



Mngiwa General Contractors Limited v Coast Institute of Technology & 2 others (Miscellaneous Application E001 of 2022) [2022] KEHC 11799 (KLR) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E001 OF 2022**

OA SEWE, J

AUGUST 12, 2022

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF ARBITRATION

AND

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT

OF AN ARBITRAL AWARD

BETWEEN

MNGIWA GENERAL CONTRACTORS LIMITED APPLICANT

AND

COAST INSTITUTE OF TECHNOLOGY 1ST RESPONDENT

**MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY 2ND
RESPONDENT**

THE NATIONAL TREASURY 3RD RESPONDENT

RULING

1. The chamber summons dated March 18, 2022 seeks orders that the final award dated January 25, 2022 issued by Jacqueline Waihenya, FCIArb, in respect of the arbitration between Mngiwa General Contractros Limited and Coast Institute of Technology, be recognized and enforced in accordance with the provisions of section 36(1) of the *Arbitration Act*, 1995. The applicant also prayed that a decree be issued accordingly, and that the costs of the application be borne by the respondent.
2. The application was filed pursuant to section 36(1) of the *Arbitration Act*, 1995, rules 4(1), (2), 5, 6, 9 of the *Arbitration Rules, 1997*, section 59 of the *Civil Procedure Act* and all other enabling provisions



- of the law. It was premised on the grounds that a duly certified copy of the final award as well as copies of the tender documents between the applicant and the 1st respondent have been filed herein in compliance with the provisions of section 36(3)(a) of the *Arbitration Act*. Thus, the applicant asserted that it is entitled to enforce the final award against the three respondents; and therefore that it is only fair and just that the orders sought be granted as prayed to enable the applicant realize the fruits of the arbitration.
3. In support of the application, the applicant relied on the affidavit sworn on March 18, 2022 by its director, Haron Manyindo Mafundo, in which he deposed that on or about May 3, 2016, the applicant and the 1st respondent signed a contract for the erection and completion of twin workshop, classrooms and offices for Mwatate Technical Training Institute. He added that thereupon the applicant proceeded to the site and commenced construction works in accordance with the terms of the contract for which certificates of payment were issued and paid. Mr Mafundo further averred that although those certificates were honoured by the 1st respondent, it declined to pay certificate of payment No 9 dated March 2, 2018 amounting to Kshs 4,321,311/=; and that it was this declinature that triggered the dispute.
 4. Mr Mafundo deposed that the parties agreed to have their dispute referred to arbitration in accordance with their arbitral agreement, for which purpose Jacqueline Waihenya, FCIarb was appointed as the sole arbitrator. He added that the parties submitted themselves to the arbitration process, and that a final arbitral award dated January 25, 2022 was thereafter published by the arbitrator for the 1st respondent to pay the applicant as follows:
 - (a) An amount of Kshs 4,321,311/=;
 - (b) Interest over and above the principal amount assessed in the sum of Kshs 2,151,657/70;
 - (c) Payment within 30 days from the date of publication and taking up of the final award;
 - (d) The costs of the reference to be paid within 30 days;
 - (e) Post-award interest on the awarded amounts at the rate of 13% per annum, to accrue within 30 days from the date of publication of the award.
 5. Lastly, the applicant averred that, *vide* a letter dated February 22, 2022, the respondent was called upon to settle the awarded sum; which letter was totally ignored by the respondent. The applicant consequently sought that its application be allowed and that orders be granted as prayed in the interest of justice.
 6. Although the application was duly served on the respondents, no response was filed by them. Indeed, Ms Karanja, learned counsel for the respondents indicated that the respondents are not opposed to the recognition or enforcement of the final award. She however urged the court not to award costs to the applicant; and that the court ought to be guided by rule 10 of the *Arbitration Rules*.
 7. In his written submissions dated June 22, 2022, Mr Otieno, learned counsel for the applicant drew the attention of the court to sections 35(2), 36(1) and 37 of the *Arbitration Act* in urging the court to recognize the final award for purposes of enforcement as a decree of the court. He pointed out that the 1st respondent has not only neglected to settle the awarded amounts but also failed to challenge the award in any way. He also relied on *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited* [2014] eKLR; *Castle Investments Company Limited v Board of Governors, Our Lady of Mercy Girls Secondary School* [2019] eKLR and *Lalji Meghji Patel & Company Limited v Nature Green Holdings Limited* [2017] eKLR to demonstrate that there is no reason why the award ought not to be recognized.



8. Section 36 of the Arbitration Act, provides thus in its sub-section (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”.
9. Indeed, rule 6 of the Arbitration Rules, 1997, does recognize that:
- “If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply *ex parte* by summons for leave to enforce the award as a decree.”
10. In addition to the foregoing, section 36(3) of the Arbitration Act stipulates that:
- “Unless the High Court otherwise orders, the party relying on an arbitration 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.”
11. In this instance, the applicant exhibited a copy of the contract dated May 3, 2016, which contract confirms that the parties included an arbitration clause at paragraph 37 thereof. The applicant has also demonstrated that a dispute arose, was declared and accordingly referred to arbitration; that the parties submitted to the jurisdiction of the sole arbitrator, Jacqueline Waihenya, FCI Arb.; and that a final award was prepared and published, a copy of which was annexed to the applicant’s supporting affidavit as annexure “PM 3”.
12. Thus, there being no pending application for setting aside the arbitral award, or any reason for refusal of recognition and enforcement of the award as prescribed by section 37 of the Arbitration Act, I have no hesitation in holding that the application is merited. Indeed, counsel for the respondents conceded to the application. Consequently, the application dated March 18, 2022 is hereby allowed and orders granted in the following terms:
- (a) That the final award dated January 25, 2022 issued and published by Jacqueline Waihenya, FCI Arb in respect of the arbitration between the applicant, Mngiwa General Contractors Limited, and the 1st respondent, Coast Institute of Technology, be and is hereby recognized as binding; and that leave be and is hereby granted to the applicant, to enforce it as a decree of the court in accordance with section 36(1) of the Arbitration Act, 1995;
 - (b) That a decree be issued accordingly;
 - (c) As costs follow the event, costs of the application are hereby awarded to the applicant.
12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF AUGUST 2022.

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OLGA SEWE
JUDGE

