



REPUBLIC OF KENYA



**Mburu & another v Longhorn Publishers PLC (Miscellaneous Application E447 of 2021)
[2023] KEHC 19473 (KLR) (Commercial & Admiralty) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
MISCELLANEOUS APPLICATION E447 OF 2021**

A MABEYA, J

JUNE 30, 2023

BETWEEN

STEPHEN NGANGA MBURU 1ST CLAIMANT

GEOFFREY WEKESA CHEMWA 2ND CLAIMANT

AND

LONGHORN PUBLISHERS PLC RESPONDENT

RULING

1. Before Court is a Chamber Summons application dated June 2, 2021. It was brought under section 36 of the *Arbitration Act*, Rules 4, 6, 9 and 11 of the *Arbitration Rules*, and sections 1A, 1B and 59 of the *Civil Procedure Act*.
2. The application sought the adoption of the arbitral award dated February 19, 2021 by Hons Kyalo Mbobu and Dr Muthomi Thiankolu be adopted and recognized as a decree of this Court. That consequently, leave be granted to the applicants to enforce the award as a decree of this court inclusive of Kshs 878,000.00 paid in satisfaction of the arbitrator's fees together with interest at 14% p.a when the respondent failed to pay its portion of the fees.
3. The grounds for the application were set out on the body of the Summons and in the supporting affidavit of Dr Geoffrey Wekesa Chemwa sworn on June 2, 2021. It was contended that the parties referred their dispute for arbitration as per the arbitration clause in their agreements and that the proceedings were concluded and award given on February 19, 2021. That parties were notified to pay the arbitrator's fees upon which the award would be collected.
4. That the applicants paid their apportionment but the respondent declined to pay despite reminders causing the applicants to make full payment to avoid inordinate delay. That the award was released on



May 17, 2021 directing the respondent to pay the 1st claimant and the 2nd claimant Kshs 18,299,166.86 and Kshs 16,799,166.86 respectively within 14 days of uptake of the award.

5. That the 14 days had long lapsed and the respondent had not complied with the award nor did it file an application to set aside the award thus the same ought to be recognized, adopted and enforced as a decree of the court. That the respondent refused to pay the claimant their accrued royalties occasioning them great loss and damage.
6. The application was opposed by the respondent vide the replying affidavit sworn by Maxwell Wahome on September 16, 2021. It was contended that the application was a non-starter for failing to comply with section 36(3) of the Arbitration Act and Rules 4 and 5 of the Arbitration Rules. That the applicants failed to file the original award or a copy duly certified by the arbitral tribunal. That they also failed to file the original arbitration agreement or certified copies. That notice of the filing of the award was also not given.
7. It was also contended that the respondent was not given proper notice of the arbitral proceedings and was unable to represent its case. That the award dealt with a dispute not contemplated or falling within the terms of the reference to arbitration and further dealt with matters beyond the scope of the reference to arbitration.
8. That recognition of the award would be contrary to the public policy of Kenya as one of the arbitrator Mr Kyalo Mbobu had authored a book which was published by the respondent's subsidiary LawAfrica Publishing Ltd thus there was a conflict of interest which was undisclosed.
9. That Mr Kyalo Mbobu was well aware that LawAfrica Publishing was a subsidiary of the respondent as he had received two letters dated September 26, 2019 and March 11, 2021, respectively 8 months before the arbitration which stated the subsidiary relationship. That in his acceptance letter, Mr Mbobu did not disclose that he was an author and his work had been published by the respondent's subsidiary or that he was a lecturer at University of Nairobi as were the claimants.
10. That this contravened section 13 of the Act which required disclosure of any circumstances that may give rise to justifiable doubts as to the impartiality or independence of the proceedings.
11. It was further contended that the arbitral procedure was not in accordance with the agreement of the parties. That the parties submitted 16 distinct arbitration agreements to the arbitrators some of which had third parties who were not joined in the arbitration. That the agreements were listed on the addendum signed by the parties and its sole purpose was to appoint the arbitrators as the tribunal in each of the agreements.
12. That there was no intention to consolidate the 16 disputes yet the tribunal in its final award and without consent, merged the arbitration agreements into one and issued a global award. That it was impossible to tell the agreements wherein the claimants claim succeeded and the award per agreement. That the merger resulted into a new arbitration agreement to which the parties were not privy and thus altered the procedure of the proceedings after parties had closed their cases thus they were denied a right to a fair hearing.
13. That the tribunal determined an issue that was not raised by either parties as regards to admissibility of evidence and no opportunity was given to the respondent to address the issue which had the effect of striking out most of the respondent's evidence in its defence and support of its claim. That the determination was not relevant to the issues in dispute as the issue raised was that the agreements were void on account of mistake and not admissibility of extrinsic evidence



