



Jupiter Electrical & Contractors v Muthemba & Michuki (Sued as administrators of the estate of the late) Louis Njuguna Muthemba & another (Civil Suit 347 of 2011) [2022] KEHC 15750 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15750 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 347 OF 2011
CW MEOLI, J
NOVEMBER 24, 2022

BETWEEN

JUPITER ELECTRICAL & CONTRACTORS PLAINTIFF

AND

ROSE WARUINU MUTHEMBA & JOHN NJOROGE MICHUKI (SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE) LOUIS NJUGUNA MUTHEMBA 1ST DEFENDANT

DESMOND PATRICK MAINA MUTHEMBA & DOREEN WANGARE MUTHEMBA (SUED AS ADMINISTRATORS (GUARDIANS IN LUNACY) OF THE ESTATE OF) ROSE WARUINU MUTHEMBA 2ND DEFENDANT

RULING

1. The motion dated 11.05.2021 by Jupiter Electrical & Contractors, the Plaintiff (hereafter the Applicant) seeks leave to enforce as a decree of this court the final arbitral award dated 31.07.2015 with interest at the rate of 14% per annum together with costs awarded on 31.05.2018. The motion is expressed to be brought under Section 36(1) of the *Arbitration Act* and Rules 6 & 9 of the Arbitration Rules 1997 inter alia, and on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Joseph Kigara, a director of the Applicant.
2. The affidavit is to the effect that on 19.12.2012 the court granted an application for referral of the suit to arbitration and upon determination, a final arbitral award was issued on 31.07.2015. That the award directed the John Njoroge Michuki, Desmond Patrick Maina Muthemba and Doreen Wangare Muthemba, the 1st and 2nd Defendant/Defendants (hereafter the 1st and 2nd Respondent/Respondents) to pay the Applicant the sum of Kshs. 2,650,000/- as damages for breach of the sale



- agreement. That in addition to the foregoing costs of the suit were awarded and were to be agreed between the parties herein within 45 days from the date of the award failing which the cost would be taxed by the tribunal in accordance to Section 32B of the *Arbitration Act*.
3. The deponent states further that in May 2016 the Respondents made three payments totaling the sum of Kshs, 2,650,670/- towards the arbitral award, but as the suit was filed on 07.08.2013 and payments made on 06.05.2016 interest of the sum of Kshs. 1,051,166 is payable and costs were not agreed upon. That following unsuccessful attempts by the Applicant's advocate to have the outstanding interest and costs settled the costs were taxed by tribunal and an award issued on 31.05.2018 directing the Respondents to pay the Applicant the sum of Kshs. 552,053/-. Further that, to date, no objection has been raised in that regard and yet the Respondents have failed to settle the interest and taxed costs and have given no reasonable explanation for the delay in payment.
 4. The Respondents oppose the motion through grounds of opposition dated 06.12.2021 and a replying affidavit sworn by Desmond Patrick Maina Muthemba on his own behalf and on behalf of his co-Respondents. The Respondents take the position that levying interest at the rate of 14% per annum is unconscionable and unreasonable as the monies remitted as purchase price of the suit property was not applied to make profit; that the motion offends the law of equitable principle that a claim against a mentally incapacitated person should not accrue penalty by way of interest; that the fact of the vendor Rose Waruinu Muthemba being declared mentally incapacitated, was the reason for delay in settling the arbitral award; and that to date the parties are yet to agree on the interpretation of the commencement of accrual of interest awarded in the final arbitral award and it would be prejudicial for the Respondents to be condemned to pay undetermined interest.
 5. The deponent confirms that prior to the onset of the medical condition leading to mental infirmity in 2018, Rose Waruinu Muthemba made three payments totaling Kshs. 2,650,670/- towards the awarded sums. He goes on to depose that due to the mental infirmity that continues to afflict Rose Waruinu Muthemba she was unable to offset the remaining arbitral award and asserts that upon declaration of the mental infirmity of such person no interest can accrue on a claim against her. He urges the court ought to stay enforcement of interest on the balance of the arbitral award and costs, as the administrators of the estate of Rose Waruinu Muthemba devise a payment plan for settling the outstanding arbitral amounts .
 6. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the provisions Section 36(1) of the *Arbitration Act* and Rule 4, 5 & 6 of the Arbitration Rules 1997 to submit that the Applicant has complied with the relevant rules of procedure before lodging the instant motion for enforcement of the arbitral award by issuing a notice dated 10.12.2019.
 7. In response to the grounds of opposition raised by the Respondents counsel anchored his submissions on the provisions of Section 37 of the *Arbitration Act* and the decisions in *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 & Co. Ltd v Nature Green Holdings Ltd* [2017] eKLR to argue that the Respondents have not demonstrated any conditions under Section 37 at the time of the arbitral proceedings for challenging the recognition and enforcement of the final award dated 31.05.2015 and award on costs dated 31.05.2018. That mental infirmity or incapacitation of Rose Waruinu Muthemba estate does not preclude the appointed administrators of her estate from settling liabilities of the estate. Reiterating the affidavit material counsel urged the court to allow the motion.
 8. The Respondents failed to file submissions despite being given ample opportunity to do so.



