



**Upperhill Chambers Limited v Vio Tech Limited & another (Miscellaneous Application E162 of 2022) [2024] KEHC 64 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 64 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E162 OF 2022  
JWW MONG'ARE, J  
JANUARY 11, 2024**

**BETWEEN**

**UPPERHILL CHAMBERS LIMITED ..... APPLICANT**

**AND**

**VIO TECH LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHINA WU YI LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1 The Applicant has by a Chamber Summons Application dated 28<sup>th</sup> February, 2022, under Section 36 of the *Arbitration Act*, 1995 as amended by the Arbitration (Amendment) Act, No. 11 of 2009, Rule 3 (2), 6 and 9 of the *Arbitration Rules*, 1997, moved this Honourable Court seeking the following Orders: -

1. Spent
2. That the Arbitral Award dated 30<sup>th</sup> August 2021 in arbitral proceedings before Mr. John M. Ohaga S.C as a Sole Arbitrator between *Vio Tech Limited v China Wu Yi Limited & Another* be adopted as a Judgment of this Honourable Court.
3. That the Applicant be granted leave to enforce the Arbitral Award dated 30<sup>th</sup> August 2021 in the arbitral proceedings aforesaid as a Decree of this Honourable Court directing the 1<sup>st</sup> Respondent to pay to the Applicant Kshs.26,457,165.00/- and interest thereon at the rate of 12% p. a from 30<sup>th</sup> August 2021 until payment in full.
4. That the costs of the application be provided.



2. The application is supported by the various grounds on its face and the Supporting Affidavit of Fredrick Ngatia SC, sworn on the same date. In a nutshell, the grounds are that the 1<sup>st</sup> Respondent instituted arbitral proceedings against the 2<sup>nd</sup> Respondent pursuant to Clause 31.0 of the Sub-contract Agreement dated 22<sup>nd</sup> June 2017 between them. The 2<sup>nd</sup> Respondent filed a motion for Applicant to join the proceedings as a party, which was allowed. The Applicant and the 2<sup>nd</sup> Respondent filed their respective defences and counterclaims and the matter proceeded for hearing before John Ohaga SC, CIArb as a sole Arbitrator.
3. On 30<sup>th</sup> August 2021 the Arbitral Tribunal published an Award dismissing the 1<sup>st</sup> Respondent's claim and allowing the Applicant's counterclaim for Kshs.26,457,165.90/- and the 2<sup>nd</sup> Respondent's counterclaim in part. The Applicant wishes to enforce the Arbitral Award since the 1<sup>st</sup> Respondent has not affected payment to the Applicant to date. The Applicant prays that award is recognised and adopted as an order of this Court and the Applicant be granted leave to enforce it as a decree of this Court.
4. 10<sup>th</sup> June 2022, the 1<sup>st</sup> Respondent filed grounds of opposition to the application urging the court to disallow the application on the following grounds:-
  1. The award dated the 30<sup>th</sup> August 2021 was a partial award not capable of enforcement in accordance with section 36 of the *Arbitration Act*.
  2. The application E162 of 2022 is thus vexatious, frivolous, and an abuse of court process.
5. Both parties filed their written submissions and appeared before the court to highlight the same. The 2<sup>nd</sup> Respondent did not file any grounds of opposition but instead during the hearing of the same urged the court to allow the application as filed.
6. In its submissions, the Applicant urged the Court to find that it has met the conditions for the recognition and enforcement of the award under Section 36 of the *Arbitration Act* in that it has availed the duly certified copies of the Arbitral Award and the Arbitration agreement as required by the law therein. The Applicant further submitted that the 1<sup>st</sup> Respondent has not challenged the enforcement of the Award in any way as envisioned by Section 37 of the *Arbitration Act* in that it has not filed an application to set aside the Award within the three-month statutory window given under Section 35 (3) of the *Arbitration Act*. The Applicant urged the Court to be persuaded by the holding in the case of Jimmy Mutuku Mwithi t/a Oasis Farm v Erick Omanga t/a Cidai Firm where the Court adopted an award that had not been challenged, set aside or appealed against. Similarly, in the case before this court, the Applicant argues that in the absence of an application seeking to set aside the Award, the only available remedy is to have the court recognise and adopt the Award as a decree of the court to enable its enforcement.
7. In opposition to the Application and vide written submissions dated 21<sup>st</sup> June 2022, the 1<sup>st</sup> Respondent argued that the instant application was premature since the arbitral award was partial in that it did not include an assessment of costs by the Tribunal. The 1<sup>st</sup> Respondent referred the court to Sub-clause VI of clause VIII of the award dated 30<sup>th</sup> August 2021 where the Tribunal provided that the costs of the reference, if not agreed within 30 days, shall be assessed by the Tribunal. Since the actual costs have not yet been determined, and there being no subsequent additional award made to clarify the position of the arbitrator on assessment of costs, the 1<sup>st</sup> Respondent argued that the Award sought to be enforced was interim and not final as envisioned by the *Arbitration Act* and therefore the Application before the court was premature and should be disallowed.



