



**Mithamo v Mutanga Investments Limited (Civil Case E289 of 2023)
[2023] KEHC 21370 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E289 OF 2023
JWW MONG'ARE, J
AUGUST 15, 2023**

BETWEEN

IAN MBUTHIA MITHAMO APPLICANT

AND

MUTANGA INVESTMENTS LIMITED RESPONDENT

RULING

1. On April 14, 2023 the Applicant herein moved the court by Chamber Summons brought under section 36(1) of the *Arbitration Act*, 1995 and Rules 4, 5, 9 and 11 of the *Arbitration Rules* 1997 and section 3A of the *Civil Procedure Act* seeking the following orders:-
 1. Spent
 2. That this Honourable court be pleased to recognize and adopt the final award delivered by Justice Aaron Ringera dated March 31, 2023 as a judgment of this court (final award) and as a decree of this court.
 3. That this honourable court do give the applicant leave to enforce the final award as a decree of this honourable court.
 4. That costs of this application be provided for.
2. The application is premised on the grounds set therein and a supporting affidavit of Ian Mbutia Mithamo. Simultaneously with the filing of this application the respondent filed an application dated May 12, 2023. The said application which is supported by the supporting Affidavit of Rose Mumbi Mimamo sworn the same date seeks the following orders:-
 1. Spent



2. That pending the hearing and determination of this application, there be a stay of the application on record dated April 14, 2023.
 3. That the Arbitral Award dated March 31, 2023 on record be set aside and the dispute be referred back for fresh arbitral proceedings
 4. That costs be provided for.
3. During the hearing of the two applications, the same were consolidated and the parties thereto made submissions on both applications. The decision of this court in both application will therefore be rendered in this one ruling for both application.
 4. The dispute arises from a family owned company whose shareholders and directors are a Mother and her children. Under its Memorandum of Association of the Defendants, clause 31 is to the effect that all disputes arising herein shall be resolved by arbitration. Clause 4(a) designates the applicable laws to be the laws of Kenya and therefore the seat of the tribunal is Nairobi. In the application for recognition and enforcement of the final arbitral award as an order of this court and in compliance with the provisions of the *Arbitration Act*, 1995, and alongside the award, the applicant has attached the Memorandum and Articles of Association of Mutanga Investments Limited where the arbitration clause is domiciled.
 5. To my mind, for enforcement of an arbitral award, the operative sections is sections 36 and 37 of the *Arbitration Act*. 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 has the power to recognize and enforce domestic arbitral award on the following terms:-

- “S.36 A domestic arbitral award, shall be recognized as binding and, upon
- (1) 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)

Section 37 of the Act, on the other hand, provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows:-

- S. 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 in capacity; 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. [Emphasis mine]

6. I am satisfied therefore that the applicant has met the pre-condition for recognition and enforcement of the award as it has provided that certified copies of the Memorandum and Articles of Association of Mutanga Investments Limited which contain the arbitration clause and a certified copy of the final arbitral award. Since the applicant has established a case for recognition and enforcement of the Final Award, the burden is 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.

7. Because of the unique nature of the dispute, I have carefully analysed the award and note that from the procedural analysis the arbitrator went out of his way to accommodate the parties herein and has given a detailed account of the events leading to the final award. I note that Ms. Rose Mumbi Mimamo who has filed on behalf of the company an application seeking to set aside the arbitral award herein, is the majority shareholder, together with the estate of her late husband, Mr. Julius Mimamo, who each owned 8750 shares and allocated to their children, including the claimant herein, 2500 of the shares, making her the surviving majority shareholder. From the information available, Ms Rose Mimamo was at all times represented by a legal counsel. Upon the commencement of the arbitral process, she withdrew from the proceedings and only to resurface after the final award was rendered to state that the company had not been given an opportunity to participate in the proceedings and therefore wished for the process to start de novo with her participation as a director of the company.



8. In line with the provisions of section 37 of the Arbitration Act, this court can only allow an application for setting aside an arbitral award only if the applicant satisfies the conditions set therein. These conditions are clearly enumerated under section 37 reproduced above. In her application and subsequent submissions before this court, Ms Mimamo has averred that she was denied an opportunity to be heard. That the Advocates corresponding with the Arbitrator did not have any instructions to appear and articulate the case for the company and her appearance in the proceedings in her personal capacity and not as director of the company. Ms. Mimamo makes reference to the celebrated English case of *Salmom vs Salmon* that set the precedent that a company assumes a separate legal entity that is separate from that of its shareholders and directors, in a nutshell.
9. I have carefully considered this argument advanced by the majority shareholder and noted from the documents attached to the pleadings herein that Ms. Rose Mimamo was not in her personal capacity sued in these proceedings. All documents provided point out that the issues were between Mr. Ian Mbuthia Mimamo as a shareholder and the company, Mutanga Investments Limited, which was at all material time controlled and operated by Ms. Rose Mimamo, in her capacity as one of the directors of the company. Secondly and most important, in his award, the arbitrator has demonstrated the effort made in including the company in the proceedings and has attached correspondences exchanged therein, which included correspondences from the lawyers representing the company. Ms. Rose Mimamo has not attached to her application any letters of protest that she or the company sent to the Arbitrator urging them to stop the arbitral process. The evidence available suggest that she was all along aware and appraised of the process. She chose to ignore the process despite the company which she controlled being a party. My evaluation of the material presented to support the application for setting aside the arbitral award fall far short of the grounds envisioned by section 37 of the Arbitration Act. I therefore find that the application for setting aside the arbitral award has not been proved to the required standards and will dismiss the same.
10. In the circumstances therefore, I find that the application for recognition and enforcement of the Final Award issued by the Arbitrator, Hon . Justice Aaron Ringera, on March 31, 2023 is successful and is hereby allowed with costs awarded to the Applicant against the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF AUGUST 2023.

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J. W. W. MONG'ARE
JUDGE

