REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCC COMM MISC E476 of 2024

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF THE ARBITRATION RULES, 1997

AND

IN THE MATTER OF ENFORCEMENT OF AN ARBITRAL AWARD

BETWEEN

MOHAMED MOHAMUD AHMED ..... 1ST APPLICANT

AL REEF FLOUR MILLS LTD ..... 2ND APPLICANT

~AND~

ABDULLAHI ADBI HIRABE ..... RESPONDENT

RULING

1. In the rich tapestry of Kenyan jurisprudence, the threads of customary and religious dispute resolution are increasingly interwoven with the fabric of statutory law, encouraged by the constitutional mandate under Article 159(2)(c) to promote alternative forms of justice. This case brings that interplay into sharp focus. It concerns a commercial venture between two men of shared faith that soured, leading them to seek recourse not in the formal halls of this courthouse, but before a panel of respected Islamic Arbitrators. The outcome of that process, an Award dated 18 August 2021, now knocks on the door of

this Court, seeking recognition and the full force of the law. However, the Respondent resists, contending that the door they entered was one of an informal mediation, not binding arbitration, and that the document produced is a mere recommendation, not an enforceable award. The Court must, therefore, determine the true nature of the path the parties chose and whether it leads to the enforcement powers of this institution. Upon that determination rests the entirety of its jurisdiction in this matter.

2. The genesis of this dispute is a commercial disagreement between the 1st Applicant and the Respondent concerning a joint venture in the flour business. The dispute revolved round the importation and sale of 21 containers of flour, with each party blaming the other for financial losses incurred.

3. On 14 July 2021, the parties, who profess the Islamic faith, sought to resolve their dispute through an alternative mechanism. They each signed a document titled “Arbitration Application Form” thereby referring their dispute to a panel of 3 individuals described by the Applicants as “certified Islamic Arbitrators’. The tribunal proceeded to hear the dispute and published its final Award on 18 August 2021. The Applicants have computed the sum due to them under the said Award as USD 84,736.145 and now approach this Court to have the award recognised and enforced as a decree of the Court.

4. The Applicants’ Chamber Summons dated 30 May 2024, brought under section 36 of the Arbitration Act, seeks the recognition and enforcement of an arbitral award dated 18 August 2021. The Applicants aver that the Respondent has neither honoured the Award nor taken steps to have it set aside within the time prescribed in law.

5. The Respondent vehemently opposes the Application. He filed Grounds of Opposition as well as a Notice of Preliminary Objection date 14 October 2024, seeking to have the Application struck out for want of jurisdiction.

6. The Application and Preliminary Objection were canvassed together by way of written submissions.

7. Given that a preliminary objection on jurisdiction, if successful, is dispositive of the entire suit, the Court shall address the Objection first.

Preliminary Objection

8. The Respondent raised a Preliminary Objection on 4 main grounds, which can be summarised as follows: That this Court lacks jurisdiction because there were no arbitration proceedings capable of recognition; that the Arbitration Act did not apply to the informal dispute resolution mechanism employed; that the Application offends Section 36 (3)(b) of the Act for want of a valid arbitration agreement; and that the Application is consequently incurably defective.

9. The Respondent argued that the initial business relationship was based on a verbal agreement, with no arbitration clause. He contended that the subsequent "Arbitration Application Form" was not an arbitration agreement within the meaning of section 4 of the Act, but was understood by the Respondent, a layman, as a mere consent to engage in informal negotiations guided by Islamic elders. It was submitted that the process was an informal Islamic mediation process, governed by *Sharia* law, not the Arbitration Act, and that the adjudicators were mediators, not certified arbitrators. It was further argued that the resultant document was a mediation agreement, not an award, as it did not grant a specific monetary sum but found both parties were to share the loss.

10. The Respondent also claimed verbally objected to the outcome, after which the parties were advised to seek recourse in a court of law. Reliance was placed on the celebrated case of ***Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)*** for the proposition that

jurisdiction is everything and a court must down its tools where it finds it has none.

11. In response, the Applicants submitted that the Preliminary Objection is incompetent as it does not raise a pure point of law and requires the Court to probe contested facts, contrary to the principles established in ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd EA 696*****.** It was argued that the Respondent's assertions about the nature of the proceedings are factual matters that cannot be determined at a preliminary stage**.**

12. On the substance of the objection, the Applicants maintained that the Arbitration Application Form signed by both parties on 14 July 2021 constitutes a valid and binding arbitration agreement in writing under section 4 of the Act. They pointed to the explicit wording of the document, where the parties consented to arbitrate and agreed that the decision arrived at by the Arbitrator(s) is binding. The Applicants further submitted that by participating in the proceedings without raising any objection to the tribunal's jurisdiction, the Respondent waived his right to do so later, as provided by Section 5 of the Act.

