delay as the medical inability of the respondent's CEO is not a reasonable ground for further adjustment on the hearing schedule.
14. It is apparent from the correspondences noted in the award that the respondent was accommodated all along but did not take advantage of the accommodation by the Tribunal. It cannot lie in the mouth of the respondent to complain that it was not given a fair hearing yet it is clear that it was given the opportunity but it failed to cease it. The grounds advanced by the respondent inviting this court not to recognize the award are rejected.



15. The question which this court should determine is whether the applicant has met the requirements of Section 36(3) of the *Arbitration Act*, 1995 which provision is similar to Article IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on 10th June 1958 (the New York Convention).
16. The main requirement for recognition and enforcement of a foreign arbitral award under the aforesaid section is to produce original or certified copies of the arbitral award and the arbitration agreement which in the instant case the applicant duly complied. It is not in dispute that the respondent has not challenged the arbitral award. Kenya, being a signatory to the New York convention is under a legal obligation to recognize and enforce the instant arbitral award.
17. In the end the arbitral award dated 28th November, 2018 delivered by Mr. Yun-Jae-Baek (sole-arbitrator) in ICC Case no. 22504/PTA between Mitsubish Electric Corporation and MITS Electrical Company Limited be recognized and enforced as a decree of this honourable court.
18. Costs is also awarded to the defendant/applicant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant

