



Muhia v Mimos Consortium Ltd (Miscellaneous Civil Application E057 of 2023) [2024] KEHC 9376 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E057 OF 2023**

FN MUCHEMI, J

JULY 25, 2024

BETWEEN

GEORGE KINYANJUI MUHIA APPLICANT

AND

MIMOS CONSORTIUM LTD RESPONDENT

RULING

Brief facts

1. This application for determination dated 30th November 2023 brought under Sections 36 of the *Arbitration Act*, Order 46 Rule 18(1) of the *Civil Procedure Rules* and Rules 6, 9 and 11 of the *Arbitration Rules* seeking for orders of adoption and enforcement of the final arbitral award delivered on 15th September 2023 by Mr. Mohammed Balala, Sole Arbitrator as a decree of the court.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 20th February 2024.

The Applicant's case

3. By a supporting affidavit by counsel for the applicant, the parties herein entered into a sale agreement dated 5th June 2014 for sale of an apartment. The defendant failed to fulfil his obligations under the sale agreement prompting the applicant to rescind the agreement and then moved the court vide Thika CMCC No. 913 of 2016. It is deposed by the applicant's counsel that the court referred the parties to arbitration under Clause 33 of the Sale Agreement which provided that in the case of a dispute, the parties shall resolve the dispute through arbitration.
4. The deponent states that an arbitrator, Mr. Mohammed Balala was appointed as the sole arbitrator on 22nd February 2023. Despite being served with the claim and a notice to enter appearance, the respondent did not file any response.



5. The applicant's counsel states that the arbitrator delivered an Arbitral Award on 15th September 2023 which was never been challenged by the respondent. Neither did the respondent settle the sum awarded. The applicant thus prays that this Honourable Court endorses the Arbitral Award delivered on 15th September 2023 as a judgment of the court for further execution.

The Respondent's Case

6. The respondent states that the application offends the mandatory provisions of the *Arbitration Act* and hence the orders sought cannot be granted in the circumstances. The respondent further states that the application is premature as the requisite procedures for applying for recognition and enforcement of awards have not been complied with. As such, it is argued that the application is bad in law and ought to be struck out with costs.
7. Parties disposed off the application by way of written submissions.

The Applicant's Submissions

8. The applicant submits that he entered into a sale agreement with the respondent dated 5th June 2014 for the sale and purchase of Apartment B3, Block B in Mimos Apartments erected on LR. No. Thika Municipality Block 8/183. The applicant further submits that the agreed purchase price was Kshs. 4,500,000/- and the contract completion date was 30th June 2015. The applicant states that he paid a sum of Kshs. 2,295,000/- being the deposit of the purchase price and a further Kshs. 85,000/- being the legal fees for the transaction. Despite making the payments, the applicant submits that the apartment was never constructed and to date the apartment has never been handed over to him.
9. Due to the breach of the contract by the respondent, the applicant filed a suit before the Chief Magistrates Court at Thika in CMCC No. 913 of 2016. The court thereafter referred the parties to arbitration pursuant to Clause 33 of the Sale Agreement dated 5th June 2014 which indicated that parties were to first refer any dispute arising for arbitration before moving the court.
10. The applicant submits that he approached the Chartered Institute of Arbitrators through his advocates where Mr. Mohammed Balala was appointed as the sole arbitrator in the matter. The applicant further submits that his advocates forwarded several notices to the respondent's advocate on different occasions when the matter was coming up before the arbitrator but the respondent's advocates chose not to participate in the arbitration proceedings.
11. The arbitrator issued an arbitral award dated 15th September 2023 in favour of the applicant for a refund of Kshs. 2,380,000/- to be paid immediately and interest on the refund sum at commercial rates from the date of filing the claim until payment in full. The applicant submits that he forwarded the arbitral award to the respondent's advocates to instruct his client to settle the amounts but the respondent's advocates did not respond to their emails.
12. The applicant relies on Section 32(A) of the *Arbitration Act* and the case of *Anne Mumbi Hanga v Victoria Njoki Gathara* as cited with authority in *Lalji Meghji Patel & Co. Ltd v Nature Green Holding Limited* [2017] eKLR and submits that an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner set out in Section 39 of the *Arbitration Act*.
13. The applicant further submits that the recognition and enforcement of an arbitral award is governed by Sections 36 and 37 of the *Arbitration Act* which the applicant argues his advocates followed due process during the arbitration process by serving all the required notices to the respondent. Relying on the case of *Capture Solutions Limited v Nairobi City Water and Sewerage Company Limited* [2020] eKLR, the



applicant submits that the onus is on the respondent to prove why an arbitral award should not be recognized and enforced which it has not done. The respondent did not participate in the arbitration proceedings and it did not file any documents in court to challenge the arbitral award which is an indication that it is not against the issuance of the arbitral award. Further, the respondent has not presented to the court any substantial reasons why the court should not recognize the arbitral award. The respondent only filed grounds of opposition with no substantive grounds.

14. Relying on the case of *APA Insurance Limited v Hasbi Communication Limited & Another* (Commercial Miscellaneous Application E236 of 2023) [2023] KEHC 24616 (KLR) (Commercial and Tax) (13 October 2023), the applicant submits that he has made out his case for recognition and enforcement of the arbitral award delivered on 15th September 2023.

The Respondent's Submissions

15. The respondent submits that the applicant has not filed an original arbitration agreement or a duly certified copy of it to his bundle of documents which flouts the statutory provisions of the *Arbitration Act*.
16. The respondent argues that the applicant has not satisfied the mandatory requirements for the recognition and enforcement of awards as stipulated by Section 36(3) of the *Arbitration Act*. Furthermore, the respondent relies on the cases of *Samura Engineering Limited v Don Wood Co. Ltd* [2014] eKLR and *Riley Services Limited v Attorney General of the Republic of Kenya & Another* [2019] eKLR and submits that a party applying for recognition and enforcement of the award should file the duly authenticated original award or a duly certified copy of it and the original arbitration agreement or certified copy of it.
17. Relying on the case of *Ndiritu Muchemi Michael & 2 Others v Asbell Macharia Wachira & Another* [2018] eKLR, the respondent submits that since the applicant has failed to comply with the strict provisions of Section 36(3) of the *Act*, the application is incompetent and incurably defective and ought to be struck out.

The Law

Whether the Arbitral Award dated 15th September 2023 should be recognized and enforced as a judgment of this court.

18. Section 32(A) of the *Arbitration Act* provides that 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 law.
19. Section 36 of the *Arbitration Act* sets out the legal parameters governing enforcement and adoption of an arbitral award. It provides:-
 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.



- c. If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

20. In *Samura Engineering Limited v Don Wood Co. Ltd* [2014] eKLR the court held that:-

Of course, Section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the *Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed....

21. The applicant has provided a certified copy of the arbitral award by one Florence Ndinda Kyule who has not described the office she holds. The arbitrator is named in the award as one Mr. Mohammed S. Balala whose address or location is not known. The applicant has neither provided the original agreement containing the arbitration clause nor has he provided a properly certified copy of the award as required by the law. It is noted that the sale agreement and the final award are not in dispute and the only issues raised by the respondent is non-compliance with the law and procedure. In my view, the non-compliance does not affect the validity of the award.
22. Consequently, I find that the applicant has failed to establish a case for recognition and enforcement of the final award as set out in Section 36(3) of the *Act*. Accordingly, it is my considered view that the application dated 30th November 2023 is incompetent and misconceived. It is hereby struck out with costs to the respondent.
23. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JULY, 2024.

F. MUCHEMI

JUDGE

