



**Solutions & Products Limited v China Zhongxing Construction Co Ltd  
& another (Arbitration Cause E011 of 2022) [2023] KEHC 22543 (KLR)  
(Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22543 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E011 OF 2022  
FG MUGAMBI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**SOLUTIONS & PRODUCTS LIMITED ..... APPLICANT**

**AND**

**CHINA ZHONGXING CONSTRUCTION CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**KENYA CONFERENCE OF CATHOLIC BISHOPS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. Before the court are three applications. In order of chronology, the first application dated January 27, 2022 was by Collaboration Engineering Solutions and Production Limited (herein the applicant) for recognition and adoption of the arbitral award dated January 26, 2022 by Eng. Basil Ononbhara Odigie (the award). The second is the application dated February 8, 2022 by China Zhongxing Construction Company Limited (herein the 1<sup>st</sup> respondent) and then the application dated March 2, 2022 by the 2<sup>nd</sup> respondent, Kenya Conference of Catholic Bishops both for setting aside the arbitral award.
2. The relationship of the parties and subsequent dispute arises from a tender for the supply, delivery, installation, testing and commissioning of a waste water treatment plant for a contract sum of Kshs. 12,000,000/= . The tender, which was floated by the 2<sup>nd</sup> respondent, was awarded to the 1<sup>st</sup> respondent who in turn sub contracted the works to the applicant vide a sub-contract agreement dated February 5, 2018. A dispute arose in the course of execution of the tender and the agreement and the same was referred to arbitration, culminating in the present applications.



3. I do not wish to regurgitate all the pleadings and submissions by parties. I will however refer to these as relevant, from time to time. A summary of the three applications is as follows:

#### **Application dated January 27, 2022**

4. The application was brought under section 36 of the *Arbitration Act* CAP 49 Laws of Kenya, rule 9 of the *Arbitration Rules* 1997, section 3A of the *Civil Procedure Act* and all enabling provisions of the Law. It seeks to have the award recognized and adopted as an order of this Honourable Court. It also seeks leave to enforce the final award as a decree of this Honourable Court and for costs of the application.
5. It was supported by the affidavit of Christopher Nganga Gathini, the Chief Executive Officer and Managing Director of the applicant and the composite written submissions dated April 19, 2022 in support of the application and in opposition to the applications by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
6. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through replying affidavits sworn by Felix Ndolo dated April 21, 2022 and another sworn by Thomas Kimani on July 18, 2022 respectively.

#### **Application dated February 8, 2022**

7. The application was brought under section 7 and 35 of the *Arbitration Act* 1995 and rule 4(2) & 7 of the *Arbitration Rules* 1997. It seeks to have the arbitral award set aside in its entirety and for costs of the application.
8. The application was supported by the grounds on the face of it, the averments contained in the supporting and further affidavits sworn by XU JIANSHENG, the 1<sup>st</sup> respondent's Managing Director and written submissions dated March 1, 2022 and further submissions in response to the applicant's submissions dated April 29, 2022.
9. The application was opposed by the applicant through a replying affidavit dated February 9, 2022 sworn by Christopher Ng'ang'a Gathini.

#### **Application dated March 2, 2022**

10. The application was brought under sections 10, 29(5), and 35(2)(a)(v) & (b)(ii) of the *Arbitration Act* No 4 of 1995 and Rule 4(2) & 7 of the *Arbitration rules* 1997. It sought to set aside the award and the consequential orders and for costs of the application.
11. The application was supported by the affidavit and further affidavit of Felix Ndolo, the Legal Officer with the 2<sup>nd</sup> respondent and written submissions dated April 21, 2022 as well as further submissions dated July 21, 2022. It was opposed the application by way of a replying affidavit sworn by Christopher Ng'ang'a Gathini on February 9, 2022.

