



**Ascent Limited v Office Code Limited (Miscellaneous Application E751 of 2022)
[2023] KEHC 22172 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E751 OF 2022
DAS MAJANJA, J
SEPTEMBER 15, 2023**

BETWEEN

ASCENT LIMITED APPLICANT

AND

OFFICE CODE LIMITED RESPONDENT

RULING

1. This matter was originated by the Applicant's Chamber Summons dated October 5, 2022 made under section 36 of the *Arbitration Act* seeking recognition and enforcement of an arbitral award dated August 22, 2022 ('the Award'). On March 1, 2023, the court allowed the application and the Award was adopted as judgment of the court and a decree of the court issued accordingly.
2. Execution of the decree precipitated the Respondent to file the Notice of Motion dated August 28, 2023 seeking the following orders:
 - d) Spent
 - e) Spent
 - f) spent
 - g) Spent
 - h) That the Applicant draft statement of Defence be deemed to be duly filed by the Applicant upon payment of the requisite fee.
 - i) That cost of this application be borne by the Respondent.



3. The application is supported by the supporting and supplementary affidavits of the Respondent's director, George Washington Karani, sworn on August 28, 2023 and September 4, 2023. It is opposed by the Applicant through the replying affidavit of its Managing Director sworn on August 30, 2023 and a Preliminary Objection dated August 30, 2023. The parties' respective advocates made brief oral submissions in support of their respective positions.
4. At the time of giving directions on the matter, I dismissed the Applicant's preliminary objection grounded on section 10 of the *Arbitration Act* which provides that, 'Except as provided in this Act, no court shall intervene in matters governed by this Act' and the conclusive nature of an arbitral award dealt with under section 32A of the *Arbitration Act* which states, 'Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by the Act.' According to the Applicant, the court cannot entertain the application to set aside judgement as this would interfere with the award in a manner that is not permissible. As I understand, the only recourse against the award is to be found in PART VI of the *Arbitration Act* titled, 'Recourse To The High Court Against An Arbitral Award.' Under section 35 thereof, a party may apply to set aside the award strictly on the grounds permitted and within the time frame provided. Further, once the court declines to set aside the award or the time for such application lapses, a party may move the court to recognise and enforce the award. Once the award is duly recognised and adopted by the court as a judgment for purposes of enforcement, then the judgment is sacrosanct and cannot be set aside.
5. I agree with the Applicant's submissions on the issue of exclusivity of arbitral process under the *Arbitration Act* (see *Nyutu Agrovet Limited v Airtel Networks Limited [2015]eKLR*). However, once the award is adopted as judgment of the court, the normal incidents of the *Civil Procedure Act* and the Civil Procedure Rules apply to the judgment so recognised. The court can intervene in the judgment in accordance with its rules but it cannot disturb the award. The award remains sacrosanct. For example, a party can apply to set aside the judgment if the matter was heard ex-parte or challenge execution if it is irregular. The substance of the issue at hand is that the application for recognition and enforcement was heard ex-parte. This, in my view, does not interfere with the Award in a manner that is inconsistent with or not provided for by the *Arbitration Act*.
6. Turning to the substance of the application which seeks an order that the, 'Applicant draft statement of Defence be deemed to be duly filed by the Applicant upon payment of the requisite fee', the grounds are set out on the face of the application and supporting deposition and are as follows. The Respondent complains that it was not served with summons or other documents relating to the matter. The Respondent's director complains that the properties served as his personal and household properties which he acquired in his personal capacity and that he is not a party to this suit and cannot be sued as such. He states that he has a strong defence which should be heard on merit.
7. Even without going any further, it is not clear that the Respondent is dealing with the subject of the suit in the application. As I informed counsel for the Respondent at the hearing, where execution is against a person who is not a party to the suit and that person has an interest in the property attached, he is entitled to file objection proceedings in order to challenge the execution by asserting his legal or equitable interest in the goods attached as provided for under Order 22 rule 51 of the *Civil Procedure Rules*. In this respect, the application in so fact as it brought to protect the Respondent's director's interest is incompetent.
8. As regards the issue of service, the Respondent's application seems to suggest that what was before the court is an ordinary suit which was commenced by way of plaint and that it was supposed to be served with summons to enter appearance in order to file its defence. This is not the position.



As stated above, this matter was commenced by a Chamber Summons seeking recognition and enforcement of an award. Since the issue before the court is the recognition and enforcement of the award, the Respondent ought to state why it failed to attend court when the award was adopted. The Respondent's case is that it was not involved in the arbitration proceedings as it was not served with process. This is an argument to be dealt with at the time of setting aside the award or opposing the application for recognition. It is not a matter the court can deal with at this stage as this would be contrary to section 10 and 32A of the *Arbitration Act*.

9. The Respondent's application as I shown above is not clear as what it seeks. While I appreciate that under Article 159(2)(d) of the *Constitution* the court is required to dispense justice without undue regard to technicalities, a party who comes to court, particularly one represented by an advocate, must come to court with an idea of what it seeks, set out its plea in an application made in accordance with the rules and seek precise orders. Compliance with the rules and procedures assists the court dispense justice fairly, efficiently and effectively. In this case, apart from the sheer incompetence of the application, the prayer sought is incongruent with the subject of the matter. The Respondent seeks to file a defence. What defence? It has not even attached the defence or even set out a semblance of a defence to the matter at hand let alone deal with what appears to be its gravamen in the matter.
10. The application August 28, 2023 must be dismissed. It is dismissed with costs to the Applicant.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

