



Kenya Wine Agencies Limited v International Beverages Company (Commercial Arbitration Cause E024 of 2024) [2025] KEHC 9954 (KLR) (Commercial and Tax) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E024 OF 2024**

BK NJOROGE, J

JULY 10, 2025

BETWEEN

KENYA WINE AGENCIES LIMITED APPLICANT

AND

INTERNATIONAL BEVERAGES COMPANY RESPONDENT

RULING

1. The Applicant filed an application dated 26th April, 2024 under Section 1A, 1B and 3A of the *Civil Procedure Act*, Section 36 (1) and (2) of the *Arbitration Act* 1995, Rules 4 (1) and (2) as well as Rules 9 and 11 of the Arbitration Rules 1997 seeking the following orders: -
 - a. That the Final Arbitration Award dated 6th December, 2023 by Hon. Philip K Murgor (as the Sole Arbitrator), between the parties herein be recognized, adopted, enforced as a decree of this Honourable Court
 - b. That this Honourable Court be pleased to order and empower the Deputy Registrar of the High Court to assess and award costs of the Arbitration Proceedings.
 - c. That this Honourable Court be pleased to make any further orders it may deem fit in the interests of justice.
 - d. That the costs of this application be in the cause.
2. The Application was premised on the following grounds:
 - a. That the parties herein entered into a Distribution Agreement dated 1st September 2020 (hereinafter “the Agreement”) pursuant to which the Applicant appointed Respondent to be the Distributor of its alcoholic and Non-alcoholic products.



- b. That a dispute however arose when the Respondent failed to pay the Claimant KES. 12,350,178.12 being payment for the products it had obtained from the Claimant.
 - c. That despite concerted efforts by the Applicant to resolve the Dispute amicably, the Parties failed to resolve the dispute among themselves thereby necessitating the Applicant to invoke the provisions of Clause 18 of the Distribution Agreement by instituting the arbitral proceedings against the Respondent.
 - d. That on 22nd March 2023, the Hon. Philip K. Murgor SC, MCIArb formally acknowledged and accepted the appointment by the Chairman, Chartered Institute of Arbitrators (Kenya Chapter) as the Sole Arbitrator to resolve the Dispute between the Parties.
 - e. That the Sole Arbitrator adjudicated the dispute and notified the parties of the award on 7th December 2023. That it was the Sole Arbitrator's position that the signed Award would be availed once the Arbitrator's fees had been paid.
 - f. That the Applicant proceeded to pay the balance of the Arbitrator's fees amounting to KES 96,000.00 upon which it received the signed Award.
 - g. That despite being notified of the Award, the Respondent has to date failed or refused to settle the Applicant.
 - h. That as the time of filing this Application, the Applicant is not aware and/or has not been served with any Application challenging or otherwise disputing the Arbitral proceedings and/or the Award.
 - i. That the Applicant has been unduly and unreasonably denied the fruits of the Arbitral Award entered by the Sole Arbitrator on 7th December 2023.
 - j. That it has become necessary to enforce the Arbitral Award in Court as by law established.
3. This Application was supported by the Applicant's Financial Accountant, Elizabeth Wangui Wangoo sworn on the 26th April, 2025. The Applicant stated that itself and the Respondent entered into a Distribution Agreement dated 1st September 2020 where the Respondent was appointed by and/or maintained an account with the Applicant as the Distributor of its Products. The Respondent therefore obtained and distributed the Applicant's products on its own account as an independent contractor. In return the Respondent gained the privilege of holding itself to the general public as KWALs Authorized Distributor.
 4. The Applicant further states that pursuant to the payment terms under Clause 5 of the Agreement, payments were to be made to the Applicant within thirty (30) days upon receipt of the Products and/or a proforma invoice from the Applicant.
 5. The Applicant contends that in the course of their contractual relationship as aforesaid, the Respondent obtained Products from the Applicant. This was on diverse dates between March 2021 and August 2021 amounting to KES 12,350,178.12. Pursuant thereto, the Applicant issued the Respondent with the relevant Proforma invoices requesting payment of the Products obtained.
 6. The Applicant decries that despite their fulfilment of their part of the bargain by inter alia supplying the Products to the Respondent, and raising the relevant invoices, the Respondent failed to pay and/or settle its payments to the Applicant. This the sum amounting to KES 12,350,178.12 which remains unpaid despite the Respondent admitting its indebtedness to the Applicant.



