



**M & R Consult Ltd & another v Mhasibu Properties Limited & another  
 (Miscellaneous Application E388 & E042 of 2022 (Consolidated))  
 [2023] KEHC 18718 (KLR) (Commercial and Tax) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18718 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
 COMMERCIAL AND TAX  
 MISCELLANEOUS APPLICATION E388 & E042 OF 2022 (CONSOLIDATED)  
 PN GICHOHI, J  
 MAY 30, 2023**

**BETWEEN**

**M & R CONSULT LTD ..... CLAIMANT**

**AND**

**MHASIBU PROPERTIES LIMITED ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**MISCELLANEOUS APPLICATION E042 OF 2022**

**BETWEEN**

**MHASIBU PROPERTIES LIMITED ..... RESPONDENT**

**AND**

**M & R CONSULT LTD ..... CLAIMANT**

**RULING**

1. The subject of this ruling are two applications before this Court . The first is a Chamber Summons dated 18<sup>th</sup> May 2022 M & R Consult Ltd v Mhasibu Properties Limited ( Misc . Application No. E 388 OF 2022) filed under a certificate of urgency by the firm of Muma Kanjama Advocates for the Claimant/ Applicant, under Article 159 (2) and 165 (6) of *the Constitution* , Section 32 A, 36 (1) of the *Arbitration Act* 1995, Section 1A , 1 B , 3 and 3A of the *Civil Procedure Act* and Rule 9 of the Arbitration Rules seeking orders that: -

1. Spent



2. The Final Award of the Sole Arbitrator J. Mwai Mathenge, published and dated 9<sup>th</sup> February 2022 be recognised as binding and thus be adopted as a Judgment and Decree of this Court.
  3. The costs of this application and expenses incidental to the adoption , enforcement and execution of the Final Award be borne by the Respondent.
  4. The Court be at liberty to grant any such further orders it deems fit and appropriate in the circumstances.
2. The grounds are on the face of the application supported by the affidavit sworn by Stephen Onchiro Nyamato on 18<sup>th</sup> May 2022 as the Director of the Claimant/ Applicant. He states that parties to the proceedings entered into a contract dated 28<sup>th</sup> February 2013 for Claimant to provide the Respondent with Architectural , Quantity Surveying , Civil and Structural Engineering, Electrical and Mechanical Engineering, Planning and Environmental Management Services through a consortium of consultants under the Claimant’s name. The said services were in respect to construction works for a commercial office building on Land Reference Number 2/406 (Original Number 2/69/2) located along Kirichwa Road , Kilimani area , Nairobi County.
  3. The contract price for the supply of the Professional Consultancy services was 12% of the construction cost plus VAT and which fees the Claimant was to be paid in percentages based on the schedule of payments incorporated into the contract to be measured on deliverables as per the stages stipulated into the contract.
  4. Pursuant to that contract, the Claimant delivered up to 75% from stage 1 to 4 without any controversy and therefore submitted the requisite documents to the Respondent and in good time for payment for Kshs. 64,165,866.22 but instead of honouring its obligation, the Respondent made partial payment of Kshs. 6,012,709.88.
  5. Several meetings ensued to address the outstanding amount and which amount the Respondent acknowledged but the meetings were unsuccessful leading the Claimant to issue the Respondent with a demand letter on 29<sup>th</sup> May 2017 seeking payment of the amount due. The Respondent did not respond and the Claimant issued a notice on 21<sup>st</sup> December 2017 to institute arbitral proceedings. After delay occasioned by Respondent’s challenge on to the Appointment of two previous Arbitrators, the dispute was entertained by the Sole Arbitrator J. Mwai Mathenge in 2021 and he issued a Final Award on 9<sup>th</sup> February 2022 in favour of the Claimant that;
    - A. The Respondent shall pay the outstanding invoice amount of Kshs. 64,163,866.60 being the principal sum due.
    - B. The Respondent shall pay Kshs. 42,620,628.50 being the interest accrued on the principal sum due to the date of this Award.
    - C. The Respondent shall bear and pay any costs of these proceedings as follows:
      - i. Party and Party Costs to the Claimant in the sum of Kshs. 1,220,596.70.
      - ii. The Tribunal’s costs of Kshs. 2,678, 165.00.
      - iii. Should the Claimant have paid part of these costs (i and ii), by the date of collecting the Award, the Respondent is to reimburse the Claimant the part of costs paid including the deposit of Kshs. 150,000.00 paid during the proceedings.
    - D. All payments directed to be made herein shall be paid within 30 days of collection of the Award in default of which simple interest at 13% p.a. shall accrue until payment in full.



