



Chippendales Kenya Limited v APA Insurance Limited (Miscellaneous Application E605 of 2022) [2023] KEHC 3816 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3816 (KLR)

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

MISCELLANEOUS APPLICATION E605 OF 2022

FG MUGAMBI, J

APRIL 28, 2023

BETWEEN

CHIPPENDALES KENYA LIMITED APPLICANT

AND

APA INSURANCE LIMITED RESPONDENT

RULING

Brief Facts

1. This ruling relates to two applications. For ease of reference, the application dated 20th September 2022 was filed by APA Insurance Limited (hereinafter APA). The application sought enlargement of time to correct arithmetic errors on an arbitral award. The application dated 24th August 2022 for enforcement of the same award was filed by Chippendales Kenya Limited (hereinafter Chippendales Ltd).
2. The dispute between the parties arises from a contract entered into with respect to the insurance cover of motor vehicle registration no KBW 248B. The court in Milimani CMCC No 1253 of 2020 referred the matter to arbitration. The arbitration was concluded and the award published on 17th March 2022. A summary of the two applications is as follows;

Application dated 20th September 2022

3. This application was brought under section 34 of the *Arbitration Act* 1995, Section 72 of the *Interpretation and General Provisions Act* and all other enabling provisions of the law. It sought the following orders;
 - i. Spent



- ii. That the court does enlarge or extend time within which the APA Insurance Limited (the applicant herein) may apply to the sole arbitrator, Samuel Mbiriri Nderitu FCI Arb to correct the award dated 17th March 2022.
 - iii. The costs of this application be provided for.
4. The application was supported by the affidavit of Kennedy Ochieng and by the grounds on the face of it. APA's case was that the arbitral award was released to the parties on 14th April 2022. Upon perusal of the same APA's counsel noted that there were arithmetic errors on the award. The error was communicated to the arbitrator on 13th May 2022. Despite admitting the error the arbitrator observed that by virtue of section 34 of the Arbitration Act, he could only correct the error with consent by both parties. APA further submits that Chippendales Ltd agreed to grant consent for extension of time on condition that APA released motor vehicle KBW 248B in compliance of the arbitral award.
5. Upon release of the vehicle, Chippendales Ltd failed to give consent for enlargement of time and instead made another demand for APA to repair the subject motor vehicle before the consent could be given. Chippendales Ltd also went ahead to file the application dated 24th August 2022 for recognition of the award.
6. Chippendales Ltd opposed the application for extension of time and filed a replying affidavit dated 6th February 2023 sworn by Makori Christopher Moranga. They did not deny that the arbitral award was published on 17th March 2022. It was instead averred that APA had enough time to collect the award and lodge the request for rectification within the required timelines. Chippendales Ltd confirmed that APA had sought a consent towards extension of time which request Chippendales Ltd declined. They faulted APA for not releasing the motor vehicle in good time. Finally, the court was urged to dismiss the application as it was time barred.

Application dated 24th August 2022.

7. This application was brought under Section 36 of the Arbitration Act 1995, Rules 4(1), 6 and 9 of the Arbitration Rules 1997 and all other enabling provisions of the law. Chippendales Ltd sought orders that;
 - i. Spent
 - ii. That the said arbitral award be adopted by this Honourable Court and leave be granted to the applicant to enforce the award as a decree of the court
 - iii. That the deputy Registrar do issue a decree to the applicant herein and
 - iv. That costs of this application be borne by the respondent.
8. The application was supported by an affidavit sworn by Ali Sharif Mohamed a director of Chippendales Ltd. In it was reiterated that the arbitrator had issued an award of Kshs 394,000/= where Kshs 60,000/= was the principal sum and Kshs 334,000/= being the interest on the principal at the rate of 10%p.a. It was further averred that APA had not settled the sums as per the award and had not challenged or appealed against the award. Chippendale further submitted that arbitral award was final and binding on the parties and the recourse available was an appeal which had not been filed. Counsel submitted that the Court could not extend time for correcting the award. It was contended that Chippendales had complied with section 36(3) of the Arbitration Act and therefore that the prayer for enforcement of the award ought to be granted.



9. In opposition to this application, APA filed a replying affidavit dated 20th September 2022 sworn by Kennedy Ochieng. While confirming the existence of the arbitral award, it was reiterated that the award contained arithmetic errors. It was stated on behalf of APA that the request by their counsel to the arbitrator to rectify the same was dismissed for it was time barred by virtue of section 34 of the [Arbitration Act](#).
10. It was further reaffirmed that despite the arbitrator's willingness to correct the award if both parties consented to the same, Chippendales Ltd had resulted to blackmailing APA. On this ground APA prayed that the application by Chippendales Ltd should be dismissed and that the award ought to be corrected so as to stop any unjust enrichment to Chippendales Ltd. This argument was refuted on the grounds that it would be against justice to prevent the adoption of the award because of the arithmetic errors.
11. Both applications were canvassed by written submissions to buttress the points as stated. I have considered the applications, the responses and the rival submissions by the parties.

