



**Golden Carra Investments Limited v Principal Secretary, Ministry of
Transport Infrastructure and Urban Development (State Department of
Housing and Urban Development) (Miscellaneous Application E621 of 2022)
[2023] KEHC 19530 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E621 OF 2022**

EC MWITA, J

JUNE 30, 2023

BETWEEN

GOLDEN CARRA INVESTMENTS LIMITED APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT INFRASTRUCTURE
AND URBAN DEVELOPMENT (STATE DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT) RESPONDENT**

RULING

1. The applicant filed a Notice of Motion dated 20th September 2022 seeking leave to amend its Chamber Summons dated 30th August 2022. The reason for seeking to amend is to include an order that part of the arbitral award published by the arbitrator on 31st May 2022 be remitted to the arbitrator for reconsideration and reevaluation of the interim payment certificate No. 15.
2. The applicant states that there is good reason to remit the claim for Kshs. 757, 224,323.66 to the arbitrator for reconsideration because despite finding the applicable rate to interim payment certificate, the arbitrator did not evaluate interim payment certificate No. 15 as warranted under clause 20.6 of the contract.
3. The applicant relies on the decision in *Elijah Arap Bii v Kenya Commercial Bank Ltd* [2013] eKLR on the principles applicable in amendment of pleadings.
4. Regarding the court's power to enforce part of an arbitral award and remit part of the award for reconsideration, the applicant cites the decision in *Mae Properties Limited v Subash Chander Kohli &*



- another [2016] eKLR, that an award can be severed in certain circumstances and part of it remitted to the arbitrator for reconsideration. The applicant again cites section 39(2) in that regard.
5. The applicant relies on a persuasive decision from South Africa, namely; Crook v Lipschitz and others (2019/18319) [2020] ZAGPJHC 80(12 March 2020) where part of the award was set aside while the part that was not in contention was held to be binding on the parties.
 6. The applicant again relies on the decision in Quality products (Pty) Ltd v MAMCSA Security Consultants CC and another (12447/2017) [2020] ZAKZDHC 13 (20 May 2020) that an award may be remitted where good cause has been shown and not only where circumstances are compelling.
 7. The applicant argues that section 39(5) of the Arbitration Act requires the arbitrator to decide a dispute according to the terms of the contract and consider usages of the trade applicable. The arbitrator failed to determine the dispute on the interim payment certificate No. 15 in compliance with the terms of the contract, despite finding the rate applicable to that interim payment certificate.
 8. The applicant makes reference to paragraphs 142 to 143 of the award to show that interim payment certificate No. 15 was an additional payment under item no. 12.3 of Bills of Quantities. However, the arbitrator rejected the claim for payment under the interim payment certificate No. 15 for the reason that the certificate as computed by the applicant was based on a different rate other than the agreed unit rate.
 9. According to the applicant, there was no finding by the arbitrator that works were not completed. There was no basis, therefore, why the arbitrator did not reevaluate or re compute interim payment certificate No. 15. The applicant relies on Newspace Creators Limited v County Government of Meru [2021] eKLR where the court remitted part of an award for reconsideration.

Response

10. The respondent has opposed the application through a replying affidavit and written submissions. Mr. Charles Mwangi Hinga, the Principal Secretary (PS) admits that parties had entered into an agreement for construction of settlement infrastructure in Nakuru.
11. The PS also admits that a dispute arose which was referred to arbitration pursuant to clause 20.6 of the contract. Parties agreed on the arbitrator who conducted proceedings and published the award on 31st May 2022.
12. The respondent argues that the applicant has filed an application for recognition and enforcement of the award and cannot be allowed to amended that application so that part of the award is remitted to the arbitrator for reconsideration and reevaluation while part of the award is enforced.
13. The respondent holds the view, that the amendment sought is not tenable under section 36 of the Arbitration Act; that under section 33, publication of the award on 31st May 2022 terminated the arbitral proceeding and the arbitrator became *functus officio*; and that the under section 32A, the final award published on 31st May 2022 is final and binding on the parties.
14. Moreover, the respondent posits, the finding of the arbitrator on the interim payment certificate no. 15 is final since the applicant has not sought to set aside the arbitrator's findings on the issue of that interim payment certificate.
15. The respondent also argues that Order 46 of the Civil Procedures Rules does not apply to this case and relies on Goodison Sixty One School Limited v Syombion Kenya Limited [2017] eKLR that under



section 10 of the *Arbitration Act*, no court should intervene in matters governed by the Act. Arbitral proceedings having concluded, the only recourse would be under sections 34 and 35 of the Act.

