



Gitutho Architects & Planners Limited v Kenya Utalii College (Miscellaneous Application E618 of 2022) [2023] KEHC 26182 (KLR) (Commercial and Tax) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E618 OF 2022**

JWW MONG'ARE, J

NOVEMBER 23, 2023

BETWEEN

GITUTHO ARCHITECTS & PLANNERS LIMITED APPLICANT

AND

THE KENYA UTALII COLLEGE RESPONDENT

RULING

1. The Applicant, Gitutho Architects & Planners Limited, on 29th August 2022 filed by a Chamber Summons Application under Section 36(1) of the *Arbitration Act* and Rules 6, 9, and 11 of the *Arbitration Rules* seeking the enforcement and recognition of the Arbitral Award dated 30th August 2021, issued by Peter M. Gachuhi, Arbitrator together with costs of the application and incidentals thereto.
2. The dispute subject matter of the Arbitration arose from a contract between the Applicant and Kenya Utalii College, the Respondent herein, entered into on 21st January 2016 and an addendum agreement dated 25th August 2016 for the provisions of a project plan and landscape schematic design. The Applicants upon completing its assignment delivered its final master plan to report on 28th November 2016 to the respondents who partly paid Kshs.10,365,885/- out of the consultancy fee of Kshs.23,035,300/= leaving a balance of Kshs.12, 669,415/=, which was the subject of the arbitration proceedings herein. The Application said application was supported by the supporting affidavit of Arch Mugure Njendu, sworn on 29th August 2022.
3. The Arbitrator was appointed on 18th June 2018 by the Chartered Institute of Arbitrators-Kenya and both the Applicant and the Respondent actively participated in the arbitral proceedings leading to an Arbitral Award that was delivered on 30th August 2021.



4. Kenya Utalii College, the Respondent herein, on 14th October 2022, filed a Notice of Motion Application under Section 35 (2) (b) (ii) of the Arbitration Act and Rule 7 and 11 of the Arbitration Rules, which seeks to set aside the Arbitral Award of the sole arbitrator, Mr. P.M Gachuhi delivered on 30th August 2021 and issued on 20th July 2022. The said Application was supported by the supporting affidavit sworn by Prof Charles Musyoki, PHD, OGW, the acting chief Executive officer and principal of Respondent sworn on 14th October 2022.
5. Further, the Respondent argued that the Tribunal took months to publish the Award despite having condemned the Respondent with excessive costs. The Respondent further argued that the Arbitrator was biased and impartial and the Award will occasion an injustice to the Respondent if not set aside, as it will amount to unjust enrichment and deprivation of resources to a public institution. The Respondent urged the court that there was no existing binding contract between the parties to sustain the Arbitration proceedings.
6. The argument that the award was against public policy was premised on the argument that the Applicant having failed to issue a tax invoice under Section 42 of the VAT Act, the same contravened the provisions on the Public Procurement and Asset Disposal Act and that it would lead to unjust enrichment and urged the court to set it aside.
7. Both applications were heard together pursuant to the directions of the Court. In their submissions the applicants urged the court to be guided by section 36 of the Arbitration Act that requires a Party seeking for enforcement and adoption of an Arbitral Award furnish the Court with the Original or certified copy of the Arbitral Award and the Arbitration Agreement. Having done so, the arbitral Award becomes final and binding upon the parties and there is no right for any court to intervene in the arbitral process, or the Award except in the circumstances of section 39. The Applicant placed reliance on the decided case of Anne Mumbi Hinga v Victoria Njoki Gathara (2009)eKLR, where the court held that once the applicant has met the conditions for the enforcement of the Award and the onus shifts to the Respondent to demonstrate why the Award should not be adopted. In this case, the Applicant argued that it had satisfied the conditions of Section 36 of the Arbitration Act and discharged that burden.
8. In its response to the Application by the Respondent to set aside the Arbitral Award, the Applicant argued that the arbitral Award does not offend public policy and that the said averments by the Respondent were vague and generalized with no reference to the specific public policy so breached. Instead, the Applicant argued that the Respondent sought to raise grounds of appeal of the factual findings by the Arbitrator and that the same was not permissible in an application for setting aside an arbitral Award. The Applicant urged the Court to be guided by the decision in Misc civil application no. 216 of 2016 Mohan Limited v Villa Cares Limited (2019) eKLR, where the High Court held as follows:

“I have understood the applicant to be arguing that the Arbitrator misconstrued the evidence and law before her. that is an argument that would typically be an argument made on appealone of the grounds that is most abused is that an Award is against public policy....”.

The Applicant urged the court to find the Respondent has failed to demonstrate that there exist sufficient grounds to warrant the setting aside of the arbitral Award, to dismiss the application dated 14th October 2022 and allow the application for enforcement of the arbitral Award date 29th August 2022.

9. The Respondent vehemently argued that the Award went outside the scope of the dispute and that the Arbitrator relied on an illegal contract in its determination of the dispute before him. The Respondent



submitted the Applicant failed to engage the Respondent in any direct discussions as envisaged in clauses 14.1 and 14.2 of the agreement and that the appointment of the Arbitrator was premature, illegal and contrary to the intention of the parties since the parties had not exhausted the pre-arbitration process of negotiating the dispute before the appointment was sought. The Respondent faulted the Arbitrator for Venturing into matters beyond the scope of the reference, which it argued resulted in an Award that failed to provide an accurate resolution to the dispute in question and that the said Award was faced with inconsistencies and irreconcilable findings as the Arbitrator wrongly found there existed an agreement between the parties while there existed none.

