



**APA Insurance Limited v Hashi Communication Limited &
another (Commercial Miscellaneous Application E236 of 2023)
[2023] KEHC 24616 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E236 OF 2023**

**MN MWANGI, J
OCTOBER 13, 2023**

BETWEEN

APA INSURANCE LIMITED APPLICANT

AND

HASHI COMMUNICATION LIMITED 1ST RESPONDENT

JOYTECH LIMITED 2ND RESPONDENT

RULING

1. The application before this Court is a Chamber Summons dated 25th March, 2023 brought under the provisions of Article 159(2)(d) of the Constitution of Kenya, Section 36 of the Arbitration Act, Cap 49 of the Laws of Kenya as read together with Rule 9 of the Arbitration Rules, 1997 and all other enabling provisions of the law. The applicant seeks the following orders-
 - i. That the Final Arbitral award on costs made on 24th February, 2023 by James Muruthi Kihara C.Arb, the Arbitrator herein in the matter of the arbitration between Hashi Communication Limited and Joytech Limited versus APA Insurance Limited be recognized and enforced as a judgment of this Honourable Court; and
 - ii. That costs of this application be provided for.
2. The application has been brought on the grounds on the face of the Summons and is supported by an affidavit sworn on 25th March, 2023 by Kennedy Ochieng', learned Counsel for the applicant. The respondents did not file any response(s) to the application herein
3. The instant application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Ochieng' K. & Associates Advocates on 12th September, 2023. The



respondents neither filed written submissions nor made any oral submissions in opposition to the application herein.

4. Mr. Ochieng', learned Counsel for the applicant cited the provisions of Section 32(A) of the Arbitration Act and submitted that an Arbitral Award is Final and binding upon the parties and no recourse is available against the award except as in the manner provided for by the Act. He further referred to the provisions of Section 32(B)(1) of the Arbitration Act and stated that it empowers the Arbitral Tribunal to make a determination on costs and other legal expenses incurred by the parties, and for the said reason, the Arbitral Tribunal had the requisite jurisdiction to make an assessment of costs in favour of the applicant, which costs were taxed at Kshs.340,450.00.
5. Counsel pointed out that the instant application is unopposed in view of the fact that the respondents did not file any response(s) to it. He stated that Section 36 of the Arbitration Act provides for recognition of a domestic arbitral award as binding, and upon application in writing to the High Court, the award shall be enforced subject to the provisions of Sections 36 and 37 of the Arbitration Act. He added that the foregoing notwithstanding, none of the grounds for refusal of recognition or enforcement of the Arbitral Award by Hon. James Muruthi Kihara C.Arb, the Arbitrator, as provided for under Section 37 of the Arbitration Act have been invoked.
6. Mr. Ochieng' submitted that the applicant has satisfied all the requirements for enforcement of an Arbitral Award hence the application herein should be allowed as prayed.

Analysis And Determination.

7. On consideration of the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, together with the written submissions by Counsel for the applicant, the issue that arises for determination is whether the Arbitral Award on costs, as awarded by the Arbitral Tribunal should be recognized and enforced as a judgment of this Court.
8. In the affidavit filed by the applicant sworn by Mr. Kennedy Ochieng', he deposed that on 25th November 2021, the Magistrate's Court made an order in Milimani CMCC No. 1051 of 2020 – Hashbi Communication Limited & Joytech Limited v APA Insurance Limited, that the dispute between the parties therein be referred to Arbitration for hearing and determination, as agreed by the parties in the subject insurance policy agreement.
9. The applicant deposed that parties agreed on a single Arbitrator Hon. James Muruthi Kihara C.Arb and arbitral proceedings commenced but the respondents persistently failed to comply with the directions given by the Hon. Arbitral Tribunal leading to termination of the said proceedings on 24th November, 2022, pursuant to the provisions of Section 33(2) of the Arbitration Act.
10. Counsel averred that the applicant was awarded costs of the arbitral proceedings which were subsequently taxed on 24th February, 2023. He further averred that the respondents have not made any application to set aside the Arbitral Award on costs thus they are bound by it.
11. Mr. Ochieng' submitted that pursuant to the provisions of Section 32(A) of the Arbitration Act and Rule 29(16) of the Arbitration Rules, an Arbitral award is final and binding to the parties and for the said reason, the respondents cannot have any further claim against the applicant.
12. He also submitted that pursuant to the provisions of Section 36 of the Arbitration Act, this Court is under a mandatory duty to recognize and order enforcement of an Arbitral Award except where the grounds set out under Section 37(1) of the Arbitration Act are proven.



Whether the Arbitral Award on costs as awarded by the Arbitral Tribunal should be recognized and enforced as a judgment of this Court.

13. The relevant law when it comes to adoption of an Arbitral Award is Sections 36 and 37 of the Arbitration Act, No. 4 of 1995. Section 36 of the said Act provides as hereunder -

- “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.
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.
4.”

14. Section 37 of the Arbitration Act, No. 4 of 1995 on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce an Arbitral Award at the request of the party against it. It states as follows -

- “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 recognised 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.”

15. From the pleadings on record, it is evident that the applicant holds an Arbitral Award on costs issued in its favour on 24th November, 2022, upon termination of the Arbitral proceedings between the parties herein. The said costs were subsequently taxed *vide* an award on costs dated 24th February, 2023 at Kshs.340,450.00. In compliance with the provisions of Section 36(3) of the *Arbitration Act*, No. 4 of 1995, the applicant has annexed to its affidavit in support of the instant application certified copies of the order referring the dispute between the parties herein to Arbitration, the order for directions No. 2 where the Hon. Arbitrator dismissed the arbitral proceedings with costs to the applicant, and an award on costs dated 24th February, 2023.

16. As indicated at the beginning of this ruling, the respondents neither filed responses nor written submissions in opposition to the application herein. Consequently, there is no assertion and/or evidence before this Court demonstrating and/or establishing any of the grounds provided for under Section 37 of the *Arbitration Act*, No. 4 of 1995, to warrant this Court’s refusal of recognition and enforcement of the Arbitral Award on costs dated 24th February, 2023. In the case of *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2013] eKLR, the Court held inter alia -

“Recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the *Arbitration Act*. The conditions set under section



37 of the Act have not been met to warrant this court not to recognize and enforce the award.”

17. It is trite that Courts will ordinarily recognize and enforce an Arbitral Award unless a party demonstrates that the award is affected by one or more of the prescribed grounds for refusal set out under Section 37 of the Arbitration Act, No. 4 of 1995. Therefore, in the absence of grounds to vitiate the Arbitral Award on costs dated 24th February, 2023 under Section 37 of the Arbitration Act, No. 4 of 1995, I am satisfied that the applicant has made out a case for recognition and enforcement of the said Arbitral Award.
18. The upshot is that the application dated 25th March, 2023 is merited and it is hereby allowed in the following terms-
- i. The Final Arbitral Award on costs made on 24th February, 2023 by Hon. James Muruthi Kihara C.Arb, the Arbitrator in the matter of the arbitration between Hasbi Communication Limited and Joytech Limited versus APA Insurance Limited is hereby recognized and shall be enforced as a judgment of this Court; and
 - ii. Costs of the application shall be borne by the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF OCTOBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kennedy Ochieng for the applicant

No appearance for the respondent

