



New International Consultancy Company (Suing by a Power of Attorney No P/A 65175/1) ((Suing by a Power of Attorney No P/A 65175/1)) v Telkom Kenya Limited; Apexvision Limited (Applicant) (Miscellaneous Application E416 of 2024) [2025] KEHC 8472 (KLR) (Commercial and Tax) (16 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E416 OF 2024**

**BM MUSYOKI, J
JUNE 16, 2025**

BETWEEN

**NEW INTERNATIONAL CONSULTANCY COMPANY APPLICANT
(SUING BY A POWER OF ATTORNEY NO P/A 65175/1)**

AND

TELKOM KENYA LIMITED DEFENDANT

AND

APEXVISION LIMITED APPLICANT

RULING

1. This matter was commenced through the 1st applicant’s chamber summons dated 16th May 2024 which seeks to enforce a final arbitral award delivered on 6-08-2022 in favour of the applicant as against the respondent for a sum of Kshs 225,226.918.75 and accrued interest of Kshs 15,666,821.94
2. The background of this cause is that New International Consultancy Company (hereinafter and for purposes of this ruling referred to as ‘the 1st applicant’) commenced arbitration proceedings against the respondent pursuant to a power of attorney said to have been donated by Apexvision Limited (hereinafter and for the purpose of this ruling referred to as ‘the 2nd applicant’) registered as P/A Number P/A 65175/1. On 6-08-2022, the arbitrator gave an award to the 1st applicant against the respondent for a principal sum of Kshs 225,226.918.75 and accrued interest of Kshs 15,666,821.94
3. Before the chamber summons could be heard, the 2nd applicant filed a notice of motion dated 8th November 2024 which seeks the following orders.



1. Spent.
 2. This Honourable Court be pleased to substitute the plaintiff in this suit with the applicant and direct that all pending payments by the defendant be made to the applicant.
 3. In the alternative to prayer 2 above, this Honourable Court does hold this suit in abeyance pending the hearing and determination of Nairobi High Court Commercial Case No. E246 of 2023; *New International Consultancy Company Limited and Another vs Apexvision Limited & 2 Others*.
 4. In the alternative to prayer 2 above, this Honourable Court be pleased to grant an *ex-parte* interim injunction restraining the defendant and/or any other person under them or otherwise howsoever from making any further payments to the plaintiff pending hearing and determination of this application.
 5. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 6. The cost of this application be provided for.
4. This ruling relates to the two applications. I choose to begin with the 2nd applicant's application 8th August 2024 which is supported by affidavit of Huang Jinrong sworn on 8th November 2024. The deponent avers that the 1st applicant did not donate the power of attorney which is registered as P/A 65175/1 which was the basis of the arbitration which is the subject if these proceedings. He adds that if the power of attorney exists, it must have been issued fraudulently or forged.
 5. The 2nd applicant also states that the 1st and 2nd applicants are parties in this court's commercial case number E246 of 2023 in which they are litigating over who is the right party as between the two to receive the pending payments from the respondent herein and that it only learned of existence of the award and this application recently while in the process of prosecution of the commercial suit. He avers that since it has as the principle extinguished the power of attorney, the 1st applicant has ceased to be an agent and as the principle it should take its place and proceed with this application. The 2nd applicant avers further that since the power of attorney was fraudulent, the 2nd applicant should be put in place of the 1st applicant. It maintains that, the 1st applicant is in the mission of defrauding the 2nd applicant as it instituted the arbitration proceedings without the knowledge of the 2nd applicant.
 6. In opposing the application, the 1st applicant has filed grounds of opposition dated 6th December 2024. The further affidavit dated 20/01/2025 which was filed without the leave of the court was expunged from the proceedings on 21-01-2025. Any submissions touching on or making reference to facts averred on the said affidavit will not be considered.
 7. The 1st applicant avers that once an award is granted in an arbitration, it is final and binding between the parties and the prayers in the 2nd applicant's application do not lie. It avers that the 2nd applicant has not provided particulars of the alleged fraud and by substituting the party, this court would be amending the arbitral award which jurisdiction it does not possess.
 8. The respondent filed a replying affidavit sworn by its head of operation one Alice Wathare Ngathi on 6th December 2024. Despite the averments therein in opposition to the application, the counsel for the respondent appeared before this court on 21-01-2025 and told the court that they are not contesting any of the applications and they will wait for the court to determine who is supposed to be paid the debt. This was on condition that the 1st applicants abandoned its claim for additional interests.



