



**Magui v Hicken Basket Food Services (Commercial Cause E011 of 2024)  
[2025] KEHC 13876 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CAUSE E011 OF 2024  
E OMINDE, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**HARRY MAGUI ..... APPLICANT**

**AND**

**HICKEN BASKET FOOD SERVICES ..... RESPONDENT**

**RULING**

1. The Applicant's Chamber Summons dated 23<sup>rd</sup> April, 2024 is expressed to be brought under Section 36(2) and (3) of the *Arbitration Act*, 1995, Rule 9 of the Arbitration Rules, 1997, Section 1A and 1B of the *Civil Procedure Act*, the inherent powers of the court all other enabling provisions of the law and seeks the following orders:
  - a. That this Honourable Court be pleased to recognize and adopt as judgement of the court the final award issued on 6<sup>th</sup> March, 2024 by Justus Munyithya FCIArb (Chartered Arbitrator) in Arbitration Cause No. 2 of 2023.
  - b. That this Honourable Court be pleased to grant leave to the Applicant to enforce the said award as a decree of this Honourable Court.
  - c. That as a consequence, an order do issue compelling the Respondent to pay to the Applicant:
    - i. A sum of Ksh.1,500,000/- with interest at 8% per annum from 1<sup>st</sup> January, 2023 until payment in full.
    - ii. A sum of Ksh.794,635/- being the Arbitration and legal costs.



- iii. Simple interest on the said sum of Ksh.794,635/- at the rate of 12% per annum at the lapse of 30 days from the date of collection (17<sup>th</sup> day of April, 2024) until payment in full.
  - d. That this Honourable Court be pleased to issue any or such further orders as it may deem just and proper.
  - e. That the costs of this application be provided for.
2. The grounds upon which the application is premised are stated on its face and are as follows:
  - a. By the award published and issued on 6<sup>th</sup> March, 2024, the Arbitral Tribunal made a finding that the Respondent had breached the terms of the Equity Purchase Agreement entered into between the Applicant and the Respondent. The Arbitral Tribunal consequently awarded the Applicant a sum of Ksh.1,500,000/- being the unpaid convertible debt with an interest at 8% per annum from 1<sup>st</sup> January, 2023 until payment in full, a sum of Ksh.794,635/- being the Arbitration and legal costs and simple interest on the said sum of Ksh.794,635/- at the rate of 12% per annum at the lapse of 30 days from the date of collection (17<sup>th</sup> April, 2024) until payment in full.
  - b. The Respondent is yet to honour the award.
  - c. It is therefore in the interest of justice that this Honourable Court enters judgement in favour of the Applicant in terms of the award issued on 6<sup>th</sup> March, 2024 and that the said judgement be enforced as a decree of this Honourable Court.
3. The application is supported by the affidavit sworn on 23<sup>rd</sup> April, 2024 by the Applicant in which he expounds on the above grounds. The Applicant also filed a further affidavit which he swore on 30<sup>th</sup> September, 2024, which, as properly pointed out by the Respondent, was filed without leave of the court. That then means that the further affidavit was filed contrary to the law.
4. Taking guidance from the Court of Appeal decision of Kiru Tea Factory Company Limited v Stephen Maina Githiga & 13 others, I will proceed to expunge the further affidavit from the record as it is not properly before me.
5. In precis, the Applicant has made depositions in his affidavit in support of the application that the dispute between the parties arose out of an Equity Purchase Agreement entered into by the parties on 1<sup>st</sup> August, 2022. In accordance with Article IV of the said agreement, the dispute was referred to arbitration and an Arbitrator was appointed on 18<sup>th</sup> April, 2023 and formally notified by a letter dated 15<sup>th</sup> June, 2023.
6. The arbitration proceedings were subsequently conducted between 28<sup>th</sup> July, 2023 and 27<sup>th</sup> September, 2023 and with the Arbitrator ultimately rendering his award on 6<sup>th</sup> March, 2024 in the following terms:
  - “79. Based on the Tribunal’s reasoning and analysis herein, it is the Tribunal’s verdict that the Claim herein dated 4<sup>th</sup> August, 2023 is merited.
  80. In conclusion, the Tribunal makes the following orders:
    - a. That the Claimant’s Claim to recover the convertible debt of Ksh.1,500,000/- advanced to the Respondent with interest at 8% per annum from 1<sup>st</sup> January, 2023 until payment in full is allowed.



