



**Cubic Business Solution Limited v Egerton University (Commercial Miscellaneous Application E380 of 2022) [2023] KEHC 18632 (KLR) (Commercial and Tax) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E380 OF 2022**

**DO CHEPKWONY, J**

**MAY 23, 2023**

**BETWEEN**

**CUBIC BUSINESS SOLUTION LIMITED ..... APPLICANT**

**AND**

**EGERTON UNIVERSITY ..... RESPONDENT**

**RULING**

**Background of the Matter**

1. The Applicant and the Respondent entered into a contract of services for the installation of CCTV Cameras in the respondent's institution after having successfully tendered for the same for one unit at a cost of Kshs.12,050,219/=. The payment mode was to be negotiated during the site handover which was held on July 7, 2017 and the delivery period was twelve (12) weeks. On November 20, 2017, the Applicant raised an invoice of Kshs.4,820,088/= for the completion of phase one of the work. The respondent failed to honour the invoice thereby frustrating the applicant's effort to complete the remaining work thus forcing the applicant to leave the site.
2. The matter was referred for arbitration and an award issued on November 5, 2021. The Respondent then filed an application dated February 17, 2022 vide Miscellaneous Commercial Application No.E017 of 2022 while the Applicant filed a Chamber Summons application dated May 15, 2022.
3. In the application dated February 17, 2022 in Nairobi Miscellaneous Civil Application No.E017 of 2022, the Respondent is seeking:-
  - a. to stay the enforcement of the arbitral award published on November 5, 2021.
  - b. set aside the arbitral award published by Philip Murgor on November 5, 2021.



4. The application is premised on the grounds set out on its face and the Supporting Affidavit sworn by the applicant's legal officer, Jane Bii on February 17, 2022. According to the Respondent, it is a public body and the award is against the public policy of Kenya. It is averred that the amount of Kshs.6,189,472 awarded to the applicant amounts to unjust enrichment of the Applicant.
5. The applicant's chamber summons application dated May 15, 2022 in the instant file seeks to have the arbitral award made and published by Philip Murgor on 5<sup>th</sup> November, 2021 recognized as binding and enforceable by the Court.
6. In opposing the application, the Respondent filed the Replying affidavit sworn by Janet Bill, the legal officer of the respondent on July 25, 2022 wherein she deposes that the Respondent was aggrieved by the arbitral award and has filed an application to set aside the same for it is against public policy of Kenya as the Respondent stands to be prejudiced if it is not set aside.
7. The respondent also filed grounds of opposition on July 18, 2022 seeking to have the Applicant's application set aside until the application dated February 17, 2022 in Miscellaneous Arbitration No.E017 of 2022 heard and determined.
8. By the court directions issued on July 29, 2022, this file was consolidated with file Miscellaneous Commercial Application No.E017 of 2022 to avoid duplicity of pleadings and conflicting orders and or decisions, having noted that the issues involved in the two files involved the same subject matter and a determination of one would lead to the determination of the other. The court thus went on to frame the issues for determination.
9. The parties were then directed to canvass, file and serve their respective submissions, which they obliged.

### **Analysis and Determination**

10. Having analysed the applications, respective responses and the submissions as filed by the parties, the issues for determination are as set out by the court on July 29, 2022, being:-
  - a. Whether the arbitral award published on November 5, 2021 should be set aside and or
  - b. Whether the Arbitral award published on November 5, 2021 should be recognized as binding and enforceable as a judgment and final decree of the court.
11. On whether to recognize and adopt the arbitral award as an order of this Court, the Applicant, Cubic Business Solution Limited submitted that the same be recognized as per the provisions of section 35 of the Arbitration Act since the nature of issue in dispute is contractual hence the provision of article 227 of the Constitution of Kenya relied on by the Respondent cannot apply. The Applicant contends that the Respondent has failed to demonstrate the illegality that was committed against or prejudice that would be occasioned to the public if the award is to be recognized. The Applicant's contention is that the fact that the award is against a Public University does not render it against public policy. Further, the applicant averred that the grounds of opposition and replying affidavit filed by the respondent were done outside the requisite period.
12. The Respondent on the other hand submitted that the arbitral award should be set aside as it was in violation of Public Policy in Kenya as provided for under section 35(2)(b)(ii) of the Arbitration Act because the Arbitral Tribunal re-wrote the contract between the parties dated April 25, 2017, so as



to adjudicate the award in favour of the Applicant. Also, it is the Respondent's contention that the award is in violation of the provision of the *Public Procurement and Disposal Act*, 2015 and cannot stand because the Applicant abandoned the site without completing the project hence did not render valuable service to the Respondent and the Tribunal awarded the Applicant damages. According to the Respondent, the award is predicated on an illegality.

