



**Family Bank Limited v Ceven Limited (Arbitration Cause E084 of 2022)  
[2023] KEHC 18939 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18939 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E084 OF 2022  
DAS MAJANJA, J  
JUNE 16, 2023**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPLICANT**

**AND**

**CEVEN LIMITED ..... RESPONDENT**

**RULING**

**Introduction and Background**

1. Before the court are two applications which the court ordered be heard together because they relate to the same arbitral award.
2. The Applicant (“the Bank”) has filed an application dated 20<sup>th</sup> December 2022 under section 36 of the *Arbitration Act*, 1995 seeking recognition and enforcement of the Arbitral Award published on 11<sup>th</sup> November 2022 (“the Award”). The application is supported by the affidavit and further affidavit of its Company Secretary and Chief Legal Officer, Eric Kori Murai, sworn on 20<sup>th</sup> December 2022 and 28<sup>th</sup> February 2023 respectively. It is opposed by the Respondent (“Ceven”) through the replying affidavit of its director, Henry Waweru, sworn on 15<sup>th</sup> February 2023.
3. Ceven filed its application dated 6<sup>th</sup> February 2023 seeking to set aside the Award invoking section 35(2) (a)(iii), (3) and (4) of the *Arbitration Act*. It is supported by the affidavit of Henry Waweru sworn on 6 February 2023 and opposed by the Bank through the replying affidavit sworn by Eric Murai on 28<sup>th</sup> February 2023.
4. Before I deal with the application, a brief background of the dispute will suffice. The Respondent and the Bank entered into a Vendor Agreement dated 8<sup>th</sup> April 2015 (“the Agreement”) for provision



of electricity tokens. When a dispute arose, the parties invoked the arbitration clause and the parties proceeded before an Arbitral Tribunal to hear and determine the dispute.

5. The arbitration proceedings were adjourned on diverse dates. The hearing eventually took place on 26<sup>th</sup> April 2022 in absence of Ceven which filed an application dated 31<sup>st</sup> May 2022 seeking to reopen the hearing. The Arbitral Tribunal issued Award No. 1 allowing the application to reopen the case on condition that Ceven pay the Arbitral Tribunal costs assessed at Kshs. 1,742,652.00 for previous adjournments, the Bank's advocate costs of Kshs. 30,000.00, Bank's witness costs of Kshs. 30,000.00 and the Arbitral Tribunal costs for the hearing of 26<sup>th</sup> April 2022 at Kshs. 75,000.00 all to be paid within 14 days otherwise the order setting aside the proceedings would stand vacated.
6. Ceven did not comply with the orders. The Arbitral Tribunal issued Order for Directions No. 18 on 8<sup>th</sup> July 2022 which vacated the order to set aside the proceedings of 26<sup>th</sup> April 2022 due to the noncompliance. Ceven filed another application dated 13<sup>th</sup> July 2022 seeking to set aside the Order for Directions No. 18 and for extension of time within which to comply with the conditions imposed on it. The Arbitral Tribunal dismissed the application by Award No. 2.
7. Ceven then filed an application dated 28<sup>th</sup> July 2022 in HCOMM Misc. Application No. E567 of 2022 ("HCOMM Misc. No. E567 of 2022") made, *inter alia*, under section 35(2)(a)(iii), 3 and 4 of the [Arbitration Act, 1995](#) ("the Act") seeking orders that the Amended Interim Award No. 1 and Interim Award No. 2 published on 30<sup>th</sup> July 2022 and 22<sup>nd</sup> July 2022 respectively be set aside and it be granted liberty to call its witnesses and present its case on merits. I heard the application and dismissed it by the ruling dated 7<sup>th</sup> November 2022.
8. After the application was dismissed, the Arbitral Tribunal then proceeded to issue the Award which granted the Bank, *inter alia*, Kshs. 193,55,898.50 as at 31<sup>st</sup> December 2020 with interest at a rate of 2.5% per month with effect from 31<sup>st</sup> December 2020 until payment in full. It is this Award that is subject to these proceedings.
9. The parties filed written submissions in support of their respective positions. In considering the application, I do propose deal with the substantive rather than procedural issues. In my view, there are two issues for determination. First, whether the court should set aside the Award and second and if not, whether the court should recognize and enforce the Award.

