



**Agro-Chemical and Food Company Limited v Edon Consultants
International Limited (Commercial Arbitration Cause E015 of 2024)
[2025] KEHC 1956 (KLR) (Commercial and Tax) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E015 OF 2024
AM MUTETI, J
FEBRUARY 12, 2025
IN THE MATTER OF THE ARBITRATION ACT (CAP 49)
AND
IN THE MATTER OF THE ARBITRATION RULES, 1997
AND
IN THE MATTER OF ARBITRATION**

**BETWEEN
AGRO-CHEMICAL AND FOOD COMPANY LIMITED APPLICANT
AND
EDON CONSULTANTS INTERNATIONAL LIMITED RESPONDENT**

RULING

Introduction

1. The applicant in this matter seeks to have an arbitration award adopted, recognized and enforced by this court.
2. The application before the Court is dated 24.1.2024 and is expressed to be brought under the provisions of Section 36 (1) of the *Arbitration Act*, 1995 and Rules 4 (1) and 9 of the Arbitration Rules, 1997.



3. It seeks orders for the Court to recognize and adopt the Final Award made by Hon. Arbitrator, Mr. Tom Onyango Oketch on 22.6.2020 in an arbitration between the parties herein as judgment of this Court and for the Applicant to be granted leave to enforce the same Award as a decree of the Court.
4. The application is supported by the affidavit of Sharon N. Cheruiyot the Company Secretary and Manager of Legal Services of the Applicant sworn on 24.1.2024. The Applicant further filed a Supplementary affidavit also sworn by Ms. Cheruiyot on 28.8.2024.
5. The same is opposed through the Replying Affidavit of Jeremiah E.O. Ndong a director of the Respondent sworn on 1.7.2024.

Applicant's case

6. The award herein was made on 22.6.2020. This was after the conclusion of the arbitral Proceedings in which the Respondent participated including in the payment of its share of the arbitrator's fees.
7. According to the applicant, the Respondent has not challenged the award or disputed the same since it was published.
8. At the same time the Respondent has not honoured the award for more than 3 years.
9. The applicant has attached a certified copy of the award and the agreement containing the arbitral clause to the supporting affidavit. The Applicant therefore urges the court to adopt the award and grant it leave to enforce the same as a decree of the court.

Respondent's case

10. In its Replying Affidavit the Respondent admits the consultancy agreement that gave rise to these proceedings.
11. It however says that the agreement required it to take out a professional indemnity insurance over which it did by providing a professional liability Insurance cover issued by AIG Insurance Co. Ltd. The policy was to cover risks that would arise if the Respondent was found professionally liable in the performance of the contract.
12. The respondent maintains that during the performance of the said contract and in the currency of the said professional liability insurance policy a dispute that gave rise to the arbitration and these proceedings arose between the parties.
13. The claim was initially filed in court but after objection by the Respondent on the basis of the arbitral clause in the consultancy agreement the court proceedings were stayed and the matter was referred to arbitration before Mr. Tom Onyango Oketch who issued the award herein on 20.6.2020 after hearing the parties.
14. The Respondent does not dispute the award but says that it is its insurer who is liable to settle the amount awarded to the Applicant under the said professional indemnity insurance cover.
15. The respondent further contends that it lodged a claim with the insurer on 10.5.2021 but the claim is yet to be settled.
16. According to the respondent the insurer is liable to meet the claim under the aforesaid professional liability insurance cover and that it would be against the doctrine of public policy to enforce the award against the Respondent as this would amount to an injustice to them.



17. The respondent therefore prays for the enforcement of the award to be stayed for a period of 90 days to enable it to pursue the insurer to settle the claim in accordance with the said professional indemnity insurance cover.
18. In answer to the plea for a stay for 90 days the applicants argue that the respondent has had more than sufficient time from 22.6.2020 when the award was made and an additional 90 days is not justifiable.

Analysis And Determination

19. Section 36 (1) of the *Arbitration Act*, 1995 under which this application is brought states that a domestic arbitral award shall be recognized as binding and upon application in writing to the High Court shall be enforced subject to the said Section 36 and Section 37.
20. Section 37 lists the grounds on which recognition or enforcement of an award may be refused.
21. The most relevant provision in this is to be found under Section 36 (b) (II). The Respondent has taken up the issue of public policy as the ground under which they seek exclusion of the award. The respondent seeks refusal to recognize the award on grounds that enforcement or recognition of the award would be contrary to the public policy of Kenya.

The contention being that since they took out an insurance cover against such claims it would be wrong and against the public policy to require them to settle the claim as a company.

