

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(COMMERCIAL AND TAX DIVISION) (MILIMANI LAW
COURTS)

**MISCELLANEOUS COMMERCIAL APPLICATION NO. E470 OF
2016**

EPCO BUIDERS LIMITED.....
..... APPLICANT

-VERSUS-

KENYA BUREAU OF STANDARDS.....
RESPONDENT

RULING

1. Before this Court is the Applicant's Chamber Summons dated **21st June 2023**, brought pursuant to **Section 36 of the Arbitration Act, 1995**, Rules 6 and 10 of the Arbitration Rules, 1997 and all other enabling provisions of law, seeking:
 - i. Recognition and enforcement of the **Final Arbitral Award dated 15th September 2016** as a judgment and decree of this Court; and
 - ii. Costs of the arbitration and of this application.

2. The application is supported by the affidavit of **Mayur R. Varsani**, sworn on 21st June 2023, and is premised on the existence of a construction contract dated **11th July 2013** between the parties,

containing an arbitration clause, pursuant to which a dispute arose and was fully arbitrated by Mr. Anthony Fredrick Gross, sole arbitrator, who issued an Award on 15th September 2016, directing the Respondent to pay various sums including refund of performance bond, office overheads, loss of profit, arbitration costs, and interest at 16% per annum, compounded after 30 days.

3. The dispute between the parties arose out of the construction contract for regional offices and laboratories at Miritini, Mombasa, entered into on 11th July 2013. Following disagreements during project execution, the matter was referred to arbitration pursuant to the arbitration clause. Both parties participated in the arbitral process, which culminated in the issuance of the Final Award on 15th September 2016. In that award, the Respondent, Kenya Bureau of Standards (KEBS), was ordered to pay various sums to the Applicant, including:

- i. **Kshs 1,333,271/=** (refund of Performance Bond) with interest at 16% p.a. from 12th August 2013.
- ii. **Kshs.133,327/=** (Office Overhead Costs) with interest at 16% p.a. from 12th August 2013.
- iii. **Kshs.3,104,062/=** (Loss of Profit) with interest at 16% p.a. effective 30 days post-award.
- iv. **Kshs.314,255/=** (refund of professional costs).
- v. Arbitration costs totaling **Kshs.1,044,000/=**, split 25% to the Applicant and 75% to the Respondent.

4. Following the award, KEBS partially complied by paying Kshs.5,888,918.85/= on 2nd September 2021, leaving what the Applicant calculates as an outstanding balance of **Kshs.6,182,828.82/=** as at that date. Despite several demands by the Applicant over the years, the Respondent allegedly declined, refused, or neglected to settle the remaining amount, hence the current enforcement application.

5. The Applicant further contends that an earlier attempt to set aside the award had already been dismissed by **Justice Tuiyott, in a ruling delivered on 18 October 2016**, who declined to set aside the arbitral award, and that no further proceedings under Section 35 of the Arbitration Act are shown to be pending.
6. The Respondent opposed the Application vide the **Grounds of Opposition dated 19th November 2024**, principally on the grounds that the application is premature and therefore not awardable since the Applicant itself filed a Notice of Appeal dated **18th October 2017** against the High Court ruling concerning the award, and that the notice has never been withdrawn. According to the Respondent, this shows that appellate processes concerning the award remain alive, and therefore the award cannot be enforced because it is not yet "binding" under **Section 37(1)(a)(vi)** of the Arbitration Act.
7. It is further the Respondent's case that the orders sought by the Applicant are not grantable since charging interest against a public body for a delay caused by legal processes constitutes "unjust enrichment" and therefore contravenes public policy, which is a ground for setting aside an arbitral award.
8. The Application proceeded by written submissions. The Applicant filed submissions dated 13 November 2024, whereas the Respondent's submissions are dated 19 November 2024.

Analysis and Determination

9. From the pleadings and the submissions, this Court finds that the sole issue for determination is whether the application for enforcement and recognition of the **Arbitral Award on 15 September 2016** is merited.

10. Under Section 36(1) of the Arbitration Act, an arbitral award shall be recognized as binding and enforced by the High Court upon application in writing. Enforcement is mandatory unless the opposing party demonstrates one or more grounds under Section 37 of the Act.

11. Section 36 of the Arbitration Act sets out the legal parameters governing the enforcement and adoption of an arbitral award in the following terms: -

“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).....

(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall 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.

