



**Britam General Insurance Company Limited & another v Infama Insurance Agency Limited (Civil Case E 174 of of 2019 & 118 of 2021 (Consolidated)) [2021] KEHC 352 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 352 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E 174 OF OF 2019 & 118 OF 2021 (CONSOLIDATED)**

**MW MUIGAI, J**

**SEPTEMBER 16, 2021**

**BETWEEN**

**BRITAM GENERAL INURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**INFAMA INSURANCE AGENCY LIMITED ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**CIVIL CASE 118 OF 2021**

**BETWEEN**

**BRITAM GENERAL INURANCE COMPANY ..... PLAINTIFF**

**AND**

**INFAMA INSURANCE AGENCY LIMITED ..... DEFENDANT**

**RULING**

**CHAMBER SUMMONS**

1. The Applicant filed a Chamber Summons Application dated 27th November 2020 for orders that; -
  - i. The Applicant be granted leave to enforce the Final Award dated 25th August 2020 and delivered on 17th November 2020 by the sole Arbitrator Hon. Justice Edward Torgbor as a decree of the court



- ii. The Respondent be ordered to pay all costs and expenses incidental to the enforcement and execution of the decree aforesaid.
2. Which Application was supported by the sworn Affidavit of Angela Tusaba dated 27th November 2020 on the grounds that; -
- a. By consent the parties were referred to Hon Justice Edward Torghbor for hearing and final determination.
  - b. On 17th November 2020 the sole Arbitrator published the Final Award and made the following orders; -
    - i. The Applicant is awarded the claimed sum of Kshs.126, 571, 885.
    - ii. The Respondent is ordered to pay the Applicant the capital sum of Kshs.126, 571, 885 with interest at 14% per annum from the date of this award to the date of full payment.
    - iii. The Respondent to pay the full costs of the Arbitration consisting of;
      1. Applicant's costs of the arbitration and its share of the arbitral deposit.
      2. Applicant's legal fees and expenses.
      3. The Arbitrators fees, to be separately communicated and notified to the parties.
  - c. On 18th November 2020 the Applicant made a formal demand upon the Respondent to settle the full award amounts but the Respondent neglected and/or failed to do so.
  - d. The Applicant requires leave of the court to enforce the award.
  - e. The Final Award has been duly filed in this cause and the Respondent's Advocates duly notified of the same.
  - f. Unless the orders sought herein are granted the entire arbitration process will be rendered nugatory.

#### REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of Steve Wanjau dated 21st January 2021 and stated that; -
- i. Section 35(3) of the *Arbitration Act* gives an aggrieved party in an Arbitration the right to challenge the Award by filing an Application to set aside the Award within 3 months from the date of the publication of the Award. The Award herein was published and made available to the parties on 17th November 2020.
  - ii. By filing the instant Application, the Applicant was seeking to diminish the Respondent's right to challenge the Award.
  - iii. The Applicant's discretion to file an application to enforce the Award whether ex parte or not is only to be exercised where an application to challenge the Award has not been filed in accordance with Section 35 of the Act, which Application can be made at any time within the three months after receipt of the Award by the aggrieved party including on the last day.



- iv. The instant Application ought to be declined pursuant to Section 37(1)(a)(vi) of the Act which provides that the Court is entitled to decline an application for recognition of an Award is yet to become binding on the parties. The Award sought to be enforced has not yet become binding.

#### SUPPLEMENTARY AFFIDAVIT

4. The Applicant filed a supplementary Affidavit of Angela Tusaba sworn on 4th March 2021 and stated as follows; -
  - i. The Arbitrator notified the parties that the Award was ready for delivery on 25th August 2020. On 14th September 2020 the Arbitrator reminded the parties that the Award was ready for collection and that interest would start accruing on the Award after the expiry of 14 days.
  - ii. On 15th September 2020 the Applicant paid its portion of the Arbitrator's fees of Kshs.1, 545, 000. The Respondent failed to pay its portion of the Arbitrator's fees forcing the Applicant to pay the full outstanding Arbitrator's fees on 6th November 2020 to facilitate the collection of the Award.
  - iii. Arbitrator released the Award vide his letter dated 17th November 2020. By the time the present Application was filed by the Applicant on 27th November 2020, the statutory period of three months within which the Respondent had the right to apply to set aside the Award had lapsed on 25th November 2020.

