



**Odyssey Capital Limited v Mburu & another (Miscellaneous Application 833 of 2023)
[2024] KEHC 7805 (KLR) (Commercial and Tax) (17 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 833 OF 2023**

JWW MONG'ARE, J

JUNE 17, 2024

BETWEEN

ODYSSEY CAPITAL LIMITED APPLICANT

AND

DAN GAIKU MBURU 1ST RESPONDENT

ANN WAMAITHA KANYUI 2ND RESPONDENT

RULING

1. There are two applications for determination by the Court. The 1st one is dated 5/9/2023 and was originally filed in Miscellaneous Application No E908/2021 by the Respondents herein who sought the enforcement and recognition of the Supplementary Arbitral Award delivered on 16/8/2023 by Mr. Arthur Igeria, sole Arbitrator.
2. The 2nd application is dated 22/9/2023 and was filed in this suit by the Applicant herein. The Applicant prayed to have the aforementioned Supplementary Arbitral Award set aside and to have the proceedings commence de novo before another Arbitrator.
3. The Court will first and foremost consider and determine the 2nd application as it seeks to set aside the Supplementary Arbitral Award, such that if the Court finds it meritorious, there would naturally be no need to consider the application seeking to enforce the Supplementary Arbitral Award.
4. The 2nd application is a Chamber Summons filed inter-alia pursuant to section 35(1), 35 (2) (b) (ii), 35 (3), 37 (b) (ii) of the *Arbitration Act*.
5. The Applicant prayed for the following orders:-
 1. Spent.



2. Spent.
 3. The Honourable Court be pleased to set aside the Supplementary Award of the Sole Arbitrator, Mr. Arthur Igeria, dated 16th August 2023 in terms of Section 35 (2) (b) (ii) of the Arbitration Act, 1995 for being contrary to the public policy of Kenya;
 4. In the alternative to prayer (3), the Honourable Court be pleased to vacate the previous proceedings and remit the matter to the Chair of the Chartered Institute of Arbitrators for the Appointment of another Arbitrator to hear and determine the matter other than the learned Mr. Arthur Igeria, Arbitrator.
 5. This Honourable Court be pleased to make such further Order(s) as it may deem fit and appropriate in the interest of justice; and
 6. The cost of this Application be borne by the Respondents.”
6. The grounds upon which the application is anchored were that the parties herein entered into an Investment Agreement dated 22/11/2017 and when a dispute arose, the same was referred to arbitration whereby Mr. Arthur Igeria was appointed as the sole arbitrator. Mr. Igeria rendered a final award dated 1/12/2021 and a clarification dated 28/1/2022.
 7. The Applicant challenged the final award and clarification before this Court in Miscellaneous Application No E908/2021 which was heard together with Miscellaneous Application No E029/2022 being the application for enforcement of the final award and on 24/11/2022, the Court rendered its ruling in respect of both the applications where it was found that the award was contrary to public policy and directed the matter to be remitted back to the arbitrator to consider the Applicant’s supplementary bundle of documents.
 8. The Applicant contended that the arbitrator disregarded the ruling of the Court and his conduct after the award was set aside amounted to a review of the Court’s order and that he proceeded to unilaterally conduct the proceedings in a manner that violated the parties right to a fair hearing. That following the setting aside of the final award, there was no award capable of being supplemented by the supplementary award thus any attempt to consider the final award dated 1/12/2021 as read with the clarification dated 28/1/2022 is res judicata and the Court should decline any invitation to consider its merits.
 9. The Applicant argued that in the alternative, should the Court consider the supplementary award, it should find that it violates the provisions of section 35(2) (b) of the Arbitration Act and is in conflict with the public policy of Kenya. Further that the supplementary award violates section 32(3) of the Arbitration Act as it failed to issue a reason for its determinations.
 10. Further the Applicant argued that the supplementary award dealt with matters beyond the scope of the tribunal and investment agreement.
 11. The Applicant is apprehensive that unless the supplementary award is set aside, the Respondents would take further steps to enforce and execute it.
 12. In ardent opposition to the 2nd application, the Respondent filed a Preliminary Objection dated 6/11/2023 and a replying affidavit sworn on even date by the 1st Respondent.
 13. In the Preliminary Objection, the Respondents prayed to have the application struck out with costs on the grounds that the application is res judicata as some of the prayers and issues have already been determined by the arbitrator as well as by this court in the ruling of Honourable Lady Justice Okwany



vide the Applicant's applications dated 21/3/2022 and 17/3/2023 respectively and the rulings of 24/11/2022 and 31/5/2023.

