



**National Water Conservation & Pipeline Corp v Runji & Partners  
Consulting Engineers & Planners Ltd (Arbitration Cause E025 of 2021)  
[2023] KEHC 21306 (KLR) (Commercial and Tax) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E025 OF 2021**

**EC MWITA, J**

**JULY 27, 2023**

**BETWEEN**

**NATIONAL WATER CONSERVATION & PIPELINE CORP ..... APPLICANT**

**AND**

**RUNJI & PARTNERS CONSULTING ENGINEERS & PLANNERS  
LTD ..... RESPONDENT**

**RULING**

**Background**

1. National Water Conservation and Pipeline Corporation (National Water) and Runji & Partners Consulting Engineers & Planners Ltd (Runji & Partners entered into a contract (No. NWC/HQ/202/2011-12) for Review of Draft Final Designs and Supervision of Construction of Muruny (Siyoi) Kapenguria Water Project. A dispute however rose over termination of that contract by National Water. Runji & Partners invoked an arbitration clause in the contract and initiated arbitral proceedings before Mr. Tom Oketch Onyango, the sole arbitrator. On 10<sup>th</sup> August 2020, the sole arbitrator published an award in favour of Runji & Partners which was sent to the parties on 1<sup>st</sup> October 2020 via email.
2. National Water filed an application under section 35 of the *Arbitration Act*, (the Act) to set aside that arbitral award. That application was heard by Mativo J and was dismissed with costs 22<sup>nd</sup> February 2021. National Water filed an application seeking leave to appeal to the Court of Appeal to challenge that ruling. Meanwhile, on 1<sup>st</sup> March 2021, Runji & Partners filed an application for enforcement and adoption of the award in High Court Commercial Arbitration No. E002 of 2020 which is still pending.



3. Runji & Partners filed its party and party bill of costs dated 21<sup>st</sup> April 2021 before the sole arbitrator, seeking a sum of Kshs. 13,317,194 being costs of the arbitral proceedings. National Water filed grounds of opposition to the bill of costs. Parties were directed to file written submissions to address the issues raised in the grounds of opposition in the order for directions dated 14<sup>th</sup> May 2021.
4. In the for Order for Directions No. 26 issued on 14<sup>th</sup> May 2021, the sole arbitrator directed that the ruling would be delivered on notice. The Runji & Partners filed its submissions dated 21<sup>st</sup> May 2021 and further submissions dated 4<sup>th</sup> June 2021, while National Water filed written submissions dated 31<sup>st</sup> May 2021. The sole arbitrator issued an award on costs and expenses for Kshs. 13,317,194 on 14<sup>th</sup> July 2021,

### **Application**

5. National Water took out a motion on notice dated 13<sup>th</sup> August 2021, under Articles 2, 3, 10, 20, 22, 23, 25(c), 50, 159 & 259 of *the Constitution*, and sections 17, 32B, 33, 34 and 35 of the *Arbitration Act*, 1995(the Act). Seeking the following orders:
  - a. That this Honourable Court be pleased to declare that the Arbitral Tribunal, TOM OKETCH ONYANGO, became functus officio on 30<sup>th</sup> December 2020 and therefore cannot make, could not make an Additional Award or any other determination (except as to declaring itself functus officio) in this arbitration and as purportedly done in the Additional Award dated 14<sup>th</sup> July 2021.
  - b. That this Honourable Court be pleased to declare that the Applicant's Party and Party Bill of Costs dated 21<sup>st</sup> April 2021 filed before the Arbitral Tribunal was time-barred and the Arbitral Tribunal was divested of any jurisdiction to tax it and the purported taxation embodied in the Additional Award dated 14<sup>th</sup> July 2021 is null and void.
  - c. That this Honourable Court be pleased to stay the execution of the additional award of Kshs. 13,317,194.00 dated 14<sup>th</sup> July 2021 arising from the Taxation of the Bill of Costs by the Arbitrator, Tom Oketch Onyango.
  - d. That this Honourable Court be pleased to make such other and further orders as the interest of justice may demand.
  - e. That costs of this Application be provided for.
6. The motion is premised on the grounds on its face and the affidavit of the Sharon Obonyo, sworn on 13<sup>th</sup> August 2021. From the grounds and affidavit, National Water's concerns are that Runji & Partners filed the party and party costs long after the award had been issued; that National Water filed grounds of objection to that bill of costs and that the sole arbitral tribunal directed parties to file written submissions to address the issues raised in the grounds of opposition which they did.
7. National Water states that in a ruling dated 14<sup>th</sup> July 2021, the sole arbitrator assumed jurisdiction and assessed the party and party bill of costs without a hearing on that bill of costs since parties had not been directed to submit on it. National Water also states that the sole arbitrator did not also give reasons for allowing the bill of costs as drawn.
8. Runji & Partners has opposed the application through a preliminary objection dated 30<sup>th</sup> August 2021. The basis of that objection is that the court has no jurisdiction on matters relating to assessment of arbitral costs and expenses; that the arbitral award of 14<sup>th</sup> July 2021 was not an additional award as contended by National Water; that parties had agreed that the sole arbitrator would assess arbitral costs