13. Finally, it was argued that the Respondent is using the Preliminary Objection as an improper backdoor attempt to challenge the award, having failed to file an application to set aside under section 35 of the Act within the statutory 90-day period.

14. The first consideration by this Court is whether the objection raised meets the threshold of a preliminary objection. The *locus classicus* on this point is the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd EA 696****,* where Law, J.A. stated that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Sir Charles Newbold, P added a crucial rider:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

15. The Respondent asks this Court to find that it lacks jurisdiction. An objection to jurisdiction is, on its face, a pure point of law and a classic example of a proper preliminary objection. However, the basis of the Respondent's objection is that the document signed by the parties was not an arbitration agreement and that the ensuing process was an informal mediation. The Applicants contend the opposite. To resolve this, the Court is not merely accepting the Applicants' pleaded facts as true: it is being asked to examine the Arbitration Application Form and other evidence to make a factual determination about the nature of the agreement and proceedings. The Respondent's submissions are replete with factual assertions regarding his state of mind as a layperson, the informal nature of the meeting and a verbal objection to the outcome. These are contested factual matters that requite investigation beyond a mere consideration of the pleadings. For this reason, the objection as framed, is not a true preliminary objection in the sense contemplated by the ***Mukisa Biscuit case (supra)***.

16. However, the matter does not end there. The objection, at its core, challenges the jurisdiction of this Court to entertain the application under the Arbitration Act. The principle laid down by Nyarangi, J.A. in **O*wners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd KLR 1*** is that jurisdiction is a threshold issue of paramount importance. The learned Judge of Appeal held:

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there*

would be no basis for a continuation of proceedings... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

17. A Court cannot, therefore, turn a blind eye to a challenge to its jurisdiction, regardless of any procedural imperfections in the manner it is raised. To proceed without satisfying itself of its jurisdiction would be to risk rendering all its subsequent proceedings a nullity. As the Supreme Court affirmed in ***Republic vs Chengo & 2 others [2017] KESC 15 (KLR)***, a decision made without jurisdiction amounts to nothing. This Court is, therefore, duty-bound to determine whether the matter before it is governed by the Arbitration Act, as that is the sole statutory basis upon which the application for enforcement is founded.

18. The central question is whether there exists a valid arbitration agreement between the parties. Section 4 of the Act defines the form of an arbitration as follows:

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in—
(a)a document signed by the parties;
(b)an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

> *(c)an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.*
>
> *(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract*.

19. The Court has carefully examined the documents marked “MMA-001A” and “MMA-001B”, titled Arbitration Application Form. These documents contain the express statement, “I ...do hereby give consent to IBRAHIM, DAYINB & CO ADVOCATES through its panel of Arbitrators to arbitrate over the dispute.” Crucially, both forms, signed by the Applicant and the Respondent, respectively, contain the declaration: “I agree that the decision arrived at by the Arbitrator(s) is binding.”

20. These documents are not ambiguous. They use the specific legal terms ‘arbitrate’, ‘arbitrators’ and ‘binding decision’. This language is the hallmark of arbitration, which is an adjudicative process resulting in a binding determination by a third party. It is distinct from mediation, which is a facilitative process where a neutral third party assists the parties in reaching their own voluntary settlement. The documents signed by the parties clearly contemplate an adjudicative and binding process. They are in writing and are signed by both parties. They fall squarely within the definition of an arbitration agreement under section 4(3)(a) of the Act.

21. The Respondent’s contention that he understood this to be an informal mediation is a subjective interpretation that cannot vitiate the clear and express terms of a written agreement he voluntarily signed. His argument that the process was governed by *Sharia* law does not oust the application of the

Arbitration Act. Section 29 of the Act enshrines the principle of party autonomy, allowing parties to choose the rules of law applicable to the substance of the dispute. By agreeing to have their dispute resolved by Islamic arbitrators according to *Sharia* law, the parties were exercising their autonomy within the framework of the Arbitration Act, not stepping outside of it. Furthermore, Article 159(2)(c) of The Constitution, encourages the promotion of alternative forms of dispute resolution, including arbitration. To hold that an arbitration conducted by religious figures according to religious law is not an arbitration under the Act would be to undermine this constitutional imperative.

22. For the foregoing reasons, the Court finds that a valid arbitration agreement exists between the parties and that the proceedings conducted pursuant thereto were an arbitration governed under the Arbitration Act, 1995. This Court accordingly has jurisdiction to hear and determine an application for the recognition and enforcement of the resultant award under section 36 of the Act. The Preliminary Objection dated 14 October 2024 is hereby found to be without merit and is accordingly dismissed.