7. The Applicant further states that despite concerted efforts, the Parties failed to resolve the dispute amicably thereby necessitating the Applicant to invoke the provisions of Clause 18 of the Agreement by instituting the arbitral proceedings against the Respondent.
8. The Applicant states that the Sole Arbitrator, Hon. Philip K. Murgor, formally acknowledged and accepted the appointment. The acceptance of the appointment was made via the letter dated 22nd March 2023 to the Chairman, Chartered Institute of Arbitrators (Kenya Chapter). Hon Philip K. Murgor accepted his appointment as the Sole Arbitrator to resolve the Dispute between the Parties. Upon conducting the Arbitration proceedings, he duly notified the Parties of the delivery of the award on 7th December 2024. The Sole Arbitrator indicated in his Notice that the signed Award would obtain once the balance of the Arbitrator's fees amounting to KES 96,000.00 (which was the Respondent's share) of the Arbitrator's fees had been paid.
9. The Applicant contends that it has duly paid the balance of the Arbitrator's fees and obtained the Final Signed Award dated 6th December 2023 being in favour of the Applicant. This is in the total sum of KES. 12,350,178.12 with interest and costs of the arbitral proceedings (the Final Award). However, despite being aware of the Final Award, the Respondent has to date failed and/or refused to settle the amount owed to the Applicant as directed by the Sole Arbitrator.
10. The Respondent herein has failed to enter appearance and make a case for or against the recognition and enforcement of the arbitral award. This is despite service being affected upon the Respondent. The Court had directed that service upon the Respondent be by way of substituted service. The Court has seen the Affidavit of service sworn on 6th March, 2025. It is averred that service of the Applicant's application dated 26th April was effected by way of advertisement in the newspaper at page 11 of the Daily Nation Newspaper of 25th February, 2025.

Issues for Determination

11. The Court frames a single issue for determination;
 - a. Whether the orders for the recognition, adoption and enforcement of the Final Arbitral Award herein ought to be granted.

Analysis And Determination

12. The Court now turns to the Applicant's application for adoption of the Arbitral award. The Court finds that the Affidavit sworn in support of the application has annexed the Final Arbitral Award. Under Section 32(A) of the *Arbitration Act* (Cap 49) 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 *Arbitration Act* (Cap 49).
13. For the enforcement of an arbitral award, the operative sections are sections 36 and 37 of the *Arbitration Act* (Cap 49). Section 36 of the *Arbitration Act* (Cap 49) states that a domestic arbitral award is to be recognized as binding and, on application to Court in writing, it shall be enforced unless the grounds set out in Section 37 of the *Arbitration Act* (Cap 49) are shown. Section 37 of the *Arbitration Act* (Cap 49) sets out the grounds upon which this Court can decline to recognize or to enforce an arbitral award. These grounds are similar to those that warrant the setting aside of an Arbitral award as provided for under the *Arbitration Act* (Cap 49).
14. The Court is satisfied therefore that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the Distribution agreement dated 1st September 2020. The Agreement contains the arbitration clause under clause 18 thereto and a certified copy of the Final



Arbitral Award published on 6th December 2023 by the sole arbitrator Hon. Philip K. Murgor SC, MCI Arb. In any event both the Distribution agreement and the Final Award are not in dispute. Since the Applicant has established a case for recognition and enforcement of the Final Award, the burden is on the Respondent to demonstrate that the Court should not recognize the award based on the circumstances set out in section 37 of the Arbitration Act (Cap 49).