14. The Court will first analyse and determine the arguments in the Preliminary Objection as it raises issues of law that may dispose of the application in limine.
15. The Respondents submitted that the Applicant's application relied on grounds that have long been determined by both this Court vide its ruling of 24/11/2022 as well as the Tribunal's ruling of 31/5/2023.
16. In the ruling of 24/11/2022, the Court determined the Applicant's application dated 21/3/2022 whereby the Applicant sought the setting aside of the arbitral award dated 1/12/2021 for inter-alia for being contrary to public policy.
17. The grounds by the Applicant in advancing its position that the award was against public policy were summarised by the Court to be the following:-Failure to keep proper records.Failure to consider the Applicant's supplementary bundle of documents.Breach of tenets of justice.Failure to serve the Respondents with the supplementary submissions.Denying the Applicant, a fair opportunity to be heard on the clarification.Unreasoned award and unjust enrichment.
18. The Court went on to state under paragraph 38 of the ruling that most of the grounds to set aside the prayer bordered on the re-evaluation of the evidence presented before the tribunal. However, under paragraphs 39 to 41, the Court noted that the failure of the tribunal to consider the Applicant's documents in its supplementary bundle of documents despite leave having been granted to file the same, amounted to a violation of its right to a fair hearing thus contravening the public policy of Kenya.
19. The Court gave the following final order under paragraph 42(b):-

“The award be remitted back to the said arbitrator but only for the limited purpose of Considering The Documents That The Tribunal Permitted The Applicant To Present through the supplementary bundle of documents.”
20. *Res judicata* is provided for under Section 7 of the [Civil Procedure Rules](#) states:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
21. In ground 6 of the current application, the Applicant brought out the issue of the lack of keeping accurate records by the tribunal. This is a similar ground that the Applicant relied on in its application to set aside the award as seen under paragraph 20 and 38 of the ruling dated 24/11/2022.
22. The Applicant in the current application further relied on the ground that the tribunal failed to issue a reasoned award. Ground 6(b), (c), (d), (e) and (f) on the current application on the issue of the right to a fair hearing was raised in the application dated 21/3/2022 and the Court dismissed the same in its ruling.
23. The issue of failure to issue a reasoned award as raised on ground 9-10 of the current application as a violation of public policy was raised in the application dated 21/3/2021 as grounds 6 and 9(d)-11 therein which the Court in its ruling dated 24/11/2022 dismissed.



24. The Applicant further raised the ground that the tribunal re-wrote the investment agreement under ground 11 of the current application. The same ground was brought out in the application of 21/3/2022 which was dismissed by this Court in its ruling of 24/11/2022.
25. Prayer 4 in the Applicant's current application, the Applicant seeks, an order to vacate the previous proceedings and to have a new arbitrator appointed to determine the matter a fresh. The court notes that the Applicant sought the same under prayer 2 in its application dated 17/3/2023 which was filed before the tribunal seeking the recusal of the arbitrator and which was already determined by the tribunal vide its ruling of 31/5/2023.
26. The above facts indicate that the grounds in the current application are similar to the Applicant's previous applications that were conclusively determined by this Court in its ruling of 24/11/2022 and the tribunal's ruling of 31/5/2023.
27. Under paragraph 38 of the ruling of 24/11/2022, the Court dismissed the grounds to set aside the award as they bordered on the revaluation of the evidence presented before the tribunal. It is therefore an abuse of the process of the Court for the Applicant to approach the Court with the same grounds seeking to have the tribunal's supplementary award set aside.
28. It is clear that the application before this Court violates the principle of res judicata, as stipulated under section 7 of the *Civil Procedure Act* and is akin to asking this Court to sit on its own appeal. The Court is of the opinion that the Applicant is keen on re-litigating the same issues.
29. On this basis, I find merit in the Preliminary Objection and I dismiss the application dated 22/9/2023 entirely.
30. The Court will now consider the application dated 5/9/2023 seeking to enforce the Supplementary Award of the tribunal.
31. The arbitrator delivered the supplementary award on 16/8/2023 after considering the supplementary documents that had been filed by the Applicant as directed by the Court.
32. Section 36 (1) and (3) of the *Arbitration Act* states as follows:-
 - “(1) (1) 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.”
33. The Applicants complied with these provisions by annexing in the supporting affidavit sworn on 5/9/2023 sworn by Dan Gaiku Mburu, a copy of the supplementary award and the investment agreement containing the arbitral clause as 'DGM-1' and 'DGM-6'.
34. Having dismissed the application to set aside the supplementary award, I find no reason not to adopt it and grant an order to enforce it as a decree of the Court. I find merit in the application dated 5/9/2023 and grant prayer 1 and 2 thereto.



The upshot of the foregoing deliberations is that the application dated 22/9/2023 is dismissed while the application dated 5/9/2023 is granted as prayed. Each party shall bear their own costs of the two applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF JUNE, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Shikanda for the Applicant. E908/2021 and Respondent in E833/2023.

Ms. Nim Adan holding brief for Mr. Mogere for Applicant in E833/2023 and the Respondent in E908/2021.

Amos - Court Assistant