6. He further states that with the Respondent not having filed an application to set aside the Award, the Claimant filed this Application.
7. Through the firm of Kimathi Wanjohi Muli Advocates, the Respondent filed a Notice of Preliminary Objection dated 7<sup>th</sup> June 2022 on the grounds that the Chamber Summons dated 18<sup>th</sup> May 2022 was premature in that the parties were issued with the Final Award on 11<sup>th</sup> May 2022 and therefore the period of three months had not lapsed. Consequently, he stated, this Court lacks jurisdiction to hear this application for recognition and enforcement of the Award before expiry of three months within the meaning of Section 35 (3) of the Arbitration Act.
8. Simultaneously, the Respondent filed a replying affidavit sworn on 7<sup>th</sup> June 2022 by Muthini Ng'ola in his capacity as a representative of the Respondent. He deponed that the Claimant's contractual obligation was categorised in six stages with different allocated percentages of contribution to the overall process . The Professional services were rendered up to stage 4 but at various levels of completeness. However, the Respondent suffered financial difficulties and therefore the project could not commence as scheduled and this has been the position to date. That the Respondent's predicament was occasioned by unforeseen and inevitable circumstances.
9. He further deponed that a dispute arose between the parties as to the amount payable for the professional services rendered up to stage 4. The dispute was heard by the Sole Arbitrator J. Mwai Mathenge and he notified them on 9<sup>th</sup> February 2022 that the Final Award was ready for collection but each party was to pay Ksh. 1,189,082.50. The Respondent found the fees manifestly higher than expected and sought to engage and negotiate with the Arbitrator. He did this request through a series of letters and on 4<sup>th</sup> May 2022, the Respondent received an email from the Arbitrator confirming receipt of the Respondent's payment of 50 % of the of their outstanding fees on 28<sup>th</sup> April 2022 but had not received from the Claimant.
10. He further deponed that despite notifying the parties that the Award was ready for publication as early as 9<sup>th</sup> February 2022, the Arbitrator did not publish or avail copies of the said Award to parties on account of failure by the Claimant to pay the outstanding balance of the Arbitrator's fees. The Respondent therefore deponed that since the parties were issued with the final Award on 11<sup>th</sup> May 2022, the period of three months had not lapsed. As a consequence , he sought that the Claimant's application be dismissed with costs for being pre- mature.
11. The second Application is an Originating Summons dated 7<sup>th</sup> June 2022 Mhasibu Properties Limited V M & R Consult Ltd ( No. E042 of 2022) filed by the firm of Kimathi Wanjohi Muli for the Respondent/ Applicant and brought under Section 35 and 39 of the Arbitration Act , Articles 48 and 50 (1) of the Constitution , Section 1A, 1B and 3A of the Civil Procedure Act. The Respondent/ Applicant seeks orders that;
  1. Spent
  2. The court be pleased to set aside the Award of the Arbitrator Mr. J. Mwai Mathenge dated 9<sup>th</sup> February 2022 and issued on 11<sup>th</sup> May 2022.
  3. The Claimant/Respondent be compelled to bear costs of this application and arbitral proceedings.
12. The grounds are on the face of the Originating Summons and mainly that the Arbitrator's determination was wrong in law due to the following;



