



**Villa Care Limited v Mashin Construction Limited (Miscellaneous Application E132 of 2021) [2022] KEHC 12543 (KLR) (Commercial and Tax) (22 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12543 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**MISCELLANEOUS APPLICATION E132 OF 2021**  
**DAS MAJANJA, J**  
**AUGUST 22, 2022**  
**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT AND RECOGNITION**  
**OF AN ARBITRAL AWARD**

**BETWEEN**

**VILLA CARE LIMITED ..... APPLICANT**

**AND**

**MASHIN CONSTRUCTION LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant has moved the court by the Chamber Summons dated 11<sup>th</sup> January 2021 made under section 36 of the *Arbitration Act*, 1995 seeking an order that the court recognize and enforce the Arbitral Award published on 4<sup>th</sup> February 2021 by Mr Dominic Mbigi, Sole Arbitrator, (“the Award”) as a decree of this court. The application is supported by the Applicant’s affidavit sworn on 11<sup>th</sup> January 2021.
2. Pending the hearing of the application, the Respondent filed an application dated 1<sup>st</sup> April 2021 seeking an order staying these proceedings pending inter-parties hearing of an application filed in HC. MISC No. E145 of 2021, Mashin Construction Limited v Villa Care Limited, seeking leave to file an appeal from the arbitral award out of time. That application was dismissed paving way for the hearing of this application.
3. The Respondent opposes the application to enforce the award through a Statement of Grounds of Opposition urging the court to reject the application on the basis of the grounds set out under section 37 of the Arbitration Act, 1995. It urges that the reference to arbitration was time barred as the constitution of the tribunal was done outside the time limits prescribed in the contract. That the Award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration



and that Award contains decisions on matters beyond the scope of the reference to arbitration. The Respondent complains that the Arbitrator was not impartial as he was involved as counsel in a highly contested and controversial matter where the advocate for the Respondent was representing another party. The Respondent contends that a party to the agreement was under some incapacity as a director who executed the agreement did not have the authority of the Respondent to execute the contract. It further complains that the Award was induced or affected by undue influence and that the enforcement of the Award is contrary to public policy. The Respondent expounded on the grounds by filing written submissions.

4. 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) .....

5. In this case, the Applicant has produced a certified copy of the Award 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 under section 37 of the Arbitration Act which 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) .....



6. In order to succeed, the Respondent must bring itself within the provisions of section 37(1)(a) and (b) aforesaid. It is important to note that the burden is on the party who resists enforcement of an award to “furnish proof” and not merely make allegations. 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.
7. Before I deal with the substance of the objection, a background of the matter is important. The subject of the arbitration proceedings is a Project Marketing Agreement dated 28<sup>th</sup> October 2014 (“the Agreement”). Under the Agreement, the Respondent appointed the Applicant as its selling agent for its apartments situated on its property known as Everest Court for a commission. The Respondent terminated the Agreement precipitating the arbitration proceedings.
8. Before the arbitral tribunal, the Applicant claimed KES. 5,881,400.00 for breach of contract. The Respondent opposed the claim and filed a counterclaim seeking refund of KES. 400,000.00 it had paid the Applicant to facilitated mobilization of the marketing system. The Arbitrator heard the testimony of the Applicant’s Managing Director, Daniel Ojjo and that of the Respondent Director, Abdinasir Muhamud. After the considering the evidence and submissions, the Arbitrator concluded that the Applicant had established a case for breach of contract. He awarded the Applicant KES. 5,015,000.00 as damages together with interest thereon, dismissed the counterclaim and awarded costs to the Applicant.
9. It is noteworthy that in seeking to oppose the application to enforce the Award, the Respondent did not file any replying affidavit to set out the facts to support its case. What the court has on record for consideration is the Agreement and Award thus the court is limited to that extent in resolving the matter.
10. The Respondent has raised the issue that the arbitral tribunal was not properly constituted on the ground that the reference was time barred as the dispute ought to have been referred to arbitration within 14 days of the such dispute arising. Without a deposition of the facts setting out the material facts that would assist the court, there is no basis for the court to make any finding on this matter. Moreover, this objection ought to have been raised at the earliest opportunity otherwise it was deemed to have been waived in line with section 5 of the Arbitration Act which provides as follows:
  5. A party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.
11. As to the complaint that the Arbitrator was not impartial and that he was under undue influence, there is no deposition to demonstrate the facts upon which the court may conclude that the arbitrator was impartial. Likewise, the Applicant is denied the opportunity to contest the allegations of impartiality. Nevertheless, a party who is concerned that an arbitrator may not be impartial is entitled to challenge the arbitrator under section 13(3) of the Arbitration Act which provides, in part, that, “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence ....” Further, the procedure for challenge is set out in section 14 of the Arbitration Act. It is clear that the Respondent did not invoke these clear provisions and it cannot do so now. In addition, the failure to challenge the impartiality of the arbitrator at the earliest opportunity means that it waived the right to challenge the arbitrator.



12. In support of the ground that the Award deals with a dispute not contemplated by or falling within the terms of the reference to arbitration, the Respondent states that the Agreement was procedurally terminated by notice and the proceeding instituted 3 years after termination only as an afterthought to compel payment of an alleged debt that it was entitled to under the Agreement. I do not find any basis for this ground as it calls for the court to re-evaluate the evidence before the arbitral tribunal as the issue before it revolved around the legality of the termination and its consequences. On this issue, the arbitrator heard the parties, considered the evidence and in the end resolved the issue in the Applicant's favour. The Respondent has not proved that the Arbitrator dealt with issues not contemplated by the reference.
13. The Respondent also attacks the Award on the grounds that the determination of costs went beyond the scope of the reference. It complains that the costs awarded were extravagant, excessive and unjustified in law and should not be allowed to stand. I have looked at the Award and among the issues framed were which party should bear the costs of the arbitration and what is the quantum of costs payable. The parties had agreed at the preliminary meeting that costs of the arbitration were to be taxed by the arbitral tribunal and not by the court. They duly submitted on the issue of costs and the arbitrator awarded costs as part of the award. It is clear that what the Respondents seeks is an appeal from the decision on costs. I find and hold that the issue of costs was clearly within the province of the reference to arbitration.
14. The court is entitled to reject an application for enforcement under section 37(1)(a)(i) of the *Arbitration Act* if a party to the agreement was under some incapacity. The issue of incapacity is a question of fact and the Applicant must furnish proof of such incapacity. It is not enough for counsel for the Applicant to submit that, "Our Client has reliably informed us that the director who entered into the marketing agreement with the Applicant/Claimant didn't have the necessary authority to bind the Respondent herein." This ground, I hold, has not been proved.
15. Finally, the Respondent has not shown how that Award violates the public policy of Kenya. Its complaint is that enforcement of the Award would lead to unjust enrichment. It argues that the Applicant did not discharge its obligations under the Agreement and for it to claim payment for work not done is morally reprehensible and goes against public policy. I reject this argument and find that it is an attempt to re-open the very dispute that was before the arbitrator.
16. The Respondent has not demonstrated that its complaints fall within any of the grounds set out in section 37 of the Arbitration Act. As the Applicant has met the conditions for recognition and enforcement of the Award, I allow the Applicant's Chamber Summons dated 11<sup>th</sup> January 2021 by making the following orders:
  - a. The Award published on 1<sup>st</sup> December 2020 by Mr Dominic Mbigi, 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 assessed at KES. 40,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF AUGUST 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Gachugi instructed by Hiram Christopher Advocates LLP for the Applicant.



Mr Nura instructed by Garane and Somane Advocates for the Respondent.