9. The two applications were disposed of by way of written submissions. 1st applicant filed its submissions dated 20th January 2025 while the 2nd applicant filed its submission dated 16th December 2024. I have read the submissions of the parties and their affidavits together with their annexures. In my view, there are two issues for determination. The first the issues for determination is whether the 2nd applicant has proved that the power of attorney was fraudulently obtained and the second one is whether the 1st applicant should be substituted for the 2nd applicant.
10. The 2nd applicant has deponed that it did not give the power of attorney which was the basis of the arbitration proceedings. The only exhibit produced in the supporting affidavit is a replying affidavit filed by the 2nd applicant in commercial suit number E246 of 2023 in which the 2nd applicant is one of the defendants. The said suit has two plaintiffs, the 1st applicant herein being one of them and Elvis Dule Consulting Limited being the other. Zict Technology Company Limited and Netex Cayman Holdings Company Limited are the 2nd applicant's co-defendants in the suit.
11. The application which the aforesaid replying affidavit was opposing has not been exhibited neither are the pleadings. I however note that paragraph 3 of the said replying affidavit talks about prayers for injunction related to stopping receipt of payments from Telkom Kenya Limited which is the respondent in this cause. This replying affidavit was sworn on 10-06-2024 and the court has not been told the outcome of the application or status of the suit. The said affidavit makes reference to a fraudulent collection agreement whereas this cause talks of a power of attorney granted ten years ago. The collection agreement has not been exhibited in this application and as such I am not able to ascertain whether the disputed terms in the same are the same as in the power of attorney in dispute in this matter.
12. The 2nd applicant has deponed that complaint of the fraud was reported to capital hill police station under OB number 28/07/2022 upon which inquiry number 68/2023 was opened for investigations. We have not been told what became of the investigations or their status. If the 1st applicant used a fraudulently power of attorney assuming that it is the same as collection agreement referred to in the commercial suit, it would mean that the same was forgery which in my view it would not take a complicated process to verify the signatures therein. The applicant has stated that the person who signed the agreement and the power of attorney was not a secretary or director of the company but it has not exhibited an extract of directorship of the 2nd applicant to prove this point.
13. In order to succeed on basis of a fraud, a party must strictly prove the alleged particulars of fraud. In the current application, the applicant has not only failed to plead the particulars of fraud but has also not made attempt to prove that the power of attorney was a forgery. It is trite that fraud is concerned with one's state of mind and intentions and not the outcome of actions. The onus of proof is always on the person alleging fraud and the standard of proof is beyond the usual standard of balance of probabilities but below beyond reasonable doubt. In *Kuria Kiarie & 2 others v Sammy Magera* (2018) KECA 467 (KLR) the Court of Appeal reiterated the position of law in matters of fraud by holding that;

The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must



be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].’

14. In the premises, this court is not satisfied that the 2nd applicant has proved the alleged fraud. Going through the averments in the chamber summons dated 16th May 2024, it is apparent that the arbitration was commenced on reference from a court in another undisclosed commercial suit. That would mean that the litigation between the parties is not new and I am not convinced that the 2nd applicant was not aware of the litigation. The 2nd applicant has been economical with information surrounding the circumstances of the power of attorney and the arbitration. The onus of proof of the fraud was on the 2nd applicant and with the scanty information, that limb of its application must fail.
15. The second limb of the application is whether this court can substitute parties at this stage. It is notable that the applicant has not sought to have the arbitration declared null and void or set aside on account of fraud. It seeks to take the place of the 1st applicant so that it can execute the arbitral award which it claims was obtained irregularly and/or fraudulently. If the 2nd applicant were to succeed in proving fraud, this court would not have hesitated in setting aside the arbitral award for reason that the same would be against the public policy. I cannot bring in the applicant to progress or complete what was fraudulently obtained or started. In any event, there is no provision for substitution of parties at the execution stage and even if there were, I do not think that they would apply in arbitration proceedings which are private arrangements between the parties. Such substitution can only be done with consent or delegation of the parties involved.
16. The applicant argue that it should be allowed to continue with the matter because it has extinguished the power of attorney and in the same breath, it tells the court that the commencement of the arbitration was without its blessings. Actually, at paragraph 19 of its submissions, the 2nd applicant states that it does not challenge the arbitral award. As far as I see it, this is an afterthought and it is the position of the law that this court has no jurisdiction to change the substance and status or capacity of the parties to arbitration. The history of the relationship between the applicants should be addressed in the commercial case or separate proceedings. I decline the invitation by both parties to interrogate any issues which are not part of the arbitration.
17. Turning to the application for enforcement of award, there is no dispute that there exists an award between the 1st applicant as against the respondent. In fact, I am told that part of the award has been paid. The respondent has told this court that it is not opposed to the application and it is waiting to be told who to pay. There has been no order stopping the respondent from paying the award in this matter and as far as I am concerned, the respondent does not have to wait to be told who to pay.
18. My duty at this stage is to either decline to enforce the award or to grant the application. Having gone through the application and being satisfied that the award exists and there being no application to set aside or vary the award, I see no reason to decline the application.
19. In the final analysis, this court orders that the notice of motion dated 8th November 2024 filed by Apexvision Limited is dismissed with costs and the chamber summons by New International Consultancy Company Limited dated 16th May 2024 is hereby allowed. I make no orders as to costs in respect of the latter.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.



Ruling delivered in presence of Mr. Kihara for New International Consultancy Company Limited and Mr. Mugo for the Apexvision Limited and in absence of the respondent.