Analysis and determination

12. From the facts presented before the court, and for convenience, the application for extension of time deserves to be considered first as its outcome will determine the way forward for the enforcement application.
13. It is not contested that the award published on 17th March 2022 was released to the parties on 14th April 2022. It is also not contested that there was an arithmetic error which was brought to the attention of the arbitrator and to Chippendales Ltd on 13th May 2022. At the time of the application for enforcement of the award it is also clear that the principal sum of Kshs 60,000/- had been paid to Chippendales Ltd and the motor vehicle subject of the arbitration proceedings had been released as well, in compliance with the arbitral order. All that remained was the element of interest on which this application is based.
14. I have seen the letter dated 18th May 2022 from the Hon. Arbitrator where he regrets the errors pointed out by APA in the following words;

I have looked at the award and note that indeed there is an error of computation whereby the claimants ended up with a computation of interest at 10% per month as opposed to 10% per annum. I regret this evident error caused by sheer inadvertence and it definitely ought to be corrected to avert an injustice.
15. I have also seen the series of communication between counsel for the parties. The error, it would seem, was apparent to all including counsel for Chippendale Ltd who was willing to proceed with the application for recognition even under the circumstances. It would appear that counsel for APA on the other hand was hopeful that a consent would be forthcoming from the negotiations. The same did not happen although the vehicle was released and the principal amount paid as per the arbitration award.
16. Be that as it may, the question is whether this court can extend time within which an application for rectification of the award can be made. There is no doubt that section 34 of the [Arbitration Act](#) does not provide for such extension of time. The Court of Appeal in the case of Anne Mumbi Hinga vs Victoria Njoki Gathara Civil Appeal No.8 of 2009 held that, the [Arbitration Act](#) is a complete code and section 10 thereto enjoins the court only to intervene in matters governed by the Act in the manner provided for in the Act. It was further held that section 34 of the [Arbitration Act](#) does not provide for



intervention by the court. It is for this reason that there is a very small window for such intervention. The justification for such intervention can only be justified by the need to deliver justice.

17. When faced with a question of such nature, the court must look beyond the *Arbitration Act* and consider the guiding principles of the exercise of judicial authority. The dictates as espoused in Article 159(2)(d) of the *Constitution* provide inter alia that justice shall be administered without undue regard to procedural technicalities.
18. *The Constitution* implores upon this court to uphold substantive justice. It is for this reason that the court has the inherent power to be exercised so as to do full and complete justice between the parties before it. Similar sentiments were expressed in *Mobinets Sal Limited v Safaricom Limited* [2020] eKLR where the court considered the provisions of section 34 of the *Arbitration Act* in extending time, even though the provisions had not been cited. Likewise, in *Pangea Development Holdings Limited v Hacienda Development Limited & Another* (2019) eKLR, the Court observed that it can use its inherent powers to grant extension of time in exceptional circumstances. This is despite the fact that section 34(1) of the *Arbitration Act*, 1995, provides explicitly that an application for correction of an award can only be made within thirty days of the publication of an award.
19. The examples of exceptional circumstances have also been a subject of litigation. In *Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another* (2018) eKLR, while relying on *Mwangi vs Kenya Airways Limited* (2003) KLR these have been held to include; the period of delay, the reason of delay, the arguability of the application, prejudice it might cause the respondent should the application be allowed, importance of compliance with the time limits and the effect on the administration of justice.
20. I have considered the period of the delay and I note that it was less than two months. Although not much has been said to explain away the time loss, I also note that there was communication between the parties towards an agreement which would have negated the need for an application before the court but may also have contributed to the delay. It would be in the interest of justice to allow the application for enlargement of time for rectification of the award. The application has been brought in good faith and no prejudice will be occasioned if the orders sought are granted.

Disposition and orders

21. In conclusion, the application dated 20th September 2022 seeking that the court does enlarge or extend time within which APA Insurance Limited (the applicant herein) may apply to the sole arbitrator, Samuel Mbiriri Nderitu FCI Arb to correct the award dated 17th March 2022 is hereby granted. The same shall be done within fourteen (14) days from the date of this ruling. I find that enforcement of the award in the manner in which it is currently, will not serve the interest of justice. For this reason, the application dated 24th August 2022 for enforcement of the award shall be deemed to be granted as prayed upon the lapse of 14 days. There shall be no orders to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28th DAY OF April 2023

F. MUGAMBI

JUDGE