15. In the present case, the Respondent, being the party against whom the arbitral award is invoked, despite being given proper notice of the appointment of an arbitrator, of the arbitral proceedings and of the subsequent proceedings before this Honourable Court, wilfully elected not to take part or otherwise present their case and otherwise establish the existence of any of the grounds that would justify the setting aside of the final arbitral award dated 6th December, 2023.
16. The fact of the matter remains that the award has not been challenged or set aside and no appeal is pending.
17. There remains the question as to whether this Court can grant leave to the Applicant, to have the costs of the Arbitration taxed or assessed by the Deputy Registrar of this Court.
18. Having pursued the claim by way of an Arbitration, it is not clear to this Court why the Applicant now wishes to jump off that train. This is more so at the tail end when all that remains is the assessment of costs by the Arbitrator. The Court has not been informed that the Arbitrator has declined to assess or tax the costs. The Court has also not been informed that the arbitration agreement provided that the issue of costs would be severed from the main arbitral proceedings. That such an issue would be left for determination by this Court.
19. In the opinion of this Court, when parties invoke the arbitration process, they should pursue their remedies before the Arbitrator including costs. They should only seek the intervention of the Court for those matters specifically provided for by the Act. Such would matters involving injunctive reliefs, appointment of an Arbitrator, setting aside, recognition, adoption and enforcement of the awards. It would be prudent to let matters that belong to arbitration proceed before an Arbitrator, while matters that belong to Court are heard by the Judge. That is the ideal behind party autonomy.
20. Section 32B (1) of the Arbitration Act Cap. 49 states

“Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).”
21. In AIC Kijabe Hospital v Itabuild Imports Limited (Miscellaneous Civil Application E262 of 2022 & Commercial Arbitration Cause E037 of 2022 (Consolidated)) [2023] KEHC 18747 (KLR) (Commercial and Tax) (24 March 2023) (Ruling) it was stated that

“Section 32B of the Arbitration Act having vested the Arbitral Tribunal with exclusive jurisdiction to determine costs and expenses and upon failure of agreement by parties, I am persuaded that the Arbitrator was right in determining the costs.”



22. Further in *D. Manji Construction Limited v C&R Holdings Limited* (Civil Miscellaneous Application 372 of 2015 & Miscellaneous Case 882 of 2011 (Consolidated)) [2022] KEHC 13180 (KLR) (Civ) (23 September 2022) (Ruling) it was held;

“... the jurisdiction on costs of the arbitral proceedings is solely vested in the arbitrator. However, on applications filed in court by virtue of the provisions of the *Arbitration Act*, the court can make a determination on the cost of such applications.”

23. Finally in *Kenya Re-Insurance Corporation Limited v Roadtainers (Mombasa) Limited & another* (Miscellaneous Civil Application E053 of 2023) [2023] KEHC 24619 (KLR) (Commercial and Tax) (22 September 2023) (Ruling) it was held;

“...the Arbitral Tribunal is clothed with the requisite jurisdiction to make a determination of costs and expenses arising out of arbitral proceedings... this is not a proper case for the applicant to invoke this Court’s inherent jurisdiction...”

24. Pursuant to Section 32B (1) of the *Arbitration Act*, Cap. 49, the arbitral tribunal is vested with exclusive jurisdiction to determine and apportion the costs of the arbitration. Consequently, the Applicant is at liberty to seek the costs of the arbitration before the arbitral tribunal. This Court’s jurisdiction is limited to determining the costs arising from the present application only.

25. Having given due consideration to the Applicant’s application dated 26th April, 2024, the Court now comes to the conclusion that the Applicant’s application dated 26th April has merit and is allowed.

Determination

26. That the Final Arbitration Award dated December 6, 2023 by Hon. Philip K Murgor (as the Sole Arbitrator), between the parties herein is hereby recognized, adopted, enforced as a decree of this Honourable Court

27. The Applicant shall have costs of the application.

28. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MILIMANI ON THIS 10TH DAY OF JULY 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Mr. Muhandik for the Applicant.

N/A for the Respondent.

Court Assistant Mr Luyai.