and expenses pursuant to section 20(1) of the Act in his Order for Directions No. 3 dated 10<sup>th</sup> June 2016 and that the application is an abuse of the court process, as it has been filed as a separate matter from Arbitration Case No. E002 of 2020. Parties. Runji & Partners prays that the application be struck out with costs.

9. In response, National Water has also filed its own preliminary objection dated 29<sup>th</sup> October 2021, primarily on the ground that the preliminary objection by Runji & Partners is not on a pure point of law, and prays that the preliminary objection be struck out with costs.

### **Submissions**

10. This court directed that both the application and the Preliminary objection be heard together through written submissions and oral highlights. National water's written submissions dated 29<sup>th</sup> November 2021 together with lists of authorities dated 29<sup>th</sup> October 2021, 1<sup>st</sup> November 2021 and 29<sup>th</sup> November 2021, while Runji & Partners' submissions are dated 16<sup>th</sup> October 2021 and 3<sup>rd</sup> December 2021.

### **Submissions by National Water**

11. National Water faults the sole arbitrator for making an additional award without inviting parties to submit on the bill of costs. According to National Water, the sole arbitrator did not invite parties to submit on the merits of the party and party bill of costs in his Order for Directions of 14<sup>th</sup> May 2021. It is National Water's contention that if the sole arbitrator decided that he was not functus officio, he should have determined the bill of costs on merit.
12. National Water asserts that there cannot be a separate award on costs. According to National Water arbitral proceedings terminated upon issuance of the final award and or exhaustion of the provisions of section 34 (5) and 32B (1) of the Act, or when proceedings are terminated in accordance with section 33 of the Act. National Water further asserts that Runji & Partners should have filed the bill of costs within 30 days on receipt of the arbitral award as required by section 34(4) of the Act. National Water argues that time for doing so lapsed on 31<sup>st</sup> October 2020 and, therefore, the sole arbitrator did not have jurisdiction to issue any other award.
13. National Water maintains that the sole arbitrator had an additional 60 days to make an additional arbitral award after receipt of the bill of costs, but despite lapsed of time, the sole arbitrator entertained the proceedings and made the additional award. National Water argues that the additional award is illegal; is in conflict with public policy and is inconsistent with Articles 25(c), 27 (1) and (2), 50 (1) of *the Constitution*. Reliance is placed on *Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A. 366*. National Water maintains that that the additional award was made in violation of the *Advocates Act*, the Advocates Remuneration Order 2009; the Advocates Remuneration (Amendment) Order 2014 and the *Arbitration Act*.
14. Citing the Supreme Court decision in *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR*, National Water submits that a preliminary objection may only be raised on a point of law. According to National Water, Runji & Partner's preliminary objection requires evaluation of factual, evidentiary and legal arguments that underpin the alleged Award on costs and expenses dated 14<sup>th</sup> July, 2021 to determine whether it is a further arbitral award or not.
15. In the view of National Water, the award of 14<sup>th</sup> July 2021, is an additional award and the sole arbitrator erred in finding that section 34(5) of the Act did not apply as all claims were determined in the award of 10<sup>th</sup> August 2020. National Water cites section 34(4) & (5) of the Act to argue that costs and expenses of arbitral proceedings should be as determined and apportioned by the arbitral tribunal in its award



under section 34(4) or any additional award under section 34(5) of the Act. National Water also relies on section 32B (1) of the Act which provides that costs of the arbitration can be determined and apportioned in an additional award.