### **Whether court should set aside the Award**

10. The thrust of Ceven's case is that it was denied the opportunity to present its case before the Arbitral Tribunal. It contends that the Arbitral Tribunal violated public policy by blocking it from presenting its case and or filing written submissions. It referred to the ruling dated 7<sup>th</sup> November 2022 where the court held that the Arbitral Tribunal had jurisdiction under section 26 of the Arbitration Act to re-open proceedings which had previously been conducted. That despite this ruling of the court, the Arbitral Tribunal proceeded to deliver the Award despite its objection that it would be in the interests of justice that it be allowed to present its case on its merits.
11. Ceven further complains that the Award was published on 11<sup>th</sup> November 2022 which was within 3 days of delivery of the ruling dated 7<sup>th</sup> November 2022 despite the fact that the court had issued a stay order against delivery of the said ruling. It contends that the Arbitral Tribunal therefore violated the stay order and had indeed predetermined the matter.
12. Ceven also attacks the Award on the ground that the Arbitral Tribunal granted antecedent interest *suo moto*. It adds that the Award is colossal as it includes interest antecedent to the Agreement. That



the interest was awarded without any reasoning or legal backing contrary to public policy. It therefore urges the court to set aside the Award.

13. In response to the application, the Bank urges that the issue raised by Ceven regarding issues of bias and lack of opportunity to be heard were conclusively dealt with in the ruling dated 7<sup>th</sup> November 2022 in HCOMM Misc. No. E567 of 2022 where the Respondent applicant applied to set aside interim awards issued in the arbitral proceedings. It adds that the Respondent did not seek to review or appeal against the ruling and that no new facts have arisen since the ruling was delivered.
14. The Bank further argues that once the court dismissed Ceven's application to set aside the interim awards, the Arbitral Tribunal was at liberty to publish the award as there was nothing left to determine. Further that although there an order staying of delivery of the final award, it was only pending the hearing and determination of the matter and once the application was dismissed, the Arbitral Tribunal was at liberty to proceed. It points out the under its final directions, the Arbitral Tribunal was required to publish the award within 30 days which it did once the court matter was completed.
15. The Bank submits that the Respondent has not made out a case that the Award has violated or breached the public policy of Kenya. It further submits that under the Arbitrators Terms and Conditions of Appointment, it was agreed that the arbitration shall be conducted in accordance with Arbitration Act and that the Arbitration Rules of the Chartered Institute of Arbitration, Kenya Branch, 2020 Edition ("the Arbitration Rules") would apply. Under section 32C of the Arbitration Act and Rule 90(j) of the Arbitration Rules, an arbitral tribunal is granted power and jurisdiction to award simple interest,

"on any sum and to any date, at such rates and with such rates as it decides appropriate."

The Bank states that it pleaded interest in its Statement of Claim and made submissions on the issue of interest. It states that the Award dealt with the issue of interest and finally held that its claim for monthly simple interest at 2.05% per annum was well founded hence there is nothing in breach of the public policy of Kenya.

16. Ceven raises two grounds for setting aside the Award. First, that it was denied the right and opportunity to present its case and second, the court awarded interest without any legal or factual basis. Its application is grounded on section 35 of the Arbitration Act which grants the court jurisdiction to set aside an arbitral award on the following terms:

35. Application for setting aside arbitral award

- (1) ...
- (2) An arbitral award may be set aside by the High Court only if—
  - (a) the party making the application furnishes proof—
    - (i) that 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, the laws of Kenya; or
    - (iii) the party making the application 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 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, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
  - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
  - (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
- (b) the High Court finds that—
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
  - (ii) the award is in conflict with the public policy of Kenya. [Emphasis mine]

