



Cytonn Investments Management PLC v Njunguna (Miscellaneous Application Arbitration E030 of 2022 & E018 of 2023 (Consolidated)) [2024] KEHC 7242 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION ARBITRATION
E030 OF 2022 & E018 OF 2023 (CONSOLIDATED)**

FG MUGAMBI, J

JUNE 14, 2024

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC APPLICANT

AND

MARGARET MARY NJUNGUNA RESPONDENT

RULING

Background

1. The two applications before this court arise from a final arbitral award dated 31st January 2023, published by Mercy Nduta Mwangi, FCIArb as the sole arbitrator.

Application to Set Aside the Arbitral Award

2. The application filed in MISC ARB E030/2023 dated 1st May 2023, seeks to set aside the arbitral award. It is supported by an affidavit sworn by Edwin Harold Dayan Dande, the Chief Executive Officer of Cytonn Investments (hereinafter CYTONN PLC).
3. The application is based on four main grounds which are that there was no valid arbitration agreement under Kenyan law; that the award conflicts with the public policy of Kenya; that CYTONN PLC was prevented from effectively presenting its case due to the arbitrator's clear bias and mala fides and that the making of the award was induced by bias, *mala fides*, and undue influence.



Opposition to the Application

4. The application is opposed through Grounds of Opposition dated 23rd May 2023, and further substantiated by a replying affidavit of Margaret Mary Njuguna (hereinafter Ms Njuguna) sworn on 22nd June 2023.
5. Ms. Njuguna argues that the application by CYTONN is filed out of time, does not meet the threshold for setting aside an award under Section 35, and that this court is precluded from delving into the merits of the arbitration. She also contends that the grounds cited by CYTONN PLC exceed the parameters set out in Section 35 of the *Arbitration Act*.

Application to Enforce the Award

6. The second application is filed in MISC APP E018/2023 and also arises from the same award. It is MS. NJUGUNA, seeking leave to enforce the award. The two matters were consolidated following the directions of this court.

Analysis and Determination

7. I have carefully considered all the pleadings, submissions and evidence presented by the parties. It is standard practice to first determine the application seeking to set aside the award.
8. The question that this Court must therefore determine is whether CYTONN PLC has made out a case for setting aside of the award.

Jurisdiction and Timelines

9. MS. NJUGUNA has raised a preliminary point challenging the jurisdiction of this court to determine the application for setting aside on merits.
10. Section 35(3) is clear that an application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award. The Interpretation and General Provisions Act defines a month to mean a calendar month and as such the 3 months period has been interpreted to be equivalent to 90 days.
11. It is not in dispute that the Award herein was published on 31st January 2023. It is also not in dispute that the application for setting side dated 1st May 2023 was filed on 2nd May 2023.
12. Section 57 (a), (b) and (c) of the *Interpretation and General Provisions* is relevant to this issue. For the avoidance of doubt, it provides as follows:
 - “(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
 - (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
 - (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day. ...”



13. By dint of section 57(a), the 90-day period for the filing of an application under section 35(3) of the *Arbitration Act* began running from the day after the Award was published which was, 1st February 2024. It is a fact that the last day for the filing of the application was therefore 30th April 2024 and not 1st May 2024 as submitted by CYTONN PLC.
14. This Court has consistently held that the timelines in the *Arbitration Act* are stringent and mandatory. The respondent cited the case of *Anne Mumbi Hinga V Victoria Njoki Gathara*, [2009] eKLR in which the Court of Appeal was emphatic that:

“Section 35 of the *Arbitration Act* bars any challenge even for a valid reason after 3 months from the date of delivery of the award. The last date for the challenge was 15th February, 2008. All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction... it was wrong for the court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the *Arbitration Act* 1995.”
15. As to whether this Court may exercise its inherent jurisdiction and discretion to enlarge time as submitted by CYTONN PLC, this Court has again remained consistent that this avenue is not open to this Court. In *Kenyatta International Convention Centre (KICC) V Greenstar Sytems Limited*, [2018] eKLR the Court held as follows:

“There being no provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35(3) of the Act is imperative, and comports well with the principle of finality in arbitration”. Indeed in the Anne Mumbi Hinga Case, the Court of Appeal proceeded to hold, in no uncertain terms, that Section 35 of the *Arbitration Act* bars any challenge even for a valid reason after 3 months from the date of delivery of the award.”
16. The strict timelines under Section 35, supported by jurisprudence, emphasize that parties in arbitration must adhere to these deadlines so as to ensure finality, predictability, and expeditious dispute resolution.
17. While I appreciate that this application was filed only one day beyond the strict timelines prescribed, this court is nonetheless bound to interpret the provisions rigidly and thus lacks jurisdiction to consider the application.

Application to Recognize and Enforce the Award

18. I now turn to address the application filed in HCCOMMISC E018/2023, dated 1st March 2023. The application is brought under section 36 of the Act and seeks the recognition of the arbitral award as well as leave to enforce the award as a decree of this court. The application is opposed vide a replying affidavit sworn by Edwin Harold Dayan Dande, the Chief Executive Officer of CYTONN PLC.
19. The legal parameters for enforcement of an arbitral award are set out under section 36 of the *Arbitration Act*. It requires that:

“ 36.

- (1) An arbitral award, irrespective of the state in which it was made 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) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
- (a) the duly authenticated original arbitral award or a duly certified copy of it; and
 - (b) the original arbitration agreement or a duly certified copy of it.”

20. Having considered and determined the fate of the setting aside application, the only thing required under section 36 is for this Court to satisfy itself that an applicant has complied with the requirements under section 36(2).
21. A perusal of the application confirms that the claimant has produced a certified copy of the final award dated 31st January 2023 as well as the PARTNERSHIP AGREEMENT dated 9th July 2018, which bears an arbitration clause at clause 16. This is in full compliance of the requirements of the Act under section 36.

Disposition

- i. In conclusion, therefore the application filed in MISC ARB E030/2023 dated 1st May 2023, seeking to set aside the arbitral award, is struck out for want of jurisdiction.
- ii. Conversely, the application filed in HCCOMMISC E018/2023, dated 1st March 2023 is allowed and consequently the final award dated 31st January 2023, published by Mercy Nduta Mwangi, FCI Arb acting as sole Arbitrator, is hereby adopted as a judgment of this court with leave to execute the final decree emanating therefrom.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

