



Kobby Technologies Limited v Kingsway Business Systems Limited (Commercial Arbitration Cause E063 of 2022) [2024] KEHC 8918 (KLR) (Commercial and Tax) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E063 OF 2022**

PM MULWA, J

JULY 18, 2024

BETWEEN

KOBBY TECHNOLOGIES LIMITED APPLICANT

AND

KINGSWAY BUSINESS SYSTEMS LIMITED RESPONDENT

RULING

1. This ruling relates to the Chamber Summons application dated 31st October 2022, brought under Section 36 (1) (3) of the *Arbitration Act*, Section 1A (1), (2) and (3) 3A and 63 (e) of the *Civil Procedure Rules*. The application seeks to enforce the amended final award and additional award on costs published and delivered on 17th October 2022 by Ms Jacqueline Waihenya. In addition, the application also seeks a further decree for the post-arbitration accrued and unpaid monthly fees totalling Kshs: 29,375,914.23/= and the costs of the application to be borne by the respondent.
2. The application is supported by the affidavit of Bico Norris Hamalah sworn on 31st October 2022. The grounds are that on 25th January 2021 the National Treasury awarded the applicant and the respondent a tender contract for the provisions of onsite support services for IFMIS applications, enhancement of IFMIS e-procurement and integrated financial management information system for Semi-Autonomous Government Agency (SAGA) for 3 years starting from 7th March 2021. After that the applicant and the respondent entered into a sub-contracting agreement dated 7th March 2021. That a dispute arose and as per the said agreement the matter was referred to arbitration.
3. The applicant contends the matter was resolved through arbitration and the award was published on 26th August 2020 and amended on 17th October 2022. That the respondent has failed to satisfy the award. It is the applicant's case that the continued negligence of the respondent to comply with



the award creates severe hardship in the performance of the contract and imminent exposure of the applicant to a claim of breach of the IFMIS.

4. Kingsway Business System Limited, the respondent herein through its submissions opposes the application because it has filed an application dated 22nd September 2022 seeking to set aside the award in Misc. App No. E687 of 2022 which was filed before the instant application and the same is pending determination by the court. The respondent argues that the instant application is thus premature. The respondent urges the court to consider the application filed seeking to set aside the arbitral award as the applicant has issued the respondent with a statutory demand and an insolvency notice.

Analysis and Determination

5. I have considered the application, and the submissions filed. Before I proceed to deal with the issue in dispute I note that the respondent on 22nd September 2022 filed an application seeking to set aside the arbitral award in Nairobi Misc. App no. E687 of 2022, but that application is yet to be determined. The move by the respondent to have the two files consolidated was strongly opposed by the applicant and in the circumstances, the Court held that the two applications be determined separately.
6. I now move to discuss the main issue for consideration in the instant application which I frame to be whether the court should enforce the arbitral award of 26th August 2020 and amended on 17th October 2022.
7. Under Section 32(A) of the *Arbitration Act* an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act.
8. Further, Section 36 of the Act gives the High Court power to recognize and enforce domestic arbitral awards. For the enforcement of the award, the section requires a party to provide a copy of the arbitral award and proof of the arbitral agreement. The Section provides as follows:

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- (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.
- (4) ...
- (5) ...

9. In the instant case, in compliance with Section 36 of the *Arbitration Act* the applicant has adduced evidence of the sub-contracting agreement between Kingsway Business System Limited and Kobby Technologies Limited signed on 7th March 2021 at clause 18.2 provided that any dispute between parties shall be resolved through Arbitration as per clause 19; whereas clause 19.6.1 provides that the arbitral award will be binding on the parties. The applicant has also provided a copy of the amended final award dated 17th October 2022.



10. It is trite law that a Court will enforce an arbitral award unless any of the grounds provided in Section 37 of the Act, have been established. Section 37 provides as follows:
37. 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 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 decision 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 awards 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.
11. In urging the court to dismiss the current application, the respondent argues it has applied to set aside the arbitral award. It is important to note that save for the respondent mentioning it has an application seeking to set aside the award, no grounds have been raised for the court to consider in the application for consideration as to whether to refuse to enforce the arbitral award.
12. From the court record it is evident the applicant holds an amended arbitral award, and a copy of the agreement providing for arbitration, the onus therefore shifts to the respondent to prove the award



ought not to be enforced. However, in the absence of any ground, as outlined in Section 37 of the *Arbitral Act* raised by the respondent, the court is duty-bound to enforce the arbitral award.

13. It is therefore my finding that the respondent has not adduced sufficient grounds for the court to refuse to enforce an award. In addition, the application also seeks a further decree for the post-arbitration accrued and unpaid monthly fees totalling Kshs: 29,375,914.23/=. I am aware of the fact that the applicant continues to pay monthly fees to several persons. The failure to pay the salary will have far-reaching consequences on the employees. It is therefore paramount that the applicant gets compensation for the monies spent post the arbitration award.
14. The upshot is that the application dated 31st October 2022, is allowed in the following terms:
 - a. The amended final award and additional award on costs published by Ms. Jacqueline Waihenya on 17th October 2022 be and is hereby recognized and adopted as a judgment of this court.
 - b. Further decree for the post-arbitration accrued and unpaid monthly fees totalling Kshs: 29,375,914.23 is hereby issued.
 - c. The cost of the application be borne by the respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2024.

P. MULWA

JUDGE

In the presence of:

Ms. Mwangi for Applicant

Mr. Mtange for Respondent

Court Assistant: Carlos

