



Coretec Solutions Africa Limited (Formerly Coretec Systems & Solutions Limited) v Export Processing Zones Authority (Civil Suit E005 of 2023) [2024] KEHC 11321 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT E005 OF 2023
MW MUIGAI, J
SEPTEMBER 24, 2024**

BETWEEN

CORETEC SOLUTIONS AFRICA LIMITED (FORMERLY CORETEC SYSTEMS & SOLUTIONS LIMITED) PLAINTIFF

AND

EXPORT PROCESSING ZONES AUTHORITY RESPONDENT

JUDGMENT

1. The Applicant/Plaintiff herein by a Chamber Summons dated 23/05/2024 sought the following orders:
 - a. That this Court to order that the Final Arbitral Consent Award dated, made and published on the 14th May 2024 issued by Mr. Martin Munyu LLB, FCI Arb and filed herein be recognized, deemed as filed as a record of this Court and be adopted as a judgment of this Court.
 - b. That this Court be pleased to grant leave to the Applicant to enforce the Final Arbitral Consent Award dated, made and published on the 14th May 2024 issued by Mr. Martin Munyu LLB, FCI Arb and that a Decree be extracted in terms of the said Final Arbitral Consent Award.
 - c. That this Court to grant any other order it deems fit and just to achieve the enforcement of the Fina Arbitral Award dated, made and published on the 14th May, 2024.
2. The Application is based on the following grounds:
 - a. Pursuant to the agreement entered between the Claimant and the Respondent parties, dated 23rd September, 2015 the parties herein entered into a supply agreement Tender No. 20/2014/2015 where the Applicant agreed to supply, instal and configure, test and commission the integrated Enterprise Resource Planning System (EPS) for the Export



Processing Zones Authority, the Respondent herein at a cost of Kenya Shillings Forty Eight Million, Eight Hundred and Ninety Two Thousand, Four Hundred and Sixty Eight Shillings (Kshs.48,892,468).

- b. Subsequently there was a breach of the terms in the said agreement in the sense that there was a failure by the Respondents to pay the balance of the Contractual sum owing amounting to Kenya shillings Thirty Four million, Two hundred and Twenty Four Thousand, seven hundred and Twenty seven shillings and sixty cents (kshs.34,224,727.60) despite performance by the Applicants herein.
- c. Accordingly, as a result of the said breach, the Claimant sued the Respondents in Machakos HCCC No. E005 of 2023 Coretec Solutions Africa Versus Export Processing Zones Authority and the parties later agreed by consent to have the matter referred to arbitration.
- d. In the course of the Arbitration proceedings, the parties entered into a consent dated 30th April 2024 and a final consent award dated, made and published on the 14th May 2024 in which the Arbitrator adopted the Consent by the parties awarded and directed that the agreed terms be adopted as Final Arbitral Award of the Arbitrator.

Replying Affidavit

3. The Respondent filed a Replying Affidavit sworn on 9/07/2024 by Meyner Ashitiva the Respondent's Corporation Secretary and Legal Services Manager deposing as follows:
 - a. The application as a whole seeks the recognition and enforcement of the Arbitral Consent Award and made and published in Nairobi on 14/05/2024 by Mr. Martin Munyu, LLB FCI Arb with the effect that the said consent Award be adopted as a judgment of this Court and a Decree be issued in terms of the Consent Award.
 - b. Soon after the publication of the Award, it came to the Respondent's attention that the KRA had previously served upon its Agency Notices dated 24th February, 2024 declaring to be a payer by virtue of Section 42 of the *Tax Procedures Act* and thereby required to pay Kshs.12,500,000/- to KRA being tax due by the Applicant. Annexed are copies of Agency Notices marked MA-1
 - c. Despite the Applicant confirming that the Respondent is to remit Kshs.14,000,000/- to KRA as per Remittance letter dated 12/06/2024, the Respondent is concerned that the current Agency notice dated 12/06/2023 nevertheless states that the Applicant owes taxes amounting to Kshs.49,432,458/- and not Kshs.14,000,000/-.
 - d. The Respondent is apprehensive that should it comply with the Agency Notice dated 12/06/2024 the Applicant will be rendered incapable of performing its obligations under the Consent Award.
 - e. The Respondent opposes the application in its entirety on the basis that enforcement of the consent award will lead to a situation whereby the Applicant may be unable to fulfil its performance obligations despite the Respondent making payments as per the Agency Notice.

