



**Utility Trading Limited /Utility Group Kenya Limited v Treat of the Day (EA) Limited /The Treat of the Day LLC (Commercial Arbitration Cause E008 of 2022) [2023] KEHC 24657 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E008 OF 2022**

**EC MWITA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**UTILITY TRADING LIMITED /UTILITY GROUP KENYA LIMITED ..... APPLICANT**

**AND**

**TREAT OF THE DAY (EA) LIMITED /THE TREAT OF THE DAY LLC ..... RESPONDENT**

**RULING**

1. This is a ruling on the application dated 18<sup>th</sup> January 2022, seeking adoption of the award on costs dated 26<sup>th</sup> July 2021 and issued on 3<sup>rd</sup> December 2021. The applicant also seeks to have the assessed costs form part of the decree in HCCOM ARB E006 of 2021.
2. According to the applicant, a dispute arose between the parties and was referred to arbitration in terms of the agreement between the parties. Parties appointed Dr. Kariuki Muigua as the sole arbitrator, Dr. Muigua heard the dispute and published the final award on 2<sup>nd</sup> February 2021.
3. The respondent filed an application to set aside that arbitral award, while the applicant filed an application for recognition and adoption of the award (HCCOM ARB E006 of 2021). On 13<sup>th</sup> July 2021, the court dismissed the application to set aside the award and allowed the application for recognition and enforcement of that award.
4. The arbitral tribunal had reserved the issue of costs and directed the applicant to file its bill of costs for consideration. Parties were also directed to file written submissions to the bill of costs.



5. There being no agreement on costs, the applicant filed its bill of cost which was assessed by the arbitral tribunal after considering representations from both sides. The award on costs was published on 3<sup>rd</sup> December 2021. That is the award the applicant seeks to have recognized and to form part of the decree in HCCOMM ARB E 006 of 2021.
6. The applicant argues that the arbitral tribunal followed the correct procedure when assessing costs in the absence of an agreement between the parties. The applicant asserts that the respondent has not disputed that award on costs.
7. The applicant relies on several decisions to support the application. These include; *National Old Corporation v Prisko Petroleum Network* [2014] eKLR; *Mabican Investments Limited & 3 others v Giovanni Gaida & 80 others* [2005] eKLR; *Rwama Farmers' Co-operative Society Limited v Thika Coffee Mills Limited* [2012] eKLR; *Kenyatta International Convention Centre v Greenstar Systems Limited* [2019] eKLR and *Optima Sports Management International (UK) Limited v The Kenya Broadcasting Corporation* (HCCC No 686 of 2009), where the court found no reason for setting aside the arbitral award.
8. The applicant also argues that the respondent has not demonstrated good reason for staying these proceedings. The applicant cites the decision in *Re Global Tours & Travel Limited* (HCWC No 43 of 2000, on stay of proceedings).
9. The respondent opposes the application through a replying affidavit and written submissions. It is the respondent's case that it sought to set aside the award in E 006 of 2021, but the application was dismissed. The respondent filed an application in the Court of Appeal (No E493 of 2022) which is still pending.
10. The respondent takes the view, that since the decision in E006 of 2021 is under challenge and the outcome of the appeal could have significant impact on the decision of this court in this application, it would be prudent for this court to stay these proceedings pending determination of that appeal.
11. The respondent again argues that this application is *sub judice*, and relies on section 6 of the *Civil Procedure Act*. The applicant further relies on *Republic v Registrar of Societies-Kenya & 2 others Ex parte Moses Kirima & 2 others* [2017] eKLR, that the purpose of *sub judice* rule is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief.
12. The respondent again relies on the decision in *Nyanza Garages v Attorney General* (Civil Suit No 450 of 1993-High Court of Uganda, Kampala), that it is in the interest of the parties and the system of administration of justice that multiplicity of suits between the same parties and over the same subject matter be avoided.

### **Determination**

13. I have considered the application, the response and submissions. I have also considered the decisions relied on by parties in support of their respective positions.
14. This application seeks recognition and enforcement of the arbitral award on costs. The arbitral tribunal reserved the issue of costs when rendering its final arbitral award. This is allowed under section 32B (1) of the *Arbitration Act*. The section provides:
  1. 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 the



arbitral tribunal and any other expenses related to the 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).

15. The arbitral tribunal determined the issue of costs and made an award which the respondent has not challenged. The respondent's argument, as I understand it, is that there is an appeal pending before the Court of Appeal against the decision dismissing its application to set aside the arbitral award. For that reason, the respondent argues, this court should stay these proceedings to await the outcome of the appeal before the Court of Appeal. In the respondent's view, this application is *sub judice*.
16. The respondent's argument that these proceedings are *sub judice*, though attractive, is of no persuasive value. The respondent has not filed an application seeking to stay these proceedings, or to set aside the award on costs. I have also not seen any substantive grounds advanced in opposition to this application. The fact that there is an appeal pending before the Court of Appeal is not a ground for declining this application.
17. This court's mandate when moved as it has, is to allow the application or decline as guided by section 36 which provides that a domestic arbitral award, shall be recognized as binding and, upon application to the Court, shall be enforced subject to this section and section 37. Section 37 provides for grounds on which the court may decline to recognize and enforce an arbitral award.
18. The respondent has not raised any grounds under section 37 that would dissuade the court not to allow the application. In the circumstances, I find the application meritorious and is allowed as prayed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023**

**E C MWITA**

**JUDGE**

