



**Fondo & 3 others v Masha (Environment and Land Miscellaneous Application 24 of 2021) [2022] KEELC 2620 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2620 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 24 OF 2021**  
**MAO ODENY, J**  
**JULY 5, 2022**  
**N THE MATTER OF LAND ADJUDICATION ACT CAP 284 READ**  
**TOGETHER WITH THE LAND CONSOLIDATION ACT CAP 283 LAWS OF**  
**KENYA**  
**IN THE MATTER OF THE ARBITRATION ACT CAP 49 LAWS OF KENYA**  
**IN THE MATTER OF RECOGNITION AND ENFORCEMENT OF AN**  
**ARBITRAL AWARD**  
**IN THE MATTER OF PARCEL MWANDA/MBALAMWENI/985**  
**ADJUDICATION SECTION**

**BETWEEN**

**MUTSUNGA SAIDI FONDO ..... 1<sup>ST</sup> APPLICANT**  
**ERICK KAZUNGU KATANA ..... 2<sup>ND</sup> APPLICANT**  
**TIMOTHY FONDO RUWA ..... 3<sup>RD</sup> APPLICANT**  
**HENRY MASHA KALAMA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**NGUMBAO CHARO MASHA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 28<sup>th</sup> May 2021, brought under the provisions of Sections 2 and 36 of the *Arbitration Act*, 1995; Section 7, 30(1) of the *Land Adjudication Act*; Section 10 of the *Land Consolidation Act*, and Section 1A, 1B and 3B, of the *Civil Procedure Act*, 2010 by the Applicants seeking the following orders: -



- a) That the Arbitral award given by the Arbitral Tribunal constituted under the [Land Adjudication Act](#) and published on 4<sup>th</sup> December 2020, be and is hereby recognized and is enforceable as a judgment of this Honourable Court; and
- b) That the costs of this application be in the cause.

Counsel agreed to canvas the application vide written submissions which were duly filed.

### **Applicants' submissions**

2. The Applicant relied on the grounds on the face of the application and the supporting affidavit dated 18<sup>th</sup> June 2021, sworn by the 1<sup>st</sup> Applicant; Mutsunga Saidi Fondo who deponed that following a dispute before the Land Adjudication Officer over land parcel Mwanda/Mbalamweni/985, measuring approximately 407 acres, the Applicants and Respondent were awarded 367 acres and 40 acres respectively vide an award dated 22<sup>nd</sup> September 2017.
3. The Applicant further stated that before the award could be enforced, the Applicants discovered that new numbers had been illegally issued within the suit property which issue was subjected to fresh adjudication before another adjudication board which after hearing the parties on merit made a similar award as the former board on 4<sup>th</sup> December 2020 as follows:
  - i. That all the new subdivisions and new numbers within Mwanda/Mbalamweni/985 illegally done be vacated and the suit property be divided only into two portions.
  - ii. That the two portions would comprise 367 acres to be awarded to the Applicants while 40 acres to be awarded to the Respondents.
4. The Applicant therefore deponed that neither has there been an appeal filed nor the award set aside hence the same should be enforced as an order of the court.
5. It was counsel's submission that the certified copies of the proceedings and original award were obtained on 22/3/2021 and the area being an adjudication section, the Applicants sought requisite Consent to institute this suit under Section 30(1) of the [Land Adjudication Act](#) which consent was granted. That the Applicants have complied with all mandatory provisions hence prays that this Honourable Court find that the award is competent and valid and therefore not amenable for setting aside orders or variation.
6. The Respondents have neither appealed nor prayed to set aside the award within the statutory period of three months.
7. Counsel filed submissions and stated that the issues for determination are: -
  - i. Whether the Arbitral Award is competent within the meaning of Section 36 [Arbitration Act](#) and therefore amenable to enforcement of this Court.
  - ii. Whether the Respondent's claim has proved any grounds for setting aside the Arbitral Award.
  - iii. Whether the doctrine of Minimum Curial Intervention applies in the present case.
8. Quoting Section 36 (3) of the [Arbitration Act](#) which requires a party relying on an arbitral award to furnish the Court with the original award or a certified copy, counsel submitted that the Applicants had complied with this provision. And relied on the case of [Summit Cove Lines Co Ltd v UAP Insurance Co Ltd](#) [2020] eKLR to buttress this point.