#### **Analysis**

12. I have considered the totality of the comprehensive pleadings, submissions and evidence presented by all the parties in support of their cases. They all point towards two issues for determination namely:
  - i. Whether the parties have met the threshold for setting aside the award in the applications dated February 8, 2022 and March 2, 2022.
  - ii. Whether the award should be recognized and adopted as an order of this court as prayed in the application of January 27, 2022.



**Whether the parties have met the threshold for setting aside the award in the applications dated February 8, 2022 and March 2, 2022.**

13. The grounds for setting aside an arbitral award are enunciated in section 35(2) of the [Arbitration Act](#). It provides in part as follows:

“ An arbitral award may be set aside by the High Court only if—

- (a) the party making the application furnishes proof—
  - (i) ...
  - (ii) ...
  - (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) ...
  - (vi) ...
- (b) the High Court finds that—
  - (i) ... or
  - (ii) the award is in conflict with the public policy of Kenya.”

14. I have reproduced here the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have relied on in their quest for setting aside the award. The 1<sup>st</sup> respondent relies on section 35(2)(iii) section 35(2)(b)(ii). The 2<sup>nd</sup> respondent in turn relies on section 35(2)(iv) and 35(b)(ii). I shall consider each of the arguments separately.

15. The first question that I must determine is whether the arbitrator went beyond the scope of the reference to arbitration. It is a well crystalized principle or arbitration procedure that arbitration proceedings are dependent on consent. Where the arbitrator steps out of the agreed confines, the entire process is bound to fall into the cracks. Counsel cited the case of [Consolidated Bank of Kenya V Arch Kamau Njendu T/A Gitutho Associates, HC MSA No. 195 of 2013, \[2015\] eKLR](#) where the court held that an arbitrator has no power apart from that given to him under the contract and if he does anything outside of this, he acts without jurisdiction.

16. In this regard, the first bone of contention is that the 2<sup>nd</sup> respondent in this proceeding did not consent to arbitration proceedings. The 2<sup>nd</sup> respondent argues that he had no privity of contract with the applicant, as he was not a party to the sub-contract agreement which provided for the arbitration proceedings between 1<sup>st</sup> and 2<sup>nd</sup> respondent.



17. The Courts have pronounced themselves on the importance of ensuring that the agreement between parties in an arbitration proceeding is upheld. A few examples will suffice. In *Rural Housing Estates Limited v Eldoret Municipal Council, [2009] eKLR* the Court observed that:
- “...This court is conscious that it is required in law to uphold agreements between parties to a contract who have agreed to have any dispute between them resolved by arbitration. However, where it appears that the arbitration process has been circumvented and a decision has been reached that is not contemplated in the agreement between the parties, this court will have no option but to intervene in accordance with the powers granted to it under the *Arbitration Act*, 1995.”
18. Speaking to the applicability of the doctrine of privity of contract, the Court of Appeal rendered itself in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another, (2015) eKLR* as follows:
- “In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd, [1915] AC 847*, Lord Haldane, LC rendered the principles thus:
- My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”
19. Further, in *Agricultural Finance Corporation V Lendetia Ltd, [1985] eKLR* the Court quoted with approval from Halsbury’s Laws of England, 3<sup>rd</sup> Edition, Volume 8, paragraph 110 regarding the same principle in the following words:
- “As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”
20. Against these well crystalized principles and considering the sub contract agreement dated February 5, 2018 presented before the Court, I note that the same was executed by the applicant and the 1<sup>st</sup> respondent only. The terms of the agreement were therefore only applicable to any disputes between the applicant and the 1<sup>st</sup> respondent only.
21. The applicant relied on clause 31.5 of the agreement which provided for the procedure that the applicant could follow to institute proceedings against the 2<sup>nd</sup> respondent in the name of the 1<sup>st</sup> respondent. For this to happen, the 1<sup>st</sup> respondent was required to give consent to the applicant upon the applicant giving such security and indemnity as would be required by the 1<sup>st</sup> respondent.
22. As already stated earlier, the 2<sup>nd</sup> respondent did not consent to this term of the contract. What this means is that there was no arbitrable dispute between the applicant and the 2<sup>nd</sup> respondent. Moreover, the requirements in the sub contract were not even fulfilled as there was no consent from the 1<sup>st</sup> respondent as required under clause 31.5 of the agreement.