- b. That the Respondent shall pay to the Claimant a sum of Ksh.794,635/- within 30 days from the date of collection of the award by the parties, as the total cost of this Arbitration and the legal cost.
  - c. That should the Arbitral and legal costs assessed above remain unpaid within 30 days from the date of collection of the award by the parties, the Respondents shall pay to the Claimant a simple interest at court rates of 12% per annum until payment in full.
  - d. That should the Respondent fail to pay to the Claimant the amount awarded in (a) above within 30 days from the date of collection of this award, the sum awarded will accrue an interest of 8% on the principal sum, as per the terms of the agreement, until payment in full.
  - e. That the parties are at liberty to apply.”
7. The application is opposed by the Respondent who to that end filed a replying affidavit sworn on 16<sup>th</sup> July, 2024 by Abisai Odingo Nandi. The grounds upon which the Respondent opposes the Applicant’s summons seeking recognition and enforcement of the arbitral award are that the costs of the arbitration were arrived at unilaterally and that the order requiring that the Respondent singlehandedly meets the arbitration costs is unconscionable.
8. This court directed that the application proceeds by way of written submissions and the parties herein filed their respective submissions.
9. I have considered the application, the response thereto, the submissions by the parties and the arbitral award. The issues that emerge, that I am now required to determine are as follows:
- a. Whether this court should proceed to recognize and enforce the arbitral award made on 6<sup>th</sup> March, 2024.
  - b. A determination as to the costs of the application.
10. I will proceed to determine the two issues.
11. What is clear from the record is that the arbitral award was rendered on 6<sup>th</sup> March, 2024. Notably, whereas the application seeking for recognition and enforcement of the award is opposed by the Respondent, no application was filed under Section 35 of the Arbitration Act seeking that the award be set aside.
12. Section 32A of the Arbitration Act provides that an arbitral award, except as may otherwise be agreed by the parties, 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.
13. With regard to costs and expenses of the arbitration proceedings, the applicable guiding provision is Section 32B of the Arbitration Act, which provides as follows:
- 32B. Costs and expenses
- (1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and



apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).

- (2) Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

14. I find it clear under Section 32B(1) of the *Arbitration Act* that where the parties to arbitration proceedings have not agreed on the costs and expenses payable on the proceedings, the Arbitrator has the discretion to determine and/or apportion the same.

15. My understanding of the phrase “shall be as determined and apportioned by the arbitral tribunal in its award under this section”, under Section 32B(1) of the Act; and the phrase “in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration” under Section 32B(2) of the Act is that costs once determined, form part of the arbitral award.

16. Recognition and enforcement of arbitral awards is generally governed by Section 36 of the *Arbitration Act*, which states as follows:

36. Recognition and enforcement of awards

- (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) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.
- (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) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.
- (5) In this section. the expression “New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

17. Where an application for the recognition and enforcement of an arbitral award is filed under the Section 36 of the Act and the Respondent opposes the application but does not file a formal application to set aside the award, the High Court is generally bound to recognize and enforce the award, unless one of the specific grounds for refusal under Section 37 of the Act is proved.

18. Let us read the said provision of statute:

37. Grounds for refusal of recognition or enforcement

- (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.

19. As we have seen above, costs, once determined by an Arbitrator, form part of the arbitration award. We have also seen that an Arbitrator has the discretion to determine and apportion costs and expenses under Section 32B(1) of the Act.

20. Recalling that Section 32A of the *Arbitration Act* provides that an arbitral award, except as may otherwise be agreed by the parties, 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, and considering that an Arbitrator's award on costs forms part of the arbitral award, it follows that the High Court cannot interfere with the arbitrator's award on costs when dealing with an application for recognition and enforcement of an arbitral award under Section 36 of the Act.



21. In my view, the role of this court, under Section 36 of the Act is strictly to enforce or refuse enforcement based on the statutory grounds under Section 37 of the same statute. Any issue with the award of costs (the same being part of the arbitral award) can only be challenged through an application to set aside the award under Section 35 of the Act and not during recognition and enforcement under Section 36.
22. This court does not have the jurisdiction to revisit the merits of the award or to modify or review the substance thereof when dealing with recognition and enforcement, and can only refuse to recognize and enforce the arbitral award where there is a valid objection under Section 37 of the Act. The court's jurisdiction is limited to deciding whether the award should be recognized and enforced, or not.
23. In *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR, the court emphasized that arbitral awards must be respected unless challenged through the specific mechanisms provided for under the [Arbitration Act](#).
24. As none of the grounds under Section 37 of the Act have been demonstrated by the Respondent, and further considering that no application has been made under Section 35 of the Act seeking to set aside the arbitral award, there is no basis that has been presented by the Respondent as to why I should not allow the application for recognition and enforcement of the arbitral award rendered on 6<sup>th</sup> March, 2024.
25. In the result, I allow the Applicant's Chamber Summons dated 23<sup>rd</sup> April, 2024 in the following terms:
  - a. That the final arbitral award issued on 6<sup>th</sup> March, 2024 by Justus Munyiya FCI Arb (Chartered Arbitrator) in Arbitration Cause No. 2 of 2023 is hereby recognized and adopted as the judgement of this court in its terms in line with Section 36 of the [Arbitration Act](#).
  - b. That the costs of this application shall be borne by the Respondent, which I assess at Ksh.5,000/-.
  - c. That this file is hereby closed.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: Ms. Owuor.

For Respondent: Mr. Mwesigwa.

Court Assistants: Mr. Ngoge & Mr. Juma.