#### SUPPLEMENTARY AFFIDAVIT

5. The Applicant filed a Supplementary Affidavit sworn on 10th March 2021 pursuant to leave granted on 10th March 2021 and stated that; -
  - i. The dispute herein was referred to Arbitration by the consent of both parties pursuant to Clause 18.2 of the Service Level Agreement dated 8th January 20186.
  - ii. The Arbitrator notified the parties that the Award was ready for delivery on 25th August 2020. On 14th September 2020, the Arbitrator reminded the parties that the Award was ready for collection and that interest would start accruing on the Award after the expiry of 14 days.

#### APPLICANT'S SUBMISSIONS

6. The Applicant submitted that the Final Award is not contested and the only ground raised by the Respondent is that the Application is premature because it was filed before the lapse of the statutory three months within which an aggrieved party may apply to set aside an Arbitral Award.
7. In the case of *University of Nairobi versus Multiscope Consultancy Engineers Ltd* [2020] eKLR the court stated; -

“This has to be contrasted with the Kenyan situation where 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. It was therefore the Applicant's submission that the Application recognition and enforcement of the Final Award is properly before the Court and well anchored and the Respondent's opposition is misconceived in law.

#### RESPONDENT'S SUBMISSIONS

9. The Respondent submitted that the Applicant's Application is incurably defective and should be dismissed as the Applicant did not comply with the provisions of Section 36(3) of the Arbitration Act which are couched in mandatory terms. On the issue of non-compliance with Section 36(3), the Respondent relied on the case of *Summit Cove Lines Co. Limited versus UAP Insurance Company Limited* [2019] eKLR where the Court held that; -

"I have perused the court record and have found that the Plaintiff/Applicant has partly complied with condition as set out in section 36 of the Arbitration Act and has furnished the court with the original final award dated 14th August, 2018 and but in the supporting affidavit the original arbitration agreement or a duly certified copy of it as not be furnished by the Plaintiff/Applicant."

10. In the case of *David Chabeda & another vs Francis Ingasi* (2007) eKLR the court rendered itself that

"Failure to comply with the mandatory provisions of section 36(3) of the Act, renders the application for recognition of an arbitral award in -curable defective. The same holding was upheld in the case *National Oil Corporation of Kenya Ltd vs Prisco Petroleum Network Ltd* (2014) eKLR. In the case of *Structural Construction Company Limited vs International Islamic Relief Organization* High Court Nairobi, Miscellaneous case No. 596 of 2005 it was held that a copy of the arbitration agreement annexed to the Applicant's supporting affidavit is acceptable for purpose of enforcement of the award. The bottom line in my considered opinion is that the original or a copy of the original arbitration agreement must be filed first before the award can be recognized as a judgment of the court."

11. The Respondent further submitted that the Application for recognition and enforcement of the Award is premature. The Applicant did not attach the Arbitration Agreement in its original form or a Certified copy thereof and the Application was made just 10 days after the Final Award was made available to all the parties.

#### DETERMINATION

12. I have considered the pleadings filed herein the submissions made by the parties' respective advocates together with the authorities that they cited. I find that the main issue for determination is whether the Final Award should be enforced.
13. It was the Respondent's contention that the Arbitral Award herein was published and made available to the parties on 17th November 2020.
14. Section 35 (3) Arbitration Act 1995 provides;

(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.



15. Having looked at the Applicant's annexures, it is evident that the Arbitrator sent an email to the parties on 25th August 2020 notifying the parties the Award was ready; -

Under Clause 2.6 of the Arbitrator's Terms of Reference, this is notice to the parties to take up the Award within 14 days of this Notice, and to pay the balance of the Arbitrator's fees and expenses per the attached Fee Note Index failing which sums shall attract simple interest at the rate of 14% per annum.

16. The above mentioned Notice was followed by a Second Notice set via an email on 14th September 2020 where the Arbitrator addressed the parties as follows;

Further to the first notice to collect the award dated 25th August 2020 this is Second Notice:

1. That the 14 days period of collecting the Award expired on 11th September 2020 and that the interest charge of 14% of the Award shall commence from today 14th September 2020.
2. That the party that pays the Arbitrator's fees in full, as notified, shall be entitled to take delivery of the award.

16. On 15th September 2020 the Applicant paid its portion of the Arbitrator's fees of Kshs.1, 545, 000. The Respondent failed to pay its portion of the Arbitrator's fees forcing the Applicant to pay the full outstanding Arbitrator's fees on 6th November 2020 to facilitate the collection of the Award. The Arbitrator released the Award vide his letter dated 17th November 2020.

17. Section 36(3) of the Arbitration Act provides as follows: -

"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.

