



**Futurerock Limited (Formerly Futureway Limited) v National
Oil Corporation of Kenya (Miscellaneous Civil Case 532 of 2018)
[2022] KEHC 14423 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL CASE 532 OF 2018
A MABEYA, J
OCTOBER 28, 2022
IN THE MATTER OF THE ARBITRATION ACT, 1995**

BETWEEN

**FUTUREROCK LIMITED APPLICANT
FORMERLY FUTUREWAY LIMITED)**

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

RULING

1. Before court is a chamber summons application dated June 24, 2021. It was brought under section 36(1) of the *Arbitration Act* 1995 and rule 9 of the *Arbitration Rules* 1997.
2. The application sought that the arbitral award dated October 8, 2018 made by Dr Kariuki Muigua in the arbitration between the applicant and the respondent be recognized and adopted as an order of the court.
3. The grounds for the application were set out on the face of the summons and on the supporting affidavit sworn by Maryanjeline Barasa on June 24, 2021. These were that, there was an imminent danger of the respondent being wound up. Its CEO had informed the Senate Standing Committee on Energy in October 2020, that the respondent was under a real and imminent threat of being wound up for inability to pay its debts to its lenders. A copy of a newspaper article from Daily Nation dated October 13, 2020 was annexed as MB1.
4. That in November 2020, the National Assembly's Committee on Energy recommended that the respondent be wound up as it was a loss-making entity. A copy of a newspaper article from Business



- Daily dated November 5, 2020 was annexed as MB2. That if such winding up took place before enforcement of the award, the applicant would lose the award sum of Kshs 44,401,109.20 plus interest.
5. That the respondent had filed an application dated January 21, 2019 seeking to set aside the award but the same was dismissed on May 29, 2020. It subsequently filed an application dated June 10, 2020 seeking leave to appeal against the ruling of May 29, 2020, but the same was dismissed on June 10, 2021.
 6. That the applicant was a judgment creditor to the tune of Kshs 44,401,109.20 but it could not enforce the same against the respondent unless the orders sought herein were granted.
 7. The respondent opposed the application vide the replying affidavit sworn by Lilian Waweru on October 12, 2021. It was denied that the respondent was unable to satisfy any decree against in in this matter, and that the allegation about the respondent's winding up was based on speculation and hearsay. That there was no report from the Senate resolving to wind up the respondent. That the newspaper copies were inadmissible evidence without formal proof.
 8. It was further contended that the arbitrator's conduct was questionable leading to doubt on his impartiality and independence thus the award ought not to be enforced as prayed. That there are no reasons in the award, the arbitral costs are unjustified and no breakdown given. If the orders sought are granted, it would be prejudicial to the respondent. That the applicant had declined negotiations to settle the matter amicably and if the orders sought are granted, the applicant would commence execution without attempting negotiations.
 9. The application was canvassed by way of written submissions which the court has carefully considered. The main issue for determination is whether the applicant has met the conditions set under the *Arbitration Act* for the enforcement of an arbitral award.
 10. The applicant's case was that the award had not been set aside despite the respondent's application and no appeal had been preferred against it.
 11. Section 36 of the *Arbitration Act* sets out the legal parameters governing enforcement and adoption of an arbitral award. It provides: -
 36.
 - (1) An arbitral award, irrespective of the state in which it was made 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) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
 - (a) the duly authenticated original arbitral award or a duly certified copy of it; and
 - (b) the original arbitration agreement or a duly certified copy of it.
 - (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified 'translation of it into the English language.
 12. In *Samura Engineering Limited vs Don-Wood Co Ltd [2014] eKLR*, it was held: -

' Of course, section 36(1) of the act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the act, and I should add, to the *Constitution*. Section 36(3) of the act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly



authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed..'

13. I have perused the record. I am satisfied that the applicant has met the preconditions for the enforcement of the award. The onus now shifts to the respondent to demonstrate why the award should not be adopted.
14. Section 37 of the *Arbitration Act* guides the court in determining whether or not it should recognize and enforce an award. The respondent's case is that the respondent has not been wound up and that there is no evidence that it is unable to pay the debt herein. The respondent however faults the arbitrator's conduct in arriving at the award and also challenges the arbitrator's costs.
15. The respondent had an opportunity to raise to raise all these in its application dated January 21, 2019 that sought to set aside the award. The same having been dismissed on May 29, 2020, all those issues became res judicata. This court cannot now attempt to act as an appellate court by re-examining issues that have already been or could have been determined.
16. Consequently, the application is found to be meritorious and is allowed as prayed.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

A. MABEYA, FCIArb

JUDGE

