



**Don-Woods Company Limited v Kenya Airports Authority (Miscellaneous Application E085 of 2022) [2024] KEHC 2954 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E085 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 anchored 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 Voi (Ikanga) Airstrip, the applicant was the successful bidder and was awarded the tender and 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. According to the applicant, the respondent made part payments in partial compliance with the Award, leaving an outstanding balance of Kshs.9,989,080.50.
3. The respondent opposed the application through a replying affidavit of its Acting Corporation Secretary Margaret Munene, sworn 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.42,458,140.00 together with interest. That in compliance with the Arbitral Award, the respondent paid the applicant a total



sum of kshs.62,263,464.00 comprising the decretal sum plus interest, in full and final settlement of the awarded amount. She averred that there is no occasion or basis for recognition of the Award. She also averred that the application is defective as it offends the provisions of Section 36(3) of the Arbitration Act.

4. The application was canvassed through written submissions. The said submissions were highlighted.
5. At the hearing of the application, Mr. Wandati, learned Counsel for the applicant submitted that in the Arbitral Award, the applicant was granted several reliefs. The amount awarded in 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. Counsel stated that computed interest was Kshs.1,662,293.94, which remains unpaid to date. He also 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. He stated that 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.
6. He argued that there was also a delay in payment of the Arbitrator's fees for 657 days which attracted interest of Kshs.690,915.00. Counsel stated that the respondent failed to demonstrate to this Court that the amount as per the Award was paid within the stipulated timelines. Counsel stated that the issue of interest was never challenged by the respondent. The applicant contended that the summary attached as proof of payment is a computer-generated document which cannot constitute evidence of payment.
7. The applicant's Counsel submitted that it 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.
8. Mr Mugambi, learned Counsel for the respondent submitted that the respondent paid the full amount as per the Award together with interest as per 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 being sought is against public policy. Counsel stated that the respondent is a government body and condemning it to pay the additional interest claimed would be against justice and morality.
9. Counsel submitted that the respondent paid a sum of Kshs.62,263,464.04 which was inclusive of interest of Kshs.12,682,041.90 with respect to the Voi Ikanga Airstrip project, as per the financial statement attached at paragraph 5 of the replying affidavit sworn by Margaret Munene.
10. The respondent's Counsel 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.

### **Analysis And Determination.**

11. 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 taken into account read 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.
12. 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.”

13. 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.” (emphasis added).

14. 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.9,989,080.50 that is still pending settlement. The respondent on the other hand averred 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.
15. I have perused the record, and it is not 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.
16. 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.
17. The respondent submitted that in the Final Award, the Arbitrator awarded the applicant a 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 for the rehabilitation of the Voi (Ikanga) Airstrip and the extension of the Embu Airstrip Runway. According to the respondent, the amount paid was inclusive of interest of Kshs.12,682,041.90 with respect to the Voi (Ikanga) project.
18. 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.
19. 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, it would be tantamount to infringement on public policy.
20. 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.
21. 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.”

22. The upshot is that 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.