Oral Submissions

Applicant's Submissions

4. It is submitted that this application is brought under Section 36 of *Arbitration Act*. The parties were referred to the Arbitration. This Court allowed the Application. After the appointment of the



- Tribunal the parties entered a Consent Award by the Tribunal under Section 31 of the [Arbitration Act](#). Upon issuance and publication of the Consent Award on 14/05/2024 the Applicant filed the application on 23/05/2024. The party attached the contract and appointment of the Arbitrator as per Arbitration Clause under Section 12 of the Act. The Respondent seems to oppose the recognition of the Award on the account of the KRA Agency Notice.
5. On the issue of refusal to recognise Award the grounds of refusal are in Section 37 of the [Arbitration Act](#) and the Respondent did not make any argument based under Section 37 of [Arbitration Act](#).
 6. Owing a debt is that there is a debt by the Applicant Company to KRA. Owing a debt cannot be a ground for refusal but should be reason enough to recognise the award to move to the execution of the Arbitral award to enable the Applicant pay the debt.
 7. At the time of Arbitration Award which they contest recognition, the Respondent was aware of the said Agency Notice 24/02/2021. The Respondent was aware of the Agency Notice and cannot use it now as a ground of refusal to recognise the award.
 8. They were further aware that if award is recognised the debt of 49 million owed and the decree is for them to pay the award, they will be placed in will pay the excess of the Arbitral Award.
 9. What is the Respondent business with the debt owed? The Respondent should focus with the performance and execution of the award/Arbitration Award.
 10. The Court lacks jurisdiction to deal with the Arbitral Award issues and jurisdiction comprises to only deal with refusal or recognition of the Award under Section 37 of [Arbitration Act](#) and bound by Section 32 of the [Arbitration Act](#).
 11. Any argument outside the confines of Section 35 36 & 37 of the [Arbitration Act](#), the Court lacks jurisdiction.
 12. The Respondent consented to Arbitration as form of dispute resolution and consented to the Agreement placed before the Arbitrator and recognition of the Final Arbitral Consent Award is a formal process as the Respondent agreed and is therefore bound.
 13. An Arbitral Final Award is final and binding to parties. In the case of Nyutu; the Supreme court reiterated the intervention by the Court in Arbitral Awards is limited by Section 10 of [Arbitration Act](#) and specifically in this case Section 35 of [Arbitration Act](#).

Respondent's Submissions

14. The Respondent did not contest the Consent that culminated to the Arbitral Consent Award but is questioning the enforcement of the award because;
15. KRA issued Agency Notice to the Respondent on 24/2/2021 and demanded payment of Ksh 12.5m and the Respondent reached out the Applicant's advocate who explained the matter.
16. On 12/6/2024, KRA issued to the Respondent another Agency Notice now demanding Ksh 49.4 m.
17. Therefore, pursuant to enforcement of the Arbitral award then the Respondent would end up satisfying the Applicant's whole debt instead of what is due and owing as per the Arbitral Consent Award. By the time the Consent between parties was reached, the Respondent was not aware of the latest Agency Notice by KRA.



18. Relying on the Replying Affidavit, the Respondent reiterated that they are apprehensive that if compliance of the Agency Notice of 12/6/2024 is completed, the Respondent will not be able to perform obligations in execution of the Arbitral Consent Award.
19. The Respondent took the view that the Arbitral Consent Award provided for various other obligations to be performed by parties, especially that the Applicant shall issue a Performance bond for remaining works.
20. The Respondent deposed that it is contrary to public policy to grant the Applicant's Application to enforce the Arbitral Consent Award as the Respondent is a Government entity run through taxpayers money and such monies must be to benefit the tax payer and be properly accounted for.

Analysis & Determination

21. The Court has considered the pleadings filed by parties and the oral submissions made during virtual proceedings. The issue for determination is whether this Court will grant recognition and enforcement of the Final Arbitral Consent Award published on 14/5/2024 by Arbitrator Mr Martin Munyu or set aside the Final Arbitral Consent Award.