The issues

22. From the affidavits filed by the parties and their respective submissions 3 issues emerge for determination as follows:-
 - i. Whether Applicant has met the criteria for recognition and enforcement of the award.
 - ii. Whether the award should be recognized and adopted by the court.
 - iii. Whether the Respondent should be granted 90 days stay of enforcement.
23. On the first issue, Section 36 of the Act sets down the criteria to be met by a party seeking recognition and enforcement orders. Section 36 (1) requires that the application for enforcement be made in writing to the High Court.
24. Section 36 (3) on its part requires that the party applying for enforcement should furnish the original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it.
25. The applicant in the present case has done so.
26. In the case of *Fatuma Mohamed Omar -vs- Edward Ngigi Muigai* (2022) KEHC 303 (KLR) at paragraph 9 this court observed as follows regarding the requirements for application for enforcement:-

“In *Samura Engineering Limited vs Don-Wood Co Ltd* [2014] eKLR it was held: -

“Of course, Section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to Sections 36 and 37 of the Act, and I should add, to *the Constitution*. 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..."

27. The position was reiterated in the recent case of Scriboski Romuald Josef-vs- Golden Century Limited (2024) KEHC 1152 (KLR) where Mong'are J. while allowing enforcement of an arbitral award stated as follows:-

'14.1 am satisfied therefore that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the Sale agreement dated 22nd December 2020 which contain the arbitration clause under clause 18.1 thereto and a certified copy of the Final Arbitral Award published on 23rd July 2023 by the sole arbitrator Aasif Karim. In any event both the Sale agreement and the Final Award are not in dispute. (Emphasis added)'

28. In the present case the respondent has not denied that the applicant provided the consultancy agreement that has the arbitral clause and the final arbitral award was published on 20.6.2020.
29. It has therefore that the applicant has met the conditions for enforcement as set out under the law. Similarly, both the consultation agreement with the arbitral clause and the final award are not in dispute.
30. Indeed, both parties agree that an initial attempt had been made to enforce the agreement by filing a suit in court.
31. The court proceedings were stayed when the Respondent objected to the court process in view of the arbitral clause in the agreement and the court allowed the arbitration to proceed leading to the award in issue.
32. As to whether the award should be recognised and enforced, the court has already found that the award is sound and was a product of a consensual process that all the parties submitted to, thus once the Applicant has met the above preconditions for enforcement the onus shifts to the Respondent to demonstrate why the award should not be adopted.
33. The Respondent has not challenged the award and no application to set it aside has ever been made.
34. The opposition to enforcement is simply on account of the applicant having had taken an insurance policy to cover themselves from liability. The applicant is asking the court to grant it 90 days stay to enable them follow up with their insurer for settlement.
35. It is for that reason that the applicant argues that it would be against public policy to enforce the award against them in the circumstances.
36. The Respondent has relied on the case of National Oil Corporation of Kenya Limited - vs- Prisko Petroleum Network Limited (2014) eKLR and argued that the elements constituting public policy are broad and that they could as well extend to cover the reason advanced by them.
37. The question is whether the reason advanced by the applicant would meet the test of public policy consideration as envisaged under the law.
38. The scope of the doctrine of public policy was dealt with recently in the case of Dinesh Construction Limited & another -vs- Aircon Electra Services (Nairobi) Limited (2021) eKLR where it stated as follows:-

'29. Both parties accept that the meaning of the term public policy for purposes of section 37(1)(b) (ii) of the Act was elucidated in *Christ for all Nations v Apollo Insurance Co. Ltd* [2002] EA



366, which was quoted with approval by the Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* (Supra), Ringera, J., stated as follows:

An award could be set aside under page 35(2)(b)(ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.

39. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and show which part of the award conflicts with that public policy.

40. This position was underscored in the decision of the court in *Matt Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR where the court observed that:

'Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this conn how the decision by the Arbitrator would negatively affect, impact or in fringe the rights of third parties and thus offend public policy. [Emphasis mine]'

41. It is clear from the above cases that public policy as a ground for refusal to enforce an award, must be narrow in scope and an assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized.

42. A public interest element must be apparent before one reaches the decision that public policy is likely to be breached should the award be recognized and enforced.

43. In any event whatever right that the Respondent may have as the insured party against its insurer under the insurance policy does not bar the applicant from executing the decree issued in its favour against the insured directly. These were the sentiments shared by this court in the case of *Martin Kamakya -vs- Resolution Insurance Company Ltd & Another* (2021) eKLR. This court noted at paragraph 32 that:-

“ 32. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly.”

