



Mobile Accord Incorporated v Reelforge Systems Limited (Miscellaneous Application E239 of 2021) [2021] KEHC 44 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 44 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E239 OF 2021

DAS MAJANJA, J

SEPTEMBER 23, 2021

BETWEEN

MOBILE ACCORD INCORPORATED APPLICANT

AND

REELFORGE SYSTEMS LIMITED RESPONDENT

RULING

1. The Applicant has moved the court by the Chamber Summons dated 30th March 2021 seeking recognition and enforcement of an Interim Award dated 30th June 2020 and a Final Award dated 14th August 2020 issued by Jane Michaels, Arbitrator in a reference between the parties.
2. The Application grounded on the supporting and supplementary affidavits of Timur Nusratty, the Applicant's General Counsel and Executive Vice President, sworn on 24th March 2021 and 1st September 2021 respectively. The Respondent has opposed the application through the replying affidavit of its director, Sammy Moses Lusiola sworn on 29th July 2021. The application was canvassed by written submissions.
3. By way of a brief background, the Applicant and the Respondent entered into a subscription agreement dated 25th November 2014 ('the Agreement') in which the Applicant undertook to provide the Respondent with access to proprietary data it had collected using its proprietary technology. The Respondent in turn agreed to remit an annual platform fee. Under the Agreement, the parties agreed to settle disputes arising therefrom by binding arbitration to be conducted in Denver, Colorado, United States.
4. In due course, the Respondent fell into arrears under the Agreement. The parties entered into a settlement agreement executed on 19th January 2017. Following breach of the agreement by the Respondent, the dispute was referred to arbitration in Denver, Colorado before Jane Michaels, the sole



arbitrator. Both parties participated in the arbitral proceedings. The Arbitrator rendered an interim award on 30th June 2020 for KES 26,097,367,00 and an additional daily interest of KES. 16,837.00 from 30th June, 2020 until payment in full. The final award was rendered on 14th August 2020 directing the Respondent to pay the Applicant USD 77,486.50 and the Applicant's reasonable attorneys' fees incurred arising from its enforcement of the letter of agreement.

5. The Applicant's case is that it has complied with the provisions of section 36(3) of the *Arbitration Act* which state as follows;

36. Recognition and enforcement of awards

(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.

6. The aforesaid provisions mirror Article 1V of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958* ("The New York Convention") which is incorporated in the Agreement. New York Convention stipulates that in order to obtain the recognition and enforcement of an arbitral award to which the convention applies, the party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy thereof and the original agreement referred to in article II or a duly certified copy thereof.

7. The Respondent contends that the Applicant has not complied either with Article IV 1(a) of the New York Convention or section 36(3)(a) of the *Arbitration Act* as it has failed to supply to this court the original or duly authenticated interim and final awards or duly certified copies thereof.

8. The Respondent further points out that the arbitration between parties was administered by the International Centre for Dispute Resolution (ICDR) under the auspices of the American Arbitration Association ("AAA") using the International Arbitration Rules of the AAA in effect on and as of the Effective Date. Article 30(4) of the said Rules provides that "the award shall be transmitted in draft form by the tribunal to the Administrator. The award shall be communicated to the parties by the Administrator." Pursuant thereto, the interim award dated 30th June 2020, and final award dated 14th August, 2020, were communicated to the parties by the administrator of the ICDR. The Respondent submits that the interim and final awards provided by the Applicant are neither the original versions nor the duly authenticated or certified copies thereof.

9. The Respondent rejects the affidavit sworn by the arbitrator, Jane Michaels, in Colorado on 3rd September 2021 in which she purported to certify the interim award dated 30th June 2020, and the final award dated 14th August 2020 as true and correct copies of the awards issued in the arbitration proceedings do not comply with the New York Convention and the *Arbitration Act*.

10. The Respondent impugns the Arbitrator's conduct of purporting to swear an affidavit at the request of the one party which is forbidden by Article 13(6) of the Rules. It contends that this fact is an admission that the interim and final awards annexed to the applicant's supporting affidavit were not duly certified otherwise there would be no need for the arbitrator to swear an affidavit now purporting to certify them. In its view, the interim and final awards now annexed to the applicant's supplementary affidavit cannot lawfully and regularly be certified by the arbitrator.



