



**Mawo FZE v Juba Airways Limited (Miscellaneous Application E866 of 2023)  
[2024] KEHC 14155 (KLR) (Commercial and Tax) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E866 OF 2023**

**PJO OTIENO, J**

**NOVEMBER 11, 2024**

**BETWEEN**

**MAWO FZE ..... APPLICANT**

**AND**

**JUBA AIRWAYS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By way of an Amended Chamber Summons dated 3<sup>rd</sup> April, 2024 and brought pursuant to section 36 of the *Arbitration Act*, the applicant seeks the orders that the Arbitration Award rendered in Arbitration Proceedings Reference No. 806 of 2018 by the sole arbitrator, Abdullah Al Safi Jabarullah, dated 06/08/2019, be recognized and enforced as the judgment and decree of this Honourable court. The applicant also prays that the costs of the application be borne by the respondent. From the face of the summons, it is apparent that the sole purpose of amendment was to substitute the initial respondent, JUBA Air Cargo Llc t/a Juba Airways Ltd with Juba Airways Limited
2. The summons is supported by the affidavit of Ali Hussein Ali Ahmed sworn on the date of the summons. The deponent of the affidavit introduces himself as the director and general manager of the applicant. He proceeds to aver that the applicant entered into a lease agreement with V BERD AVIA LTD for the lease of the applicant's FOKKER 50 AIRCRAFT MSN: 20130 and subject to the terms and conditions of a lease agreement dated 24.8.2015. He proclaims that with the consent of the applicant, V BERD AVIA LTD sub leased the aircraft to the respondent on the term that they would jointly pay the monthly rental value for the lease of the aircraft.
3. He explains that the dispute arose in relation to the termination of the agreement and non-payment of the rental value for the lease of the aircraft and Hon. Arbitrator Abdullah Al Safi Jabarullah was consensually appointed to adjudicate the dispute vide an arbitration agreement dated 27.3.2019. The



arbitration proceedings precipitated an award dated 06.08.2019. He adds that the award has neither been appealed, set aside nor challenged and he is therefore asking this court to enforce the award.

4. The application is resisted by the replying affidavit of Said Nur Qailie sworn on 12<sup>th</sup> June, 2024 in which he introduces himself as the director of the respondent. He objects to the recognition and enforcement of the arbitral award for the reason that the respondent was not given notice of the appointment of the arbitrator, the arbitral proceedings took place without its knowledge, was thus denied the opportunity to present its case and that he was a stranger to the arbitration agreement and thus the award.
5. He asserts that the arbitral award being an international arbitral award is regulated by the New York Convention (1958) and article V which provides that an application for recognition and enforcement of an award may also be dismissed at the request of the party against whom it was enforced if that party establishes that he was not given proper notice of the arbitrator and/or arbitration proceedings hence was rendered unable to present its case. He declares that the arbitral award offends the respondent's right to be heard and the right to a fair trial is a right that cannot be limited under article 25 of *the Constitution* of Kenya. He adds that the respondent has lodged a complaint and subsequently opened a case at the Government of Dubai Legal Affairs Department against the firm of advocates who represented it in the purported proceedings without its knowledge, instruction and authority. He avows that the arbitration award was procured by fraud and should therefore be dismissed under section 37(1)(a)(viii) of the *Arbitration Act*.
6. In addition, he asserts that the respondent was not an executing party in the lease proceedings that resulted in the arbitration proceedings. He stated that clause 23.3 of the agreement between the applicant and V BERD AVIA LTD required for a written consent by the applicant allowing for any sub lease of the agreement and that there is no written consent in respect of a sub-lease to the respondent in performance of the alleged lease agreement as alleged by the applicant. He avows that the applicant cannot enforce the lease agreement and the award against the respondent who was not privy to the two.
7. Pursuant to the directions by the court, parties have filed their respective submissions. The court has had a chance to read and has derived valuable guidance from the submissions.

### **Applicant's Submissions**

8. It is argued that whether the respondent participated in the proceedings is a matter of record and that the respondent was a party to and signed the arbitration contract and was represented by an advocate, M/S abduhakim Bin Herz and that the defence offered in the arbitration proceedings is the defence given in this case. It is further argue that the contention by the respondent that they did not give instructions to the advocate does not hold water because no pleadings have been produced to ascertain the nature of the complaint.
9. On whether the respondent should be adjudged liable, the applicant submits in the affirmative and argues that the assertion that the award is contrary to public policy was an issue determined in the arbitration proceedings and in the proceedings in the circuit court in the UAE and therefore reopening this argument is akin to this court sitting in appeal of the award when the role of this court under section 36 and 37 of the *Arbitration Act* is not to sit as an appellate court but to adopt the outcome of arbitration.
10. The decision in Chai Housing Cooperative Society Ltd vs Marie Wambui Thande (2019) eklr for the proposition of the law that it would be unreasonable to expect everybody dealing with a company to meticulously examine its internal machinery in order to ensure that the officer he is dealing with is duly authorised to act on behalf of the company. The court was urged to find that the advocate who appeared for the respondent was duly appointed and had the ostensible authority to act as he did