- a. The Arbitrator totally disregarded the Respondent/ Applicant's case particularly the expert's evidence without having a contrary expert's evidence and without giving reasons for disregarding the same.
  - b. The Arbitrator awarded the Claimant/Respondent interest on contracted amount yet the specific contract did not have a clause for inclusion of interest on the contracted amount.
  - c. The Arbitrator failed to note that in the construction industry, 12 % of the costs of the construction being the amount contracted for, was inordinately high and therefore did not have an award of interest on the principal sum.
  - d. He backdated the award to 9<sup>th</sup> February 2022 instead of 11<sup>th</sup> May 2022 when the parties received it.
  - e. He denied the parties an opportunity to mention the matter before him for purposes of requesting downward revision of the same.
13. In its response to the Originating Summons, the Claimant/Respondent filed a replying affidavit sworn by Stephen Onchiri Nyamato. Restating the contract between the two parties and breach by the Respondent/Applicant, he deponed that the Award was published on 9<sup>th</sup> February 2022 and parties were notified on the same day that the Award was ready for collection upon settlement of the Arbitrator's fees in equal instalments by each party.
  14. He further deponed that indeed the parties raised the issue of discounting fees. However, on 24<sup>th</sup> February 2022, the Arbitrator supplied the parties with the itemised Fee Note giving breakdown of the hours spent on the matter and subsequently, the Claimant/Respondent settled their portion of the fees and collected the Award on 5<sup>th</sup> May 2022 and filed the Application dated 18<sup>th</sup> May 2022 seeking enforcement of the Award published on 9<sup>th</sup> February, 2022.
  15. He deponed that the Respondent/Applicant ought to have filed his application within three months of the Award being published and provide evidence that the Award concerns matters not contemplated within the terms of the arbitration and hence the Arbitrator went out of his jurisdiction, or that the Arbitrator disregarded public policy in reaching the Final Award. However, he deponed that the Respondent/ Applicant has failed to comply with provisions of Section 35 of the Arbitration Act and therefore the application for setting aside lacks merit . He sought that the Claimant's application dated 18<sup>th</sup> May be allowed.
  16. Parties filed and exchanged submissions and emphasized the material in the two applications and the affidavits. The Respondent/ Applicant filed theirs dated 12<sup>th</sup> January 2023. On whether the Respondent/ Applicant's Originating Summons is time barred under Section 35 (3) of the Arbitration Act, counsel for the Respondent/ Applicant submitted that even though the Award is dated 9<sup>th</sup> February 2022, parties herein were informed that it was ready for collection on 11<sup>th</sup> May 2022 and therefore, time started running for purposes of counting from 11<sup>th</sup> May 2022 meaning the Application for setting aside dated 4<sup>th</sup> August 2022 was filed on time as ninety (90) days period was to lapse on 10<sup>th</sup> August 2022.
  17. While relying on the case of University of Nairobi v Multiscope Consultancy Engineers Limited [2020] e KLR, counsel submitted that the delivery means that it is the power of the parties to collect the award and therefore, it would be intolerable if the collection of the award was left to the power of one or more parties who failed to collect the Award for non- payment.



18. On whether the Arbitral award should be set aside, counsel submitted that the Sole Arbitrator went against public policy for disregarding the Respondent Applicant's evidence and in particular the expert evidence. On this issue, he relied on Section 19 of the *Arbitration Act*, Section 2 (1) of the *Evidence Act* and the case of *Goodison Sixty-One School Limited v Symbion Kenya Limited* [2017] eKLR and urged that his application be allowed with costs.
19. On their part, the Claimant/ Respondent's submissions are dated 12<sup>th</sup> January 2023. On whether the application for setting aside was made within the stipulated timelines, counsel relies on Section 35(3) of the *Arbitration Act*, the case of *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR, *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others* [2005] eKLR and *Jimmy Mutuku Mwithi t/a Oasis Farm v Erick Omanga t/a Cidai Firm* [2021] eKLR and submitted that the Award is deemed to be delivered when the parties are notified that the Award is ready for collection and not when a party actually collects it. In the circumstances, counsel submitted that both parties admit that they were on 9<sup>th</sup> February 2022 notified by the Arbitrator that the Award was ready for collection. Therefore, counsel submitted, time started to run from the date of notification which means the Respondent's application for setting aside was filed outside the timelines.
20. On whether the Respondent/ Applicant's application meets the conditions of setting aside under Section 35 (2) of the *Arbitration Act*, counsel relies on among others, the case of *Castle Investments Company Limited v Board of Governors - Our Lady of Mercy Girls Secondary school* [2019] eKLR and Court of Appeal decision in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR and submitted the issues raised by the Respondent/Applicant are matters concerning the merits of the dispute and therefore the Court cannot be called upon to reevaluate and delve into the evidence adduced in the arbitral process.
21. Be that as it may, counsel submitted that both parties had expert witnesses giving their evidence during the arbitral proceedings and in his determination, the arbitrator gave reasons in his Award for agreeing or not agreeing with them.
22. On issue of interest, counsel submitted that both parties submitted on the same and the Arbitrator exercised his discretion in finding that the Respondent is entitled to simple interest at the commercial banks lending rate at the time of the award and computed the interest at 13% p.a. and further held that this was guided by the provision in section 29 (5) of the *Arbitration Act* that the tribunal should take into account the usages of the trade applicable to a particular transaction. That on the issue of 12% being the applicable rate in the determination of construction cost, the Arbitrator determined that this was the appropriate rate in accordance with the *Architects and Quantity Surveyors Act*, Cap 525.
23. On whether the Award was contrary to public policy, counsel relied on the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366 and urged the Court to find that the Arbitrator did not disregard public policy in reaching at the Final Award and that that the Application for setting aside is not meritorious.
24. On whether the Claimant/Applicant's application for enforcement of the Award should be allowed, counsel relies on Section 36 (1) of the *Arbitration Act* and further the Supreme Court of Kenya decision in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR and urged the Court to find that the Final Award herein is final and binding upon the parties and therefore allow the Claimant's application dated 18<sup>th</sup> May 2022.