9. The Court has considered the rival affidavit material and submissions made in respect of the motion. It is not in contention that the dispute herein was referred to arbitration and a final arbitral award delivered on 31.07.2015 and an award on costs subsequently issued on 31.08.2018. It is further not disputed that Rose Waruinu Muthemba who at the time was a Respondent in the arbitral proceedings, had in May of 2016 paid a total sum of Kshs. 2,650,670/- in a bid to settle the awards and that at the time of the instant motion, no challenge to the arbitral award had been filed by the Respondent pursuant to Section 35 of the Arbitration Act. Section 36 (1) & (3) of the Arbitration Act provides as follows: -
- (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.”
10. Section 37 of the Act provides for grounds upon which an application to enforce an arbitral award can be refused or award set aside. The provisions of Section 36 (1) & (3) and 37 of the Arbitration Act inter alia require the party seeking to enforce an arbitral to furnish the original arbitral award or a duly certified copy thereof and the original arbitral agreement or duly certified copy thereof with the application. The matter having been referred by order of the court to arbitration, all that was required of the Applicant herein was to furnish the arbitral award.
11. The arbitral award and that in respect of costs were delivered on 31.07.2015 and 31.08.2018, respectively. The Applicant is therefore entitled to the fruits of the arbitration. On a perusal of the record the court confirmed that the notice of the arbitral decision was duly filed by the Applicant. However, the requirement in section 36 (3) for the applicant seeking recognition and enforcement of an award to furnish the original arbitral award or a certified copy and the original arbitral agreement or a certified copy is couched in mandatory terms.
12. The Supreme Court in *Moses Mwicigi and 14 Others vs Independent Electoral and Boundaries Commission and 5 Others* [2016] eKLR while addressing itself on the purpose of rules of procedure expressed itself in part as follows: -
- “65. This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so clearly intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”
13. While arbitration is undoubtedly a useful and expeditious mechanism for settling disputes, and concomitantly section 36 of the Act is designed to enhance the enforcement of the arbitral awards, the



court agrees with Nzioka J. in *Riley Services Limited v Attorney General of the Republic of Kenya & another* [2019] eKLR where she stated that:

“The provisions of section 36(2) of the *Arbitration Act* are couched in mandatory terms failure to comply with the same renders the application incurably defective. Even if the Court were to disregard the same, it cannot give an order to enforce awards not availed to enable it appreciate the content thereof and/or verify that indeed the amount sought as awarded was awarded and is due and owing.”

14. In the instant matter there is some contention by the Respondents regarding the accrual date in respect of interest on the amounts awarded. An uncertified copy of the arbitral decision was annexed to the supporting affidavit as “JK-1”. A certified copy would serve in the verification and authentication of the terms of the arbitral decision. In the absence of such copy, the court is of the view that the enforcement motion is incompetent for non-compliance with the provisions of Section 36(3) of the *Arbitration Act*. The motion is therefore be struck out but the court orders that costs be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF NOVEMBER 2022

C.MEOLI

JUDGE

In the presence of:

Mr.Kwaka for the Applicant

Mr. Ms. Wanjau h/b for Mr. Kihara for the Respondents

C/A: Carol

