



**Vishnu Builders and Developers Limited v Kennedys Construction
Limited (Miscellaneous Civil Application E 305 of 2021)
[2022] KEHC 18 (KLR) (Commercial and Tax) (14 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 18 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E 305 OF 2021
A MABEYA, J
JANUARY 14, 2022
IN THE MATTER OF THE ARBITRATION ACT, 1995
AND
IN THE MATTER OF AN APPLICATION FOR
ENFORCEMENT OF AN ARBITRATION AWARD**

**BETWEEN
VISHNU BUILDERS AND DEVELOPERS LIMITED APPLICANT
AND
KENNEDYS CONSTRUCTION LIMITED RESPONDENT**

RULING

1. Before Court are two applications. The first one was lodged by the applicant and is dated 21/4/2021 and was brought under section 36 of the *Arbitration Act* and Rule 6 of the Arbitration Rules, 1997. The applicant sought leave to enforce an arbitral award delivered by a sole arbitrator, Nekoye Masibili on 22/1/2021, as a decree.
2. The second application dated 26/5/2021 was lodged by the respondent and sought an order to set aside the said arbitral award and an order to reopen the arbitral proceedings and allow the respondent an opportunity to present its case and testimony on merit.
3. The Court will decide the second application first before dealing with the first application. That Motion was brought under section 35 of the *Arbitration Act*, Order 10 rule 11 of the Civil Procedure Rules and rule 7 of the Arbitration Rules 1997.



4. The Motion was predicated upon the grounds that the applicant obtained the final arbitral award ex-parte and had commenced the process of enforcement. It was averred that the arbitral proceedings proceeded in the absence of the respondent whereby prejudicial ex-parte orders were made against the respondent. That unless the orders sought are granted the respondent will be condemned unheard without an opportunity to present its case.
5. The applicant opposed the application vide a replying affidavit sworn on 8/9/2021. It was contended that the application to set aside the arbitral award is time barred as it was filed after the statutory 3 month period timeline and that the application has not met the grounds for setting aside an arbitral award under the Arbitration Act.
6. That the respondent was copied in the correspondence that led to the appointment of the arbitrator by the Architectural Association of Kenya; that the respondent was duly served with a notice of the preliminary meeting, all communication with the tribunal and the pleadings in the arbitral proceedings through its physical and email addresses.
7. The respondent swore a supplementary affidavit on 28/10/2021 in response to the applicant's replying affidavit. The respondent emphasized that it did not receive any notifications of the arbitral proceedings through the registered post as alleged by the applicant; that the alleged affidavit of service indicating service of the statement of claim upon the respondent is defective as it was not served upon a principal officer of the company as stipulated by the rules of service on a company; that despite the subject arbitral award being published on 22/1/2021, the respondent only received and became aware of it on 25/5/2021 when they were served with the respondent's application dated 21/4/2021 that sought to enforce the award. In the premises, the 3 month statutory period had not expired.
8. The respondent annexed a draft statement of response to the applicant's statement of claim in its further affidavit.
9. The court has considered the record in its entirety.
10. Section 35 (2) (a) (iii) of the Arbitration Act states that the High Court may set aside an arbitral award if 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.
11. The respondent averred that it was not served with the statement of claim and supporting documents and was not notified of the arbitral hearing. The applicant contended otherwise.
12. 'BR3-BR4' are attachments in the applicant's replying affidavit and constitute the notice of dispute, correspondence with the Architectural Association of Kenya, a letter of appointment of the arbitrator and an acceptance by the arbitrator. The Court notes that the respondent was copied in the documents above however there was no proof therein to show that they were delivered to and received by the respondent. There was no stamp of receipt from the respondent nor an email of acknowledgement of receipt from it.
13. The Order for Directions No.4 annexed as 'MK1' of the respondent's supplementary affidavit indicated at paragraph 29 that the postal services company reported that they were unable to reach the respondent via its registered telephone number for the collection of the hard copy letters.
14. Further, Order for Directions No.7 annexed as 'MK-2' stated that the Notice for Agenda of Preliminary Meeting dated 16/6/2020 and Order for directions No.4, 5 and 6 were not collected by the respondent and had to be returned to sender.



15. The above facts are proof that the respondent did not receive any documentation and pleadings regarding the arbitral proceedings. It is therefore clear that the respondent was not aware of the arbitral proceedings and therefore did not have the opportunity to file its defence. There is no evidence to the contrary.
16. On the issue of the present application being time barred, the Court has already established that there is no proof that the respondent was properly notified of the arbitration nor served with the proceedings. Therefore, the contention by the applicant that the present application is time barred holds no water.
17. In addition, the respondent's statement of opposition annexed as 'MK 5' in its supplementary affidavit presents arguable grounds of defence that ought to be considered by the tribunal before rendering a final decision.
18. The upshot of the above is that the application dated 26/5/2021 has merit. Prayer numbers 2 and 4 are hereby granted. The final arbitral award dated 22/1/2021 is hereby set aside and the arbitral proceedings are reopened in order to have the respondent's defence considered by the tribunal.
19. In light of this, the first application dated 21/4/2021 is hereby dismissed. The parties are hereby referred back to the Honourable Tribunal to begin the process afresh. The costs to be in the arbitration.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

