



**Nyakongo t/a HR Ganijee & Sons v Independent Electoral & Boundaries Commission  
(Civil Suit 61 of 2015) [2022] KEHC 16637 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 61 OF 2015  
OA SEWE, J  
DECEMBER 20, 2022**

**BETWEEN**

**JOHN OMOLLO NYAKONGO T/A HR GANIJEE & SONS ..... APPLICANT**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES  
COMMISSION ..... RESPONDENT**

**RULING**

- 1 The application that is the subject of this ruling is the Chamber Summons dated November 17, 2022. It was filed on November 18, 2022 by the applicant, John Omollo Nyakongo, under section 36(1) and (3) of the *Arbitration Act*, 1995 (as amended by the Arbitration (Amendment) Act no 11 of 2009) and rules 6 and 9 of the *Arbitration Rules*, 1997 for orders that:
  - a Spent
  - b The final award made and published by Dr Kariuki Muigua (sole arbitrator) on December 31, 2018 be recognized and adopted as a judgment of the court.
  - c Leave be granted to the applicant to enforce the Final Award made and published by Dr. Kariuki Muigua (Sole Arbitrator) on 31st December, 2018 as a decree of the Court.
  - d The costs of the application be awarded to the applicant.
- 2 The application was based on the grounds that the applicant and the respondent entered into a contract dated August 12, 2011 whereby the respondent appointed the applicant as a contractor for the purpose of the completion of an office block and a multipurpose hall in Kwale at a cost of kshs 2,848,251.68. It was further the contention of the applicant that subsequently, a dispute arose necessitating the filing of this suit, being Mombasa HCCC no 61 of 2015 against the respondent, seeking payment of kshs 7,165,486.17 together with interest and costs. It was further deposed that thereafter the respondent,



vide an application dated May 22, 2015, sought stay of proceedings pending arbitration in accordance with clause 37.1 of the contract; which application was allowed by consent on December 17, 2015.

3 The applicant further averred that, upon the appointment of Dr Kariuki Muigua as the sole arbitrator, the arbitration proceedings were held and an award published on December 31, 2018 in favour of the applicant in the sum of kshs 12,759,644/= together with interest at the rate of 21% from November 1, 2016 until payment in full. The applicant was also awarded costs of the arbitration proceedings. The applicant thereafter had his costs taxed and a certificate of taxation issued in the sum of kshs 5,782,746.39 against the respondent. Although the respondent filed an application dated December 6, 2019 seeking to have the arbitral award set aside, the said application was dismissed vide a ruling dated February 26, 2021. It was therefore the contention of the applicant that, in the circumstances, this matter is now ripe for enforcement of the arbitral award.

4 The application was supported by the averments set out in the affidavit of the applicant, sworn on November 17, 2022 as well as the documents annexed thereto. The annexures include a certified copy of the contract dated August 12, 2011 (annexure “JON-1”), a copy of the arbitral award published on December 31, 2018 (annexure “JON-3”) as well as a copy of the ruling dated February 26, 2021 (annexure “JON-7”).

5 At paragraph 18 of his Supporting Affidavit, the applicant deposed that he had initially filed an application for enforcement of award dated August 11, 2021, but has since withdrawn the same, principally on the ground that the figures as tabulated therein were disputed by the respondent. He exhibited a copy of The Notice of withdrawal as annexure “JON-11” to his Supporting Affidavit.

6 The applicant explained that he is currently unwell and has been advised to seek medical attention abroad; but cannot do so without funds. He annexed copies of his medical records as annexure “JON-8” and averred that it is in the interest of justice that his application be determined as a matter of urgency. The application also exhibited a copy of a letter dated October 19, 2022 (marked annexure “JON-10”) by which the respondent confirmed that it is in the process of approving the applicant’s payment; and that the sums due to the applicant would be paid once the respondent received its allocation of funds from the national assembly.

7 The court record shows that, although the application was duly served for inter partes hearing on December 13, 2022, the respondent neither filed a response nor attended court to defend the said application. The matter proceeded *ex parte* in the circumstances, and Ms Murage for the applicant essentially reiterated the applicant’s averments as set out in his Supporting Affidavit.

8 Section 36(1) of the [Arbitration Act](#), pursuant to which the instant application has been brought, provides that:

“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 In this instance, there is no dispute that, by mutual consent, the parties submitted themselves to the jurisdiction of the arbitral tribunal pursuant to their contract, by which they covenant at clause 37.1 that:

“In case any dispute or difference shall arise between the employer or the project manager on his behalf and the contractor, either during the progress or after the completion or termination of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an



arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties."

10 From the material presented before the court, the arbitration was successfully conducted by Dr Kariuki Muigua and an award published on December 31, 2018 pursuant to which the respondent was to pay the applicant a total of kshs 12,759,644.64 together with interest at the rate of 21% from November 1, 2016 until payment in full, in addition to costs and expenses of the arbitration. That is the award that the applicant now seeks to enforce; there being no pending application for setting aside the said award. Indeed, vide a letter dated October 19, 2022 (annexure "JON-10") the respondent indicated that it was ready and willing to pay the sums awarded to the applicant; and that it was awaiting its exchequer allocation to enable payment.

11 Clearly therefore, the application has merit, noting that rule 6 of the Arbitration Rules, 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." (emphasis supplied)

12 And, in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR the Court of Appeal held that:

"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."

13 In the light of the foregoing, I find merit in the application dated November 17, 2022. The same is hereby allowed and orders granted as hereunder:

a The final award made and published by Dr Kariuki Muigua (sole arbitrator) on December 31, 2018 be and is hereby recognized and adopted as the judgment of the court.

b Leave be and is hereby granted to the applicant to enforce the final award made and published by Dr Kariuki Muigua (sole arbitrator) on December 31, 2018 as a decree of the court.

[c] The costs of the application are hereby awarded to the applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF DECEMBER 2022.**

.....

**OLGA SEWE**

**JUDGE**

