



Gilbi Construction Company Limited v Chania Gardens Limited (Commercial Case E067 of 2022) [2023] KEHC 18807 (KLR) (Commercial and Tax) (19 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E067 OF 2022
JWW MONG'ARE, J
JUNE 19, 2023**

BETWEEN

GILBI CONSTRUCTION COMPANY LIMITED PLAINTIFF

AND

CHANIA GARDENS LIMITED DEFENDANT

RULING

1. The applicant has moved this court by a chamber summons dated November 7, 2022 brought under section 36 of the *Arbitration Act*, rules 4 and 9 of the *Arbitration Rules 1997* and order 46 of the *Civil Procedure Rules* seeking to have the court recognize, adopt and enforce the award dated December 3, 2021 and the additional award dated April 11, 2022 by the sole arbitrator, Honourable Nyaga Boore Kithinji, as a decree of the honourable court.
2. The application is supported by the grounds set on its face and the supporting affidavit sworn on November 7, 2022 and a further affidavit sworn on February 22, 2023 by Gopal Lalji Vekaria, a director of the applicant company. The application is opposed and the respondent has filed a replying affidavit sworn by Chris Gacheru sworn on December 5, 2022.
3. The applicant has filed submissions to support the application and a further written submissions dated February 22, 2023 and March 24, 2023 respectively. It is the applicant's position that it has met the threshold set by section 36 of the *Arbitration Act*. The applicant argues that it has satisfied the preconditions necessary for enforcement and recognition by the court of the arbitral award in that it has provided certified copies of the award and the additional award together with the arbitration agreement and that the onus now shifts to the respondent to demonstrate why the award should not be adopted.
4. The applicant further avers that section 37 of The *Arbitration Act* has set out clear guidelines as to what is required to be established by a party opposed to the recognition and enforcement of an arbitral



award and argues that the grounds sought to be relied by the respondents are not part of the guidelines provided under the said section of the law. In any event, the applicant argues that section 34 of the Arbitration Act empowers the arbitral tribunal to correct any computation, clerical or typographical errors or any other errors of a similar nature where an application is made within 30 days after receipt of the award.

5. The applicant further argues that the respondent did not make any moves for 10 months post award to move the tribunal in accordance with section 34 of the Arbitration Act but only chose to raise its objection within the applicant's application which is outside the purview of the law as set out. According to the applicant, the respondent failed to timely invoke the reserved jurisdiction of the arbitrator to resolve the pending issues in the manner provided by the law and therefore the objection is an afterthought and an attempt to deny the applicant the fruits of the award.
6. On its part the respondent filed its objection and stated that the application to enforce and recognize the award was brought prematurely since in its view the court can only recognize and enforce an award if the award does not reserve any matter for consideration by the arbitration or any other person. The respondent argues that the final award and additional award is a conditional award incapable of being recognized and enforced as a decree of the court on account of the reserved jurisdiction by the arbitrator on two issues, namely; on the issue of the quantum of the materials left at the site and the determination of costs that each party was to bear in accordance with section 32(6) of the Arbitration Act.

Analysis and Determination:

7. I have considered the pleadings by the parties and their written submissions and the supporting list of authorities relied upon by each party to support its position. The issue for determination that emerges is "whether the applicant has satisfied the threshold for recognition and enforcement of the arbitral award and the additional award dated December 3, 2021 and April 11, 2022 respectively." section 36 of the Arbitration Act provides as follows;

“ 36. Recognition and enforcement of awards

- (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) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.
- (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”

8. The applicant has satisfied the above threshold in that he has provided alongside the application the arbitral award and the additional award(clarification) and a copy of the arbitration agreement. Section 37 however allows a party not satisfied with the arbitration award being recognized and enforced to file an objection on the following grounds;

37. Grounds for refusal of recognition or enforcement



- (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—
 - (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 recognized 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;
 - (b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.



(2) 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”.

9. The objection by the respondent is premised on the issue of reserved jurisdiction of the arbitral tribunal. The respondent argues that the jurisdiction of the arbitrator has not yet been exhausted since there are issues within the arbitration process that are yet to be determined with a finality being the quantum for the materials left on the site and the costs between the parties. The reverse argument of the applicant is that these issues were time bound and the arbitrator clearly set out the timelines within which the parties were to revert to him if they failed to agree. It has been argued by the applicant that the same lapsed and these issues are being raised within the application with a view to further frustrate the applicant and deny him the fruits of his award.
10. Respectively, both parties cited the court appeal decision in *Kenfit limited v Consolata fathers* [2005]eKLR where the court of appeal held that an award becomes final once all issues including costs are determined with a finality by the arbitrator. The applicant in its reliance on this authority distinguished it from the present case and stated that the said award did not set limitations set as in the present case, hence the holding by the court. I agree with the argument adduced by the applicant that failure to comply with timelines set out by the arbitrator the respondent is deemed to have waived its right to invoke the issue of reserved jurisdiction as a bar to the recognition and enforcement of the award. The respondent waited 10 months to raise issues which the arbitrator had set clear guidelines on what was to be done and only raised the same to object to this application. The respondent is therefore guilty of laches and cannot be allowed to visit an injustice on the applicant by its action. Furthermore, no material has been placed before me to demonstrate what steps the respondent has taken to comply with arbitrator’s direction. To my mind, the award and the additional award are final and the applicant has met the parameters set by section 36 of the *Arbitration Act* in seeking to have the same recognized and enforced as a decree of this court.
11. Flowing from the above, I find and hold that the applicant has satisfied the threshold set by section 36 of the *Arbitration Act*, 1995 for recognition and enforcement of the arbitral award as a decree of the High Court and hence the application before me has merit and I will allow the same with costs to the applicant.
12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE 2023

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

a. Ms. Katherine Ouma for the Applicant.

b. Ms. Misere for the Respondent.

c. Sylvia- Court Assistant

