



**Mark Properties Limited (In Administration) & another v Globe Developers Limited & another (Miscellaneous Cause E001 & E022 of 2022 (Consolidated)) [2023] KEHC 3997 (KLR) (Commercial and Tax) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3997 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CAUSE E001 & E022 OF 2022 (CONSOLIDATED)  
JWW MONG'ARE, J  
APRIL 27, 2023**

**BETWEEN**

**MARK PROPERTIES LIMITED (IN ADMINISTRATION) ..... APPLICANT**

**AND**

**GLOBE DEVELOPERS LIMITED ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**MISCELLANEOUS CAUSE E022 OF 2022**

**BETWEEN**

**GLOBE DEVELOPERS LIMITED ..... APPLICANT**

**AND**

**MARK PROPERTIES LIMITED (IN ADMINISTRATION) ..... RESPONDENT**

**RULING**

1. This application was heard together with the application in Misc. Cause No. E022 of 2022 between the parties which application was seeking to set aside the arbitral award issued by Eng. Oliver C W Khabure, CE, FCI Arb, delivered on 8/12/2021. For good order, I will first address the application in Misc Cause No. E001 of 2022 whose outcome will either way determine the findings in the second application.



2. Before this court is an application dated 8th January, 2022 brought under Section 36(1) of the Arbitration Act, 1995 and Rules 9 and 11 of the Arbitration Rules, 1997 and all other enabling provisions of the law. The application seeks the following orders;
  - i. This Honourable court be pleased to recognize and adopt the Final Award dated 8/12/2021 and delivered by the Hon Arbitrator Eng. Oliver C W Khabure, CE, FCI Arb, as a judgment of this Honourable Court.
  - ii. Judgment be entered in favour of the Applicant as against the Respondent in terms of the Final Award dated 8<sup>th</sup> December 2021 by the Hon. Arbitrator, Eng. Oliver C. W Khabure, CE, FCI Arb.
  - iii. The Honourable Court do give the applicant leave to enforce the Final Award as a decree of the Honourable court.
3. The application is supported by the grounds set on the face of it and the supporting affidavit and supplementary affidavit by the said Christopher Ndolo Mutuku sworn on 8<sup>th</sup> January 2022 and on 25<sup>th</sup> March 2022 respectively. The application is opposed and the Respondent has filed a replying affidavit and a further affidavit sworn by Imraani Kasmani a duly authorized officer of the Respondent on 14<sup>th</sup> February 2022 and 18<sup>th</sup> March 2022 respectively.
4. Both parties have filed written submissions, which I have considered.

**The Applicant's Case: -**

5. The applicant has brought this application seeking for orders to enforce and recognize as a decree of this court the arbitral award delivered on 8<sup>th</sup> December, 2021 by the Hon. Arbitrator, Eng. Oliver C. W. Khabure, CE, FCI Arb as a Judgment of this Honourable Court.
6. The Applicant submitted that pursuant to clause 45 of the JBC, that both parties agreed that disputes emanating from the JBC were to be resolved through arbitration in accordance with the Arbitration Act, 1995, That the parties voluntarily submitted themselves to the arbitration process before the Hon. Arbitrator, Eng. Oliver C. W. Khabure, CE, FCI Arb and paid their respective fees towards the arbitration and fully participated in the arbitration process and the final award was issued in the following terms:-
  - i. In favour of the claimant;
    1. The sum of Kshs.49,456,290/- on account of the claimant for work done;
    2. The sum of Kshs.74,332,896/- on account of the claimant's claim for retention;
    3. The sum of Kshs.33, 404,840/- on account of the claimants for idle equipment.
  - ii. And for GDL on its Counterclaim as follows;
    1. The sum of Kshs.452,418/-on account of the Respondent's counterclaim for damaged goods;
    2. The of Kshs.310,000/-on account of the Respondent's counterclaim for damaged CCTV;
    3. The sum of Kshs.1,175,879/- on account of the Respondent's costs of dismantling the Crane.



7. The Applicant has urged the court pursuant to Section 36 of the *Arbitration Act*, 1995, to adopt the above award as an order of the Honourable Court and grant leave to the Applicant to enforce the Final Award as a decree of this Honourable Court.

