



**Kenya Technical Teachers College v Will Developers &
Construction Limited & another (Arbitration Cause E014 of 2021)
[2022] KEHC 106 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E014 OF 2021
DAS MAJANJA, J
FEBRUARY 18, 2022
IN THE MATTER OF AN APPLICATION FOR RECOGNITION
AND ENFORCEMENT OF AN ARBITRAL AWARD**

BETWEEN

KENYA TECHNICAL TEACHERS COLLEGE APPLICANT

AND

**WILL DEVELOPERS & CONSTRUCTION LIMITED 1ST RESPONDENT
GOVERNMENT OF THE REPUBLIC OF KENYA PERMANENT SECRETARY,
VOCATIONAL & TECHNICAL TRAINING MINISTRY OF EDUCATION,
SCIENCE & TECHNOLOGY 2ND RESPONDENT**

RULING

1. On 21st May 2021, this court dismissed the 1st Respondent's application seeking, inter alia, to set aside the Arbitral Award of the Sole Arbitrator, Kimani A.G (FCI Arb) ("the Arbitrator") dated 11th May 2020 ("the Award"). The court observed that the application was time barred and that the Arbitration Act, 1995 did not grant jurisdiction to the court to extend the time for filing the application.
2. The Applicant has now moved the court by the Chamber Summons dated 21st May 2021 under section 36(1) of the Arbitration Act and Rule 6 and 9 of the Arbitration Rules seeking an order for this court to recognize and for leave to enforce the Award as a judgment and decree of the court. The application is supported by the affidavit of the Applicant's Chief Principal, Dr. Edwin Tamo, sworn on 21st May 2021 and opposed by the 1st Respondent ("the Respondent") through the replying affidavit of its Executive Chairman, Johnson Mwanzia Wambua sworn on 11th August 2021. The application was canvassed by way of written submissions with the parties advancing their respective positions.



3. For ease of reference and context, I will rehash the facts that gave rise to the arbitration. The Applicant entered into a contract dated 26th April 2011 (“the Contract”) with the 1st Respondent after it was awarded a tender to construct two standard workshops/laboratory complexes for the contract price of KES. 53,421,480.00 at the Applicant’s Nairobi Campus. The Contract comprised of the following documents: Letter of Acceptance, Form of Tender, Conditions of Contract part I, Conditions of Contract part II and Appendix to Conditions of Contract, Specifications, Drawings and Priced Bills of Quantities.
4. Following a dispute over payment and completion of works, the parties referred it to arbitration in accordance with Clause 37.1 of the Contract. The 1st Respondent lodged a claim for, inter alia, interest on delayed payment on various certificates amounting to KES. 39,681,942.42 while the Applicant filed a counterclaim seeking an order that the 1st Respondent be compelled to complete the contract works or in the alternative it be ordered to refund the monies paid to it.
5. The 2nd Respondent denied the claim on the ground that it was not party to the Contract, never participated in its execution and that it never participated in the appointment of the Arbitrator and that the Arbitrator did not have jurisdiction over it.
6. After hearing the matter, the Arbitrator published the Award on 11th May 2020. He found that the parties to the Contract were the Applicant and the 1st Respondent and that the 2nd Respondent was not liable to the 1st Respondent for acts of the Applicant. The Arbitrator found, inter alia, that the Applicant made all payments without delay as Certificates Nos. 1, 2, 3, 4, 5 and 7 were settled within the required 45 days of the issuance by the Project Manager and that the application for payment for Certificates Nos. 6 and No 8 was not validly made under the Contract hence they were not payable by the Employer. The Arbitrator further held that the Applicant was not entitled to recovery of mesne profits in respect of loss of use of the workshop nor the refund of the payments made to the 1st Respondent or any interest arising therefrom.
7. In conclusion, the Arbitrator made final orders that he had no jurisdiction over the 2nd Respondent, all claims of the 1st Respondent were dismissed, an order was issued to the 1st Respondent to complete the contractual works within 14 days after providing the necessary performance security and Insurances for the works and the 1st Respondent was to provide, within 14 days of receipt of the Award, a Performance Security and necessary Insurances in accordance with the contract conditions. The Arbitrator further dismissed all other counterclaims of the parties.

Analysis and Determination

8. I have gone through the rival pleadings and submissions of the parties. The main issue falling for determination is whether the Award ought to be recognized and leave be granted for the same to be enforced as a judgment and decree of the court.
9. Under section 32(A) of the *Arbitration 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 *Arbitration Act*. The High Court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards in 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)

10. Having rejected the Respondent’s application to set aside the Award, its existence and authenticity is not disputed hence the formal conditions for enforcement and recognition have been satisfied by the Applicant.

11. The substantial issue for resolution is whether the Respondent has established that the Award does not meet the substantive grounds for enforcement or rather the grounds upon which the court may refuse to recognize and enforce the Award under section 37 of the Arbitration Act which, at the part material to this application, provides is as follows:

37. Grounds for refusal of recognition or enforcement

- (1) 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 to the High Court proof that—
 - (i)
 - (ii)
 - (iii)
 - (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 decisions 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 recognised and enforced; or
 - (v)
 - (vi); or
 - (vii)
 - (b) if the High Court finds that—
 - (i); or
 - (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.
- (2)/[Emphasis mine]**



12. From its reply, the Respondent's assault on the Award is premised on it being contrary to the public policy of Kenya and going beyond the scope of arbitration.