## Respondent's Submissions

11. For the respondent, it is argued in the submission that the respondent was fraudulently represented by a firm of advocates in Dubai without its express consent and authority. The submissions contend that the firm of advocates purported to have authority to execute documents on behalf of Juba Air Cargo LLC which is now assumed by the applicant to be trading as Jubba Airways Limited. It is argued that the lack of the representation of the respondent in the said proceedings offended public policy as defined by the court of appeal in the case of *Kenya Shell Limited v Kobil Petroleum Limited* (2006) eKLR where the court observed that an award could be set aside under section 35(2)(b)(ii) of the *Arbitration Act* for being inconsistent with the public policy of Kenya if it was shown that it was inconsistent with *the Constitution*.
12. They submit that the purported arbitration award emanated from arbitration proceedings that were allegedly borne by an arbitration clause in a lease agreement that was not executed by the respondent. It is contended, based on the principle of privity of contract, that only parties to a contract can sue and be sued on that contract and the decision in *Chidhya (Kenya) Limited v Africa Equipment & Engineering Power S.A (AEE Power S.A)* (2020) eKLR is cited in that regard. The court is therefore urged to refrain from enforcing an award that was made against a third party to the proceedings.

## Analysis and Determination

13. The sole issue for the court's determination is whether the Arbitration Award rendered in Arbitration Proceedings Reference No. 806 of 2018 by the sole arbitrator Abdullah Al Safi Jabarullah dated 06/08/2019 should be recognized and enforced as the judgment and decree of this honourable court.
14. While the foundation of arbitration is the party autonomy in choice of forum, the court retains its inherent power to scrutinize the proceedings and the ensuing award with a view to ensuring that basic norms of justice are maintained as a way of maintaining the attributes of Arbitration as an alternative process to litigation in dispensation of justice.
15. The court is thus expected to honour the parties' choices and outcomes of the dispute resolution by the chosen forum with the window to set aside the award or refuse its enforcement when the circumstances set out in section 35 and 37 of the *Arbitration Act* are demonstrated.
16. Here, on the said twin grounds, the respondent protests that the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya as set out in section 37(b)(ii) of the *Arbitration Act* on the twin grounds that it was never a party to the agreement and award.
17. While public policy as a ground for setting aside or refusing recognition of an award remains a broad concept incapable of precise definition, every party resisting enforcement has the duty to demonstrate to the satisfaction of the court that enforcement would offend public policy<sup>1</sup>. In this matter there is no application for setting aside. The respondent only resists enforcement but invokes the power of the court under section 37.
18. While the argument by the respondent that the arbitration proceedings did not accord them audience, the right to be heard, a non-derogable right under *the Constitution* of Kenya, could beg the elaborate questions on whether the named advocate was indeed appointed and instructed by the respondent, the question of whether the respondent was a party to the award is fairly straightforward. It only calls for the reading of the proceedings and the award to know who was before the arbitrator. The court has undertaken that task and established that the award was against Juba Air Cargo LLC.

<sup>1</sup> See Ringera J (as he then was) in *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366



19. The Arbitration award marked LHAA 3, it lists the parties to the arbitration proceedings as; MAWO (FZE) as the claimant, V Bird Avia Limited as the first defendant and Juba Air Cargo LLC as the second defendant. The advocate representing the second defendant has been identified as M/S Abdul Karim Bin Herz.
20. Even the judgment of the United Arab Emirates, Ministry of Justice, marked as LHAA4 which applicant contends recognized the arbitral award, identifies the parties to the arbitration proceedings as; MAWO (FZE) as the claimant, V Bird Avia Limited as the first defendant and Juba Air Cargo LLC as the second defendant.
21. From these documents, there cannot be any valid dispute that that party that participated in the arbitration proceedings leading up to the arbitral award now sought to be enforced was Juba Air Cargo LLC and not Juba Airways Limited. It follows that the person obligated to meet the award and against whom the award may be enforced cannot be the respondent named in this application. To enforce the award as sought by the applicant would be to obligate a third party to the award. That is an action that every norm of justice would frown upon as travesty of justice.
22. For reason that the respondent was not a party to the award sought to be enforced, the court is fully satisfied that the respondent herein, cannot, in justice and fairness, be called upon to satisfy the award not made against it.
23. The court thus declines to recognise the arbitral award with the consequence that the application for its enforcement must fail. It is thus dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024**

**PATRICK J O OTIENO**

**JUDGE**