14. It was further contended that, according to section 33(1) of the Act, arbitral proceedings were terminated by the final award. That the award was published on May 19, 2021 but issued on May 17, 2021 time by which the tribunal was functus officio.
15. The claimants filed a supplementary affidavit in response to the respondent's affidavit. It was sworn by Dr Geoffrey Wekesa Chemwa on January 25, 2023. He contended that the claimants complied with section 36(3) of the Act as they had filed the certified agreements as well as the certified copy of the arbitral award.
16. That upon filing the application, counsel for the respondent was duly served on June 22, 2021 and an affidavit filed in compliance with Regulation 4 and 5. That the claimant's counsel was already instructed to file the original award in court and did indeed deliver the original award in court.
17. That the dispute commenced through a letter dated June 24, 2020 which indicated that the dispute was for the non-payment of Kshs 15,806,784.65 belonging to the 1st claimant and Kshs 14,306,784.65 belonging to the 2nd claimant. That the dispute was based on the statement of accounts issued by the respondent as regards their royalties and the figures and prayers sought in the statement of claim were clearly discernable between each claimant.
18. That the allegation of involvement of third parties not before court was untrue. That the documents sought to be relied by the parties were not for the purpose of introducing new parties to the proceedings and such agreements had no bearing to the monies claimed from the respondent.
19. That the respondent consented to the production of all the documents and the claim was restricted to the contracts entered into between the claimants and respondent. That the various documents filed including the agreements were subjected to the rules of evidence. That it was not true that the respondent sought orders in respect of each of the agreements but merely sought to have all the agreements be declared void.
20. That the procedure adopted by the tribunal was in accordance to the rules of arbitration and the procedure was consented to by the parties. That at paragraph 52(g) of the award, it was clear what the tribunal was expected to adjudicate over and there was no confusion as the only dispute was the deductions the respondent was illegally making on the applicants' royalties.
21. On public policy, it was contended that each party was to appoint an arbitrator and the claimant's counsel proposed Hon Kyalo Mbobu and the claimants agreed. That the applicants were unaware that Mr Mbobu had authored a book or had previous correspondence with the respondent or its subsidiaries on any issue that would have compromised the sanctity of the proceedings.
22. That the mere fact that Mr Mbobu was an author did not present a conflict of interest as alleged. That the respondent never raised any issue on his impartiality, professionalism or conduct during the proceedings. That the 2nd applicant was a lecturer at JKUAT and not UON as alleged and in any event, Mr Mbobu was not known to the applicants prior to the proceedings.
23. That the tribunal found that extrinsic evidence could not alter or contradict a formal agreement and that the internal memos adduced by the respondent were allowed but the respondent's interpretation of the agreement was found to be inadmissible. That the issue of copyright ownership was adjudicated upon and the respondent was arguing an appeal vide its response.
24. That the allegation that the tribunal was functus officio was misleading as the award was collected later owing to the respondent's refusal to pay the arbitrator's fees. That the opposition to the application was in bad faith and the claimants received withholding certificates from KRA both dated October 21,