8. The 1<sup>st</sup> Respondent relied on the Court of Appeal decision in *Kenfit Limited v Consolata Fathers* (NRB CA Civil Appeal No. 229 of 2006) [2015] eKLR to the effect that the High Court can only recognise and enforce a final award by an arbitrator if the award does not reserve any matter for consideration by the arbitration or any other person. The 1<sup>st</sup> Respondent also relied on the Court of Appeal's decision in *Ezra Odoni Opar v Insurance Company of East Africa Ltd* [2020] eKLR to support the position that the instant application is premature since the issue of costs has not been concluded.
9. In response, through supplementary submissions dated 28<sup>th</sup> June 2022, the Applicant asserted that it was ordered to bear its own costs and that consequently the award of the counterclaim in its favour is not subject to any assessment of costs by the Arbitral Tribunal. The Applicant conceded that the 1<sup>st</sup> Respondent was held responsible for the 2<sup>nd</sup> Respondent's costs and that the two parties were to agree on the costs failure to which the Arbitral Tribunal was to assess the costs. Be that as it may, the Applicant maintained that the adoption of the Award would not be affected by the fact that the Arbitral Tribunal has not assessed costs between the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.
10. To support this position, the Applicant highlighted that under section 3 of the Act, an arbitral award includes an interim arbitral award. The Applicant also relied on the High Court decisions in *Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited* [2021] eKLR and *Kimaryo v First Riverside Acres Limited & another* (Miscellaneous Application E1283 of 2020) [2022] eKLR on the power of the court to recognise and enforce Arbitral Awards where the assessment of costs is reserved.

### **Analysis and Determination**

11. I have carefully considered the application and the supporting affidavit and the written submissions by the Applicant, the rival arguments and submissions by the Respondent and the list of authorities upon which both parties placed reliance on. To my mind, the only issue for determination is “whether the Applicant has made out a case for the adoption and recognition of the arbitral award dated 30<sup>th</sup> August 2021 as an order of this Court”.
12. Section 36(1) of the *Arbitration Act* provides as follows: -

“ 36.

- (1) A domestic arbitral award, shall be recognised 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) ....
- (5) ....”



13. It is clear from the record that the Applicant has furnished certified copy of the award titled “Final Award [save as to assessment of costs]” dated 30<sup>th</sup> August 2021 and the Sub-contract Agreement dated 22<sup>nd</sup> June 2017 containing the arbitration agreement under clause 31.0.
14. It is not in dispute that there is no application made by the 1<sup>st</sup> Respondent to set aside the award. However, the issue in contest is whether the adoption of the award can be hindered because of the issue of costs has not been concluded.
15. At para. 353, 354 and part VIII of the Award, the Tribunal observed: -

“353. Taking all these matters into consideration, I therefore decide that the 1<sup>st</sup> Respondent is entitled to recover from the Claimant the costs of the arbitration limited to the areas in which it has had success. Even though the Tribunal recognizes that the 2<sup>nd</sup> Respondent is the principal in relation to both the Claimant and the 1<sup>st</sup> Respondent, it takes the view that the Claimant did not seek to advance any claim against the 2<sup>nd</sup> Respondent and accordingly the 2<sup>nd</sup> Respondent will bear its own costs of the reference.

354. The amount of such costs, failing agreement by the parties, shall be determined by the Tribunal in terms of section 32B (1) of the *Arbitration Act*.