Back Ground

22. The Claimant/Applicant by contract executed on 23/9/2015 with the Respondent after successful tender bid provided and completed certain minimum services pursuant to the said Agreement to supply, install, configure, test, commission integrated ERP Management Systems based on Microsoft dynamics. Despite performance, the Respondent breached its obligations to pay for services rendered. Clause 23 of the Contract provided for Arbitration as the dispute resolution mechanism. On 26/9/2023 this Court stayed Court proceedings to facilitate the Arbitration process.
23. The Chartered Institute of Arbitrators appointed Arbitrator on 8/1/2024 and the 1st Preliminary meeting held on 16/1/2024. The Claimant filed Statement of Claim on 2/2/2024 and Respondent filed Statement of Response on 26/3/2024. On 7/5/2024 parties informed Arbitrator that they had reached an all-inclusive settlement and executed Consent on 30/4/2024 and submitted for adoption and payment of arbitration fees.

Consent

24. The gist of the Consent is that the Respondent will pay Ksh 14,667,740.40 within 14 days of the Consent as per Schedule C of the contract.
25. Upon the said payment, the Claimant would send qualified technical personnel to resolve any outstanding issues raised by Respondent in the Implementation Work Plan.
26. The Respondent shall at all times during performance of terms of Consent shall provide necessary assistance, support, data, documentation and personnel that shall be necessary to comply with Clause 2 of the Consent.
27. The Respondent in performance of Contract dated 23/9/2015 to pay Claimant Ksh 9,778,493.60 as per Schedule C within 60 days before 30/6/2024.
28. The Claimant in performance of the Contract dated 23/9/2015 will provide 12 months free warranty/support period as per Clause 2.10 being the warranty period of the system Go-Live.



29. The Respondent in performance of the Contract of 23/9/2025 will pay the Claimant Ksh 9,778,493 as per Schedule C of the Contract within 12 months.
30. In the event of default by Respondent including payment of sums agreed in Clause 1,4,& 6 the Claimant shall be at liberty to commence execution proceedings 7 days upon notifying the Respondent of the default.
31. The Claimant waives its claim for interest on outstanding payments.
32. The present suit Machakos HCC No E005 of 2023 Coretec Solutions Africa vs Export Processing Zones Authority be marked as settled by the Consent and each party paying their costs.
33. That parties are at liberty to apply.
34. The Arbitrator/Tribunal reviewed the Consent executed between the Parties and was satisfied that it encompasses the issues in this dispute and provides a valid Agreement for adoption as a Consent Award.
35. This Court considered the consent that culminated to the Final Consent Arbitral Award of 14/5/2024 and notes that from pleadings filed by Claimant for recognition and enforcement of the Arbitral Award and the Setting aside and refusal for Enforcement and finds that parties agreed that the Consent was voluntarily entered into negotiated agreed and executed by both Claimant and Respondent.
36. Written Consents compromise dispute resolution in litigation/court proceedings and/or alternative dispute resolution processes herein Arbitration. The Arbitrator adopted the Consent as Final Arbitral Award.
37. In the case of Charles Kiptarbei Birech v Paul Waweru Mbugua & another [2021] eKLR the Court referred to the following case to fortify position impact and effect of Consents as stated by Court in James Muchori Maina vs. Kenya Power & Lighting Company Ltd [2005] eKLR the Court, approving the case of Flora Wasike observed as follows:

“ Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd -vs- Benjoh Amalgamated Ltd. -Nairobi Civil Appeal No. 276 of 1997*, wherein the Court of Appeal applied the reasoning in the case of Flora Wasike vs Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

38. In M & E. Consulting Engineers Limited vs Lake Basin Development Authority & Another [2015] eKLR the Court of Appeal on grounds of setting aside consents:

“ We re-affirm the dicta in the High Court case of Kenya Commercial Bank Ltd. -v-Specialized Engineering Company Ltd., 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was



obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.

39. The Consent herein was/is valid and not subject to setting aside as a contract no evidence of fraud illegality collusion or duress is alleged or evidence to the said effect adduced to this Court. In fact parties have not challenged the Consent that culminated to the Final Arbitral Consent Award. The Consent Award formally brought the Arbitration to conclusion. See; *Lloyd & Others vs Wright & Dawson Vs Wright* [1983] QB 1065.