17. The provisions of Section 36(3) of the Arbitration Act have been complied with by the filing of the copy of the Final Arbitral Award certified by Muoria Kungu Advocates annexed to the Application of 27th November, 2020. A copy of the Arbitration Agreement is in Paragraph 6 of Final Award as Clause 18.2 of the Service Level Agreement.

18. The 2nd issue raised is that the Application of 27th November was filed on 27th November 2020 and according to the Respondent it was premature as the 3 months period prescribed to set aside by an aggrieved party should elapse from the date of receipt of the Final Award. It was contrary to Section 37 (1) (a) (vi) of *Arbitration Act* and Rule 6 of Arbitration Rules 1997.

19. The Respondent failed to confirm date of receipt of the Final Award so that time to file setting aside application begun to run. The Court notes that the Arbitration Act & Rules does not make the filing of an application for recognition and enforcement timebound. The Arbitration Rules 1995 as set out do not confirm that filing an application for recognition of Final Award must be after 3 months elapse, a party may file and await the time prescribed to elapse before hearing and determination of the said Application. So that if no application for setting aside is filed, then the exparte application to enforce award is granted.

4. (1) Any party may file an award in the High Court.



(2) All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.

(3) If an application in respect of the arbitration has been made under rule 3(1) the award shall be filed in the same cause; otherwise the award shall be given its own serial number in the civil register.

5. The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.

6. If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.

20. Assuming the Respondent received the Final Award on 17th September 2020 when the Arbitrator released the Award upon payment of fees by the Applicant, the 3 months begun to run to end on 21st February 2021. That is when the Respondent filed Application to set aside the Final Arbitral Award in Misc E 118 of 2021 and by virtue of Rule 4 of Arbitration Rules 1997 was consolidated to the present matter.

#### CERTIFICATE OF URGENCY OF 17TH FEBRUARY 2021.

21. On 17th February 2021, the Respondent/Applicant filed Notice of Motion Application in Misc. Civil Application No. E118 of 2021 sought to set aside the Arbitral Award. Although the Applicant Respondent submitted that the Arbitral Final Award was published on 25th August 2020 and emails of 14th & 25th September 2020 were sent to both parties, this Court takes the view that time begun to run from date of release and receipt of the award. This was on 17th September 2020 after full payment of Arbitrator's fees by the Applicant, the Arbitrator released the Final Award. Section 35 (3) Arbitration Act refers to Final Award is/was received, so even if published once the Final Award is released, then time begins to run.

22. The Applicant made reference to *Dewdrop Enterprises Ltd vs Harvee Construction Ltd* Misc no 684 of 2008 [2009]eKLR & *United EA Warehouses Ltd vs Somalia & Southern Sudan* Misc App 182 of 2013[2015]eKLR

23. The grounds for setting aside the Arbitral Final Award are as follows;

- a) The Arbitrator wrongly conferred jurisdiction upon himself by making factual findings not pleaded by parties and thereby handled matters beyond his scope and outside arbitration procedure.
- b) The Arbitrator did not decide the reference in accordance with the terms of the contract between the parties and contemplated and relied on matters not provided for by the contract and which went beyond the scope of the Arbitration.
- c) The Arbitrator was biased by going beyond his role as an arbitrator and conferring himself investigatory powers in matters not before him and hence awarding the Plaintiff/Respondent damages which he was not entitled to.
- d) Arbitrator relied on unreconciled monthly statements incapable of ascertaining the true position of remittances



## SUBMISSIONS

24. Respondent/Applicant submitted that the Final Award is against public policy under Section 35(2)(b) of Arbitration Act as the Applicant herein was denied fair hearing under Article 50 of COK2010. See *Christ for All Nations vs Appollo Insurance Co Ltd* (2002)EA 366
25. The Respondent submitted that the under Section 35 (2) (a) (iv) of Arbitration Act that the Arbitrator exceeded his jurisdiction.
26. The Applicant submitted that the allegations made were general and unsubstantiated and no specific issues were identified.
27. The Applicant relied on *Mabican Investments Ltd & Others vs Giovanni Gaida & Others* HCMisc Civ 792 of 2004 that held;

In order to succeed the applicant must show beyond reasonable doubt that the arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute.

