



**Don-Woods Company Limited v Kenya Airports Authority  
 (Miscellaneous Application Arbitration E086 of 2022)  
 [2024] KEHC 3594 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3594 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
 COMMERCIAL AND TAX  
 MISCELLANEOUS APPLICATION ARBITRATION E086 OF 2022**

**MN MWANGI, J**

**MARCH 8, 2024**

**BETWEEN**

**DON-WOODS COMPANY LIMITED ..... APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY ..... RESPONDENT**

**RULING**

1. The applicant has moved this Court by way of a Chamber Summons application dated 22<sup>nd</sup> December, 2022 brought under Section 36(1) of the *Arbitration Act*, No 4 of 1995 and Rules 4(1), (2), 6 and 9 of the *Arbitration Rules 1997*, seeking an order that this Court recognizes as binding and adopt the Arbitral Award published on 27<sup>th</sup> June, 2019 by Eng Paul T. Gichuhi. The applicant also seeks that the costs of the application be borne by the respondent.
2. The application is predicated on the supporting and supplementary affidavits sworn on 22<sup>nd</sup> December, 2022 and 20<sup>th</sup> November, 2023, respectively, by Donald Kiboro Mwaura, the Managing Director of the applicant. The applicant's case is that following an advertisement by the respondent in the local dailies for the proposed rehabilitation of the Embu Airstrip Runway extension and other associated works, the applicant emerged the successful bidder, and was awarded the tender. That in the course of carrying out the project work, a dispute arose between the parties which was resolved through arbitration in line with Clause 14 of the contract dated 23<sup>rd</sup> October, 2013. According to the applicant, the amount due from the respondent is Kshs 1,775,794.00 being accrued interest that is yet to be paid.
3. The issue in dispute before the Arbitrator was the sum of Kshs 13,984,187.00 plus Kshs 2,744, 544.73 interest accrued from 8<sup>th</sup> December, 2015 to 24<sup>th</sup> May, 2016 due and owing from the respondent from the contract work.



4. The respondent opposed the application through a replying affidavit sworn by its Acting Corporation Secretary, Margaret Munene, on 9<sup>th</sup> June, 2023. She deposed that the Arbitrator in the Final Award published on 27<sup>th</sup> June, 2019, awarded the applicant a total sum of Kshs 42,458,140 together with interest. That in compliance with the Final Arbitral Award, the respondent paid the applicant a total sum of Kshs 62,263,464 comprising the decretal sum plus interest in full and final settlement of the amount awarded for two projects namely, the rehabilitation of the Voi (Ikanga) Airstrip and the extension of the Embu Airstrip Runway. She averred that there is therefore no occasion or basis for recognition of the Award. She also deposed that the application is defective as it offends the provisions of Section 36(3) of the *Arbitration Act*.
5. The application was canvassed through written submissions. The written submissions, which were highlighted.
6. At the hearing of the application Mr. Wandati, learned Counsel for the applicant submitted on the two projects. He stated that in the Final Arbitral Award, the applicant was granted several reliefs. The first relief was to be paid within 45 days from the date of the Award but the amounts remained unpaid until 17<sup>th</sup> September, 2019 and the period of 111 days attracted interest at 14% per annum. That the computed interest was Kshs 1,662,293.94 which remains unpaid to date. He further stated that the sum of Kshs 9,948,793.00 was to be paid from July 2018 until payment in full and was to attract 14% interest per annum, but the said amount was paid in May 2020 after a delay of 247 days, thereby accruing interest of Kshs 2,781,382.00 which remains unpaid.
7. He argued that there was also a delay in payment of the Arbitrator's fees for 657 days which attracted an interest of 690,915.00. He contended that the respondent failed to demonstrate to this Court that the amount as per the Award was paid within the stipulated timelines. Counsel argued that the issue of the interest was never challenged by the respondent. Mr. Wandati contended that the summary attached as proof of payment is a computer-generated document which cannot constitute evidence of payment.
8. He submitted that applicant has complied with the requisite provisions of Section 36(1) of the *Arbitration Act*, and the onus shifts to the respondent to demonstrate why the Award should not be recognized and/or enforced.
9. Mr Mugambi, learned Counsel for the respondent submitted that the respondent paid the full amount together with the interest as outlined in the replying affidavit sworn on 9<sup>th</sup> June, 2023. Counsel submitted that the application seeking to recognize and enforce the award beats the principle of necessity as the Final Arbitral Award was settled and the enforcement and recognition is against public policy. He stated that the respondent is a government body and condemning it to pay the additional interest being claimed would be against justice and morality.
10. It was stated that the respondent paid a sum of Kshs 14,899,014.39 inclusive of interest in the sum of Kshs 1,385,869.28 with respect to the Embu project as per the financial statement attached at paragraph 5 of the replying affidavit of Margaret Munene.
11. The respondent submitted that the applicant is guilty of laches and this Court should not aid the indolent as the current application has been brought 3 years after the Final Award was published on 27<sup>th</sup> June, 2019 and the current application was brought on 22<sup>nd</sup> December, 2022.
12. I have considered the application, the supporting and supplementary affidavits in support of the said application, and the replying affidavit filed in opposition. I have also considered the written and oral submissions by the parties' Advocates. The issue for determination is whether the applicant has made out a case for recognition and enforcement of the Final Arbitral Award of 27<sup>th</sup> June, 2019.