13. Section 10 of *Arbitration Act* 1995, sets out the court's jurisdiction where parties are Bound by Arbitration clause as follows; "Except as provided in this Act, no court shall intervene in matters governed by this Act".

14. The wordings of the above cited Section bars the court from intervening in matters referred to arbitration unless it finds some compelling circumstances as stipulated under section 37 of the *Arbitration Act*.

15. Firstly, under section 35(3) of the *Arbitration Act*, a party challenging an arbitral award is required to raise the same within three (3) months after the service of the arbitral award. It is stated therein 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 34 from the date on which that request had been disposed of by the arbitral award"

16. There is no dispute that the arbitral award, subject matter herein was made on November 5, 2021, hence the parties had until February 5, 2022 to challenge the same. Thus, by filing the application dated 17<sup>th</sup> February, 2022, the Respondent did so ten (10) days after the stipulated period of three (3) months, hence the same was time barred.

17. In the case of *Kenyatta International Conventional Center KICC –vs- Green-star systems limited* (2018) eKLR, Olga Sewe, J. cited the Court of Appeal decision in *Anne Mumbi Hinga v Victoria Njoki Gathara* (2009) wherein it was stated as follows;

"...Thus, there being no provision in the *Arbitration Act* for extension of time, it is to be understood that strict compliance with the time line set out in section 35(3) of the Act is imperative and comports well with the principle of finality in Arbitration. Indeed, in the Anne Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, 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."

18. With regard to whether the arbitral award should be recognized and enforced, Section 36 of the *Arbitration Act* provides that the High Court has the power to recognize and enforce domestic arbitral award on the following terms:-

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

(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.



19. It is therefore upon the Respondent to demonstrate through evidence before this court as to why the award by Philip Murgor should not be enforced as per Section 37 of the Arbitration Act. Section 37 of the Act, provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against whom it is to be enforced. It provides as follows:-

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 incapacity; 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.

20. It is the Respondents contention that the arbitral award issued by the Arbitrator on November 5, 2021 is in contravention of Public Policy since it is a Public University. It is worth-noting that the contract



was entered into as between the Applicant and Respondent and both parties elected. Arbitration is a means of resolving any dispute arising therein and this parties are expected to agree with the outcome of the Arbitration. Court has read through the record and finds that the Respondent has not demonstrated that the arbitral award was obtained illegally or through unlawful acts. The Respondent has also not demonstrated in which way it will be prejudiced if the award is recognized and enforced as it is. In the case of *Reliable Concrete Works v Ngewanyi Co. Ltd* [2002]eKLR, the Court held:-

“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 Public Policy of Kenya if it is shown that it was either;

- a. Inconsistent with the *Constitution of Kenya* ; or,
- b. Criminal to the National Interest of Kenya; or,
- c. Contrary to justice and morality.”

Neither of these instances have been demonstrated herein.

21. In the circumstances, having found the Respondent has failed to demonstrate how the arbitral award issued on November 5, 2021 violates the Public Policy of Kenya, the application dated May 15, 2022 is found merited.
22. The award by the arbitrator published on December 5, 2021 is fit for recognition and this court orders for its recognition and enforcement under section 36 of the *Arbitration Act*.
23. Subsequently:-
  - a. The application dated February 17, 2022 be and is hereby dismissed for being time barred.
  - b. The application dated May 15, 2022 is allowed with costs to the Applicant.
  - c. The Arbitral Award published by the Arbitrator on December 5, 2021 is hereby recognized and adopted as an order of this court for enforcement.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF MAY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**Mr. Kaburu Counsel for applicant**

**Court Assistant – Martin/Sakina**