- 2021 indicating that the respondent was the withholder of Kshs 946,679.00 each yet if failed to make the attendant payment to the claimants.
25. The application was canvassed by way of written submissions. The applicants' submissions were dated January 25, 2023 whereas those of the respondent were dated February 14, 2023. This Court has considered those submissions alongside the rival pleadings and applications before it.
26. The main issue for determination is whether the arbitral award ought to be adopted or not as a decree of this Court.
27. 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 of The Act has the power to recognise 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
 - (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) .
28. The respondent contended that the applicants had failed to comply with this section by failing to furnish either the original arbitral award and agreement or duly certified copies by the arbitrators. Respectfully, that is a wrong interpretation of section 36 of the Act. There is no provision that the award and agreements must be certified by the arbitrator himself.
29. This Court has considered the record and notes that the a duly certified copy of the arbitral award and the agreements were lodged with the Court. The same were annexed as GWC 1 and GWC 2, respectively. The original award was later physically filed and is on record. The applicants were fully compliant.
30. The respondent also contended that the claimants contravened Rule 4 of the Arbitration Rules by failing to give notice to all parties of the filing of the award, date of filing of the award, case number and registry wherein it was filed.
31. On record, there is an affidavit of service filed before court as per Rules 4 and 5 wherein the respondent was served with the application which bore all the necessary details. The respondent was also served with the notice dated June 21, 2021 which also provided the necessary details including the registry wherein the award was filed.
32. This Court is satisfied that the applicants met the pre- condition for enforcement of the award as they provided certified copies of the agreements which contain the arbitration clause and a certified copy of the arbitral award. In any event both the agreements and the final award are not in dispute.



33. Since the applicants established a case for recognition and enforcement of the final award, the burden was 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.
34. The respondent opposed the enforcement of the award citing various reasons including that; the award dealt with a dispute not contemplated or within the terms of reference to arbitration; the award contained decisions on matters beyond the scope of the reference to arbitration; the award was contrary to the public policy of Kenya and that the arbitral procedure was not in accordance with the agreements of the parties.
35. Section 35(3) of the Arbitration Act No 4 of 1995 stipulates the grounds for setting aside of an award as follows: -
- ' (a) The party making the application furnishes proof;-
- i) That 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, the laws of Kenya; or
 - iii) The Party making the application 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 or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
 - v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with provisions of this Act from which the parties cannot derogate; or failing such agreement was not in accordance with this Act; or
 - vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption
- (b)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 Award is in conflict with the public policy of Kenya.'
36. Though the respondent failed to make the application to set aside the award as stipulated to under section 35 the Act, the grounds relied upon to oppose the application were similar to those provided for under that provision.



37. It was the respondent's case that the parties submitted disputes to 16 distinct arbitration agreements to the arbitrators. That the agreements were listed on the addendum signed by the parties advocate's dated November 19, 2022 and they included other third parties who were not joined to the arbitration. That the addendum was to appoint the arbitrators as the tribunal in each of the agreements to grant the tribunal jurisdiction over all the agreements.
38. That the arbitrators consolidated all the agreements without consent and gave one global award instead of determining the matters distinctly thus altering the procedure of the proceedings and the respondent was unable to discern the agreements under which they had been directed to pay royalties.
39. This Court has considered the record before it. The applicants communicated the dispute through a letter dated June 2, 2020 in respect of non-payment of Kshs 15,806,784.65 for the 1st applicant and Kshs 14,306,784.65 for to the 2nd applicant. The claim was based on the statement of account issued by the respondent to each of the applicants stipulating the royalties due to them, and the applicants challenged the deductions reflected therein and time-lines for the payment.
40. Indeed, the respondent issued one statement of account in respect of all the agreements. The applicants disputed the deductions from that statement which was in relation to all the agreements. The parties were unable to agree on whether the agreements authorized the respondent to make the deductions from the royalties or not.
41. In its counter-claim, the respondent sought to have all the agreements declared void on account of mistake and sought to set aside clauses 2, 3, 4, 5 and 7 in each of those agreements.
42. In the circumstances, it cannot be said that there was a distinct dispute in each of the agreements. The main dispute as to deduction of royalties and voidability of the agreements was common to all the agreements, and the parties' advocates signed an addendum giving the tribunal jurisdiction to resolve the disputes under all the agreements.
43. The respondent is now saying that the tribunal ought to have heard 16 separate claims with 16 separate awards. Respectfully, that approach is not tenable. The parties were clear as to the nature of the dispute in their agreements and they brought those disputes before the tribunal as related to all disputes. The applicants did not file 16 separate claims nor did the respondent file 16 separate counter-claims. The dispute under the agreements was very clear. The tribunal could not have been expected to publish 16 separate claims.
44. In any case, the respondent submitted on the same issue before the tribunal and at Clause 8 of the award, the tribunal indicated that the agreements contained an identical clause under clause 22 of the agreements. Having been conferred jurisdiction over all agreements by the parties, the respondent cannot now turn around to contend that the tribunal ought to have distinctly heard the dispute on each agreement.
45. Further, any contrary finding to the tribunal on this issue will be tantamount to sitting on appeal. That cannot do. The application before court is for enforcement of an award, and not an appeal against the tribunal's award. That ground fails.
46. On the contention that the agreements involved other third parties not joined in the arbitral proceedings, this Court disagrees with the respondent's submission. The dispute as framed was clearly between the applicants and the respondent. The said third parties were neither identified, nor was it established that their presence was necessary in the arbitral proceedings. They neither had a claim against the respondent nor the applicants. The final orders issued in the award are only directed to the