The Award being contrary to public policy

13. An award will be contrary to the public policy of Kenya if it is shown that it was either inconsistent with *the Constitution* or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality. However, it is not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. The public policy exception must have a connotation of national interest and must be interpreted narrowly so as not subsume the other grounds for setting aside (see *Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366* and *Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR*).
14. The Respondent states that the Award was against the public policy as it was biased and partial against the Respondent and in favour of the Applicant and that it failed to consider the evidence on record more so in respect of the fact that the delegated manager, Mr. Tarus, was in fact the Project Manager. The Respondent also contended that the Award was oppressive as it intended to enrich the Applicant. The Respondent complains that the Award sanctioned corrupt and illegal practices by stating that although not permitted under the Contract, it is probable that the certificate was prepared to ensure funds allocated were not returned to the Treasury.
15. After going through the Award, I do not find any weight in the Respondent's contentions that the Award is contrary to the public policy of Kenya. The Arbitrator made findings of fact after considering the evidence and parties' submissions. For instance, the Arbitrator was able to ascertain from the documentary evidence provided by the parties that the Project Manager was always the District Works Officer who was responsible for supervising the execution of the works and administering the Contract and that the Contract documents (drawings and bill of quantity) were also indicated to have been prepared and issued by the said District Works Officer. The Arbitrator also heard evidence that overall responsibility of the Project was with the Ministry of Public Works but that the Contract allowed the delegation of 'day to day' running of the project. Further, that the certificates from the Ministry were signed by the said District Works Officer which buttressed the finding that the said District Works Officer, was and remained as the Project Manager.
16. There is nothing against public policy in the conclusion by the Arbitrator that the District Works Officer was involved in the implementation of the Works as the Project Manager and that assistance in the discharge of these duties and responsibilities was by the delegated Project Manager, Mr. Tarus. This conclusion was based on the Arbitrator's appreciation and analysis of the evidence and was indeed a live issue for determination hence the conclusions was not against the public policy of Kenya.
17. The Respondent also intimates that the Arbitrator sanctioned an illegality or corrupt practice. The Arbitrator, at Paragraphs 247 to 260 of the Award was categorical that payment of the subject certificate was not due as it was issued 8 days after the preceding certificate and yet clause 23.1 of the Contract provided for payment applications to be made monthly. His averment in the succeeding paragraph 261 that the certificate might have been prepared to ensure funds allocated were not returned to the Treasury, though an opinion, was still disclaimed that the same was not permitted under the Contract and that in all events, the amounts certified were as admitted, incorrectly certified and hence the amount in the certificate was still not due for works executed.
18. Therefore, I do not find any reason that recognition and enforcement of the Award would be contrary to the public policy of Kenya.



The Award being beyond the scope of arbitration

19. The Respondent accused the Arbitrator of going beyond the scope of his jurisdiction in attempting to re-write the contract between the parties by deliberately ignoring the evidence of the Respondent and in all instances agreeing with the Applicant's witnesses and interfering with and watering down the negotiations and mutual agreements of the parties. The Respondent further stated that the Arbitrator disputed the agreement made by the parties wherein the Project Manager was Mr. Tarus who acted together with the District Works Officer.
20. If I am to understand the Respondent correctly, it is questioning the Arbitrator's jurisdiction by claiming that he went outside of what was to be determined by him as contemplated and presented by the parties.
21. Indeed, it is not in dispute that the parties herein presented their issues for determination and the same were listed by the Arbitrator in the Award. One of the issues raised by the Respondent was whether the District Works officer was involved in the running of the project. I have already found that the Arbitrator held in the affirmative and that it was within his province and entitlement to do so. I also find nothing wrong in the Arbitrator agreeing with the Applicant's witnesses or arguments on the Contract if the Arbitrator was persuaded by the said arguments. An arbitral tribunal has the authority to interpret an agreement and the parties' arguments and evidence in a manner which makes the agreement more effective, without re-writing the agreement (see *Equity Bank Limited v Adopt a Light Limited ML HC Misc. Application 435 of 2013 [2014] eKLR*). This means that the Arbitrator was entitled to review the evidence and come to his own conclusion and even if that conclusion was wrong as the Respondent suggests or even if this court may take a different view of his findings.
22. The Arbitrator remains the master of facts and the court must resist the temptation to become an appellate court as was explained in [*Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012 \[2014\] eKLR*](#) where the Court of Appeal cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd (The "Balears")* 1 Lloyds LR 215:

The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

23. It is for the above reasons that this attack by the Respondent on the Arbitrator going beyond the scope of his jurisdiction fails.

Disposition

24. In conclusion, I find that the 1st Respondent has not succeeded in providing the court with valid reasons as to why the Award should not be recognized and enforced as a judgment and decree of



the court. I therefore allow the Applicant's Chamber Summons dated 21st May 2021 by making the following final orders:

- a. The Arbitral Award dated 11th May 2020 by Kimani A. G (FCI Arb) be and is hereby recognised and adopted as a judgment of this court and leave be and is hereby granted to the Applicant to enforce it as an order of this court.
- b. The 1st Respondent shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Kamende instructed by Kamende D. C. and Company Advocates for the Applicant.

Ms Makori instructed by Mogeni and Company Advocates for the 1st Respondent.

Mr Kiarie instructed by the Office of the Attorney General for the 2nd Respondent.