16. National Water faults the sole arbitrator for failing to appreciate that although costs were granted in the final award, it was not clear on the amount. According to National Water, clarification on the amount could only be made through taxation of the bill of costs as an additional award which would then form part of the award.
17. On whether the word determination of costs is the same as assessment or taxation of costs, National Water argues in the affirmative. National Water cites *Kenfit Limited v Consolata Fathers* [2015] eKLR for the proposition that it is only after quantum of costs of arbitration reference has been determined that a final award can come into existence.
18. National Water maintains that this court has jurisdiction under section 35(2)(iii) of the Act to determine an application to set aside an arbitral award if the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

### **Runji & Partners' submissions**

19. Runji & Partners submits that parties agreed and mandated the sole arbitrator to assess costs and expenses which was captured in paragraph 19 of the Order for Directions No. 3 dated 10<sup>th</sup> June 2016. The successful party was to lodge a bill in a form similar to the one an advocate sends to his client, but amplified as necessary to identify which fee earner was engaged on any piece of work, after the sole arbitrator had rendered the award.
20. According to Runji & Partners, recoverable costs and expenses can only flow from a determination contained in an arbitral award as required by section 32B of the Act. Runji & Partners asserts that a determination was made at paragraph 11.2 of the award that all costs of the arbitration be paid by National Water.
21. On whether the sole arbitrator had jurisdiction to make the impugned award, Runji & Partners cites the Court of Appeal decision in *Kenfit Limited v Consolata Fathers* (supra), for the argument that it is only after a quantum of costs of arbitration reference has been determined that a final arbitral award can come into existence.
22. Regarding National Water's argument that the award on costs dated 14<sup>th</sup> July 2021 was an additional award, Runji & Partners contends that it was not. According to Runji & Partners, the term additional award is a technical phrase used in section 34 (4) of the Act and relates to claims pleaded in terms of section 24 of the Act and or presented in the arbitral proceedings but omitted from the arbitral award. Runji & Partners argues, therefore, that a bill of costs cannot be awarded but only taxed or assessed costs result into to a certificate of costs under the arbitral award. Runji & Partners maintains that the court has no jurisdiction either by way of a reference or under section 35 on matters relating to assessment of costs and expenses by the sole arbitrator.

### **Determination**

23. I have considered the application, the response and submissions by parties. There is also a preliminary objection which, in my view, is a response to the application.
24. As already seen from the background of this matter, a dispute was placed before the sole arbitrator who issued an award in favour of Runji & Partners. National Water applied to set aside that award but



the application was dismissed on 22<sup>nd</sup> February 2021. Runji & Partners, the successful party, filed an application to recognize and enforce that award in a different matter that is still pending before the court. Runji & Partners also filed party and party bill of costs before the sole arbitrator which was allowed on 14<sup>th</sup> July 2021, prompting this application.

25. National Water has sought three principal orders. First, a declaration that the sole arbitrator became functus officio on 30<sup>th</sup> December 2020 upon rendering the award and could not make the additional dated 14<sup>th</sup> July 2021. Second, a declaration that the bill of costs dated 21<sup>st</sup> April 2021 was time barred and the sole arbitration had been divested of jurisdiction to tax it and, therefore, the impugned additional award is null and void. Third, that the court does order stay execution of the additional award. The core issues in this application, in my view, are whether the sole arbitrator was functus officio and whether the additional award is null and void.

### **Whether the arbitrator was functus officio**

26. National Water argues that the sole arbitrator was wrong for holding that he was not functus officio. According to National Water, arbitral proceedings terminated once the final award was issued. Runji & Partners maintains that the sole arbitrator was not functus officio because parties had agreed that the sole arbitrator was to determine the issue of costs once the award had been made, and the successful party was to file a bill of costs.
27. Section 32A of the Act provides that except as otherwise agreed by parties, an arbitral award is final and binding upon the parties and no recourse is available against that award otherwise than in the manner provided for by the Act.
28. With regard to costs, section 32B provides as follows:

Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of arbitral tribunal and any expenses related to arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section or any additional award under section 34(5).
29. Section 32B is clear that an arbitral tribunal may determine and apportion costs in the award, in an additional award under section 34(5) or as parties may agree.
30. Section 34 is on correction and additional awards. Subsection (4) provides:

Unless otherwise agreed by parties, a party may upon notice to the other party, within 30 days of receiving the arbitral award, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
31. The import of subsection (4) is that a request for an additional award is to be made 30 days after receipt of the arbitral award. The additional award must be on claims that were made in the arbitral proceedings but their determination omitted in the award. It is that additional award whose time is limited to thirty days and the party seeking that additional award, has to serve notice to the opposite party in that regard. Under subsection (5), the additional award, if any, is to be made within sixty (60) days.
32. A perusal of the arbitral award shows, as correctly argued by Runji & Partners, that the issue of costs and who was to bear those costs, was determined by the sole arbitrator. (See para 11.2 of the award.) What remained to be determined was the quantum of those costs. Section 32B is clear that parties may agree on how costs are to be determined. In that regard, Runji & Partners asserts that parties had



agreed that the sole arbitrator would assess costs and expense after publishing the award. This, Runji & Partners argues, was contained at paragraph 19 of Order for Directions No. 3 dated 10<sup>th</sup> June 2016. The successful party was to lodge a bill in a form similar to the one an advocate sends to his client, but amplified as necessary to identify which fee earner was engaged and the related work. National Water has not disputed the correctness of this submission.

33. A reading to the provisions in sections 32B and 34 is plain that the arbitral tribunal retains power to determine issues of costs as parties may agree. According to paragraph 19 of the Order for Directions No. 3 dated 10<sup>th</sup> June 2016, the successful party was to lodge a bill of costs after publication of the award. There was no time limit within which the bill of costs was to be filed or a determination on costs made. The section National Water relies on does not state that the issue of costs must be made or determined within 30 days. Only an additional award which is on issues that were omitted in the award is subject to time.
34. National Water has misapprehended as it relates to additional award which is not the same as award on costs as parties may agree. At the risk of repeating myself, an additional award is an award on claims that were in the arbitral proceedings but were not determined in the arbitral award. Assessment of costs in the manner parties had agreed could not amount to an additional award in terms of section 34.
35. In the circumstances, the conclusion I come to is that the sole arbitrator was not functus officio and had power to consider and determine the issue of costs as parties had agreed.

#### **Whether the bill of costs was time barred**

36. Having determined that the sole arbitrator was not functus officio, the other relevant issue is whether the bill of costs was time barred. National Water argues that the bill of costs dated 21<sup>st</sup> April 2021 was time barred since the sole arbitrator had been divested of jurisdiction and, therefore, the award dated 14<sup>th</sup> July 2021 is null and void. This argument cannot succeed. As I have already stated, the award made on 14<sup>th</sup> July 2021 was not an additional award in the sense contemplated in section 34. Rather, it was a determination on quantum of cost, the sole arbitrator having determined that costs were to be borne by National Water. What remained was ascertainment of those costs as parties had agreed and the sole arbitrator had power to do so. Flowing from that standpoint, there would be no legal or factual basis to hold the award on costs null and void.

#### **Whether stay of execution of the award dated 14<sup>th</sup> July 2021 should be granted**

37. National Water has sought stay of execution of the award dated 14<sup>th</sup> July 2021. Having made determinations that the sole arbitrator was not functus officio and that the award dated 14<sup>th</sup> July 2021 is not null and void, it is not clear on what basis a stay of execution of that award should be made. National Water has sought specific orders in the application for specific reasons, namely; that sole arbitrator was functus officio; the bill of costs was time barred and stay. The first two prayers having been declined, the request for stay of execution of the award on costs lacks legal basis.
38. National Water has made arguments to suggest that the impugned award was made without arguments being made on the bill of costs. However, a perusal of the application, reveals that there is no prayer in the body of the application alleging that and seeking a relief on that ground. The argument has only been made in the submissions. A court can only deal with issues raised in the pleadings and grant or decline prayers sought but not otherwise.



**Conclusion**

39. In the end, this court finds that the sole arbitrator was not functus officio and had power to deal with the bill of costs dated 21<sup>st</sup> April 2021. The court also finds that the bill of costs was not time barred and the award dated 14<sup>th</sup> July 2021 is not null and void.
40. Consequently, the application lacks merit. It is dismissed with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2022.**

**E C MWITA**

**JUDGE**