12. In *Samura Engineering Limited vs Don-Wood Co Ltd* [2014] eKLR it was held: -

“Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But the application is subject to sections 36 and 37 of the Act, and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file: 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or a certified copy of it. Doubtless, the award must be filed...”

13. From the application and the affidavit in support thereof, the Court notes that the Applicant has annexed all documents required under Section 36(2) of the Arbitration Act, including:
- a. A certified copy of the Final Arbitral Award dated **15th September 2016;**
 - b. A certified copy of the Arbitration Agreement;
 - c. The Arbitrator's Agreement;
 - d. Proof of service on the Respondent.
14. The Court notes that the Respondent's attempt to set aside the award failed in 2017 when Tuiyott J (as he then was) dismissed the Respondent's application on 18th October 2017. The award, therefore, remains valid and partially unsatisfied.
15. The Respondent contends that this Court became functus officio upon delivery of its ruling on 18th October 2017, declining to set aside the arbitral award, and that no further proceedings could properly be entertained in this file.
16. That argument fundamentally misconceives both the nature of arbitral proceedings and the scope of the functus officio doctrine. Proceedings for setting aside an arbitral award under Section 35 and proceedings for recognition and enforcement under Section 36 are distinct, autonomous, and statutorily provided processes. A court does not exhaust its jurisdiction merely because it has declined to set aside an award.
17. Accordingly, the Court finds that it retains jurisdiction to entertain the present application and is not functus officio.
18. **On Public Policy**, the Respondent argued that charging interest against a public body for a delay caused by legal processes constitutes "unjust enrichment" and therefore contravenes public policy, which is a

ground for setting aside an arbitral award. However, the Court notes that the Arbitrator exercised discretion in awarding interest at commercial rates. While the Respondent is a public body, it is bound by the terms of its commercial contracts and the resulting arbitral outcomes. Delay in payment, regardless of the cause, attracts interest to preserve the value of the award for the successful party. This ground, therefore, fails

Effect of a Notice of Appeal on enforcement

19. The Respondent further argued that a Notice of Appeal filed in October 2017 bars enforcement of the award, or at the very least requires the Court to adjourn the enforcement proceedings.
20. The Court has carefully examined the record. There is no evidence before the Court of a subsisting appeal, stay order, or proceedings actively pending before the Court of Appeal. In any event, it is a settled principle of law that a Notice of Appeal, without more, does not amount to an appeal, nor does it operate as an automatic stay of execution.
21. Section 37(1)(a)(vi) of the Arbitration Act contemplates refusal of enforcement only where an award “has been set aside or suspended by a court.” No such order exists in this case. The award remains binding and enforceable.
22. The Court therefore rejects this ground as well.

Alleged procedural defects and non-payment of fees

23. The Respondent raised objections relating to alleged non-compliance with the Arbitration Rules, including the form of application, change of advocates, and alleged insufficiency or non-payment of court fees.

24. The Court is guided by Article 159(2)(d) of the Constitution, which mandates courts to administer justice without undue regard to procedural technicalities. More fundamentally, none of the objections raised fall within the exhaustive grounds for refusal of recognition or enforcement under Section 37 of the Arbitration Act. Again, the arguments also fail.
25. It is trite law that no variation on the terms of an arbitral award is to be made by the Court unless grounds under section 35 or 37 are established. In **Nyutu Agrovat Ltd v Airtel Networks Kenya Ltd [2019] eKLR (Supreme Court)** The Supreme Court clarified that arbitral awards are final and binding, and courts should be slow to interfere except on narrow grounds under section 35.
26. In the present case, no basis has been laid either under Section 35 or 37 of the Act that warrants the setting aside of the arbitral award. A delay in enforcement occasioned by the Respondent's refusal to pay cannot be invoked to defeat the Award.
27. Accordingly, the present application, dated **21st June 2023**, for recognition and enforcement of the arbitral award is hereby allowed as follows: -
- i. The Final Award published by Anthony Fredrick Gross on 15th September 2016 is hereby recognized and adopted as a Judgment and Decree of this Court.
 - ii. Leave is granted to the Applicant to enforce the said Award as a Decree of this Court.
 - iii. The costs of this application are awarded to the Applicant, as costs follow the event.
28. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

12TH DAY OF FEBRUARY, 2026

A handwritten signature in blue ink, appearing to read 'ADO MOSES', is centered on the page. The signature is stylized and somewhat illegible due to its cursive nature.

**ADO MOSES
JUDGE**

In the presence of:

Evayo...for Applicant.

N/Afor Respondent.

Moses.....C/A

ORIGIN