



Catholic University of Eastern Africa v Mohammed; Brookhouse International Ltd (Interested Party) (Arbitration Cause E092 of 2023) [2024] KEHC 11140 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E092 OF 2023
FG MUGAMBI, J
SEPTEMBER 20, 2024**

BETWEEN

CATHOLIC UNIVERSITY OF EASTERN AFRICA APPLICANT

AND

BALALA MOHAMMED RESPONDENT

AND

BROOKHOUSE INTERNATIONAL LTD INTERESTED PARTY

RULING

Introduction And Background

1. This ruling determines two applications. The first application dated 6/8/2023 is filed in Misc. Arb E772 of 2023 by Catholic University (CUEA). It seeks to compel the arbitrator to release the arbitral award to CUEA and for extension of the time for making an application to set aside the award to run from the date the award is released. The second application dated 25/11/2023 is filed by Bookhouse International Limited (Bookhouse) in Misc. Arb E092 of 2023 and seeks recognition and enforcement of the arbitral award.
2. Both applications were consolidated and parties filed respective submissions on both applications which I now proceed to determine.



The application dated 6/8/2023 filed in Misc Arb E772 of 2023:

3. It is brought under Order 40 Rule 2 and Order 46 Rule 13 of the *Civil Procedure Rules* 2010, Sections 1 and 3A of the Civil Procedure Act, Sections 25, 32 and 34, of the Arbitration (Amendment), Act 2009 and the Arbitration Rules 2012.
4. CUEA contends that their challenge of the exorbitant fees charged by the arbitrator was ignored by the arbitrator at the start of the proceedings. That subsequently, the arbitrator withheld the award and released it to the interested party only, which was illegal, irregular, biased and an affront to the principles of natural justice and the constitutional right to a fair hearing.
5. Opposing the application, the arbitrator confirms having sent out an email to the parties on 8/8/2022 notifying them that the award was ready for collection upon payment of the arbitrator's fees of Kshs. 780,000/=. CUEA failed to pay its part of the arbitrator's fee and the award was consequently released to Bookhouse on 16/01/2023 after it made the payments.
6. The respondent contends that his actions were guided by Rules 111 and 121 of the Arbitration Rules, 2020 which empower an arbitrator to release the award upon payment of fees to any party that paid the costs. He contends that the application by CUEA is incompetent, and bad in law, and that this court lacks the jurisdiction to entertain it for lack of compliance with the provisions of Section 32B(4) of the Arbitration Act.
7. Bookhouse equally opposes the application accusing CUEA of attempting to frustrate the enforcement of the arbitral award. Bookhouse confirms that indeed the award was published on 8/8/2022 and that CUEA failed to pay the arbitrator's costs. This prompted Bookhouse to pay for the same and subsequently, the award was released to them. They further contend that the issue of the arbitrator's fees is res-judicata having been resolved in Misc. E1142 of 2020. As such, it is Bookhouse's case that the application does not meet the threshold required to disturb or set aside an arbitral award as per Section 35 of the Arbitration Act.

Analysis and determination

8. Section 35 (3) of the *Arbitration Act* sets the timeline within which an application to set aside an award should be made. It states 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, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.”
9. It is common ground that the application to set aside the arbitral award in this matter is out of time by dint of section 35 above. CUEA's arguments are hinged on the provisions of the Civil Procedure Rules and Act. It contends that this court has inherent and unlimited jurisdiction, including jurisdiction to extend time where necessary, to meet the ends of justice.
10. While this may be true, it is to be noted that there is no specific provision in the *Arbitration Act* or the Rules providing for the extension of time to file an application for setting aside an award under section 35.
11. Moreover, in line with the requirements and objectives of Section 10 of the Arbitration Act, I am inclined to reject any attempt to introduce interpretations beyond the scope of the Act. It is now well-



established that Section 10 of the Arbitration Act excludes the application of the Civil Procedure Act and its Rules, a point supported by numerous judicial decisions.

12. For reference purposes I may highlight the decision in *Ann Mumbi Hinga V Victoria Njoki Gathara*, [2009] eKLR. The Court of Appeal considered an appeal in which the appellant had invoked provisions of the Civil Procedure Act and Rules and held as follows:

“A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: “Except as provided in this Act no court shall intervene in matters governed by this Act.”

13. It therefore follows that an interpretation suggesting this court has the discretion to extend time under Section 35, as previously stated by this court, is not envisioned under the Act. Mativo, J (as he then was) in the case of *Will Developers and Construction Limited V Government of the Republic of Kenya Permanent Secretary, Vocational Training, Ministry of Education, Science and Technology & Another*, [2021] eKLR was categorical on this respect. The court noted that:

“Resolution of the issue whether the court has jurisdiction to extend time for lodging an application to set aside an arbitral award out of time proceeds on the basis that the arbitration under the Arbitration Act is wholly consensual at inception and parties who agree to this mode of dispute resolution also agree that the court of intervention in the process is limited as provided under the Act. This is the meaning of section 10 thereof which provides that, “Except as provided in this Act, no court shall intervene in matters governed by this Act.