23. I have looked at the award and it would appear that the arbitration proceeded on the assumption that the 2<sup>nd</sup> respondent contracted the claimant which is not accurate. The 2<sup>nd</sup> respondent contracted the 1<sup>st</sup> respondent and it is the 1<sup>st</sup> respondent who sub contracted the applicant in terms of the sub-contractor agreement.
24. I therefore find no difficulty holding that the arbitration proceedings and the award herein dealt with a dispute that was not contemplated by the terms of the reference and went beyond the scope of the reference to arbitration. Having so found, I need not go further with any other grounds relied on by the 2<sup>nd</sup> respondent since it is clear that the award cannot stand.
25. The 1<sup>st</sup> applicant on the other hand states that it had no notice of the appointment of an arbitrator. I note from the record that indeed, a letter dated March 1, 2019 was written to the 1<sup>st</sup> respondent declaring a dispute and suggesting a number of possible arbitrators to adjudicate over the dispute. The applicant relied on Clause 31.2 of the sub-contract agreement. It provided that:
- “ ... The dispute shall be referred to arbitration and final decision of a person to be agreed by the parties. Failing agreement to concur in the appointment of an arbitrator, the arbitrator shall be appointed by the chairman or vice chairman of the Architectural Association of Kenya or the chairman or vice chairman of the Chartered Institute of Arbitrators, Kenya Branch at the request of the applying party.”
26. The 1<sup>st</sup> respondent responded to this letter vide one dated March 5, 2019 denying that there was any dispute and choosing instead to remain tightlipped about the choice of an arbitrator. This prompted the applicant to write to the Chartered Institute of Arbitrators who appointed Eng. Basil Ononbhara Odigie as sole arbitrator. The applicant also paid the Kshs. 20,000/= appointment fees due to the Chartered Institute.
27. By virtue of having responded to the letter of March 1, 2023 I am convinced that the 1<sup>st</sup> respondent had notice of the process of appointment of the arbitrator but deliberately chose to stay away from this process as it did not consider there to be any arbitrable dispute with the applicant. The same befell the arbitration proceedings whereby the 1<sup>st</sup> respondent chose to remain aloof.
28. What is critical however, and I must concur with the 1<sup>st</sup> respondent is that the arbitrator’s award and proceedings and particularly the preliminary meeting and directions at the start of the arbitration did not recognize, record or acknowledge the 1<sup>st</sup> respondent as a party to the dispute. The letter of July 4, 2019 from the Chartered Institute of Arbitrators appointing the sole arbitrator also referred to the dispute between the applicant and the 2<sup>nd</sup> respondent. It is only mid-way through the proceedings that the 1<sup>st</sup> respondent surfaced as a party. Having not been recognized as a party from the onset, I agree that there would have been no point in serving the 1<sup>st</sup> respondent with the proceedings. The applicant has not controverted this fact by producing any evidence of service. I therefore find that the 1<sup>st</sup> respondent had no notice of the proceedings and as a result did not present his case before the tribunal.
29. As a consequence, the Court cannot allow the application for enforcement of the award.

### **Determination**

30. In the premises, the application dated February 8, 2022 is hereby granted setting aside the arbitral award published on January 26, 2022 against the 1<sup>st</sup> respondent. The import of this is that the application of January 27, 2022 is not successful against the 1<sup>st</sup> respondent.



31. The application of March 2, 2022 is hereby granted, setting aside the arbitral award published on January 26, 2022. The import of this is that the application of January 27, 2022 is not successful as against the 2<sup>nd</sup> respondent.
32. The 1<sup>st</sup> respondent contributed to the misfortune and as such is not deserving of the costs of this application. The 2<sup>nd</sup> respondent shall however have the costs of this application.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.**

**F. MUGAMBI**

**JUDGE**