**The Respondent's Case: -**

8. The Respondent opposed the said application to enforce and recognize the Final Award dated 8<sup>th</sup> December, 2021, by the Hon. Arbitrator, Eng. Oliver C. W. Khabure, CE, FCI Arb. In the two affidavits deponed by Imraan Kasman, the Respondent took issue with the application and stated that the same had been brought prematurely before the court, as the award was not final since the Arbitrator had reserved the final decision on the award on costs.
9. Further and in addition to the above, the Respondent took issue with the fact that the supporting affidavit was sworn by the counsel for the Applicant in the matter and in the award. The Respondent challenged the same and stated that the right procedure was for the Applicant to authorize the swearing of the said affidavit in writing. The Respondent reiterated that the parties in their terms of engagement had reserved their right to challenge by or an appeal the any issue they were dissatisfied emanating from the Tribunal.
10. In his oral submissions, the Respondent raised two issues. Firstly, that the arbitrator had exceeded his mandate under Section 29 of the *Arbitration Act*. The Respondent argued that the role of the arbitrator was to enforce the contract between the parties but in this case, the arbitrator went outside the said mandate to determine issues not specifically pleaded and in the process failed to provide an opportunity to the Respondent to respond to the said issues. The Respondent raised issue with the Arbitrator's determination of the time at large issue which he opined that it was not pleaded and nor was it part of the contract and hence its determination was outside the mandate of the Arbitrator. The Respondent argued that the Arbitrator arbitrarily allowed 14 days outside the contractual period for the applicant and hence went out of the mandate granted to him under the Act.
11. Secondly and as regards the final arbitral award, the Respondent submitted that it had no issues with the final award of Kshs.123,000,000/- and was indeed not challenging the same. However, the Respondent stated that the award of Kshs.33,000,000/- awarded under the claim for equipment should not have been made since contractually the Developer/Respondent was obligated to keep the equipment hence the determination in their view was contrary to public policy. Further, the arbitrator in disallowing its claim for liquidated damages acted against public policy.
12. For the above reasons. The Respondent urged the court to set aside the award and resubmit the matter back for a fresh arbitration.

**Analysis and Determination: -**

13. I have considered the pleadings by the parties in this matter and the written and oral submissions. I note from the outset that there is no dispute to the existence of an arbitration in this matter. I further note that both parties submitted themselves voluntarily to the arbitration process in line with Clause 45 of the JBC contract. To my mind, for enforcement of an arbitral award, the operative Sections are Sections 36 and 37 of the *Arbitration Act*. Under Section 32(A) of the Act an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act. The High Court under Section 36 has the power to recognize and enforce domestic arbitral award on the following terms:

“S.36



- (1) A domestic arbitral award, shall be recognized 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) .....

13. Section 37 of the Act, on the other hand, provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows;

S. 37. 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 in capacity; 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. [Emphasis mine]

14. I am satisfied therefore that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the Contracts which contain the arbitration clause and a certified copy of the arbitral award. In any event both Contracts and the Final Award are not in dispute. Since the Applicant has established a case for recognition and enforcement of the Final Award, the burden is on the Respondent to demonstrate that the court should not recognise the award based on the circumstances set out in Section 37 of the Act.
15. The first issue raised by the Respondent related to the affidavits by the Applicant's advocate in support of the application. In my view, I note that the said affidavits are limited to the production of the arbitral award and the arbitration contract. Both documents have also been produced by the Respondent and both parties have relied on them in the matter before the court. I find no harm in the said conduct as the same relate to matters within the knowledge of the advocate, being the advocate appearing for the Applicant in the arbitral process.
16. The second issue related to the Respondent's grievance on the award of to the Applicant of KShs.33,404,840.00/- as compensation for the use and retention of its plant and equipment; and dismissal of the Respondent's claim for liquidated damages of about Kshs.600 million. It is the Respondent's case that the Award on the plant and equipment, coupled with the failure to find in favour of the Respondent, rendered the Award by the Arbitrator contrary to public policy. Put another way, had the Arbitrator found in favour of the Developer on both issues, the Award would have been in accordance with public policy. I have considered the issue as to what in the courts view, would amount to "public policy." Justice Ringera in *Christ for All Nations v. Apollo Insurance Company Limited*, summed up 'public policy' as follows "That public policy is a most broad concept incapable of precise definition", and he likened it to 'an unruly horse' that 'once one got astride of it you never know where it will carry you'. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).
17. I have considered this issue in light of the above observation by the Hon. Justice Ringera(RTD) and I note the what is disputed by the Respondent is matter that falls within the purview of the arbitrator. I note that the same was properly adjudicated and the arbitrator, as was expected of him, made a determination on the issue. To my mind, a matter cannot be deemed to be against public policy if one side of a dispute has been declared unsuccessful. It must be something that stands against the agreed tenets of written law or the Constitution. As the learned Judge stated, "In order for this court to set aside the award for contravening public policy, the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has



no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.”

18. Again in *Glencore Grain Ltd versus TSS Grain Millers Ltd.* [2002] 1 KLR 606, the Court considered public policy as:-

“A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.”

19. As with every litigation, there will always be losers and winners. The issues raised stated above were issues that if properly raised within the arbitration process, could have been properly determined by the Arbitrator. The Respondent had opportunity in my view, to have the same addressed since he was fully engaged in the arbitration process and willingly participated in the arbitral proceedings from the beginning to the end, regularly paying its shares of the Arbitrator’s fees until the Final Award was issued.

20. Both parties were ably represented in the bargain; both had legal capacity; both accepted the appointment of the Arbitrator; both willingly participated in the arbitral proceedings and both exercised their rights to be heard, without restraint or hindrance.

21. I find, therefore, that the application before me for enforcement and adoption of the Arbitral award is properly before the court and is merited and I shall allow it. Subsequently, the application filed by the Respondent against the Applicant in HCCOMMARB No. E022 of 2022-*Globe Developers -v- Mark Properties Ltd* is rendered null and void by operation of the law and the same stands dismissed.

22. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

.....

**J. W. W. MONG’ARE**

**JUDGE**

IN THE PRESENCE OF: -

Mr. Wandabwa for the Applicant.

Mr. Mutuku for the Respondent/Plaintiff.

Sylvia- Court Assistant

