



**Mellech Engineering & Construction Limited v Foundation Henry M Jackson Foundation & another (Miscellaneous Application E189 of 2022) [2023] KEHC 18656 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18656 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**MISCELLANEOUS APPLICATION E189 OF 2022**  
**DAS MAJANJA, J**  
**MAY 26, 2023**

**BETWEEN**

**MELLECH ENGINEERING & CONSTRUCTION LIMITED ..... APPLICANT**

**AND**

**HENRY M JACKSON FOUNDATION ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction and Background**

1. On 15<sup>th</sup> November 2016, the Arbitrator published an award in which the Applicant's claim was dismissed and the 1<sup>st</sup> Respondent's counterclaim was allowed to the extent of Kshs. 44,937,698.56 together with interest at the rate of 14% per annum from the date of the award until payment in full. The 2<sup>nd</sup> Respondent's counterclaim was dismissed with no order as to costs and the Applicant was to pay the 1<sup>st</sup> Respondent's recoverable costs on the claim together with simple interest at the rate of 14% per annum should such costs remain unpaid thirty (30) days after the quantum of costs had been agreed upon or assessed until full payment. The amount of such costs and interest was to be agreed between the parties and failing agreement was to be determined by the Arbitrator upon agreement by both parties. The Applicant was to further pay 70% of the 1<sup>st</sup> Respondent's recoverable costs on its Counterclaim together with simple interest at the rate of 14% per annum should such costs remain unpaid thirty (30) days after the quantum of costs has been agreed upon or assessed until full payment. The amount of such costs and interest was to be agreed between the parties and failing agreement be determined by me upon agreement by both parties. The Applicant was also to pay 70% the Arbitrator's costs while the Respondents were to pay 30% of his costs in accordance with the account submitted



to the parties separately from the award amounting to a total of Kshs. 1,032,500.00 inclusive of Value Added Tax to be paid before collection of this Award. The Arbitrator further held that should one party pay the entire amount of his costs, it was to be entitled to reimbursement by the other party of the portion in excess based on the value above together with simple interest at the rate of 14% per annum from the date of such payment until the date of such reimbursement (“the Award”)

2. The Applicant has now filed the Notice of Motion dated 16<sup>th</sup> November 2021 under section 35(3) of the Arbitration Act seeking to set aside the Award whereas the 1<sup>st</sup> Respondent has also filed an application dated 9<sup>th</sup> March 2022 seeking to enforce it under the provisions of section 36 of the Arbitration Act. The Applicant’s application is supported by the grounds on its face and the supporting affidavit and replying affidavit of the Applicant’s director, Gerald Wamalwa sworn on 15<sup>th</sup> November 2021 and 26<sup>th</sup> October 2022 respectively. It is opposed by the 1<sup>st</sup> Respondent through the replying affidavit sworn on 9<sup>th</sup> March 2022 by Linda Opati-Coulson, the Director of Legal Services - Africa of HJF Medical Research International, Inc., a wholly owned subsidiary of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent has also objected to the application by filing Grounds of Opposition dated 21<sup>st</sup> September 2021.

### **Analysis and Determination**

1. I note that the Respondents have attacked the competence of the Applicant’s application on the preliminary ground that it is time barred. In light of the instructions in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* [1989] 1 KLR 1, the issue of jurisdiction must be resolved first before consideration of the merits. I will therefore consider whether this court has jurisdiction to entertain the application to set aside the Award.
4. The Applicant’s application to set aside the Award is grounded on section 35 of the Arbitration Act. Subsection 3 thereof provides as follows:

35(3) 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 34 from the date on which that request had been disposed of by the arbitral award. [Emphasis mine]
5. Essentially, an applicant seeking to set aside an award has three months to file its application from the date of receiving the said award. In several decisions among them University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR and Mercantile Life and General Assurance Company Limited and Another v Dilip M. Shah and 3 Others [2020] eKLR) the courts have held that “received” in section 35(3) means that the parties are deemed to have been received the arbitral award once the arbitral tribunal notifies the parties that the award is ready for collection.
6. It is deponed on behalf of the Applicant that the Arbitrator informed the parties on 14<sup>th</sup> November 2016 that the Award was ready for collection subject to and upon payment of the balance of his costs amounting Kshs. 1,032,500.00. However, the Applicant states that the parties were only able to pay part of the fees after the lapse of a considerable period of time and upon payment of the fees, the Award was the made available to them sometime or about 17<sup>th</sup> August 2021. The Applicant thus states that the delay in paying the Arbitrator’s fees was not deliberate and thus urges the court to consider the harsh economic times that are something to contend with.
7. I reject the Applicant’s argument for the simple reason that I have already stated that the court has always maintained that time begins to run from the date when the parties were notified that the Award was ready and not when the parties paid the Arbitrator’s fees and or collected it. Arguing otherwise like