Effect/import of final Arbitral consent award

40. Section 2 of the *Arbitration Act* defines ‘arbitral award’ means any award of an arbitral tribunal and includes an interim arbitral award

Section 32 of *Arbitration Act* provides content of Arbitral Award as follows;

- (1) An arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators.
- (2) For the purposes of subsection (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the arbitrators shall be sufficient so long as the reasons for any omitted signature are stated.
- (3) The arbitral award shall state the reasons upon which it is based, unless—
 - (a) the parties have agreed that no reasons are to be given; or
 - (b) the award is an arbitral award on agreed terms under section 31.
- (4) The arbitral award shall state the date of the award and the juridical seat of arbitration as determined in accordance with section 21(1), and the award shall be deemed to have been made at that juridical seat.
- (5) Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party. Section 32A of *Arbitration Act* indicates the effect of award

Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act



41. The Applicant Claimant filed Chamber Summons annexed Supporting Affidavit and attached the copy of the Contract between Export Processing Zones Authority and Coretec Systems & Solutions Limited EPZA TENDER No 20/2014-2015 and therein Clause 23 the Arbitration Clause in compliance with Section 36 (3) Arbitration Act sought recognition and enforcement of Arbitral Award.
42. The Court's intervention depends on certain legal factors, provisions of law on court intervention, the general policy and pleadings disclosing legal basis of Court's intervention as prescribed by law.
43. In the instant matter, this Court's intervention is limited to recognition and enforcement or the Arbitral Award or setting aside the Arbitral award. The Court's jurisdiction is based on Section 10 & 36 Part VII of Arbitration Act which provides for Recognition and Enforcement of Awards. Part VI provides for Recourse to the High Court Against Arbitral Award. Section 35 Arbitration Act provides for Application for setting aside arbitral award ONLY on the following grounds;
- (2) An arbitral award may be set aside by the High Court only if—
- (a) the party making the application furnishes proof—
- (i) that 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, the laws of Kenya; or
- (iii) the party making the application 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 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, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
- (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
- (b) 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 award is in conflict with the public policy of Kenya.
44. Section 37 of Arbitration Act also provides for grounds for Refusal of recognition or enforcement of an Arbitral award on similar grounds.



45. At the outset, the Respondent filed Replying Affidavit and during the oral submissions relied on its contents to support submissions for refusal to recognize and enforce the Arbitral award. From the outlined grounds, the Court found that the Replying Affidavit filed by the Respondent on 9/7/2024 is not a substantive application for setting aside the Arbitral award and/or Refusal of Recognition or Enforcement of Arbitral Award. The Replying Affidavit was filed within 3 months of publication of the Arbitral award as prescribed under Section 35 (3) of *Arbitration Act*. Ideally, the application to set aside an arbitral award is made within 3 months after receipt of the award by filing Summons supported by an affidavit specifying grounds relied upon furnishing proof of any of the grounds under Section 35 of *Arbitration Act*.
46. Be that as it may; the Court considers the matter on its merits. The Respondent's pleadings Replying affidavit and annexures do not disclose any proof furnished to this court to prove any or some or all grounds under Section 35 and/or Section 37 of the *Arbitration Act* for setting aside the arbitral award or grounds for refusal of recognition or enforcement of the arbitral award.
47. The issues raised in the Statement of Claim and Statement of Defence by parties to the arbitration process before the Arbitrator did not include the current issue of the KRA Agency Notice(s) and KRA was not a party to Arbitration proceedings, the Consent or pleadings filed in Court. If the Agency Notice (s) was deposed in pleadings before Arbitrator then the Court would remit the matter to the Arbitrator as provided by Section 35 (4) of *Arbitration Act*.
48. In *Kenya Sugar Research Foundation vs Kenchuan Architects Ltd Civil Case No 695 of 2012*, the High Court held;
- “It is only when an erroneous proposition of law is stated in the Award that a Court can set aside the award or remit it to the Arbitral Tribunal for reconsideration on the grounds of such error of law apparent on the face of the record. The Court will not interfere with the Award unless some real injustice or substantial diversion from the law can be proved.”
49. In *Cape Holdings Ltd v Synergy Industrial Credit Limited* [2016] eKLR which cited with the case of *Christ for All Nations v Apollo Insurance Company Limited*, NRB HCC No. 477 of 1999, where the court held that an award will be set aside under Section 35(2) (iii) of the *Arbitration Act* as being either
- (a) inconsistent with the public policy of Kenya if it was inconsistent with *the Constitution* or other Laws of Kenya, whether written or unwritten or
 - (b) inimical to the national interest of Kenya; or
 - (c) contrary to justice and morality.
50. In *Glencore Grain Ltd vs TSS Grain Millers Ltd* [2002] eKLR the Court described an award made against public policy as follows;
- “A contract or arbitral award will be against public policy, in my view, if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society.”



