



**Eggjen Joinex Ltd v The Nairobi Hospital (Miscellaneous Application E487 of 2021)
[2022] KEHC 12767 (KLR) (Commercial and Tax) (26 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12767 (KLR)

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

MISCELLANEOUS APPLICATION E487 OF 2021

A MSHILA, J

AUGUST 26, 2022

BETWEEN

EGGJEN JOINEX LTD APPLICANT

AND

THE NAIROBI HOSPITAL RESPONDENT

RULING

Background

1. The chamber summons dated June 28, 2021 was brought under section 36(1) of the *Arbitration Act, 1995*, rules 6, 9 and 11 of the *Arbitration Rules*. The application was supported by the sworn affidavit of Harjinder Singh Rupra and the applicant sought for orders that;
 - a. Leave be granted to the applicant herein to enforce the final arbitral award as published by QS Onesimus Mwangi Gichuhi Arbitrator, dated the June 10, 2020 together with costs in the arbitration and accrued interest therefrom, as a decree of the court.
 - b. The costs of this application be borne by the respondent.
 - c. The respondent be ordered to pay all such costs and expenses as are incidental to the enforcement and execution of the final award aforesaid.
 - d. The court to grant any such further or other orders as it may be deemed to grant in the circumstances.
2. The respondent filed a chamber summons dated October 18, 2021 under sections 36 & 37(l)(iv) of the *Arbitration Act, 1995* and rule 4 & 9 of the arbitration *Rules* for orders that;



- a. The court to refuse recognition and enforcement of the arbitral award dated June 10, 2020 and published on May 5, 2021 as relates to the award on extended preliminaries.
 - b. That the costs of this application be borne by the applicant.
3. The application was supported by the sworn affidavit of Maxwell Maina who stated that the respondent prayed for the sum of Kshs 10,115,625.00 while the arbitrator, despite dismissing part of the claim of extended preliminaries, still awarded the claimant the sum of Kshs 27,997,777.81. No interest was awarded.
 4. The arbitrator in his award dealt with a dispute not contemplated by or falling within the terms of reference to arbitration. moreover, the award contains matters beyond the scope of arbitration as the arbitrator, in respect of the claim for extended preliminaries, granted amounts not contemplated by or falling within the terms of reference to arbitration.
 5. The award dated June 10, 2020 as relates to extended preliminaries should not be recognized and enforced as it reflects terms beyond the scope of the reference to the present arbitration under section 37(1) of the [Arbitration Act, 1995](#).
 6. The applicant also filed a notice of preliminary objection dated October 18, 2021 on the grounds *inter alia*: -
 - a. The application offends the mandatory provisions of section 35 of the [Arbitration Act](#) and this honorable court lacks jurisdiction to entertain the application.
 - b. The application is time barred as it has been filed outside the statutory timelines for setting aside of part of an award.
 - c. The application is fatally defective, bad in law and should be struck out with costs to the applicant.

Applicant's Case

7. The applicant submitted that the preliminary objection herein is hinged on the clear position that an award was rendered on the May 5, 2021 while the application challenging it herein was made on the October 18, 2021. The threshold set by [Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors](#) has thus been met, as the point raised does not require a contest on factual issues.
8. It was the applicant's position that any application that seeks to challenge the contents of an award may only be made under section 35 of the [Act](#). This position explains why the grounds in section 37(1) (a) are copious of the grounds in section 35(2) (a) of the [Act](#). section 35 of the [Act](#) may only be invoked within 90 days.
9. Further, that any application that would have the effect other than enforcement or recognition of an award may only be made under section 35 of the [Act](#). The failure to file an application under section 35 precludes a person from placing reliance on section 37(1)(a) of the [Act](#). As was observed in the case of [National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited](#) [2014] eKLR, when an application for recognition and enforcement of an award has been heard and determined, a party seeking to set aside the award

"may have to surmount arguments on *res judicata* or that the issues were determined by court before seeking further opportunity to re-litigate them under section 37 of the [Arbitration Act](#)"



10. In its submissions the applicant observed that applications for recognition and enforcement of an award provided for under section 36 of the [Arbitration Act](#) are granted unless an application to set aside an award is made under section 35. In the absence of an application made under section 35 within 3 months of the rendering of the award, we submit that the recognition application ought to be granted.
11. The applicant relied on the case of [Fund LLP v Katchy Kollections Limited](#) [2018] eKLR the court considered the fact that no application had been made under section 35 within the 3 months' statutory period, and proceeded to grant the application seeking to enforce and recognize the award.