VIII. for the reasons stated above, i now therefore award and direct that AWard in full and final settlement of all claims in thisArbitration:

- I. The Claimant's claims against the 1<sup>st</sup> Respondent is denied.
- II. The 1<sup>st</sup> Respondent's counter claim against the Claimant is allowed to the following extent:-
  - i. Kshs.152,980.00/- being the costs of handling and transportation of the units;
  - ii. Kshs.1,026,000.00/- being the costs of storage paid to Vas Auto Garage Limited until March 2020; the Claimant shall thereafter be responsible for all further costs of storage of all the units at Vas Auto Garage Limited;
  - iii. The 2<sup>nd</sup> Respondent's counterclaim against the Claimant is allowed in the sum of Kshs.26,457,165.90;
  - iv. The amounts awarded to the Respondents shall be paid within forty-five (45) days from the date the Award is taken up by the Parties, failing which simple interest shall



accrue thereon at the rate of 12% per annum until payment in full;

- v. The Claimant shall pay to the 1<sup>st</sup> Respondent's the costs of the reference but the costs of the Award shall be borne equally between the Parties.
- vi. The costs of the Reference, if not agreed within sixty (60) days, shall be assessed by the Tribunal."

16. From the above, it is clear that the Tribunal ordered the 1<sup>st</sup> Respondent to pay the 2<sup>nd</sup> Respondent's costs of the reference and if not agreed within sixty (60) days, they would be assessed by the Tribunal. It is common ground that the actual costs have not been determined, and no subsequent additional award made to clarify the position of the arbitrator on the assessment of costs. It is also clear that the Tribunal ordered that each party would bear the costs of the award.
17. I have considered the Court of Appeal decision in *Kenfit Limited v Consolata Fathers* NRB CA Civil Appeal No. 229 of 2006 [2015] eKLR, cited in the 1<sup>st</sup> Respondent's submissions and note that the holding in that decision were that the award was a partial award and not a final award since the quantum of costs was left in abeyance for future determination and that it is only after the quantum of costs of arbitration has been determined that a final arbitral award could issue. The Court of Appeal also found that therefore the High Court was correct to find that the application for enforcement and recognition of the award was premature; and that subject to all relevant laws, the right of the appellant to make an application at a later date for the recognition and enforcement of the arbitral award remains unfettered. I note that the said case is distinguishable from the one before me in the sense that the Tribunal made a determination as to costs as between the Applicant and the Respondents and therefore there is no pending issue for determination between the parties.
18. Similarly in the case of *Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited* [2021] eKLR, cited in the Applicant's submissions, Hon. Justice Majanja, faced with a similar issue, observed as follows:-

"40. While I accept that I am bound by the decision of the Court of Appeal in *Kenfit Limited v Consolata Father* (*Supra*), I hold that the decision was per incuriam as the court's attention was not drawn to Section 3(1) of the *Arbitration Act* which states that, "arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award." This means that any award whether interim or otherwise is an award and may be enforced as it is an award under Section 36(1) of the *Arbitration Act*. Further, Section 36 does not qualify what kind of award may or may not be enforced. As a practical matter, it is inconceivable that an arbitral tribunal can issue interim or partial awards during the proceedings to resolve specific issues but which cannot be enforced until the final award. Just like the court may issue a preliminary decree, the *Arbitration Act* does not foreclose the issuing of interim awards that may be enforced as the arbitral proceedings continue."



19. Again, in *Kimaryo v First Riverside Acres Limited & another* (Miscellaneous Application E1283 of 2020) [2022] eKLR, Hon Majanja rehashed that:-

“Further, I disagree with the Respondents that since the proceedings were not complete, the Applicant’s application for recognition and enforcement was premature. Under section 3(1) of the *Arbitration Act*, ““arbitral award” means any award of an arbitral tribunal and includes an interim arbitral award.” This means that any award whether interim or otherwise is an award and may be enforced as it is an award under section 36(1) of the *Arbitration Act*. Section 36 does not qualify what kind of award may or may not be enforced (see *Dinesh Construction Limited and Another v Aircon Electra Services (Nairobi) Limited* [2021] eKLR). I therefore find and hold that the Applicant’s application to enforce the Initial Award was not premature.”

20. I am inclined to agree with the findings by Hon Majanja J on the two decisions cited above and find that in the present case, the application to enforce the award dated 30<sup>th</sup> August 2021 is not premature. The same is therefore allowed in the following terms:-

1. The Final Award dated 30<sup>th</sup> August 2021 made by Mr. John M. Ohaga SC, CIArb, be and is hereby recognized and adopted as a judgment of this court; and the Applicant is hereby granted leave to enforce the Final Award as an order of this court.
2. The 1<sup>st</sup> Respondent shall pay to the Applicant the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF JANUARY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

Mr. Ngatia SC for the Applicant.

Mr. Waigwa for the 1<sup>st</sup> Respondent.

Mwangi for the 2<sup>nd</sup> Respondent.

Amos - Court Assistant