51. The Respondent's objection to the Recognition and/or enforcement of the Final Arbitral Consent Award is not based on any issue pertaining to the executed Consent and/or conduct of Arbitration culminating to the award but is with regard to Post Arbitration Hearing developments.
52. The Respondent, a Government entity, indicated that it was to remit Kshs.14,000,000/- to KRA as per Remittance letter dated 12/06/2024, earlier the Respondent was to remit Ksh 12,500,000 to KRA as per the Agency Notice of 24/2/2021 taxes due by the Applicant. The Respondent is concerned that the current Agency Notice dated 12/06/2024 nevertheless states that the Applicant owes taxes amounting to Kshs.49,432,458/- and not Kshs.14,000,000/-. The Respondent is apprehensive that should it comply with the Agency Notice dated 12/06/2024 the Applicant will be rendered incapable of performing its obligations under the Consent Award.
53. In *GeoChem Middle East vs Kenya Bureau of Standards SC PET 47 of 2019* [41] the SC stated;
- We must reiterate that arbitration is meant to expeditiously resolve commercial disputes and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Section 35 and 39 of the Act.
54. Section 10 of *Arbitration Act* provides
- Except as provided in this Act, no court shall intervene in matters governed by this Act.
55. In *Nyutu Agrovat Limited vs Airtel Networks Kenya Limited CoA Civil Appeal 61 of 2012* [31] the Court observed;
- “In pre-emptory terms, Section 10 restricts jurisdiction of the Court to only those matters provided for by the Act. The Section epitomizes the recognition of the policy of party autonomy which underlies [the] arbitral process. The section articulates the need to restrict the Court's intervention in arbitration so as to give effect to that policy. The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps to achieve the key object of arbitration. That is to deliver fair resolution of disputes between parties without unnecessary delay and expense.”
56. The Post Hearing issues raised by the Respondent are not matters that this Court exercise the limited jurisdiction under Section 10 of the Act to adjudicate on. The Court's intervention is prescribed by law. The Court is mandated by the *Arbitration Act* either to recognize and enforce Arbitral awards or set aside or refuse recognition of Arbitral awards. The specific grounds for either grounds are clearly set out by the *Arbitration Act* that requires a party to furnish proof of any of the grounds to enable the Court grant orders.
57. The Respondent's claim /objection is on enforcement of Arbitral award which is a post hearing matter and is actually a dispute for another legal forum where KRA maybe joined as a party and determination of what and how and to whom the Arbitral Award execution proceeds would be paid.



DISPOSITION

1. The Respondent failed to provide any proof of any or some of the grounds for setting aside the Final Arbitral Consent Award as provided by Section 35 or Section 37 for Refusal of Recognition or Enforcement of Arbitral award of *Arbitration Act*. The objection is hereby dismissed.
2. The Chamber Summons of 23/5/2024 seeking recognition and enforcement of the Final Arbitral Consent Award of 14/5/2024 under Section 36 of the *Arbitration Act* is granted.
3. Each Party to bear own Costs.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT ON 24/9/2024 IN MACHAKOS HIGH COURT.

M.W. MUIGAI

JUDGE

In the presence of:

Mr. Otwal - for the Plaintiff

Ms Irene Odhiambo for Bake - for the Defendant

Geoffrey/Patrick Court Assistant (s)

