



**Kilimanjaro Construction Limited v Cytonn Investment Partners  
Three LLP & another (Miscellaneous Application E1109 of 2020)  
[2023] KEHC 1365 (KLR) (Commercial and Tax) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1365 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E1109 OF 2020  
A MSHILA, J  
FEBRUARY 10, 2023**

**BETWEEN**

**KILIMANJARO CONSTRUCTION LIMITED ..... APPLICANT**

**AND**

**CYTONN INVESTMENT PARTNERS THREE LLP ..... 1<sup>ST</sup> RESPONDENT**

**CYTONN REAL ESTATE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The Chamber Summons dated March 9, 2022 was brought under Section 36 of the *Arbitration Act*, Rule 9 of the *Arbitration Rules*, Section 3A of the *Civil Procedure Act*. The Application was supported by the sworn Affidavit of Arvind Patel and sought for the following orders;
  - a. The Arbitration Award made, signed and published on July 21, 2021 be adopted as the final Judgment in the dispute between the Applicant and the Respondents.
  - b. The determination of Party to Party Costs made, signed and published on December 9, 2021 be adopted as the final determination on costs of the arbitral proceedings.
  - c. A Decree do issue in terms of the Arbitral Award and a Certificate of Costs be issued based on the determination of Party to Party Costs as follows;
    - i. Judgment for Kshs 30,114,760.71 being the balance of the contractual sums unpaid by the Respondents.



- ii. Simple interest for late payments at prevailing Standard Chartered Bank of Kenya Limited lending rates from December 20, 2019 for the amount of Kshs 33, 114, 760.71 in the Final Certificate until payment of Kshs 3, 000, 000 on January 20, 2020 and simple interest of the balance of Kshs 30, 114, 760.71 from January 20, 2020 until July 21, 2021.
  - iii. Simple interest at prevailing Standard Chartered Bank of Kenya limited lending rates for the amount of Kshs 30, 114, 760.71 after 60 days from the date of collection of the award until payment in full.
  - iv. Taxed costs in the sum of Kshs 1, 712, 574.88.
  - v. Interest on costs at prevailing Standard Chartered Bank of Kenya Limited lending rates after the lapse of 60 days from the date of collection of the Final Determination on Costs until payment in full.
2. The Application was unopposed.

### Issues For Determination

3. The court has considered the applicant’s application, the annexures therewith and the issues for determination are;
- a. Whether the Arbitral Award dated July 21, 2021 should be adopted as the final judgment of the Court?
  - b. Whether a Decree should issue in terms of the Arbitral Award and a Certificate of Costs?

### Analysis

#### Whether the Arbitral Award dated July 21, 2021 should be adopted as the final judgment of the Court?

4. Section 36 of the *Arbitration Act, 1995* under which the application is brought provides in subsection (1) as hereunder:
- “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.”
5. Section 36(3) of the *Arbitration Act* No. 4 of 1995, states that; -
- 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.
6. In *Samura Engineering Limited v Don-Wood Co Ltd* [2014] eKLR it was held: -
- “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...”

7. The Applicant has met the preconditions for the enforcement of the award. The court confirms that there is a duly certified copy of the award as well as the arbitration agreement. The Respondent did not file any response to the Application and therefore there is no reason why the Arbitral Award should not be recognized and adopted.

#### **Whether a decree should issue in terms of the arbitral award and a certificate of costs?**

8. Section 32B of the *Arbitration Act* provides;
  - (1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).
9. The court therefore issues a decree in terms of the arbitral award and a certificate of costs is hereby issued based on the determination of party to party costs as follows;
  - a. Judgment for Kshs 30,114,760.71 being the balance of the contractual sums unpaid by the Respondents.
  - b. Simple interest for late payments at prevailing Standard Chartered Bank of Kenya Limited lending rates from December 20, 2019 for the amount of Kshs 33, 114, 760.71 in the Final Certificate until payment of Kshs 3, 000, 000 on January 20, 2020 and simple interest of the balance of Kshs 30, 114, 760.71 from January 20, 2020 until July 21, 2021.
  - c. Simple interest at prevailing Standard Chartered Bank of Kenya limited lending rates for the amount of Kshs 30, 114, 760.71 after 60 days from the date of collection of the award until payment in full.
  - d. Taxed costs in the sum of Kshs 1, 712, 574.88.
  - e. Interest on costs at prevailing Standard Chartered Bank of Kenya Limited lending rates after the lapse of 60 days from the date of collection of the Final Determination on Costs until payment in full.
10. Section 32A of the *Arbitration Act* states clearly the effect of award as follows;

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.

11. The application is found to be meritorious.

#### **Findings and determination**

12. In light of the foregoing this court makes the following findings and determinations;
  - i. This court finds the application to be merited and it is hereby allowed;
  - ii. The arbitral award be and is hereby recognized and adopted as a judgment of this court.
  - iii. A decree do hereby issue in terms of the arbitral award and the certificate of costs as follows;



- a. Judgment for Kshs 30,114,760.71 being the balance of the contractual sums unpaid by the Respondents.
- b. Simple interest for late payments at prevailing Standard Chartered Bank of Kenya Limited lending rates from December 20, 2019 for the amount of Kshs 33, 114, 760.71 in the Final Certificate until payment of Kshs 3, 000, 000 on January 20, 2020 and simple interest of the balance of Kshs 30, 114, 760.71 from January 20, 2020 until July 21, 2021.
- c. Simple interest at prevailing Standard Chartered Bank of Kenya limited lending rates for the amount of Kshs 30, 114, 760.71 after 60 days from the date of collection of the award until payment in full.
- d. Taxed costs in the sum of Kshs 1, 712, 574.88.
- e. Each party shall bear its own costs of this application.

Orders accordingly.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Miss Mwangi for the Respondent

Apeda holding brief for Donge for the Applicant

Lucy-----Court Assistant