17. An application to set aside an arbitral award can only be allowed if, "the party making the application furnishes proof" to support the application. In its submissions, the Bank correctly points out that the affidavit in support of Ceven's application, is not supported by annexures. It states that it wrote to the Ceven on 20<sup>th</sup> February 2023 seeking to be served with the annexures but to no avail.
18. While an affidavit constitutes evidence on oath which may be relied on to resolve an application, in a case where an applicant seeks to set aside an award on the basis of deficiencies in procedure, the party must, at a minimum, furnish the court with a copy of the award, record of proceedings and other documentary evidence that support its case. It would be difficult in my view to impugn proceedings without a record and such an application would fail to meet the minimum threshold required for setting aside an award. In this case though, I am prepared to exercise discretion in favour of the Respondent as the Applicant did respond to the application by furnishing all the necessary documents in evidence and the parties have submitted on them. Further, the issues raised by the Respondent are already part of previous proceedings which culminated in a ruling in HCOMM Misc. No. E567 of 2022.
19. On the first aspect of the application, the Bank is correct to point out that the court has already adjudicated on the issue whether Ceven's right and opportunity to be heard was violated when the Arbitral Tribunal reinstated and or vacated an order it had made previously setting aside proceedings to enable it present its case for failure to comply with the conditions for setting aside. In HCOMM Misc. No. E567 of 2022, this court addressed the issue whether Ceven's right and opportunity to present its case had been infringed. After analyzing the evidence presented in the ruling dated 7<sup>th</sup> November 2022, the court held as follows:

[20] The question for this court is whether the Applicant has made out a case in terms of section 35(2)(a)(iii) of the *Act* by furnishing proof that it was, "unable to present its case." Looking at the evidence as a whole, the Arbitral Tribunal gave Ceven the opportunity to be heard despite



the numerous adjournments. The Arbitral Tribunal considered the reason for failure by the Applicant to attend the proceedings despite being given an opportunity to attend. The Arbitral Tribunal then set aside the application on terms. It cannot therefore be said that the Applicant was not granted a fair opportunity to present its case. It is only after Ceven failed to comply with the orders that the Arbitral Tribunal issued Directions No. 18 and vacated the order to set aside the proceedings.

[21] Under section 35 of the Act, the High Court can only set aside an arbitral award if the party making the application furnishes proof of the grounds for setting aside. Having considered the entirety of the evidence, I find and hold that the Ceven was given the opportunity to present its case but failed to do so as a result of its own default and non-compliance with the Arbitral Tribunal's directions.

[22] I dismiss the application dated 28<sup>th</sup> July 2022 with costs to the Respondent. The interim orders in force are hereby discharged. The costs are assessed at Kshs. 50,000.00 only.

20. The ground that the Respondent was not given a fair opportunity to present its case was conclusively determined and is for all purposes *res judicata*. The facts and circumstances of this case satisfy the elements of the doctrine set out by the Supreme Court in John Florence Maritime Services Limited and Another v Cabinet Secretary, Transport, and Infrastructure and 3 others [2021] KESC 39 (KLR) where it held that:

We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.

21. In response to the Bank's argument that there are no new facts to warrant re-opening of the ground that it was denied a fair hearing, Ceven contends that its right to be heard was further violated when the Arbitral Tribunal failed to give it an opportunity to file written submissions or make further representations once the court delivered the ruling on 7<sup>th</sup> November 2022.

22. I reject Ceven's argument for the following reasons. The court declined to set aside the arbitral proceedings that had culminated in an Order for Directions No. 18 by the Arbitral Tribunal ("Directions No. 18") which stated as follows:

Order for Directions No. 18

Pursuant to a compliance mention duly convened in Nairobi on 8<sup>th</sup> July 2022 at 12.00 noon and attended by Mr. Eric Thige, an Advocate of the High Court of Kenya representing the Claimant and Mr Moses Muguro, an Advocate of the High Court of Kenya representing the Respondent and Upon Consideration all the matters raised thereat, I Kyalo Mbobu, EBS, the Sole Arbitrator duly appointed hereby Direct and Order as follows:-



- i. That the Respondent has failed to comply with Order A and Order D. of the Amended Interim Award No. 1 dated 30<sup>th</sup> June 2022. It was initially published on 20<sup>th</sup> June 2022.
- ii. That accordingly, the order is set aside and the proceedings of 26<sup>th</sup> April 2022 be and is hereby vacated.
- iii. That the Arbitral Tribunal will prepare the Final Award which will be published within Thirty (30) Days.
- iv. Liberty to apply.

