



Pavanputra Enterprises Limited v Green Dairy (K) Limited (Commercial Arbitration Cause E011 of 2023) [2023] KEHC 20357 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E011 OF 2023**

DAS MAJANJA, J

JULY 21, 2023

BETWEEN

PAVANPUTRA ENTERPRISES LIMITED APPLICANT

AND

GREEN DAIRY (K) LIMITED RESPONDENT

RULING

1. On October 6, 2021, the Arbitrator (also “the Arbitral Tribunal”) published an award awarding the Applicant Kshs. 65,122,753.17 with interest thereon at 14% per annum together with costs of Kshs. 3,658,093.00 (“the Award”). The Applicant has filed the Chamber Summons dated January 27, 2023 made under section 36 of the *Arbitration Act*, 1995 seeking recognition, adoption and enforcement of the Award. The application is supported by the affidavit of the Applicant’s Managing Director, Harish Premji Patel sworn on the same date. When the application was served on the Respondent, it filed a Notice of Motion dated March 8, 2023 invoking section 35(2)(a)(v) of the *Arbitration Act* seeking to set aside the Award. The application is supported by the affidavit of its director, George Kariuki, sworn on the same date. The application is opposed by the Applicant through the affidavit of Harish Patel sworn on March 20, 2023.
2. I directed that both application be heard together and in that regard, the parties filed written submissions. The application to set aside the Award ought to be considered first as its success or otherwise will determine the fate of the application for recognition and enforcement of the Award. From the submissions, the Applicant has raised a preliminary issue that goes to the jurisdiction of the court to determine the application to set aside the Award.
3. The Applicant’s depones that the arbitration proceedings were concluded in October 2021 whereupon the Arbitrator called on the parties to pay his charges and collect the Award. That the Applicant paid the Arbitrator’s charges and the Award was released to it on November 21, 2022. As the Respondent



filed the application to set aside on March 10, 2023 which is more than three months after the Award was published, the application is incompetent in light of section 35(3) of the *Arbitration Act*.

4. The Respondent did not contest the facts asserted by the Applicant by filing a supplementary affidavit. In its submissions, it admits that it delayed in filing the application due to financial constraints hence it was not able to obtain a copy thereof within a reasonable time. It accepted that the Arbitrator notified counsel for the parties of publication of the Award in which it informed the parties that upon receipt of his charges, it would deliver the Award.
5. The Applicant's objection revolves around the interpretation of section 35(3) of the *Arbitration Act* which provides as follows:

35(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award. [Emphasis mine]

6. Essentially, an applicant seeking to set aside an award has three months to file its application from the date of receiving the said award. The Respondent has relied on *Dewdrop Enterprises Limited v Haree Construction Ltd* [2009] eKLR to support the argument that the statutory period commences only after a copy of the arbitral award has been availed to the relevant party. It also cites decisions of the Supreme Court of India; *Union of India v Tecco Trichy Engineers and State of Maharashtra and others v M/S Ark Builders Pvt Limited* where the court considering similar provisions, held that for delivery to be effective it has to be received by the party.
7. The applicant's case is that the meaning of "received" in section 35(3) has been expounded on by the court in a several decisions. It submits and I agree that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection. In *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR, Tuiyott J., explained the position as follows:

[T] statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.

8. The court was of the view that the only obligation of the arbitral tribunal is to avail the signed copy of the award subject to payment of fees and expenses which is an obligation of the parties. Once the parties are notified that the award is ready for collection on payment of fees, the arbitral tribunal has discharged its obligation (see also *Mercantile Life and General Assurance Company Limited v Dilip Shah and 3 others* [2020] eKLR, *Mabican Investments Limited and 3 others v Giovanni Gaida and 80 others* [2005] eKLR and *Transworld Safaris Limited v Eagle Aviation Limited and others* [2012] eKLR). Since the parties are responsible for paying the arbitrator, they cannot rely on the delay to defeat the statutory period for making the application to set aside an award. As was held by Mwita J., in *Jimmy Mutuku Mwithi t/a Oasis Farm v Erick Omanga t/a Cidai Farm* [2021] eKLR, "Should a party delay in paying fees, that party cannot then argue that the date notified of the availability of the award is not the date of its publication or receipt because he is responsible for the delay to collect the award."



9. The respondent has urged that to uphold the Award would amount to an affront to the right of equal protection of the law, access to justice and the right to a fair trial guaranteed under articles 25(c), 27(1), 48 and 51 of the Constitution. In my view, there is no breach or violation of the Constitution in this regard. First, arbitration is one of the forms of alternative dispute resolution processes that the court is enjoined to promote under article 159 of the Constitution. Second, the arbitration process is consensual and parties to enter into arbitration agreements are aware of and are bound by the provisions of the Arbitration Act. As Maraga CJ., explained in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SCK Petition No. 12 of 2016 [2019] eKLR, “Every litigant has the right to choose which mode best serves his or her interests. As AM Gleen posited, “Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court.” Once one has made that choice, one cannot be heard to claim that one’s right of access to justice has been denied or limited.”
10. Finally, an application under section 35 of the Arbitration Act that is time barred is fatal and there is no provision in the Arbitration Act that can salvage such an application. This position is fortified by the Court of Appeal in Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR where it was stated that, “Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award.”
11. The Respondent’s application dated March 8, 2023 is time barred, incompetent, and therefore cannot stand and is accordingly struck out.
12. I now turn to consider the Applicant’s application dated January 27, 2023. Under section 32(A) of the Arbitration 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 Arbitration Act. The High Court, under section 36 of the Arbitration Act, has the power to recognise and enforce domestic arbitral awards once the original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it have been furnished to court.
13. Section 37 of the Arbitration Act sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award. The Respondent in this case has not filed any response setting out any facts upon which the court may refuse recognition of the Award. Essentially, the application is not opposed. It is therefore allowed.
14. For the reasons I have outlined, I now make the following orders:
 - a. The Respondent’s application dated March 8, 2023 be and is hereby struck out.
 - b. The Applicant’s application dated January 27, 2023 is allowed on terms that the Final Award published on October 6, 2021 be and is hereby recognised and adopted as a judgement of the court and leave is granted to the Applicant to enforce it as a decree of the court.
 - c. The Respondent shall bear the costs of both applications assessed at Kshs. 60,000.00.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2023

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kimathi instructed by J. M. Kimathi and Partners Advocates LLP for the Applicant.

Mr Omwansa instructed by Okenyo Omwansa and Associates Advocates for the Respondent.