- respondent and the applicants. No other party is referred to such that enforcement and execution of the award would prejudice the interest of any other party not before the tribunal.
47. The other ground relied upon by the respondent was in relation to public policy. It was submitted that on April 1, 2021, the respondent was shown a book titled ‘The Law and Practice of Evidence in Kenya’ by one of the arbitrators Mr Kyalo Mbobu. That the respondent conducted investigations and found two letters issued to Mr Kyalo signed by Maxwell Wahome, the deponent in the respondent’s replying affidavit, in the position of ‘Group Managing Director & CEO’. That one of the letters stated that the respondent was the parent company of Law Africa Publishing Ltd.
 48. That the letters were in the form of circulars circulated to hundreds of authors and Mr Mbobu had received one of the letters 8 months before he accepted his appointment as an arbitrator in the dispute. That when accepting the appointment, Mr Mbobu stated that he knew of no circumstances likely to give rise to justifiable doubts as to his impartiality or independence. That he failed to inform the parties that he was an author and his work had been published by a subsidiary of the respondent or that he was a lecturer at the University of Nairobi as were the applicants.
 49. It was thus submitted that the non-disclosure contravened section 13 of The Act and raised justifiable doubts as to his impartiality or independence during the proceedings. That the right to a fair hearing before an independent and impartial tribunal or body as stipulated in Article 25 of the Constitution was unlimited.
 50. In response, the applicants submitted that the arbitration clause in the agreements provided that any dispute was to be referred to arbitration of two persons and each party was to name an arbitrator. That they appointed Mr Mbobu who was suggested by their advocate and none of them was aware that he had authored a book or had previous correspondence with the respondent or its subsidiaries on any issue that would have compromised the sanctity of the proceedings.
 51. That the mere fact that Mr Mbobu was an author could not present a conflict of interest as alleged. That the respondent never raised concerns as to his impartiality, professionalism and proper conduct of the proceedings.
 52. The 2nd applicant denied that he was a lecturer at University of Nairobi (UON) as averred as he lectured at Jomo Kenyatta University of Agriculture and Technology (JKUAT). The applicants contended that Mr Mbobu was unknown to them before the proceedings and that the arbitrator appointed by the respondent was himself a lecturer at UON and this did not give rise to any doubt as to his impartiality.
 53. The Court has considered the record before it. The respondent produced a search on LawAfrica Publishing Limited from the Companies registry indicating that the respondent and 4 other parties were directors of LawAfrica Publishing. The respondent also produced some of the pages from the book titled ‘Law and Practice of Evidence in Kenya’ authored by Kyalo Mbobu. Undeniably, Mr Mbobu authored the book and the same was published by LawAfrica Publishing Limited.
 54. The respondent contended that Mr Kyalo ought to have disclosed this fact as he was aware that the respondent was the parent company of LawAfrica. This Court has seen the letters sent to Mbobu and hundreds of other authors. The first was dated September 26, 2019 and was directed to Mr Mbobu. Its purpose was to notify authors of change in management at LawAfrica Publishing Limited and was penned off by Maxwell Wahome, the respondent’s deponent.
 55. The second letter was written on March 11, 2021 and was not specifically addressed to a particular person but to ‘Dear Author’. Its purpose was to notify the author of change in management at lawAfrica Publishing Limited.