44. In Kenya public policy leans towards finality of arbitral awards as stated in the case of *Christ of All Nations -Vs- Apollo Insurance Co. Ltd* (2002) as quoted at paragraph 32 in the *Dinesh Construction Limited Case* (Supra). Similar views were expressed in the case of *Kenya Shell Limited -vs- Kobil Petroleum Limited* (2006) eKLR where the court added that it did not feel compelled to extend the agony of that litigation.

45. Whether the Respondent should be granted 90 days stay of enforcement. It is clear that the same is not warranted. The award herein was delivered on 22.6.2020. A period of over 4 years has lapsed.

46. The delay in the settlement of the award is inordinate in the circumstances. Even if the Respondent was to be excused for the fact that it lodged Its claim with its insurer on 10.5.2021, the Respondent stands to suffer no prejudice as it can recover from its insurers any amounts paid in satisfaction of the award on the basis of the indemnity cover.

47. In the case of *National Bank of Kenya Limited V Pipeplastic Samkolit (K) Ltd & Anor* (2001) eKLR the court expressed itself thus; A court cannot re- write a contract between the parties. The parties



are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved". The fact that the applicant has an insurance cover is a matter of privity of contract between the applicant and his insurer thus he should pursue the insurance for indemnity once the company settles the award.

48. In the case of Richardson Vs Mellish [1824] , the court branded public policy as;-
- 'Unruly horse [that] when you get astride it, you never know where it will carry you '. English courts have interpreted the phrase 'against public policy 'to include fraud, illegality, bribery and other forms of corruption.
49. The courts must exercise caution in accepting every other claim of public policy consideration because the ingenuity of litigants in coining such reasons and grounds is inexhaustible. The array of such reasons must mirror public interest concerns not private interests such as the reason advanced by the respondent in the instant case.
50. The court should consider public policy breaches where any of the following matters are apparent;-
- i. Inconsistency with *the constitution* or any other laws written or unwritten;
 - ii. An award is inimical to the national interest of Kenya
 - iii. An award is contrary to justice and morality.
51. In have not found any of the above stated considerations present in the instant matter to render the award incapable of enforcement. The respondent has also not alluded to any of them. The application by the applicant cannot fail on the grounds raised by the responded.
52. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* Cap 21.
53. In Jabir Singh Rai & 3 Others v Tarlochan Singh Rai & 4others (2014) eKLR. The Court held as follows: -
- “It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

Conclusion

54. The matter having been referred to Arbitration and an award given, there appears not to have been raised any objections to the award by the respondent.
55. The applicant contends that since the respondents have not challenged the award then it would be proper for this court to have it adopted as a judgment of this court since three years have since lapsed a position that this court readily agrees with.



56. Arbitral awards by their nature originate from a consensual dispute resolution mechanism adopted by the parties.
57. The Arbitral award is deemed final and binding upon the parties with very limited grounds of setting aside under Section 35(2) of the Arbitral Act.
58. The doctrine of finality must therefore be respected by all parties.
59. I have noted that the respondents do not dispute award but their only ground for resisting its adoption and enforcement is that it is the Insurance Company (A19 Insurance Co. Ltd) which had provided a professional liability cover which should meet the award and not the respondent.
60. The insurance company is not a party and as such is not bound by the award. The issue of indemnity would thus be a matter strictly between the applicant and his insurer.
61. Public Policy properly considered must tilt in favour of the adoption and enforcement of properly obtained awards.
62. The respondent must understand that one of the fundamental doctrines of arbitration is the doctrine of finality and it must never be the business of the court to stand in the way of Adoption and enforcement of Arbitral awards unless proper reasons are advanced. The arbitration process must be deemed fair, just and expeditious for the parties to feel that they have received justice they so much wanted.
63. Taking into account the period that has lapsed since the time the award was made, it would be oppressive to the applicant to delay the adoption of the award for a further period to allow the respondent and his insurer to decide on who among them should settle the claim.
64. I agree with the applicant that the respondent has not demonstrated the steps taken by him if any to get his insurers to settle the award. The request for delay for 90 days is a cry in equity but it has come too late in the day.
65. Accordingly, this court allows the chamber summons dated January 24, 2024 and the award made by Hon. Arbitrator Tom Onyango Oketch on 22/6/2020 is hereby adopted as a judgement of this court and the applicant is granted leave to enforce the final award as a decree of this court.
66. The applicant shall have the costs of the application.
67. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Wanjohi for the Applicant

Ms Kibet for the Respondent

