



REPUBLIC OF KENYA



Villacare Limited v CWZ Development Limited (Fantasia Homes) (Miscellaneous Application E047 of 2024) [2025] KEHC 5598 (KLR) (Commercial and Tax) (2 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5598 (KLR)

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

MISCELLANEOUS APPLICATION E047 OF 2024

RC RUTTO, J

MAY 2, 2025

BETWEEN

VILLACARE LIMITED APPLICANT

AND

CWZ DEVELOPMENT LIMITED (FANTASIA HOMES) RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application dated 30th July 2024 seeking orders that the arbitral award be enforced as a decree of the court.
2. The application is premised on the grounds on the face of it and further supported by the affidavit sworn on 30th July 2024 by of Daniel Ojjo. The grounds are that, by a service agreement dated 6th May 2019 between the parties, the Applicant was granted the exclusive mandate to market and sell four units of the Respondent's Fantasia Homes development, situated on L.R. No. 7583/92 along Elijah Wambugu Close, at an estimated price of Kshs.70,000,000/=. It was a term of the agreement that, in discharging its obligations, the Applicant would market the said units through various means including utilization of its client database, placement of signboards, advertisements on its official website, distribution of brochures, deployment of site representatives, among others, and would also provide progress reports to the Respondent. It was further agreed that the Respondent would pay the Applicant, as their agent, a commission of 3% per unit on all successful sales, exclusive of all taxes. Additionally, the agreement provided that, in the event the Respondent secured a purchaser independently or terminated the service agreement, the Applicant would be entitled to 50% of the commission otherwise due, to cover its marketing expenses. It was also a term of the agreement that any delayed payments would attract interest at a rate of 5% above the prevailing commercial bank rate per annum, calculated from the date of invoice until payment in full.



3. The Applicant contends that it diligently marketed the Respondent's property by utilizing its client database, placing a signboard at the Respondent's property site, advertising on its official website and social media platforms, deploying a site representative, and providing the Respondent with regular progress reports. The Applicant further contends that, despite its efforts, the Respondent proceeded to sell the units directly but has failed to pay the Applicant a sum of Kshs.4,788,000/=, being 50% of the commission due for the sales contracted directly by the Respondent, as stipulated under Clause 4(v) of the service agreement. The Respondent has declined to settle the said amount resulting to the primary dispute. 16th April 2024, Hon. Biko Adera issued an arbitral award in favour of the Applicant. The arbitrator directing the Respondent to pay the Applicant 3% commission fee amounting to Kshs.8,400,000/= together with interest at a rate of 5% above the prevailing commercial bank rate. The Respondent was also directed to refund the Applicant its half-share of the arbitrator's fees, amounting to Kshs.176,625,000 which had been borne by the Applicant.
4. The Application is unopposed. Pursuant to the directions issued by this Court, the application was canvassed by written submissions. The Applicant filed their submissions dated 22nd October 2024.

Applicant's Submissions

5. In the background of its submissions, the Applicant stated that a dispute arose from the service agreement, which was subsequently referred to arbitration. An arbitral award was eventually delivered on 16th April 2024 by Honourable Adera, MCI Arb.
6. The Applicant addressed two key issues: first, whether it has met the threshold for recognition of the arbitral award; and second, whether the arbitral award issued by the arbitral tribunal should be recognised and enforced as a judgment of the Court.
7. On the first issue, the Applicant relied on Sections 36 and 37 of the *Arbitration Act* and the case of Nairobi Commercial Miscellaneous Application E236 of 2023, *APA Insurance Limited v Hashi Communication Limited & Another* [2023] KEHC 24616 (KLR), to submit that courts ordinarily recognise and enforce arbitral awards unless a party demonstrates that the award is affected by one or more of the prescribed grounds for refusal under Section 37 of the *Arbitration Act*. The Applicant further submitted that it holds an arbitral award dated 16th April 2024, and that the Respondent has neither filed a response nor submitted written submissions in opposition to the application.
8. On the second issue, and while placing reliance on Kajiado Miscellaneous Civil Application No. 56 of 2020, *Jimmy Mutuku Mwitibi t/a Oasis Farm v Erick Omanga t/a Cidai Farm* [2021] eKLR, the Applicant submitted that where an arbitral award is made and thirty (30) days lapse without the award being challenged or set aside, the same may be recognised as binding upon the parties. The Applicant further contended that the arbitral award was made in its favour, and that upon the lapse of 30 days from 16th April 2024, the Respondent has not applied to have the same set aside.
9. The Applicant concluded that it has made out a case for the recognition and enforcement of the arbitral award and pray that this court holds so.

Analysis and Determination

10. I have considered the application and Applicants submissions made in respect of the motion and it is my view that there is only one issue for determination; whether the court should enforce the arbitral award of 16th April 2024.
11. Under Section 32(A) of the *Arbitration Act* an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act.



12. Further, Section 36 of the Arbitration Act gives the High Court power to recognize and enforce domestic arbitral awards. For the enforcement of the award, the section requires a party to provide a copy of the arbitral award and proof of the arbitral agreement. The Section provides as follows:

36(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.

(4)... Kagwaru Kairu

(5)

13. In the instant case, and in compliance with Section 36 of the Arbitration Act, the Applicant has adduced evidence of the service agreement dated 6th May 2019 between itself and the Respondent. A dispute arose between the parties, leading to the appointment of an arbitrator, and the arbitral proceedings culminated in a final award published on 16th April 2024. This court therefore finds that, the requirements of Section 36 of the Arbitration Act have been satisfied in the present application. Accordingly, the burden shifts to the Respondent to demonstrate why the award should not be enforced. Notably the application is not opposed and there is no ground under Section 37 of the Arbitration Act identified which can be used to oppose the application, thus the court is duty bound to recognize and enforce the arbitral award.

14. Consequently, I find that the Application dated 30th July, 2024 is merited and I therefore allow it with costs to the Applicant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Applicant:

.....for Respondent:

Sam Court Assistant:

