



**LRMG Proprietary Limited v Jkuat Enterprises Limited (Miscellaneous Application E852 of 2021) [2023] KEHC 1987 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**MISCELLANEOUS APPLICATION E852 OF 2021**

**FG MUGAMBI, J**

**MARCH 10, 2023**

**IN THE MATTER OF THE ARBITRATION ACT NO.4 OF 1995**

**AND**

**IN THE MATTER OF THE ARBITRATION RULES, 1997 AND**

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT**

**OF ARBITRAL AWARD BETWEEN**

**BETWEEN**

**LRMG PROPRIETARY LIMITED ..... CLAIMANT**

**AND**

**JKUAT ENTERPRISES LIMITED ..... RESPONDENT**

**RULING**

**Brief Facts**

1. This ruling determines the application dated November 22, 2021 brought under Section 36(1) of the *Arbitration Act*, Rule 4(1), 2, 3,4,5,6 and 11 of the *Arbitration Rules 1997*, Order 46 of the *Civil Procedure Rules*, Section 3 and 59 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and all other enabling provisions of the Law. The application seeks the following orders;
  - i. That the arbitral award dated 29.06.21 be recognized, adopted and enforced as an Order of the Court.
  - ii. Leave be granted to enforce the arbitral award published on 29.06.21 as a decree of this Court.
  - iii. The costs of the application be provided for.



2. The application is premised on the grounds on the face of it and supported by the affidavit and a further affidavit dated October 22, 2022 sworn by Francis Kariaringi. The respondent opposed the application vide a replying affidavit dated 11<sup>th</sup> October and sworn by Martin Muange Mweu. The application was canvassed by written submissions which I have also considered.
3. The agreement dated March 1, 2020 for the provision of eLearning services at the instructions of the respondent is not denied neither is the payment dispute that arose and the award by the arbitrator. The crux of the application is as to whether the arbitral award dated June 29, 2021 awarding the applicants Kshs 26,250,000/= with interest at 12% should be recognized, adopted and enforced as an order of this court. The respondents argue that the same is against public interest and that it is ambiguous and vague.
4. The main arguments in support of the application are that the respondents have already admitted the indebtedness and even started making payments towards the arbitral award. In this regard, the respondent paid part of the legal fees leaving a balance of Kshs 254,707 which remains unpaid to date. It is also submitted that the respondents did not contest the arbitral award within the timelines set by the *Arbitration Act* and have only sought to object to it now that the applicants seek to enforce the same.
5. The applicants deny that the award is against public policy as stated by the respondents, and instead aver that the interest at 12% is reasonable. It is also their case that the award is stated in clear terms by the arbitrator that interest will be paid at the rate of 12% per annum with effect from the date of this award to the date of payment in full. The respondents main ground of opposition is that the award is against public policy.

#### **Analysis and Determination:**

6. The relevant sections of the law are section 36 of the *Arbitration Act* which sets out the legal parameters governing enforcement an adoption of an arbitral award. Section 37 lists the grounds upon which an arbitral award may be refused by the High Court. A party would have to present evidence before the court to prove any of the following grounds:
  - i. 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, under the law of the state where the arbitral award was made;
  - iii. the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or
  - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
  - vi. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or



- vii. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;
7. The section further provides that:
- "If the High Court finds that—
- a. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
  - b. the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya,

If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

8. In view of the foregoing, the burden placed on the applicant in an application for enforcement of an award is to ensure that it provides the certified copies of the arbitral award as well as the agreement between the parties which contains the arbitral clause. I have perused the record and it is apparent that the applicant has met the conditions set out by section 36 of the *Arbitration Act*.
9. The burden is now on the respondent to demonstrate why the said award should not be enforced or adopted as the order of this court. The grounds upon which the respondents opposed the application were that the contract between the parties had limited the party's liability to the prescribed contract sum of Kshs 26, 250,000/= and that the learned arbitrator erred in awarding 12% interest as it was inordinately high and was contrary to public policy. The respondent argued that the award on interest did not state the time within which it was payable thus making it vague.
10. The first task here is to demystify the term public policy. In the case *Christ for All Nations Vs Apollo insurance Company Limited* [2002] EA 366 Ringera J opined as follows:
- "Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."
11. Likewise, Mabeya J, in *Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd* [2012] eKLR stated as follows:
- "These terms ("contrary to public policy", "against public policy", "opposed to public policy") do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."



12. Regarding the purpose of interest, I am in agreement with Havelock J, in *Premier Bag & Cordage Limited v National Irrigation Board* where the learned Judge expressed the following view with regard to interest:

"Interest is meant to compensate a party for having been kept out of its/his funds or property for some time and not either to enrich such a party or punish the opposing party."

13. I have perused the award by the arbitrator. I note that at paragraph 14 of the same, the arbitrator stated that parties had confirmed his jurisdiction to award interest in terms of section 32(c) of the *Arbitration Act*. For the avoidance of doubt, section 32(c) provides as follows: -

"Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award."

14. On this basis the arbitrator went ahead to make an award of simple interest on the awarded sum of Kshs 26,250,000/= with effect from the date of the award up to the date of payment in full.

#### **Determination**

15. From the reasons stated above, I find that the respondent has failed to discharge the burden or indeed prove that the final award is contrary to public policy. I find and hold that the applicant has met the conditions for recognition and enforcement of an award under section 36 of the Act.

I therefore allow the Chamber Summons application dated July 18, 2020 on the following terms;

- i. That the Final Award published on June 29, 2021 be and is hereby recognized and adopted as a judgment of this court.
- ii. That leave is granted to the Applicant to enforce an award as a decree of this court.
- iii. The respondent shall bear the costs of this application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI (VIRTUALLY)**

**THIS 10<sup>TH</sup> DAY OF MARCH, 2023**

**F. MUGAMBI**

**JUDGE**