10. The respondent maintained that the Award consists of multiple instances of conflicting findings which create confusion and raises questions about the integrity and impartiality of the Arbitrator, which, in the Respondent's view was sufficient reason to set aside the Award.

Analysis and Determination

11. I have considered at length the two applications, the affidavits in support and opposition thereto and the written submissions together with the authorities cited by the parties. To my mind, the following issues emerge for determination;

- i. whether the application for setting aside has met the threshold set out under section 37 of the [Arbitration Act](#),

I have considered the pleadings by the parties in this matter and the written and oral submissions. I note from the outset that there is no dispute to the existence of an arbitration in this matter. I further note that both parties submitted themselves voluntarily to the arbitration process in and actively participated in the arbitral proceedings including making payment of the Arbitrator's fees as agreed upon. To my mind, for enforcement of an arbitral award, the operative sections are 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:-

“ 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)



12. 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:-

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 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, 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]

13. I am satisfied therefore that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the Contracts which contain the arbitration clause and a certified copy of the Arbitral Award. On the flip side, the onus to prove the grounds upon which the application for setting aside the Award is on the Respondent who has made various arguments in support thereto.



14. Among the arguments put forward by the Respondent in seeking to set aside the Arbitral Award is that the Arbitrator went outside the scope of the dispute. I have perused the contents of the final Award, the Arbitrator raised several issues as follows:-
- a. whether the arbitral tribunal has jurisdiction to hear the dispute. he went ahead to find the applicant had tried to engage the Respondent to amicably solve the dispute but declined to co-operate and thus by the strength of Clause 15.4 the Arbitrator has the jurisdiction to hear the dispute he found the non-compliance with clause 14 of the agreement lacks merit and was rejected.
 - b. whether there was a binding contract between the parties. the Arbitrator evaluated the contract dated 21st January 2016, the addendum agreement and the oral evidence of the Respondent's witness who confirmed the agreement was signed by its authorized officer. the tribunal went ahead to find that the addendum was about the agreement being amended for the benefit of the Respondent, it bore a seal and appeared to have been witnessed by the Respondent's Attorney the tribunal went further to find that the parties entered into the agreement.
 - c. Whether the agreement was illegal, null and void for breach of section 135(3) of the Act. The tribunal the interpretation of Section 135(3) is to provide a standstill for 14 days between the notification of the Award and the conclusion of the contract to enable any party who wishes to challenge an Award decision to do so. this was in line with the [*Public Procurement Administrative Review Boards: Kenya Power & Lighting Company Limited \(Interested Party\) ex parte Transcend Media Group*](#) (2018) eKLR. The tribunal found the agreement was valid and enforceable.
 - d. whether any party breached the contract. the tribunal found the Respondent settled the first fee note but failed to settle the subsequent fee note. there was no proof from the Respondent that work was not done and completed as per the contract. the Respondent was found in breach of the contract.
 - e. what are the appropriate remedies, the tribunal held the Applicant was entitled to the balance of the sum due being Kshs 12,669,415 plus interest.

Subsequently, I find that the Arbitrator confined himself to the dispute as set out above.

15. The second ground for urging the court to set aside the award was that the same was contrary to public policy and that it was biased, impartial and against natural justice and that it was based on an illegal contract. Further, the Respondent averred the contract entered into was illegal since the applicant had failed to adhere to the stipulated timelines in executing the contract and thus there was no binding contract between the parties. The Respondent further faults the applicant for failing to issue a tax invoice and argued that the same was contrary to the law, and that the initial amount of Kshs10,365,885/= was illegally paid out as the contract was illegal.
16. Section 37 of the [*Arbitration Act*](#) curtails the recognition of an arbitral Award if it is against public policy. From the Respondent's assertion, the tribunal was biased and impartial. I do agree with the Applicant that other than stating the Award is against public policy the Respondent has failed to expound on the same. the Respondent has failed to demonstrate that indeed the arbitral Award violated a particular existing rule or law.



17. I am guided in the decision of the Court in the case of *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR, where the court held that:-

“Public policy, which is a favour we may consider in the exercise of our discretion, is, of course, an indeterminate principle or doctrine. In years of yore, it was branded “an unruly horse, and when you get astride it, you never know where it will carry you”- Richardson v Mellish [1824] 2 Bing 229. Nevertheless, it has reference to ideas which for the time being prevail in a country as to the conditions necessary to ensure its welfare. It is variable and must fluctuate with the circumstances of time.

18. In view of the above, it is my finding that the Respondent in its application dated 14th October 2022, has failed to demonstrate grounds as enshrined under Section 37 of the *Arbitration Act* for this court to set aside the arbitral Award. The upshot is that the application dated 14th October 2022 is dismissed with costs to the applicant. This therefore means that application dated 29th August 2022, seeking the adoption and enforcement of the Arbitral Award issued on 30th August 2021 by Peter M. Gachuhi is allowed with costs to the Applicant. The result is that the arbitral Award of 30th August 2021 is hereby recognized, adopted and enforced as an order of this court.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

J. M. W. MONG'ARE

JUDGE

In the Presence of:

Mr. Wathuta for the Applicant.

Ms. Nganga for the Respondent.