56. The claim was filed before the tribunal on September 1, 2020, the arbitrators accepted their appointment on August 20, 2020. The first letter herein was sent to Mr Mbobu on September 26, 2019. It was personally signed by the respondent's deponent Mr Maxwell Wahome. This signifies then that the respondent was always aware that Mr Mbobu was an author with its subsidiary. Indeed, the second letter sought to be relied on was dated March 11, 2021 well after the appointment of the arbitrator and was signed by Mr. Wahome himself, once again signifying that the respondent was aware of the authorship facts.
57. Why then did the respondent not raise this issue before or during the proceedings? Didn't the respondent have an opportunity to bring an application before this court under section 13 and 14 of the Act seeking the removal of Mr Mbobu?

' 13.

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.
- (2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.
- (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.
- (4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.'

58. Having been aware of the fact, the respondent still submitted itself to the jurisdiction of the tribunal. The respondent failed to bring its concerns at the earliest opportunity despite that the Act lays down a procedure or mechanism to resolve issues of impartiality and independence of arbitrators.
59. One other thing, the respondent did not allege that its subsidiary had had disagreements with or had mistreated Mr Mbobu to raise a possibility of the latter being biased against the respondent by way of revenge.
60. In the view of the Court, the respondent having at all times had all these facts within its knowledge cannot now run back to a well-known fact and turn around to blame Mr Mbobu for failure to disclose a known fact. The respondent instead waited for the entire arbitral process to be concluded then turn around to raise that fact. That won't do.
61. The question is, would a reasonable man knowing the fact that Mr Mbobu was an author through a subsidiary of the respondent have doubt as to Mr Mbobu's impartiality in the matter? I don't think so.
62. In any case, nothing in that letter indicates that the same was received by Mr Mbobu. The respondent did admit that the letters were sent as a circular to hundreds of authors. There is no solid evidence that Mr Mbobu received the letter such as an email forwarding it or a signature acknowledging receipt. The



content of the letter was about LawAfrica Publishing Limited and not about the respondent such that an ordinary man would catch attention of any relationship between the two.

63. Moreover, in his book, Mr Mbobu paid attribute to his publisher LawAfrica Publishing Co Ltd and not to the respondent. There is nothing on the publishers' details thereon to suggest that LawAfrica Publishing Limited was a subsidiary of the respondent such that any author publishing with it would have notice that there existed a parent company.
64. Further, from the copy of the pages derived from the book authored by Mr Mbobu, the 1st edition was published around October 2011. The 2nd edition was published around February 2016. This matter only arose in September 2020. There is nothing to tell that Mr Mbobu was still an author with LawAfrica Publishing or even the respondent and that his impartiality was in doubt.
65. The respondent submitted that Mr Mbobu ought to have disclosed that he was also an author and a lecturer at UON as the claimants were. One of the applicants was not a lecturer at UON, and even then, this alone could not be concluded as conflict. The respondent's own arbitrator Hon Dr Muthomi Thiankolu was himself a Lecturer at UON and no issue of bias has been raised by the respondent.
66. The simple reason that an decision is not favorable to a party cannot by itself be a basis to feign bias. The test for detecting bias was discussed in *Justice Philip K Tunoi and Another v Judicial Service Commission and Another NRB CA Civil Appeal No 6 of 2016 [2016] eKLR*, wherein it was held that: -

' Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.' The same position was taken by the Supreme Court (per Ibrahim J) in *Jasbir Rai and 3 Others v Tarlochan Singh Raid and 4 Others SCOK Petition No 4 of 2012 [2013] eKLR* that, 'The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.'