Chamber Summons dated 30 May 2024

23. The policy of the law in Kenya, as encapsulated in the Arbitration Act, is to promote the finality of arbitral awards and to limit judicial intervention in the arbitral process. Section 10 of the Act provides that except as provided in this Act, no court shall intervene in matters governed by the Act. Further, section 32A states that an arbitral award 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. This position has been consistently upheld by the Court. As Ringera, J famously stated in ***Christ for All Nations vs Apollo Insurance Co. Ltd 2 EA 366:***

> *"...the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards,*

warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."

24. The Applicants have brought this application under Section 36 of the Act, which governs the recognition and enforcement of domestic awards. Section 36(3) sets out the procedural requirements, obligating the party seeking enforcement to furnish the original or a certified copy of the arbitral award and the arbitration agreement. The Applicants have annexed to their application certified copies of the translated award and the signed Arbitration Application Forms, thereby complying with this requirement.

25. The burden then shifts to the Respondent to prove the existence of any of the grounds for refusal of recognition or enforcement as set out in Section 37 of the Act. The Respondent's opposition to enforcement rests on the same grounds advanced in the Preliminary Objection: that there was no valid arbitration agreement and that the process was an informal mediation not governed by the Act.

26. This brings into sharp focus the interplay between section 35 and section 37 of the Act. Section 35 provides the exclusive recourse against an arbitral award by way of an application to set it aside. The grounds for setting aside an award under Section 35(2)(a) are nearly identical to the grounds for refusing enforcement under Section 37(1)(a). These include proof that the arbitration agreement is not valid and that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Section 35(3) imposes a strict, mandatory time limit for such an application.

27. The award in this matter was published on 18 August 2021. The Respondent had until 18 November 2021 to challenge the award on the very grounds he now raises. He failed to do so. He did not seek to set aside the award on the basis that the arbitration agreement was invalid or that the proceedings were

not in accordance with the Act. He sat on his rights for over 2 years before the Applicants brought this application for enforcement.

28. The question that this Court must answer is whether a party who has failed to challenge an award under Section 35 within the stipulated time can be permitted to raise the same grounds to resist enforcement under Section 37. To permit such a course of action would be to render the mandatory time limit in Section 35(3) completely redundant and to defeat the legislative object of ensuring speed and finality in arbitration. A party cannot be allowed to have a second bite at the cherry by resurrecting grounds that have become time-barred. By failing to bring a timely application under section 35, the Respondent is deemed to have waived his right to object to the award on those grounds and is now estopped from raising them as a defence to the enforcement proceedings. His right to recourse was extinguished by his own laches.

29. The Respondent also faintly argues that the award was uncertain and, therefore, unenforceable, contending that the sum claimed is fictitious and non-existent because the award does not name a specific figure. An arbitral award must be certain and final to be capable of enforcement. However, this does not mean it must contain a single, pre-calculated monetary sum. It is sufficiently certain if the amount can be objectively and definitively ascertained by a simple arithmetic calculation based on the findings and directions contained within the award itself, without the need for any further adjudication.

30. The award herein, in its Decisions and Conclusions, makes several clear determinations: That profits and losses must be equally shared by both parties. It provides a detailed schedule of allowable expenses. It specifies that money transferred by the Respondent as an advance payment will be counted in his favour and it lists specific sums of money privately paid by the 1st Applicant to the Respondent, which must be recovered. The award, thus,

provides a clear formula and the necessary data for the final quantum to be calculated. The Applicants have averred that this calculation results in the sum of USD 84,736.145. The Respondent has not challenged the arithmetic but has only attacked the validity of the award as a while. This Court finds that the award is not void for uncertainty; it is capable of being rendered certain through calculation based on its express terms.

31. However, the Court notes that the Applicants, in their Supporting Affidavit, have added VAT at 16% and legal fees to the sum derived from the award. The Court's power under section 36 is to recognise and enforce the arbitral award as made by the tribunal. The Court cannot add to or vary the award. The award itself does not provide for VAT on the principal sum, nor does it award party and party costs on the High Court scale. Therefore, the enforcement shall be limited to the principal sum awarded by the tribunal, which the Applicants have calculated to be USD 84,736.145.

32. In conclusion, the Applicants have satisfied the procedural requirements for enforcement under Section 36 of the Act. The Respondent has failed to establish any valid grounds for refusal of enforcement under section 37. The Application must, therefore, succeed.

33. In light of the foregoing, the Court makes the following orders:

    (i) The Respondent's Preliminary Objection dated 14 October 2024 is hereby dismissed;
    (ii) The Chamber Summons dated 30 May 2024 is allowed. The Arbitral Award dated 18 August 2021 is hereby recognised and adopted as an order of this Court.
    (iii) Costs are awarded to the Applicants.

DATED AND DELIVERED AT NAIROBI THIS 14 DAY OF NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicants: Mr. Odero

Respondent: Ms. Anjiko & Mr. Abdiaziz

Court Assistant: Lucy Mwangi