the Applicant has done would suggest that time begins to run when the parties pay the arbitrator's fees rather than when parties are notified of the award and such an argument would defeat the object of arbitration which is to ensure a speedy and final resolution of disputes. The court in [Mabinder Singh Channa v Nelson Muguku and Another](#) ML HC Misc. Appl. No. 108 of 2006 [2007] eKLR cited with approval the following dicta in *Bulk Transport Corporation v Sissy Steamship Co. Ltd* [1979] 2 Lloyd's 289 which gives the reason why delivery under section 35 of the [Arbitration Act](#) is synonymous with notice;

Publication was something which was complete when the arbitrator became functus officio but so far as the time for moving under the statute was concerned, it was notice that mattered. He does not say in that passage so far that notice necessarily means notice of actual contents. The alternative which seems to me to wholly untenable is that time would not begin to run for a wholly indefinite period if neither side took up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the six weeks period has only just started to run and the fact that I could have had this award by walking round the corner at any moment from the date upon which I received notice of its availability cannot be held against me. Such a construction of the rule appears to me entirely unreasonable. It has never been applied and I see no reason to hold and I decline to hold, that it applies now”.

8. The Arbitrator, having notified the parties that the Award was ready for collection 14<sup>th</sup> November 2016, the Applicant had three months from that date to file an application to set aside the Award, that is by 15<sup>th</sup> January 2017 latest. Its application having been filed almost exactly five years later makes it clearly time barred. In *University of Nairobi v Multiscope Consultancy Engineers Limited* (Supra) and *Mercantile Life and General Assurance Company Limited v Dilip Shah* (Supra), the court was emphatic that an application under section 35 of the [Arbitration Act](#) that is time barred is fatal to the application and there is no provision in the [Arbitration Act](#) that can salvage such an application. I agree with the 2<sup>nd</sup> Respondent that this position is fortified by the Court of Appeal in [Ann Mumbi Hinga v Victoria Njoki Gathara](#) NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR where it was stated that, “Section 35 of the [Arbitration Act](#) bars any challenge even for a valid reason after 3 months from the date of delivery of the award.” The Applicant's application can only thus be struck out for being incompetent as there is no indulgence available to it in law.
9. The consequence of the above finding is that the court can now determine whether 1<sup>st</sup> Respondent's application dated 9<sup>th</sup> March 2022 for enforcement and recognition of the Award should be granted. Under section 32(A) of the [Arbitration 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 [Arbitration Act](#). The High Court, under section 36 of the [Arbitration Act](#), has the power to recognise and enforce domestic arbitral awards once the original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it have been furnished to court.
10. Section 37 of the [Arbitration Act](#) sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award. The Applicant in this case has not filed any response setting out any facts upon which the court may refuse recognition of the Award. Essentially, the application is not opposed. It is therefore allowed.

## Disposition

11. For the reasons I have outlined, I now make the following orders:



- a. The Applicant's application dated 16<sup>th</sup> November 2021 (COMM ARB Cause No. E048 of 2021) be and is hereby struck out.
- b. The 1<sup>st</sup> Respondent's application dated 9<sup>th</sup> March 2022 (COMM MISC. No. E189 of 2022) is allowed on terms that the Award published on 15<sup>th</sup> November 2016 be and is hereby recognised and adopted as a judgement of the court and leave is granted to the 1<sup>st</sup> Respondent to enforce it as a decree of the court.
- c. The Applicant should also bear the costs of both applications assessed at Kshs. 50,000.00 for each Respondent.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Ongegu instructed by Ongegu and Associates Advocates for the Applicant.

Mr Oyoo instructed by Kaplan and Stratton Advocates for the 1<sup>st</sup> Respondent.

Ms Kanini, State Counsel, instructed by the Office of the Attorney General.

