



**Wuor v Beatper Enterprises Limited (Miscellaneous Application E089 of 2023)
[2024] KEHC 11008 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E089 OF 2023
FG MUGAMBI, J
SEPTEMBER 20, 2024**

BETWEEN

BAPINY MONTUEL WEJANG WUOR APPLICANT

AND

BEATPER ENTERPRISES LIMITED RESPONDENT

RULING

1. There are 3 applications before the court for determination, namely:
 - i. Application dated 4/12/2023 filed by the applicant seeking the setting aside of the arbitral award dated 21/11/2023 (hereinafter ‘the Award’).
 - ii. Application dated 6/5/2023 filed by the respondent seeking the adoption of the award.
 - iii. Application dated 24/5/2024 filed by the applicant seeking a review of the court order dated 11/3/2024.
2. The court proceedings indicate that on 27/5/2024 when the parties appeared virtually in court, they consented to have the application dated 24/5/2024 heard on priority. As such the court will first and foremost consider it before the other applications.
3. In the said application, the applicant sought an order to review and discharge the order made on 11/4/2023 and to substitute it with another order for the deposit of the original title of the suit property Land Reference No.12882/28 in court.
4. On 11/5/2024, I delivered a ruling in this matter whereby I stated the following:

“10.It is my view that this is a case where a stay ought to be granted but on conditions. Accordingly, the order which commends itself to me and which I hereby grant is that the



application dated 11/12/2023 is allowed to the extent that the interim orders of stay are hereby vacated and prayer 2 for security is allowed. The effect of this is that there will be a stay of execution pending the hearing and determination of the application dated 4/12/2023 on condition that:

- i. The applicant deposits half of the award amount in a joint interest earning account in the name of joint advocates in the next 21 days; in default of which the respondent shall be at liberty to execute;
 - ii. The costs of the application shall follow the outcome of the application for setting aside.”
5. The applicant seeks to have the aforementioned ruling reviewed. I however note that the ruling granted a stay of execution pending determination of the application dated 4/12/2023 which is one of the applications that this court will determine in this ruling. It is therefore my view that the application dated 24/5/2024 has for all intents and purposes been overtaken by events and is rendered moot.
 6. The court will now consider the applicant’s application dated 4/12/2023 which seeks to set aside the Award. The application is brought under section 35 of the Arbitration Act and rules 7 and 11 of the Arbitration Rules. It is anchored on the grounds that the arbitration proceedings that led to the Award were based on an agreement that is not valid under the laws of Kenya. The applicant argued that the award is contrary to the law and public policy in Kenya and contains decisions on matters beyond the scope of reference.
 7. The respondent relies on its affidavit sworn in the application dated 11/12/2023 to oppose the instant application. The respondent contends that the applicant had deliberately concealed that he had filed a similar application to that of 4/12/2023, dated 5/12/2022 in HCCC E501/2022 which was dismissed vide a ruling issued on 20/4/2023 and the respondent was ordered to pay costs in the sum of Kshs.70,000/-.
 8. I have looked at the ruling dated 20/4/2023 delivered by Majanja J (as he then was), which is annexed as ‘RG-2’ in the applicant’s affidavit sworn in support of its application of 11/12/2023. Paragraph 1 of the said ruling is clear on the issue that was before the court which is “whether the sole arbitrator has jurisdiction to deal with the claim before it on account of the arbitration clause in the agreement dated 18th September 2015”.
 9. The court dealt with the application which claimed that the arbitrator did not have jurisdiction to deal with the arbitration on the basis that the agreement dated 18/9/2015 between the parties herein was superseded by the subsequent agreements which did not contain an arbitration clause.
 10. The Learned Judge observed that, following the tribunal’s ruling on its jurisdiction on 14/10/2022, the applicant had 30 days under the Arbitration Act to challenge the decision in court. Since this timeframe was not observed, the Judge determined that the application was time-barred and accordingly dismissed it, awarding costs assessed at Kshs. 70,000/=.
 11. The instant application seeking to set aside the Award is based on the same grounds that were raised in the application of 5/12/2022. It goes without saying that the instant application violates the principle of res judicata as the applicant is seeking to relitigate the same issues between the same parties that have already been dealt with by a court of concurrent status and also by the Arbitrator. The conduct of the applicant amounts to an abuse of the court process. The application therefore lacks merit and is dismissed.
 12. The last application is the one filed by the respondent dated 6/5/2024 seeking to have the court recognize the Award dated 21/11/2023 and issue a decree thereof.



13. The grounds of the application are that the Arbitrator, George Eshuchi, issued a final Award on 21/11/2023, which the respondent prays to have recognized as binding and enforced by this court. Further that the stay of execution order against the Award issued by the court on 15/3/2024 expired and therefore the respondent is at liberty to execute it.
14. In the ruling of 11/3/2024, I issued a stay of execution on the condition that the applicant deposits half of the award amount in a joint interest earning account in the name of joint advocates within 21 days; in default of which the respondent would be at liberty to execute.
15. The applicant failed to adhere to the conditions set out in the ruling, therefore the stay of execution lapsed and the respondent became free to seek the execution of the award.
16. Section 36(1) of the *Arbitration Act* states:

“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.”
17. Subsection (3) thereto states:

“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.”
18. A certified copy of the Award along with the certified arbitration agreement have been produced as “RG-2” in the supporting affidavit of 8/5/2024. In light of the dismissal of the application to set aside the Award, I find no impediment to recognizing the same as binding and proceeding with its enforcement.

Disposition

19. Accordingly, the application dated 6/5/2024 for recognition of the Award is granted as prayed. Consequently, the application dated 4/12/2023 for setting aside of the Award is dismissed with costs awarded to the respondent. Finally, the application dated 24/5/2024 for review is dismissed as moot with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

