



**Emerson Kenya Limited v Athi Water Works Development Agency
(formerly known as Athi Water Services Board) (Miscellaneous Application
E013 of 2025) [2025] KEHC 7627 (KLR) (Civ) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION E013 OF 2025

SN MUTUKU, J

MAY 14, 2025

BETWEEN

EMERSON KENYA LIMITED APPLICANT

AND

**ATHI WATER WORKS DEVELOPMENT AGENCY (FORMERLY KNOWN AS
ATHI WATER SERVICES BOARD) RESPONDENT**

RULING

1. Emerson Kenya Limited (the Applicant) has brought the Chamber Summons dated 16th January 2025 (the Application) under Section 36 of the *Arbitration Act*, Cap. 49, Laws of Kenya and Rule 9 of the *Arbitration Rules, 1997* seeking an order that the final arbitral award dated 17th July 2023 delivered by Engineer Lucas A.N. Ochieng (the arbitrator) and all consequential orders, be recognized and enforced. The Applicant seeks a further order that a decree be issued in terms of the arbitral award, and that costs of the Application be provided for.
2. The Applicant has advanced grounds in support of that application as set out on the face of the application and in the Supporting Affidavit sworn by the Applicant's Director, Michael Muraya Mbugua, on the 16th January 2024. The Applicant has stated that a dispute ensued between the Applicant and Athi Water Works Development Agency (formerly known as: Athi Water Services Board) (the Respondent) out of a construction agreement dated 18th February 2015 (the agreement) and which dispute was referred for arbitration, as per the terms of the agreement. That, consequently, the parties agreed to appoint the arbitrator to hear and determine the dispute; that, the arbitrator awarded damages to the Applicant herein vide the final arbitral award made on 17th July 2023, which award the Respondent has failed and/or neglected to settle despite the demand by the Applicant to do so.



The Replying Affidavit

3. The Application is opposed by the Respondent the Grounds of Opposition dated 28th February and a Replying Affidavit sworn on 29th February 2025. The Respondent raised the following Grounds of Opposition:
 - (i) The Application is incompetent, fatally defective as the Applicant has not complied with the mandatory provisions of Section 36 (3) of the Arbitration Act, 1995, by failing to:
 - a) Attach either the original or a certified copy of the Arbitral Award; and
 - b) Attach the original Arbitration Agreement or a duly certified copy of it.
 - (ii) The failure to adhere to the prescribed statutory procedure renders the Application incompetent and improperly before this Honourable Court and the court therefore lacks jurisdiction to entertain the application.
 - (iii) That mandatory statutory requirements and procedures must be adhered to and failure to follow such statutory procedures, as confirmed by previous court decisions, renders this application incompetent and incurably bad in law, thus ripe for dismissal.
 - (iv) The Application is premature, unnecessary, a waste of precious judicial time and an abuse of the court process as the Applicant has not exhausted the mechanisms of resolving the matter out of court.
 - (v) In light of the foregoing, the Application should be struck out with costs to the Respondent for being incompetent, fatally defective and bad in law.
4. The Respondent has similarly filed a Replying Affidavit sworn by its Corporation Secretary, Joyce N. Mukururi on 28th February 2025, reiterating the Grounds of Opposition. The Respondent stated, further, that the omission by the Applicant in complying with the mandatory provisions of Section 36 (3) of the Arbitration Act, 1995 would constitute a fatality thereby rendering the Summons incompetent and bad in law.

Applicant's Further Affidavit

5. The Applicant, through its counsel Ms Vivianne Wachanga, filed a further supporting affidavit to the Application sworn on 10th March 2025 in which it is stated that the original arbitral award has been attached to the Summons, only that the same appears as a scanned copy due to the nature of the e-filing system.
6. The advocate has further stated that she is amenable to providing a physical copy of the said award if called upon to do so. Regarding the arbitration agreement, she stated that the omission was an inadvertent mistake and that the agreement was annexed to her affidavit and marked as "VWW 1" thereby curing the omission. It is stated that the failure on the part of the Applicant in annexing a certified copy of the agreement to the application would not constitute a fatality to its competency and that the court has discretionary power to allow a party to avail such document at a later date. The Applicant has urged this court to consider the merits of the Application and allow it in the interest of justice.
7. Joyce N. Mukururi filed a supplementary affidavit sworn on 21st March 2025 on behalf of the Respondent, reiterating her earlier averments on the Applicant's non-compliance. She has averred that the scanned copy of the arbitral award is neither an original nor a certified copy and does not therefore



meet the threshold set out under Section 36(3) of the *Arbitration Act*; that the explanation given for the non-compliance or omission on the part of the Applicant is untenable; that the certification done on the arbitration agreement is questionable because it was done by the advocate who has sworn the supporting affidavit and that such certification ought to have been done by an independent officer of the court or a different advocate, pursuant to Section 4 of the *Oaths and Statutory Declarations Act* Cap. 15 Laws of Kenya, and therefore the certification by the aforesaid advocate constitutes a legal and procedural irregularity.

8. The Respondent urged that the Application should be struck out or dismissed with costs.

Submissions

9. Parties have filed written submissions but I have noticed that no directions were taken on the mode of canvassing the application. I have also noted that no directions were taken and no leave was sought and/or granted to file Further Supporting Affidavit or Reply to that Further Supporting Affidavit. It is worth mentioning that this matter was allocated to Justice Mulwa to determine and a mention date fixed for 3rd March 2025 before that Judge. There is no record to show that the file was placed before the judge. It was instead placed before me. To avoid back and forth in the matter, I directed that the Grounds of Opposition and the Replying Affidavit be served on the Applicant and the application be heard by way of oral submissions on 27th March 2025.
10. On 27th March 2025, both counsel submitted or rather highlighted their written submissions. The Applicant, through its counsel, reiterated the averments earlier made, that the arbitration award having already been scanned and filed in its original form, there was no need to have the same certified. That as it stands, the Applicant has complied with Section 36(3) of the *Arbitration Act*. That in any event, the Respondent does not dispute the contents or substance of the award filed.
11. The Applicant has further reiterated the averments earlier made, that the failure to annex the arbitration agreement to the Summons at the time of filing was due to a genuine oversight on the part of the Applicant's advocate but which oversight has since been cured, as indicated above. That in any event, the failure to avail the documents set out under Section 36(3) is not fatal to an application such as the present one, citing the case of *Pride Enterprises Limited v Kenya National Highways Authority* [2021] KEHC 13220 (KLR) where the court was persuaded to extend the timelines for compliance with Section 36(3).
12. On the subject of certification of the arbitration agreement annexed to the supporting affidavit of counsel, it is the Applicant's contention that the argument raised by the Respondent challenging the veracity of the said certification is unmerited, since it is undisputed that the said advocate constituted part of the team which participated in the arbitration proceedings and moreover, she is an Advocate of the High Court and therefore competent to certify the agreement as being a true copy of the original. In submitting so, the Applicant has relied on the decision rendered in *Kay Construction Co. Ltd v Attorney General* [2015] KEHC 5243 (KLR) where the court reasoned thus:

“The provisions of Section 36 (3) of the *Arbitration Act* do not specify who is to certify the award or the document and therefore the said sections of the *Evidence Act* as quoted by the Respondent do not apply. I have perused a copy of the award attached to the Applicant's application and indeed the same is certified as required under the *Arbitration Act*.”



13. The Applicant has similarly relied on the following reasoning adopted by the court in *Mobile Accord Incorporated v Reelforge Systems Limited* [2021] KEHC 44 (KLR):

“...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.”

14. On the merits of the Summons, the Applicant has contended that the Respondent has not brought any material to demonstrate why the orders sought therein should be denied, adding that no application has been filed to set aside the arbitral award. On those grounds, the court has been urged to allow the Summons as prayed.

15. The Respondent submitted that while Section 36(3) of the *Arbitration Act* makes provision for the mandatory furnishing of the originals or certified copies of the arbitral award and arbitration agreement, Rules 4 and 5 of the Arbitration Rules further set out the manner and procedure for undertaking filing and service of applications for recognition and enforcement of awards at the High court; that the mandatory nature of the aforesaid Section is echoed in the case of *Talewa Road Contractors v Kenya National Highways Authority* [2019] KEHC 2014 (KLR).

16. The Respondent relied on the case of *Speaker of the National Assembly v Karume* [1992] KECA 42 (KLR) in which the Court of Appeal rendered itself thus:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

17. It was submitted that the Application is incompetent and fatally defective for non-compliance with the strict provisions under Section 36(3) of the *Arbitration Act*.

18. It is the Respondent’s submission that the subsequent annexing of the arbitration agreement to the supporting affidavit cannot cure the Applicant’s earlier non-compliance with Section 36(3) and that the certification of the said agreement ought to have been done by an independent person and not the advocate deposing the aforesaid affidavit. That in view of the foregoing, the application is incompetently before this court and ought to be dismissed with costs.

Analysis and Determination

19. I have considered the application and the grounds in support of it; the Grounds of Opposition; the Replying Affidavit and submissions of the parties. I have also read the court records. I have noted that a dispute arose between the parties from the construction agreement between them necessitating referral of that dispute to an arbitrator as the terms of that agreement dictate.

20. The arbitration proceedings commenced terminating into a final award on 17th July 2023 in favour of the Applicant, who was awarded a total sum of Kshs. 9,166,157.30 together with interest at the rate set out in the award. That arbitral award gave rise to this application.

21. The application is opposed for alleged failure to comply with section 36(3) of the *Arbitration Act*. This section provides that:

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.
22. I have considered the rival arguments in respect of the issues raised in this application. The challenges presented by the e-filing system are within the knowledge of this court. The arbitral award annexed to the application and marked as “MM 1”, is a scanned copy. This is admitted by the Applicant. Counsel explained the challenges faced in presenting the award to court that it was not possible to present it in its original form due to the requirement to scan it and file it electronically.
23. My analysis and consideration of the issues raised by the parties does not disclose the Respondent challenging authenticity of the award whether in content or substance. Section 37 of the Arbitration Act provides grounds for refusal of recognition or enforcement of an arbitral award. It provides that:
- (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—
- (i) a party to the arbitration agreement was under some incapacity; or
- (ii) 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;
- (iii) 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
- (iv) 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
- (v) 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
- (vi) 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
- (vii) 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



24. The Respondent has not provided proof of any of the factors listed above to persuade this court that the arbitral award cannot be recognized or enforced. In fact, the arbitral award is not being challenged per se, as to being incompetent. Under section 36(1) of the *Arbitration Act*, “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.”
25. The Respondent, having failed to present evidence to bring its opposition to the application under the ambit of section 37 of the *Arbitration Act*, has failed to persuade this court to decline granting the orders sought. My understanding of section 36 (3) of the *Arbitration Act* is that even at this stage, the applicant can still comply with this act by providing or furnishing the original documents as provided. Counsel for the applicant ought to have thought outside the box and furnish an original or certified copy of the award to the court even after filing the scanned copy. This would have spared us valuable time spent arguing this application.
26. The second limb of the Respondent’s opposition of the instant application is that the Applicant failed to comply with (b) above by failing to furnish the original arbitration agreement or a certified copy thereof at the time of filing the Summons, and in only availing the same at a later date; adding that the aforesaid agreement was irregularly certified by the advocate who swore an affidavit in further support of the Summons, contrary to Section 4 of the *Oaths and Statutory Declarations Act* which expresses thus:
- 1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:
- Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.
- ...
27. From a perusal of the record, it is not in dispute that initially, the Applicant had omitted to furnish the arbitration agreement. However, it is apparent from the record that in an attempt at curing this omission, the Applicant sought to furnish a certified copy thereof, by annexing it to the supporting affidavit as “VWW 1”. From a perusal of the annexed agreement, it is clear that the same bears the certified stamp of the Vivianne Wachanga.
28. In the present instance, as earlier mentioned, a certified copy of the agreement was availed, albeit following the initial filing of the Summons. Upon consideration thereof, I am of the view that Section 36(3) of the *Arbitration Act* does not hinder a party from furnishing any of the requisite documents at a later date following the filing of an application seeking recognition and enforcement of an arbitral award, in a bid to regularize the record. I am therefore satisfied that there was no harm or prejudice occasioned to the Respondent.
29. On the subject of certification thereof, upon a reading of the above-cited Section 4 of the *Oaths and Statutory Declarations Act*, I find that the Respondent has not demonstrated the existence of any particular law that precludes an advocate from certifying a document in a matter where such advocate is acting on behalf of a party.



30. Further, Section 34(3)(b) of the *Arbitration Act* does not specifically set out who is mandated to certify an arbitration agreement. I find no impropriety or departure from procedure, in having the agreement herein certified by Vivianne Wachanga, who is a qualified advocate, and in having the same annexed to her affidavit. I have read the case of *Kay Construction Co. Ltd v Attorney General* [2015] KEHC 5243 (KLR) cited in the Applicant’s submissions, 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 therefore the said sections of the *Evidence Act* as quoted by the Respondent do not apply. I have perused a copy of the award attached to the Applicant’s application and indeed the same is certified as required under the *Arbitration Act*.”

31. I am satisfied that the opposition to the application by the Respondent is not merited. To make amends for the failure by the applicant to provided the original arbitral award and agreement or certified copies of the same documents, and noting that the Respondent is not prejudiced given that the substance or the authenticity of the arbitral award is not being questioned, I hereby direct the applicant to provide bound hard copies of the original arbitral award and agreement or certified copies of the two documents within seven (7) days after this ruling before final orders as sought in the application can be issued.

32. This court shall issue the final orders in respect of the Chamber Summons dated 16th January 2025 after compliance by the Applicant of the directions issued in this ruling. This matter shall be mentioned on a date to be agreed upon by the parties and the court to allow the applicant the seven (7) days granted by the court to comply.

33. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 14TH MAY 2025.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Kimani holding brief for Ms Wachanga for the Applicant

Ms Munene for the Respdnent.

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