Further and in respect of an award, section 32A of the Arbitration Act provides that, “Except as otherwise agreed by the parties, 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 this Act.” Part VI of the Arbitration Act encompassing section 35 which provides the basis for setting aside an arbitral award sets out the conditions under which court may set aside an award including the time limit under which this may be done. It does not provide for an extension of time in the event a party fails to act within the time prescribed”. (emphasis mine)

14. Since the court lacks jurisdiction to proceed any further, no purpose will be served by examining the reasons why CUEA seeks leave to file its application to set aside the award late. The prayer seeking to have the arbitrator release the arbitral award to CUEA is also moot as the award is before this court and presumably CUEA has had a chance to interact with the same. I also notice that the award was served on CUEA by Bookhouse in its application for recognition of the award.
15. Finally, I find that the arbitrator acted within the law in delivering a copy of the award to Bookhouse being the party that paid the arbitrator’s fee.

Disposition

16. Accordingly, the application dated 6/9/2023 filed by CUEA lacks merit and the same is dismissed with costs to Bookhouse.



The application dated 25/11/2023 in Misc. Arb E092 of 2023:

17. The application filed by Bookhouse is brought under Section 36 of the Arbitration Act, Rule 6 of the Arbitration Rules 1997 and Section 3A of the Civil Procedure Act. It seeks to recognize and enforce the final award herein.
18. In response to the application the applicant filed grounds of opposition dated 4/3/2024, citing the following grounds:
 - i. The application is fatally defective both in form and substance;
 - ii. The application is bad in law, incompetent, misconceived and an abuse of the court process;
 - iii. The application offends the provisions of Section 32(5) and 32B of the Arbitration Act;
 - iv. That the application does not meet the tests of recognition as set out under section 37 (i) (a) (vi) of the Arbitration Act.
19. Section 32A of the Arbitration Act provides that an arbitration 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.
20. Sections 36 and 37 of the Act are the operative sections for the enforcement and recognition of an award. Section 36 empowers the high court to recognize and enforce domestic arbitral awards so long as an applicant has furnished the court with:
 - (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.
21. I have perused the record presented before me and I am satisfied that Bookhouse has met the requirements under Section 36. The Partnership Agreement between the parties provides for an arbitration clause which the parties conformed to and submitted themselves voluntarily to arbitration. Bookhouse has also furnished a copy of the arbitral award published on 8/8/2022.
22. The burden then shifts to CUEA to challenge the enforcement of the award and raise any of the grounds set out in section 37 of the Act. I note that CUEA has not set out any of the grounds under section 37 that would warrant setting aside an arbitral award. Most of the grounds set out in the grounds of opposition are imprecise and unsubstantiated. It would appear that the substantive ground upon which CUEA opposes the application is that the same is premature as the issue of costs has not been determined.
23. I cannot overemphasize, based on the judicial pronouncements already cited, the conclusion that the Arbitration Act is a self-contained statute. As much as possible, no interpretation beyond its scope should be entertained. The issue of costs is not a valid ground for refusing an application to enforce an award under Section 37. In any case, the Act addresses situations like the one raised by CUEA under Section 32B(1) and (2), which are designed to ensure finality and the expeditious resolution of disputes arising from arbitration proceedings. It states as follows:

“Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.”



24. The provision under Section 32B, allowing the withholding of the award until payment of fees, is intended to promote the efficient and expeditious functioning of the arbitral process. It ensures that arbitrators are properly compensated while encouraging parties to meet their financial obligations under the arbitration agreement.
25. It is important to remember that arbitration is a consensual contractual arrangement to which parties voluntarily submit. In my view, Section 32B is designed to prevent delays caused by disputes over costs and fees from clogging the process. I therefore hold that the arbitrator acted within his rights under Section 32B(3) to withhold the award, which was later released upon payment by Bookhouse in accordance with Rule 121 of the Arbitration Rules, 2020. There is nothing improper about the arbitrator's conduct in light of this.

Disposition

26. Accordingly, in the absence of any specific grounds for setting aside the arbitral award, this court finds that the application for recognition and enforcement of the award issued on 8/8/2022 by BOOKHOUSE is merited. It is allowed as prayed.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

AMENDED AND SIGNED IN NAIROBI THIS 26TH DAY OF SEPTEMBER 2024.