28. The Applicant relied on the fact that the Final Award ought to be upheld as the setting aside was filed after the 3 month period from the date of publishing the award on 28th August 2020 and the Arbitrator sent 2 more emails. This Application was filed after the lapse of the three-month statutory period. The jurisprudence on the extension of time for filing application set aside Final Award is settled in the following cases;

- a. Kenyatta International Convention Centre (KICC) versus Greenstar Systems Ltd [2018] eKLR which provides;

“Thus, there being no Provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35 (3) of the Act is imperative, and comports well with the principle of finality in arbitration. In deed in the Ann Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, that Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from delivery of the award.”

- b. Anne Mumbi Hinga vs Victoria Kariuki Gathara [2009] eKLR where Court of Appeal stated;

“I do not agree that was the intention of Parliament in drafting Arbitration Act, if that was so, it should have expressly stated so and such Rule cannot override Statute, the Arbitration Act. The provisions of Arbitration Act make it clear that it is a complete Code except as regards the enforcement of the award /decree where Arbitration Rules 1997 apply Civil Procedure Rules where appropriate....

It is also clear that CPR would not be regarded as appropriate if its effect would be to deny an award finality and expeditious enforcement, both of which are objectives of Arbitration. It follows that all provisions invoked except Sections 35 & 37 of Arbitration Act do not give jurisdiction to the superior Court to intervene and any application filed in the Superior Court other than provided does not give the superior Court jurisdiction. Without jurisdiction Courts should strike out such applications, for want of prosecution.”

## DETERMINATION



29. This finds that the jurisdiction of the Arbitrator ought to be challenged before the Arbitrator under Section 17 of Arbitration Act, if the party is aggrieved by the decision may file application in the High Court.
30. With regard to the Arbitrator's excess of jurisdiction; the parties' arbitration agreement/clause prescribes;
31. The issue of the Arbitrator exceeded jurisdiction; the Arbitration provides;
 

The parties shall use their best efforts to settle amicably any dispute, controversy or claim arising from or in connection with this Agreement or the interpretation thereof including its existence thereafter referred to as the dispute.... If the dispute has not been settled pursuant to amicable settlement process within 14 days .....ant party may commence arbitration...
32. In light of the Arbitration clause/agreement, the dispute encompassed any dispute, controversy or claim under the Agreement which allowed the Arbitrator wide latitude unless specific proof is furnished to this Court that the Arbitrator went beyond the legal bounds of the Arbitration Agreement/Clause that bestowed jurisdiction, then excess of authority to arbitrate cannot be said to have been proved in terms of Section 35 of Arbitration Act and be the basis of setting aside the Final Award.
33. Thirdly, this Court's scope is limited to considering the Arbitration process and outcome against the requirements set under Section 35 of Arbitration Act and where the Applicant furnishes proof of bias or prejudice by the Arbitrator 'by going beyond his role as an arbitrator and conferring himself investigatory powers in matters not before him and hence awarding the Plaintiff/Respondent damages' then the Court would exercise its mandate to set aside the Arbitral Award.
34. In the instant case, the Dispositive Orders by the Arbitrator at Clause 60 of Final Award is that the claim of Ksh 126,571,885 of unremitted premiums is upheld and at 14% interest per annum with full costs and expenses. There is no award of damages anywhere. The Applicant's claim is not borne by the Final Award.
35. Secondly, Section 32B of Arbitration Act provides that the award of costs and expenses is by the Hon. Arbitrator.
36. The facts of the dispute as determined by the Arbitrator are not subject to the Court's review or appeal to re-evaluate the same again as was held in;

Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016]eKLR where the court held that;

“The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.”

Kenya Oil Co. Ltd & another vs Kenya Pipeline Co. [2014]eKLR where the court held that;

“The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of



course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

37. The Applicant's allegation that The Arbitrator relied on unreconciled monthly statements incapable of ascertaining the true position of remittances cannot be dealt with at this stage as the Arbitration Agreement excuted by parties gave wide discretion as to scope of the dispute before the Arbitrator and any objection to jurisdiction or admissibility ought to have been raised during Arbitration proceedings. Secondly, findings of fact are not interrogated at this stage in the absence of proof furnished to establish lack of fair hearing and being contrary to public policy.

#### DISPOSITION

1. The upshot of this is that the Respondent's Notice of Motion Application dated 17th February 2021 fails.
2. The Applicant's Application dated 27th November 2020 is allowed on terms that the Final Award dated 25th August 2020 is hereby recognized as binding and leave is hereby granted to the Applicant to enforce it as a decree of this court.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**MR.A.TANGEI FOR APPLICANT-PRESENT**

**MS WANGARE H/B MR WANDATI &MR MBURU FOR RESPONDENT-PRESENT**

