



**Kuria v Invesco Assurance Company Limited (Arbitration Cause E007 of 2022)
[2022] KEHC 10456 (KLR) (Commercial and Tax) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E007 OF 2022**

DAS MAJANJA, J

MAY 25, 2022

BETWEEN

DAVID KABUBII KURIA APPLICANT

AND

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The Applicant has moved the court under section 36 of the *Arbitration Act* seeking orders for recognition, adoption and enforcement of the Final Arbitral Award dated 22nd February 2021 (“the Award”) by Mbiriri Njuguna, Sole Arbitrator (“the Arbitrator”). The Chamber Summons dated 25th October 2021 is supported by the Applicant’s affidavit sworn on the same day. It is opposed by the affidavit of the Respondent’s Chief Finance Officer sworn on 19th May 2022. The parties’ advocate made brief oral submissions in support of their respective positions.
2. The issue before the court is whether the court should recognize and enforce the Award. 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:

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- (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)

3. The first step in the inquiry is to determine the Applicant has met the formal requirements. The Applicant has filed a certified copy of the Specific Shareholders Agreement dated 14th December 2011 which contains the dispute settlement clause at Clause 24 and also a certified copy of the Award. At any rate, the Respondent does not dispute the fact of the arbitration agreement and the Award. I therefore find and hold that the Applicant has established the formal requirements for enforcement under section 36 of the *Arbitration Act*.

4. The next step for consideration is whether the Respondent has established grounds upon which the court may refuse to recognize the Award. Section 37 of the *Arbitration Act* sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award 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)

5. The Respondent has the burden of establishing the grounds it relies on to avoid the Award. The thrust of its response is that it is unjust for the court to adopt the Award. In its replying affidavit, the Respondent states that the arbitral proceedings were concluded in December 2020 and the parties were notified that the award would be ready on 25th January 2021. By a notice dated 25th January 2021, the Arbitrator notified the parties that the Award was ready and available for delivery upon settlement of his fees in the matter as indicated in the invoice which was attached. The Respondent's deponent states that due to financial difficulties, it was only able to settle its part of the fees on 3rd August 2021 and once it made payment on that day, it found that the Award was dated 22nd August 2021 which was the day the Applicant made the payment.
6. The Respondent argues that due to the date of the Award and considering the provisions of section 35 of the *Arbitration Act* as read with the jurisprudence of the court, the Arbitrator had shut the door



unfairly to set aside the Award since the Respondent was way outside the 3-month timeline for an application to set aside the Award. It urges that the Arbitrator ought to have dated the Award when the Respondent was informed that the Applicant had settled his fees. The Respondent therefore submits that it was unfair for the Arbitrator to unfairly shut the door to justice since it could not afford the Arbitrator's fee at the time and within the stipulated three months.

7. In addition to the Respondent contends that the Arbitrator dealt with issues beyond his scope and that the Award is against public policy as it contravenes and is inconsistent with the [Companies Act](#) and it supports unjust enrichment.
8. In order to succeed in its application, the Respondent must demonstrate that the grounds it agitates fall within the purview of section 37 of the [Arbitration Act](#). This is not only consistent with section 32A of the [Arbitration Act](#) but also in line with section 10 of the [Arbitration Act](#) which does not permit any intervention in matters of arbitration except in accordance with the Act. In this case, I do not see how the failure to apply to set aside the Award for whatever reason amounts to a reason for the court to refuse to recognize it. Simply stated, the reasons proffered by the Respondent do not fall within the scope of section 37. Since this is not an application to set aside the Award, I do not propose to deal with the issue whether or not the Respondent could, in the circumstances, invoke section 35 of the [Arbitration Act](#).
9. The Respondent's deposition raises the issue that the Award was outside the scope of the reference and is against the public policy of Kenya. Unfortunately, the deposition is rather threadbare. It does not set out the fact or propositions that would lead the court to conclude that it should refuse to recognize and enforce the Award. As I stated, the Respondent must furnish proof of the grounds it relies on and the court must be satisfied that those grounds have been established. The Respondent's case falls far short of the threshold necessary for this court to intervene.
10. The Respondent has failed to prove any grounds why the Award should not be recognized and enforced as an order and decree of the court. I allow the Applicant's Chamber Summons dated 25th October 2021 on the following terms:
 - a. The Final Arbitral Award dated 22nd February 2021 by Mr Mbiriri Nderitu, FCI Arb, FMI Arb, 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 it as a decree of this court.
 - b. The Respondent shall bear the costs of this application which is assessed at KES 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Mr Mwangi instructed by Mbugwa, Atudo & Macharia Advocates for the Applicant.

Mr Anyona instructed by Muma & Kanjama Advocates for the Respondent.