Respondent's Case

12. In response the respondent submitted that its application is primarily based on section 37 of the [Arbitration Act](#) where the said provision provides grounds for refusal of recognition or enforcement and that there is nowhere within the respondent's application that section 35 of the [Arbitration Act](#) is cited.
13. The respondent strongly opposed the submission by the applicant that by virtue of the similarity of the provisions in section 35 and section 37, automatically, section 37 is subsumed to the stringent measures imposed on section 35 and the two provisions can be read simultaneously.
14. On the issue that the application is time-barred, and it has been filed outside the statutory timelines for setting aside of an award; the respondent submitted that it ought to be made clear that section 37 mainly deals with refusal of recognition and enforcement and not setting aside of an award as postulated by the applicant.
15. Section 37 does not attach any timeline to its applicability. The rationale is well captured by the court's obiter *dictum* in [University of Nairobi v Multiscope Consultancy Engineers Ltd](#) [2020] eKLR.
16. The respondent's application under section 37 is not time-barred and should not be subjected to the terms and conditions of section 35. Section 37 is an independent legal provision with its own substantive applicability and capable of being determined on its own merits.
17. As such the respondent submitted that its application should be dealt with on its merits and the present preliminary objection be dismissed with costs to the respondent.
18. In addressing itself to costs the respondent submitted that the court is given full discretion in the awarding of costs as per section 27 of the [Civil Procedure Act](#). The respondent has incurred costs in the form of legal fees, having consulted a law firm and it has not acted in any manner that would suggest that its application is an abuse to the court process.

Issues For Determination

19. The court has carefully considered the applications filed herein and the responses as well as the written submissions and the issues for determination are;
 - a. Whether the arbitral final award should be recognized and adopted and leave granted for enforcement as a decree of the court?
 - b. Whether to refuse to recognize the final arbitral award;



Analysis

20. A dispute arose between the applicant and the respondent and in accordance with the terms of their agreement the dispute was referred to arbitration. QS Onesmus Mwangi Gichuhi was appointed to hear and determine the dispute which led to the final award being issued in favour of the applicant.
21. Under the provision of section 32A 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 court, under section 36 of the *Arbitration Act*, has the power to recognize and enforce domestic arbitral awards in the following terms:
 - "(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) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.
 - (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."
22. The recognition and enforcement of arbitral awards is governed by sections 36 and section 37 of the Act. Section 36 as stated above, confirms the binding nature of domestic arbitral awards and requires a party seeking enforcement of such awards to avail to the court either the original arbitral award and the original arbitration agreement or their certified copies.
23. The applicant has already availed to this court certified copies of the arbitral award and the arbitration agreement.
24. The 2nd application was brought pursuant to section 36 and 37 of the act and rules 4 and 9 of the *Arbitration Rules*; in the application the respondent urged the court to refuse to recognize and enforce the final award; which application was opposed by a preliminary objection being raised on statutory timelines for setting aside of part of the award and the prayers sought were the striking out of this 2nd application as it was fatally defective and bad in law.
25. This court will not belabor itself in dealing with the preliminary objection as it is satisfied that the respondent had invoked the provisions of section 37 as opposed to section 35 of the *Act*; section 37 deals with refusal of recognition and enforcement and does not attach any timelines to its applicability whereas section 35 deals with the setting aside of an award and has stringent terms;
26. Section 37 of the *Arbitration Act* sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award and provides as follows:
 - "(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 or
- (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) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application



of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

27. The respondent refutes the recognition of the award on the grounds that The arbitrator in his award dealt with a dispute not contemplated by or falling within the terms of reference to arbitration. Moreover, the award contains matters beyond the scope of arbitration as the arbitrator, in respect of the claim for extended preliminaries, granted amounts not contemplated by or falling within the terms of reference to arbitration.
28. The court has carefully perused the statement of claim as well as the award and it is evident that as regards the claim for extended preliminaries the amount sought by the claimant was Kshs 10,115,625 while the arbitrator in the final award awarded the claimant Kshs 19,862,250. Further, the arbitrator at page 35 of the final award outlines the claim for extended preliminaries as Kshs 27,997,777.81 contrary to the amount stated in the statement of claim of Kshs 10, 115,625.
29. In view of the foregoing, the court notes that the respondent has demonstrated that the arbitrator granted amounts not contemplated by or falling within the terms of reference to arbitration. Pursuant to the provision of section 37 (1)(iv) the arbitral award is hereby recognized save for the claim for the extended preliminaries which issue shall be referred back to the arbitrator for clarification.

Findings And Determination

30. For the forgoing reasons this court makes the following findings and determinations;
 - (i) This court finds the 1st and 2nd applications to be partially merited;
 - (ii) The final arbitral award as published by QS Onesimus Mwangi Gichuhi Arbitrator, dated the June 10, 2020 in the sum of Kshs 19,862,250 be and is hereby recognized and adopted as an order of this court save for the claim for the extended preliminaries;
 - (iii) Leave be and is hereby granted to the applicant herein to enforce the final arbitral award in the sum of Kshs 19,862,250 as a decree of the court.
 - (iv) The claim for the extended preliminaries be and is hereby referred back to the arbitrator for review.
 - (v) Each party shall bear their own costs of this application.

Orders accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

HON A MSHILA

JUDGE

In the presence of;

Onyango Brian for the applicant.

Kelvin Njuguna holding brief for Kivindyo Munyao for the respondent.

Lucy-----Court Assistant.