11. The Respondent submits that pursuant to Article 30(4) of the International Arbitration Rules, the arbitrator sent to the administrator of the ICDR the draft interim and final awards and it is the administrator of the ICDR who then sent to the parties the versions that the parties have come to know as the interim and final awards. Consequently, it is only the administrator of the ICDR who could certify the copies of the awards that it sent to the parties as being true copies of the versions of the draft that she received from the arbitrator. In the circumstances, it urges the court to reject the application.
12. The Respondent relied on the decision in *Ndiritu Muchemi Michael & 2 Others v Ashbell Macharia Wachira & Another [2018] eKLR* where the court. Nzioka J. held that:
 - (21) ...the provisions of Section 36 (3) of the Act make it mandatory that the original Arbitral Award or a duly certified copy of it must be furnished by the Applicant making an application under the Section.
 - (22) ...The only clear thing is that the said annexed Award is not the “original” copy and is not certified. Yet the provisions are very clear, the copy that should be annexed to the Application must be a “duly certified copy.” Similarly, Section 36(3)(b) states that “in addition to provision of the original certified copy of the Arbitral Award, the original Arbitration Agreement or a duly certified copy thereof must be provided.” That has not been done herein
 23. In that regard, the Applicants in their Application dated 29th September, 2016 have not fully complied with the mandatory provisions of order 36 (3) of the *Arbitration Act*. Therefore, there is no competent Application before the Court for consideration. The Application is consequently struck out and all the prayers therein fall by the way.”
13. The Respondent also attacks the supporting affidavit of Timur Nusratty sworn on 24th March, 2021 on the ground that it purports to support an application that was non-existent at the time when the affidavit was sworn as the application was made on 30th March, 2021 which is 6 days after the affidavit had been sworn. It urges that the court ought, in the circumstances of this application, to refuse to exercise its discretion under Order 19 rule 8 of the *Civil Procedure Rules* to admit the affidavit.
14. In response to the Respondent’s arguments, the Applicant submits that Kenya is a signatory to the New York Convention which is applicable is domesticated under Article 2 (6) of the Arbitration Act and reinforced by section 36 (2) of the *Arbitration Act* which states that, “an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.”
15. The Applicant submits that it has met both the criteria set out in the New York Convention and the *Arbitration Act* which prescribe minimum formal requirements for enforcement or international arbitral awards. They require an applicant seeking recognition to supply a duly authenticated original award, or a duly certified copy thereof as well as the original arbitration agreement or a duly certified copy thereof. The Applicant cites *Royal Exchange PLC v Patrick Nyaemba Tumbo [2019]eKLR* and *Federica Martina Ferro v Gabriella Zouras Ferro* to support this position.
16. In response to the Respondent’s objection regarding the manner of certification, the Applicant submits that section 36(3) of the *Arbitration Act* does not specify the manner of certification. It relies on *Nanda Properties Ltd v Amreek Singh Mudher & another [2021] eKLR* which cited with approval the decision in *Kay Construction Co Ltd v Attorney General* where the court stated that, “the provisions of section 36 (3) of the *Arbitration Act* do not specify who is to certify the award or the document



and the sections [65-68] of the Evidence Act do not apply.” It adds that the Applicant has nevertheless furnished a version of both the interim and final awards which have been duly certified by the sole arbitrator in the proceedings in Denver. Counsel urged the court to adopt the decision in *Pathologist Lancet Kenya Limited v Christamarianne Mission Hospital [2021] eKLR* where the court found that the contents of the awards are not disputed and observed that:

[I]n *Samura Engineering Limited v Don-Wood Co. Ltd* the court held as follows: “Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made....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...” ...the certification of the award and agreement are also not in issue in this case for reasons that this court made a determination on the respondent’s application to set aside the award under section 35 of the Act...

17. It is apparent from the arguments raised by the Respondent that it does not dispute the fact of the interim and final awards or their substance. It has raised technical objections regarding the affidavit and the manner in which the awards were certified. As regards, the argument that the affidavit in support of the application was sworn before the application, the answer is to be found in Order 19 rule 8 of the Civil Procedure Rules which permits the court to admit an affidavit sworn before the date the application was dated or filed. In my view, admission of the affidavit does not prejudice the Respondent as the affidavit is merely formal and presents the documents which are not disputed in any material way. I reject this objection.
18. I accept the *dicta* of the court in *Nanda Properties Ltd v Amreek Singh Mudher & another (Supra)* and *Pathologist Lancet Kenya Limited v Christamarianne Mission Hospital (Supra)* that the awards are not disputed in form and substance and that the manner of certification is not prescribed in the Arbitration Act and any manner of certification provided from the said country is acceptable. The Respondent does not suggest that the certification, as such, does not comply with the law of the country of origin. Finally, the court must take the award as it finds it. If, as the Respondent argues, there was a breach of procedure in the manner it was forwarded to the Applicant, then it is entitled to move the Arbitral Institution appropriately or otherwise apply to set aside the award on grounds set out in section 35 of the Arbitration Act.
19. For the reasons I have set out, I find that the Applicant has established the basis for the recognition and enforcement under section 36 of the Arbitration Act. Consequently, I allow the Chamber Summons dated 30th March 2021 and order as follows:
 - a. The interim award issued on 30th June, 2020 and the final award issued on 14th August, 2020 by the arbitrator, Jane Michaels, in the arbitral proceedings between the parties herein in Denver, Colorado in ICDR Case No. 01-19-0002-5346 be and is hereby recognized as a judgment of this court and a decree shall issue accordingly.
 - b. Leave be and is hereby granted to the Applicant to enforce the decree.
 - c. The Respondent shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE



Court Assistant: Mr M. Onyango

Mr Gethoi instructed by CM Advocates LLP for the Applicant.

Mr Obok instructed by Prof. Albert Mumma & Company Advocates for the Respondent.