13. Section 36(1) of the *Arbitration Act* provides as follows:

“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.”

14. Section 37 of the *Arbitration Act* gives the High Court the power to refuse to recognize an award. The said Section provides as follows-

“(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 recognized 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.”

15. This Court ought to be persuaded that any of the above grounds exist in deciding whether or not to recognize an Award. According to the applicant, it seeks recognition of the Final Arbitral Award on the basis that there is an outstanding balance of Kshs 1,775,794.50 that is still pending settlement. The respondent’s Counsel on the other hand submitted that the Final Arbitral Award has been paid in full, thus condemning it to pay additional interest, when it has already been settled, will be prejudicial as it is a government institution.
16. I have perused the record, and it is not in dispute that the principal sum awarded by the Arbitrator has been fully settled. What is in contention is the interest accruing from the late payment.
17. The Final Award was published on 27<sup>th</sup> June, 2019. The Arbitrator held as follows:
- i. The Respondent pays the Claimant Kshs 32,509,347 plus VAT within 45 days;
  - ii. The Respondent pays the Claimant’s second Moiety of kshs 9,948,793 before 28<sup>th</sup> August 2019 and the accrued interest at 14 %;
  - iii. payment not made in time will attract simple interest at commercial rates;
  - iv. Each party to bear their own costs; and
  - v. Respondent to pay the costs of the arbitration at Kshs 5,483,450.00 which includes fees for the Embu Airstrip.
18. The respondent submitted that in the Final Award, the Arbitrator awarded the applicant the sum of Kshs 42,458,140.00, and it had paid a total sum of Kshs 62,263,464.04 to the applicant in full and final settlement of the Arbitral Award, for the two projects. According to the respondent, the amount paid was inclusive of the sum of Kshs 14,899,014.39 which was inclusive of interest of Kshs 1,385,869.28 for the extension of the Embu Airstrip Runway.
19. The Final Arbitral Award was published on 27<sup>th</sup> June, 2019 and the respondent made payments on diverse dates. It is my finding that the amounts awarded by the Arbitrator were paid in full, several months before the current application was filed. I do agree with the respondent that there are no orders left for this Court to enforce as the Final Award has been fully satisfied.
20. It is also the finding of this Court that if the applicant is allowed to continue calculating the interest of the Arbitral Award for additional accrual on the respondent after payment was made, will be tantamount to infringement on public policy.
21. Section 37 of the *Arbitration Act* prohibits the High Court from recognizing and enforcing an Award if the same defeats public policy. The respondent argued that it is a government institution and if it was ordered to pay additional interest, it would be prejudiced.



22. In *Christ For All Nations v Apollo Insurance Company Limited* (2002) EA 366, Ringera J., held as follows-

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the *Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

23. The upshot is the application dated 22<sup>nd</sup> December, 2022 is bereft of merits. It is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MARCH, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Maina h/b for Mr. Wandati for the applicant

Mr. Mugambi h/b for Ms Nungo for the respondent

Ms B. Wokabi – Court Assistant.

