



Senaca International Limited v Bollore Transport & Logistics (Kenya) Limited (Arbitration Cause E031 of 2022) [2022] KEHC 15978 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E031 OF 2022
A MSHILA, J
NOVEMBER 25, 2022**

BETWEEN

SENACA INTERNATIONAL LIMITED CLAIMANT

AND

BOLLORE TRANSPORT & LOGISTICS (KENYA) LIMITED RESPONDENT

RULING

Background

1. The Applicant filed a Chamber Summons dated 4th April, 2022 under Section 36(1) of the *Arbitration Act*, 1995 and Rules 9 and 11 of the *Arbitration Rules*, 1997 and all other enabling provisions of the Law, for orders that;
 - a. The Amended Final Award as amended at Nairobi on January 10, 2022 and delivered by the Hon. Justice (Rtd) J. B. Havelock, C. Arb. be recognized and adopted as a Judgment of the Court.
 - b. Judgment be and is hereby entered in terms of the Amended Final Award as amended at Nairobi on January 10, 2022 by the Hon. Justice (Rtd) J. B. Havelock, C. Arb.
 - c. The costs of this Application be in the Cause.
2. The Application was served on the Claimant and at the date set down for hearing no objection or appeal had been preferred against the Amended Final Award.
3. The Respondent in canvassing the application relied on the Supporting Affidavit made by Jacqueline Onsando and the certified copy of the Amended Final Award annexed thereto. Hereunder is a summary of the Applicant/Respondent's claim;



Applicant/respondent's Case

4. The Application was supported by the sworn Affidavit of Jacqueline Onsando who stated that she was the Respondents Legal Manager Kenya and Regional Company Secretary.
5. The dispute between the parties arose from the Service Agreement made on the March 14, 2018; the Hon. Arbitrator Hon. Justice (Rtd) J.B.Havelock, C.Arb was appointed as the sole arbitrator in the matter and he delivered the Award in terms of the Amended Final Award as amended on January 10, 2022 (marked J03).
6. The Respondent has since settled the sums adjudged as due and payable in the said award save for the Claimant's Advocate's costs; In addition, the Claimant has not taken any steps to set aside the Amended Final Award within the limited time which has since lapsed.
7. The Respondent prayed that the Amended Final Award be adopted, recognized and enforced as a judgment of this Court.

Respondent/claimant's Case

8. In response, the Respondent submitted that the issue of termination of arbitral proceedings is governed by S.33 of the Arbitration Act. Thus the question as to when arbitral proceedings are terminated depends on the prevailing circumstances of each case and should be determined on case to case basis and may not stand as terminated despite the publishing of the final award.
9. The dispute between the parties herein is whether the Amended Final Award published by the Arbitrator settles the dispute between the parties with finality. The Respondent's position is that the Arbitrator has not settled all the issues before him. The issue of apportioning and assessing quantum of the costs payable remains unresolved.
10. The Claimant had made an application for the assessment and ascertainment of quantum before the arbitral tribunal and the Arbitrator made a ruling that he had jurisdiction to tax the bill of costs as requested by the Claimant. The Respondent/Applicant has not moved to set aside the Arbitrator's ruling hence the same stands as ruled and as per the said ruling, the issue of costs is pending before the Arbitrator and thus the arbitral proceedings between the parties have not been closed.
11. Further, the Respondent submitted that Section 33B of the Arbitration Act gives the parties to an arbitration proceeding the autonomy to agree on the issue of costs failure to which the Arbitrator is clothed with powers to apportion the costs as well as the power to award the costs determined as part of the award or as an additional award.
12. The Respondent argued that the need to assess and apportion costs can only arise when the Arbitrator has made a pronouncement that a party is entitled to costs of the arbitration proceedings unless parties agree on the quantum themselves.
13. The Respondent relied on the decision of the Court of Appeal in Kenfit Limited vs Consolata Fathers where the Court held that parties should litigate matters in full and should not recognize partial awards and later recognize and enforce costs relating to the same arbitral proceedings.
14. It was the Respondent's position that the prayer to adopt the arbitral award is not ripe for adoption.



Issues For Determination

15. After reading the Application, the Supporting Affidavit and perusing the Annexure this court has framed only one issue for determination;
 - i. Whether the Applicant/Respondent has made out a case for recognition and adoption and enforcement of the Amended Final Award as a judgment of the court?

Analysis

16. Being that the Arbitral process is a consensus, voluntary procedure through which parties choose to resolve their dispute; the court can only intervene in that process as set out under Section 10 of the Arbitration Act which provides that:

“Extent of court intervention

Except as provided in this Act, no court shall intervene in matters governed by this Act.”

17. Section 32A of Arbitration Act states:

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”

18. In *Prof. Lawrence Gumbo & Another vs. Honourable Mwai Kibaki & Others*, High Court Miscellaneous No. 1025 of 2004, the Court held that:

“Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented...”

19. Under section 32(A) of the 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 Act.

20. The High Court under Section 36 has the power to recognize and enforce domestic arbitral award on the following terms:

“36 (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.”

21. The Respondent has annexed to the Summons a certified copy of the Amended Final Arbitral Award (Annexure ‘JO3’). There were no grounds presented to this court by the Claimant as provided by Section 37(1) of the Arbitration Act that would have vitiated the Amended Final Award. Having perused the documents presented and after satisfying itself that the necessary provisions of the law had



been complied with this Court is satisfied that there are no anomalies in the Amended Final Award that may lead this Court to refuse to recognize and adopt the Amended Final Award.

22. In the absence of any Application to set aside the award under the listed grounds for non-recognition or any other challenge or any preferred appeal, this Court finds that the Applicant has satisfied the conditions precedent and finds that the Application to be merited.

Findings And Determination

23. In light of the foregoing this court makes the following findings and determinations;
- i. This Court finds that the Application to be merited and it is hereby allowed.
 - ii. The Amended Final Award as amended at Nairobi on January 10, 2022 and delivered by the Hon. Justice (Rtd) J.B.Havelock, C.Arb., the Arbitrator, be and is hereby recognized and adopted as an judgment of this Court.
 - iii. Judgment be and is hereby entered in terms of the Amended Final Award as amended at Nairobi on January 10, 2022 by the Hon. Justice (Rtd) J.B.Havelock, C.Arb.
 - iv. Each party shall bear its own costs of this Application.
- 24 Orders accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Masika for the Respondent

Wanyonyi holding brief for Mr. Tito for the Claimant

Lucy-----Court Assistant