## Determination

25. After considering the material before Court, the issues for determination are;



1. Whether the Application for setting aside is time barred.
  2. Whether the Respondent / Applicant has established grounds for setting aside of the Final Award.
  3. Whether the Arbitral Award should be recognized and enforced.
26. The Respondent /Applicant who is aggrieved by the arbitral Award has a right to apply for setting it aside under Section 35 (3) of the *Arbitration Act* which specifically provides that:
- “An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 36 from the date on which that request had been disposed of by the arbitral award.”
27. On the first issue, this Award was published on 9<sup>th</sup> February 2022 and both parties were notified on the same date that the Award was ready for collection but the Respondent/Applicant did not act. In the case of *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others* [2005] eKLR Justice Ransley adopted the reasoning by Justice Nyamu in *Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others* H.C. Misc. Application No. 238 of 2003 and held that receipt means when notice is given that the Arbitral Award is ready for collection. Having been so notified, time started running from that date that is 9<sup>th</sup> February 2022 and not the time of collecting the award as argued by the Respondent/Applicant.
28. Indeed, the Court in the case of *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR discussed the issue at length when it held;
- “...the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.
- Should it be any different because the arbitral tribunal has withheld the delivery of the award because of none payment of fees and expenses (Section 32B (3)? Counsel Ngatia argues that it would be a legal absurdity to deem that the award has been delivered when in fact it has been withheld. With respect I am unable to agree. Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed received because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.”
29. This Court is in agreement with the reasoning in the above case. For the Respondent /Applicant to hold on and not to pick the Award for whatever reason despite being notified the Award is ready for collection and later claim that time would run from when he collects it would run counter to



purpose and intent of the Arbitration Act. A party would choose not to collect the Award and come up with such an application simply to delay the matter as has happened in this case. It is noted that the Respondent/Applicant refers to his application as dated 4<sup>th</sup> August 2022 yet it is dated 7<sup>th</sup> June 2022. The fact remains that Respondent /Applicant's application was time barred as at the time it was filed.

30. On the second issue , the Respondent/Applicant claims the Arbitrator failed to note that in the construction industry, 12 % of the costs of the construction being the amount contracted for, was inordinately high and therefore did not have an award of interest on the principle sum. Interest is provided for in the contract between the parties not what happens in the industry out there and in any event, the Arbitrator reasoned as to why he awarded the interest as he did.
31. Further, the Respondent/ Applicant argues that the Award was against public policy. On issue of public policy , Ringera J (as he then was) held in the case of Christ for all Nations v Apollo Insurance Company limited [2002] EA 366;

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

32. The reasons the Respondent/ Applicant justifies this ground is that the evidence of the expert witness for the Respondent/ Applicant was ignored. The arbitral proceedings do not support this argument. Both parties were heard . The Arbitrator analysed and gave his reasons for the findings. There is nothing to show that the Arbitrator's findings were contrary to public policy. This Court is not sitting on appeal and therefore it has no role in re-evaluating the evidence before the Arbitrator.
33. Parties who choose arbitration as a mode of resolving their dispute should embrace the principle of finality in that resolution and the Court would not intervene unless there are good reasons for doing so. Indeed, the Supreme Court had this to say on this issue in Nyutu Agroviet Limited v Airtel Networks Limited [2015] eKLR at paragraph 106;

“One of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with doctrine of res judicata that is deeply rooted in public international law. Section 32A captures this principle: “Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it...” Most parties, especially those engaged in commercial transactions, desire expeditious and absolute determinations of their disputes to enable them to go on with their businesses. They require a final and enforceable outcome.”

34. From the foregoing, I find no merit in the Respondent/ Applicant's application that is Arb. Misc. Application No. E042 of 2022 and as a consequence, the same is dismissed.
35. On the other hand, the Claimant / Applicant has satisfied the provisions of Section 36 of the Arbitration Act in regard to adoption and recognition of the Final Arbitral Award. In the upshot ,the Claimant's application dated 18<sup>th</sup> May 2022 is allowed as follows;
1. The Final Award of the Sole Arbitrator J. Mwai Mathenge , published and dated 9<sup>th</sup> February 2022 be and is hereby recognised as binding and thus be adopted as a Judgment and Decree of this Court.



2. The costs of this application and expenses incidental to the adoption , enforcement and execution of the Final Award be borne by the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

**Miss Muiruri for Claimant/Applicant**

**N/A for Respondent**

**Kevin Isindu, Court Assistant**