9. On the issue as to whether the Respondent has proved any grounds for setting aside the arbitral award. Counsel submitted that by virtue of Section 36 of the [Arbitration Act](#), 1995, an arbitral award is deemed to be binding and upon application to the High Court, it is enforced; and that any recourse to the Court to set aside such an award should be made within 3 months from the date of the award, as provided for under Section 35(3) of the [Arbitration Act](#).
10. That the Respondent's application to set aside the arbitral award is time barred and cited the cases of [Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd](#) [2015] eKLR; [Mahican Investments Limited & 3 others v Giovanni Gaida & Others](#) NRB HC Misc. Civil App No. 792 of 2004 [2005] eKLR; and Misc. App 780 of 2017 [Castle Investments Company Ltd v Board of Governors – Our Lady of Mercy Girls Secondary School](#) [2019] eKLR.
11. On the issue as to whether the doctrine of minimum curial intervention applies in this case, counsel relied on the case of [Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators –Kenya Branch \(interested party\)](#) [2019] eKLR, and submitted that this court is not required to conduct an analysis of the arbitral award, instead the award is to be read such that only meaningful breaches that cause prejudice are remedied. The court therefore by virtue of the doctrine of minimum curial intervention, is prohibited from considering the Respondent's arguments that were never raised before the arbitrator and urged the court to allow the application for enforcement of the award.

### **Respondent's submissions**

12. It was the Respondent's case that the award filed by the Applicants before this Court was illegally obtained by the Applicants and should therefore not be enforced by this Court. The Respondent further stated that Section 21 of the [Land Adjudication Act](#) was clear on the mode of challenging a decision issued by the Adjudication Committee. That an aggrieved party is to file a complaint to the Executive Officer of the Committee within fourteen days, who shall thereafter submit the same to the board.
13. The Respondent further deponed that instead of following this procedure when their objection was dismissed on 13<sup>th</sup> March 2020, the Applicants went ahead to irregularly obtain another decision in their favour on 4<sup>th</sup> December 2020 without the Respondent's knowledge.
14. Counsel submitted that the Applicants had failed to produce a copy of the award to the Court as required under Section 36 (1) and (3) of the [Arbitration Act](#), and under Section 32 thereon and relied on the cases of [Tanzania National Roads Agency v Kudan Singh Construction Limited Misc Civil App No. 17 of 2012](#) and [Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others](#) [2005] eKLR.

### **Analysis and Determination**

15. This is an application for enforcement of an arbitral award as a judgment of the court. The issue for determination is whether the arbitral award is competent within the meaning of Section 36 of the [Arbitration Act](#) and therefore amenable to enforcement by this Court. Section 36 of the [Arbitration Act](#) provides for the recognition and enforcement of arbitration awards 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.

Section 37 further provides: -

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

a party to the arbitration agreement was under some incapacity; or

the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

i. the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

ii. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

iii. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

iv. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

v. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.



16. The 1<sup>st</sup> Applicant annexed a certified copy of the arbitral award dated 4<sup>th</sup> December 2020 to the supporting affidavit marked as MSF-3. The Respondent's claim that the award was not presented to Court is not factually correct. The Respondent further stated that he was not aware of the arbitral proceedings and that the Applicants obtained the same illegally.

Section 109 of the Evidence Act CAP 80 provides that: -

17. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
18. The Respondent has not substantiated the allegations that the award was illegally obtained by the Applicant by any tangible evidence and therefore has no probative value.
19. I have considered the application, the submissions by counsel and order that the arbitral award dated 4<sup>th</sup> December 2020 is hereby recognized and adopted as a judgment of this court and leave is granted to the Applicant to enforce the arbitral award as a decree of this court. Respondent to bear costs of this application

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF JULY, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules

