



**Sapra v Africare Limited (Commercial Arbitration Cause E028 of 2022)
[2023] KEHC 2327 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E028 OF 2022
DAS MAJANJA, J
MARCH 17, 2023
IN THE MATTER OF AN
APPLICATION FOR RECOGNITION AND ENFORCEMENT
OF AN ARBITRAL AWARD**

BETWEEN

DR NISHA SAPRA APPLICANT

AND

AFRICARE LIMITED RESPONDENT

RULING

1. The Applicant has moved the court by the application dated March 22, 2022 made, *inter alia*, under section 36(1) of the [Arbitration Act, 1995](#) (“the Act”) seeking an order for leave to enforce the Interim Award dated February 16, 2022 by Hon David Mereka (Sole Arbitrator) as a judgment and decree of this court and for judgment for the sum of Kshs 2,704,350.00 with interest thereon from February 2019.
2. The application is supported by the Applicant’s affidavit sworn on March 22, 2022. It is opposed by the Respondent through Grounds of Opposition dated June 13, 2022. The application came up for hearing on February 24, 2023 but neither the Respondent nor its advocate attended court despite service. I have therefore considered the application and objection on record.
3. It is not in dispute that the Arbitrator issued an award dated April 16, 2023 titled “Interim Ruling”. The ruling was the result of the hearing of two applications. In the application dated August 31, 2021, the Respondent sought a declaration that the Claimant, the Applicant herein, had no legal basis to occupy the Respondent’s premises and interim orders compelling the Applicant to vacate



the Respondent's premises pending the hearing and determination of the arbitration. The second application by the Applicant was dated September 6, 2022 and sought judgment for Kshs 2,704,350.00 being her revenue share from February 2022 and an order that without prejudice to the outcome of the arbitration that the Respondent pay her Kshs 2,738,537.00. The Arbitrator considered both applications and dismissed the Respondent's application and allowed the Applicant's application to the extent that he ordered the Respondent to pay the Applicant, "Kshs 2,704,350.00 being the Claimant's revenue share from February 2019 to February 16, 2021 within the next 14 days." It is this interim award that is now subject of enforcement.

4. Under section 32(A) of the Act, 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 the Act. The High Court, under section 36 of the Act, has the power to recognise and enforce domestic arbitral awards in the following terms:

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- 1 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
- 2 ...
- 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.
- 4
- 5

5. The Applicant has filed certified copies of the award and the arbitration agreement which is contained in the Revenue Sharing Agreement dated January 2, 2017 hence there is no dispute the Applicant has complied with the formal requirements for enforcement and recognition of an arbitral award. The question then is whether the court should refuse recognition and enforcement of the Award.
6. The Respondent opposes the application on several grounds. First, that the application is premature as the interim award has yet to become binding on the parties. It argues that that the application is fatally defective because the arbitral tribunal has not even commenced hearing the substantive claim and the interim award amounts to granting final orders at an interlocutory stage which offends principles of the law and a fair hearing. It urges that section 36 of the Act contemplates the enforcement of the final award as opposed to an interim award. It cites *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR where the Supreme Court stated that, "[32] An award is the final outcome of an arbitration and when it is confirmed, varied, set aside, or remitted to the arbitral tribunal for re-consideration." It also cites *John Omollo Nyakongo (t/a H. Ganjee and Sons) v Independent Electoral and Boundaries Commission* HC MSC Misc. Appl. 256 of 2018 [2019] eKLR as authority for the proposition that an arbitral award cannot be construed to mean an incidental and every preliminary order or direction of the arbitral tribunal. The Respondent further avers that it has raised a substantial



counterclaim which has yet to be determined by the arbitral tribunal hence it would suffer serious detriment if its case is successful as a result of piecemeal awards.

7. The Applicant rejects the Respondent's contention and urges that an interim award may be enforced by the court and there is no reason for the court to reject the application as the Applicant has not established the grounds for refusal of recognition and enforcement set out in section 37 of the Act.
8. The Respondent's substantial argument is that an interim award is not a final award and cannot therefore be the subject of recognition and or enforcement. This objection is answered by section 3(1) of the Act which states:

“arbitral award” means any award of an arbitral tribunal and includes an interim arbitral award

This means that any award whether interim or otherwise is an award and may be enforced as it is an award within the provisions of section 36(1) of the Act. Further, section 36 does not qualify what kind of award that may or may not be enforced.

9. I would be remiss if I did not mention that in *Kenfit Limited v Consolata Fathers* NRB CA Civil Appeal No. 229 of 2006 [2015] eKLR, the Court of Appeal held that, “the High Court can only recognise and enforce a final award by an arbitrator if the award does not reserve any matter for consideration by the arbitration or any other person.” As I stated in *Dinesh Construction Limited and Another v Aircon Electra Services (Nairobi) Limited* [2021] eKLR that, “[40] While I accept that I am bound by the decision of the Court of Appeal in *Kenfit Limited v Consolata Father* (Supra), I hold that the decision was per incuriam as the court's attention was not drawn to section 3(1) of the Act.” As a practical matter, it is inconceivable that an arbitral tribunal can issue interim or partial awards during the proceedings to resolve specific issues but which cannot be enforced until the final award. Just like the court may issue a preliminary decree or an interlocutory order, the Act does not foreclose the issuing of interim awards that may be enforced as the arbitral proceedings continue. Taking such an approach would undermine the complementary function of the court to assist arbitral tribunal in the course of proceedings.
10. The Respondent does not contest the application on any substantial grounds for refusal or recognition of the award under section 37 of the Act. Absent proof of those grounds and upon compliance by the Applicant with the formal provisions of section 36(1) of the Act, I am bound to allow the application to extent that it seeks enforcement of the award. The duty of the court under this provision is to recognize the award as it is, since it is the award that becomes the judgment of the court from which the decree flows. The court cannot add anything else, for example, interest which the Applicant claims. It can only award costs of the application in the circumstances.
11. I therefore allow the Applicant's Summons dated March 22, 2022 by making the following final orders:
 - a. The Interim Award dated February 16, 2022 by Mr David Mereka (Sole Arbitrator) be and is hereby recognised and adopted as a judgment of this court and leave be and is hereby granted to the Applicant to enforce it as a decree of this court.
 - b. The Respondent shall bear the costs of this application assessed at Kshs. 50,000.00.

DATED and DELIVERED at NAIROBI this 17TH day of MARCH 2023.

D S MAJANJA

JUDGE



Court Assistant: Mr M Onyango

Mr Atonga instructed by Atonga Advocates LLP Advocates for the Applicant.

instructed by Ameyo Guto and Company Advocates for the Respondent.

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