



REPUBLIC OF KENYA



**Waga v Property Reality Company Investments Limited (Arbitration Cause E031 of 2021)
[2022] KEHC 125 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E031 OF 2021
DAS MAJANJA, J
FEBRUARY 18, 2022**

BETWEEN

PAUL JOSEPH WAGA APPLICANT

AND

PROPERTY REALITY COMPANY INVESTMENTS LIMITED ... RESPONDENT

RULING

1. The Applicant has moved the court by the Chamber Summons dated 15th September 2021 under section 36 of the *Arbitration Act*, 1996 and Rules 6 and 9 of the *Arbitration Rules* seeking an order that the court recognize as binding and adopt as an order of the court the Arbitral Award made on 4th February 2021 and the Award on Costs made on 16th July 2021. The application is supported by the Applicant's affidavit and supplementary affidavit sworn on 15th September 2021 and 2nd February 2021. The Respondent opposes that application through the replying affidavit of its director, Brian Gacari, sworn on 21st January 2022.
2. The parties agree that the dispute between them under an Agreement for Sale of Apartment No. 5G on 5th Floor erected on LR Nakuru Municipality/Block 23/196 was referred to arbitration before a single arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). The Arbitrator published the Final Award on 4th February 2021 and an Award on Costs on 16th July 2021.
3. 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)

4. In this case, the Applicant has produced a certified copy of the Final Award and Award on Costs and certified copy of the Agreement thus meeting the procedural requirements for recognition and enforcement under section 36(3) aforesaid. The question then is whether the court should reject the application on grounds proffered by the Respondent.
5. In the replying affidavit, the Respondent contends that during the arbitration proceedings it was represented by Kogweno and Bubi Advocates LLP. That when the parties were unable to agree on costs, the Applicant filed his Party and Party Bill of Costs. That although the parties were given time to respond to the Bill of Costs and file written submissions, its advocates did not respond and the costs were determined ex-parte. The Respondent contends that the costs of KES. 462,791.00 which include the taxed costs and Arbitrator's charges and expenses are way above the costs provided under the Advocates Remuneration Order and that it is the interest of justice that the costs be reviewed by this court before the Applicant's application is allowed.
6. The substantive grounds upon which the court may refuse to recognize or enforce the Award are premised under section 37 of the Arbitration Act which, at the part material to this application, provides 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) 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 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) 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 award 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.
- (2)

7. In order to succeed, the Respondent must bring itself within the provisions of section 37(1)(a) and (b) aforesaid. In the absence of proof of those grounds, the court cannot intervene as it is prevented from doing so by section 10 of the Arbitration Act which states that, “Except as provided by this Act, no court shall intervene in matters governed by this Act.” Further, section 32A circumscribes the instances where the court may interfere with a final award.
8. The Respondent raises the issues of costs which is within the jurisdiction of the arbitral tribunal to determine. It has not demonstrated that its complaint falls within any of the grounds set out in section 37 that allow the court to reject an application for recognition and enforcement. In conclusion, I find that the 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.
9. I allow the Applicant’s Chamber Summons dated 15th September 2021 by making the following final orders:
- (a) The Final Award (Save as to Costs) made and published 4th February 2021 and the Award on Costs of the Reference and Arbitrator’s Fees and Charges on Determination of Costs made and published on 16th July 2021 by William C. Githara, Sole Arbitrator 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 them as an order of this court.**

(b) The Respondent shall bear the costs of this application assessed at KES. 30,000.00.

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

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Mukuhi instructed by Okeyo, Mbeya and Mukuhi Advocates for the Applicant.

Ms Ng'etich from the Respondent.