67. Arbitrators are assumed trustworthy and understand that they should approach every case with an open mind. The mere fact that an arbitrator is in the same profession as the parties before him cannot by itself raise justifiable doubts as to an arbitrator's impartiality nor does it point towards bias.
68. In *Zadock Furnitures Systems Limited & another v Central Bank of Kenya [2014] eKLR*, the court held that the appropriate test is that the lack of impartiality and independence must be manifest and not a mere possibility. The fact that one of the arbitrators had been an author cannot by itself manifest any bias and only raises a speculative assumption of bias. No bias or unfair practice was detected by the parties during the proceedings.
69. This Court is not convinced that the award contravenes the public policy of Kenya. Though public policy is not defined under the Act, the same has its limits and cannot be loosely used to deny a party from enjoying the fruits of its award. In *Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366*, Ringera J, observed as follows: -

' I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that as the common law Judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you. An award could be set aside under section 35(2) (b) (ii) if 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* of Kenya or to other laws



of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality. The first category is clear. In the second category I would without claiming to be exhaustive include the interest of the national defence and security good diplomatic relations with friendship nations and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive include such considerations as whether the award was induced by corruption, fraud or whether it was founded on a contract contrary to public morals.

70. In *Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd [2012] eKLR*, the court held: -
- ' These terms ('contrary to public policy', 'against public policy', 'opposed to public policy') do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society.'
71. All these pronouncements show that for an award to be contrary to public policy, there must be some fundamental departure from the law and legal norms. The circumstances of this case do not meet the above criteria. It must also be noted that the instant award was unanimously reached by both arbitrators and not solely by Mr Mbobu such that he may have been in a position to unduly influence the outcome of the claim.
72. The ground of public policy was therefore not established.
73. The other ground was that the tribunal determined an issue not before it as regards admissibility of extrinsic evidence.
74. This Court has considered the relevant sections of the final award including those attacked by the respondent such as paragraphs 61 and 64. It is noted that the issue that was being considered therein was whether or not the copyright of the works done by the applicants belonged to them or the respondent.
75. The tribunal found that the copyright belonged to the applicants as per the agreements. The tribunal then proceeded to give reasons for that finding and it is at that point that it found that any extrinsic evidence that attempted to vary, alter or contradict the formal agreements was inadmissible.
76. It is therefore not the case that the tribunal created a new issue and determined it. There was evidence before the tribunal including oral and documentary evidence such as letters and memos which attempted to vitiate the terms of the agreements. The tribunal's decision to treat the evidence a certain way did not amount to creation of a new issue especially when such a decision was directly linked to a finding on an issue that fell for determination.
77. More-over, even if the evidence was admitted, the result of the finding would not have changed considering that the tribunal found that there was no evidence that the letters and internal memos were served on the applicants. Consequently, that ground fails.
78. The final ground was that the tribunal was functus officio. That under section 33(1) of the Act, arbitral proceedings were terminated by the final award which was published on February 19, 2021. That the letter dated May 17, 2021 to the respondent from the applicants directing reimbursement of costs to the respondent was misplaced as the tribunal was already functus officio.
79. Respectfully, that submission is untenable and is a wrong understanding of fuctus officio. The respondent did not deny that it failed to pay its portion of its fees to the tribunal causing the applicants



to pay an extra Kshs 878,000/- in order to collect the final award. It is unclear what it is that the tribunal did after the award that would justify the ground of fuctus officio.

80. Section 32B(3) of the Act permits the tribunal to withhold the delivery of an award to the parties until payment of the fees and expenses of the arbitral tribunal is received. The process of receiving payment and releasing the award does not offend the principle of fuctus officio.
81. Having not denied that the respondent did not pay its portion of the tribunals fee, the amount paid by the applicants is refundable by the respondent. The applicants proved that they are the ones who paid the final portion of the costs due from the respondent. There was also before Court the letter demanding a refund for the same.
82. It has already been found that the applicants were compliant with the provisions of the Act as regards enforcement of the award. No grounds have been established to vitiate the award as provided for under section 37 of the Act.
83. There is no justification why the final award should not be recognized and enforced. The claimants have also been able to proof their claim of Kshs 878,000.00 against the respondent.
84. The upshot is that the Chamber Summons dated June 2, 2021 is meritorious and is allowed as prayed with costs to the applicants.

It is so ordered.

DATED and DELIVERED at Nairobi this 30th day of June, 2023.

A. MABEYA, FCIArb

JUDGE