16. The respondent relies on *Diamond Trust Bank Kenya Limited v Invesco Assurance Company Limited & another* [2021] eKLR and argued that the proposed amendments do not meet the threshold for the exercise of the court's discretion to grant leave to amend.
17. The respondent urges that the application be dismissed with costs.

Determination

18. This is an application for leave to amend Chamber Summons dated 30th August 2022. That chamber summons seeks recognition and adoption of the final award published on 31st May 2022, as judgment of the court.
19. The application is opposed. The respondent argues that the amendment sought is not merited since the arbitral proceedings concluded the moment the final award was published. The respondent also takes the view, that what is before court is an application for recognition and adoption of the award and not setting aside of the award.
20. I have considered the application and arguments by parties. Whether or not to allow a party to amend is an exercise of discretion which should, however, be exercised judiciously.
21. The court has discretion to grant leave to amend pleadings even where, as the respondent argued, there is no provision in the statute (*Arbitration Act*) for amendment. In such circumstances, the court would exercise its inherent powers to ensure that justice is served to the parties.
22. What amounts to inherent powers of the court was stated by Musinga, J.A. in *Equity Bank Limited v West Link Mbo limited*, [2013] eKLR thus:

Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the *Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.
23. *Seth Lookasan Sethiya v Ivan E. John* AIR [1975] ALL 113, it was held that power means authority, whether any discretion is left or not and whether any direction is imperative or directory relates to the manner and exercise of the power and not to the basic ingredient of the authority itself. Inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.
24. The applicant seeks to make two amendments to the application. Prayer 1 is to be amended as follows (intended amendment underlined):

This Honourable Court be pleased to recognize and adopt the final award dated and published by Mr. Collins Namachanja, Arbitrator on the 31st May 2002(sic) as judgment of the Court, "save that part of the Award in so far as it relates to applicant's claim in the arbitration for payment of Kshs. 757,224,323.66 under Interim Payment Certificate No. 15 be remitted back to the arbitrator for reconsideration and re-evaluation of the Interim Payment Certificate No. 15.



25. Prayer 2 is to be amended as follows (amendments sought again underlined):

This Honourable Court be pleased to grant leave to the applicant to enforce the arbitral award as decree of this Honourable Court save the portion of the award remitted back to the Arbitrator for reconsideration and re-evaluation of IPC No, 15.

26. The applicant relies on the decision in *Newspace Creators Limited v County Government of Meru* [2021] eKLR to support the argument that the court can sever the arbitral award and remit part of the award to the arbitrator for reconsideration.

27. I have read that decision and note that the application in that case sought two prayers and one alternative prayer: First, that the court partially set aside the arbitrator's findings on quantum as contained in the arbitral award and, second, that the court does remit the award back to the arbitrator for purposes of the arbitrator, inter alia, taking measures and computations in terms of Clauses 37.6 and 37.7 of the General Conditions of Contract. The alternative prayer was for the court to set aside the whole arbitral award.

28. One will note that the essence of the applicant in that case was to set aside part of the award or the whole award. That is not what is before this court. The application dated 30th August 2022 which the applicant seeks to amend, is for recognition and enforcement of the whole award as published by the arbitral tribunal.

29. A court may allow a party to amend his pleadings if the intended amendment will aid the court in resolving the real issue in controversy, will not change the essence and character of the initial pleadings or introduce a new cause of action.

30. In *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court stated:

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side. (underlining).

31. A careful reading of the intended amendments shows that they have, if permitted, the potential of aiding the applicant to seek to set aside part of the arbitral award, thus changing the character and tenor of the application dated 30th August 2022. That is, the applicant will in effect, have surreptitiously have been allowed to apply to set aside the award outside the time allowed by statute (section 35 (3) of the *Arbitration Act*).

32. The court must, in the circumstances of this case, see the application as it is and reject the attempt to circumvent the law through the intended amendments.



33. In the premise, having considered the application and arguments made on behalf of the parties, the conclusion I come to, is that this is not the sort of amendments the court should allow. Consequently, the application is declined and dismissed. I make no order on costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2023

E C MWITA

JUDGE