Signed

Arbitrator

23. Having, declined the Ceven's entreaty to set aside the interim arbitral awards that culminated in the order for Directions No. 18, the arbitral proceedings took their natural course. The only issue was for Arbitrator to prepare and publish the award within the thirty day from the date of the directions. Ceven does not dispute the fact that the Award was published 3 days after delivery of the ruling on 7<sup>th</sup> November 2023. This was within the time limited by the Directions No. 18 and there is nothing sinister about this. In any event, Directions No. 18 was issued on 8<sup>th</sup> July 2022. From that date the Arbitral Tribunal had 30 days to prepare the award which would have been delivered on 9<sup>th</sup> August 2022 latest but on 4<sup>th</sup> August 2022, the court issued an order that,

“there shall be a stay of the delivery of the final award in the arbitration proceedings between Family Bank Kenya Limited and Ceven Limited pending further directions of this court.”

Once the ruling was delivered in the matter, the interim orders lapsed and arbitrator was entitled to publish the award since only 5 days were left to do so under Directions No. 18. That ruling is clear that,

“the interim orders in force are hereby discharged”

hence the Arbitral Tribunal was not restrained from preparing the Award for the period of 21 days when its proceedings remained unchallenged. I therefore hold that the Ceven has not proved that the arbitral proceedings were stained by the Arbitral Tribunal's failure to accord it the right and opportunity to present its case.

24. The next question for resolution is whether the interest awarded was contrary to the public policy of Kenya. Ceven does not dispute the fact that the Arbitral Tribunal had the power to award interest both under section 32C of the *Arbitration Act* and the *Arbitration Rules* agreed on by the parties. Ceven's complaint that it was not given an opportunity to make its case on this issue but as I have held, the Arbitrator made default orders which the court has already determined were within the law. There may be circumstances where the court may set aside an award on interest on the grounds of violation of public policy for example where the interest is clearly usurious and has no bearing on the claim. In this case though, the claim for interest was pleaded, it was subject of submissions and the Arbitrator gave reasons for awarding the interest in the manner he did. I hold that the Respondent's case is an attempt to appeal against that aspect of the award on its merits which is not permitted by the *Arbitration Act*.



### **Whether the Award should be recognized and enforced**

25. An application for recognition and enforcement of an arbitral award under section 36 of the [Arbitration Act](#) must be accompanied by a certified copy of the agreement containing the arbitration agreement and a certified copy of the arbitral award. The Applicant has complied with formal provisions for recognition and enforcement of an award. In any case, the Ceven does not dispute the fact that under the Agreement they were bound to settle their disputes by arbitration and that an award was issued.
26. In opposing the application, Ceven has objected to the enforcement on the same grounds it raised in its application to set aside the Award. The grounds upon which the court may refuse to recognize and enforce an arbitral award are set out in section 37 of the [Arbitration Act](#). Those grounds mirror the grounds for setting aside an award under section 35 of the [Arbitration Act](#). Since I have dismissed Ceven's application to set aside the Award on the same grounds that are raised in opposition to the application for recognition and enforcement, I have no reason to refuse to refuse the Bank's application. It is allowed.

### **Disposition**

27. For the reasons I have set out above, I now make the following dispositive orders:
- a. The Respondent's application dated 6<sup>th</sup> February 2023 is dismissed.
  - b. The Applicants application dated 20<sup>th</sup> December 2022 is allowed on terms that the Arbitral Award published on 11<sup>th</sup> November 2022 be and is hereby recognized as a judgment of this court and leave is granted to the Applicant to enforce it.
  - c. The Respondent shall pay the costs of both Applications to the Applicant assessed at Kshs. 100,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Irungu instructed by KMK Law LLP Advocates for the Appellant.

Mr Thige instructed by Muri, Mwaniki, Thige and Kageni LLP Advocates for the Respondent

