



REPUBLIC OF KENYA



**Krishnamurthy v Nairobi West Hospital (Cause E573 of 2021)
[2023] KEELRC 1816 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1816 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E573 OF 2021**

JK GAKERI, J

JULY 27, 2023

BETWEEN

NARAYANAN KRISHNAMURTHY CLAIMANT

AND

THE NAIROBI WEST HOSPITAL RESPONDENT

RULING

1. Before the court for determination is a Chamber Summons by the Claimant dated 8th February, 2023 seeking Orders That;
 1. The Final Arbitral award made on 15th December, 2022 be recognized and adopted as a judgement of this Honourable Court.
 2. The Applicant be granted leave to enforce the arbitral award as a decree of this Honourable Court.
 3. The costs of this application be borne by the Respondent.
2. The Chamber Summons filed under Certificate of Urgency is expressed under Section 36 of the Arbitration Act, Cap 49, Laws of Kenya, Rule 9 of the Arbitration Rules, 1997 and any other enabling provisions of the law and is based on the grounds set out on its face and supported by the Affidavit sworn by the Claimant on 8th February, 2023.
3. The affiant depones that the dispute between him and the Respondent was referred to arbitration pursuant to the terms of Clause 6.2 of the contract of employment dated 30th June, 2020 and the sole arbitrator made a final award on 15th December, 2023 in favour of the Claimant for the sum of USD 141,465.16 and Kshs.9,955,356/= as compensatory damages.
4. That despite a reminder, the Respondent had not honoured its obligations which prompted the instant application.



Respondent's response

5. In a Replying Affidavit sworn by Mary Ng'ang'a the Human Resource Manager on 20th March, 2023, the affiant deposes that the Respondent had already filed an application seeking the setting aside of the award on the ground that the award is contrary to public policy and the arbitrator acted outside the scope of his mandate as itemised in the Notice of Motion dated 21st March, 2023.

Claimant's submissions

6. As to whether the Arbitral Award should be recognized and enforced, counsel relied on the provisions of Section 36 of the Arbitration Act on the requirements of having an award enforced. Reliance was made on the decisions in Tanzania National Roads Agency v Kudahsign Construction Ltd Civil Application No. 171 of 2012 cited by Odunga J. in Boleyn Magic Wall Panel Ltd v Nesco Services Ltd (2020) eKLR, sentiments of Majanja J. in Capture Solutions Ltd V Nairobi City Water and Sewerage Co. Ltd (2020) eKLR, Castle Investments Co. Ltd v Board of Governors – Our Lady of Mercy Girls Secondary School (2019) eKLR and Fatuma Mohamed Omar v Edward Ngigi Muigai (2022) KEHC 303 to urge that the applicant had met the threshold for recognition and enforcement of the final award.

Respondent's submissions

7. As regards enforcement, counsel for the Respondent relied on the Replying Affidavit by Mary Ng'ang'a on the arbitrator's failure to consider Section 29(5) of the Arbitration Act and acting outside his mandate and all other grounds set forth in the Notice of Motion.
8. Reliance was also made on the provisions of Section 37(iv) of the Arbitration Act to reinforce the submission.
9. Counsel further cited the decision in Mahican Investments Ltd & 3 others V Giovanni Gaida & 80 others (2005) eKLR to urge that the Respondent would be gravely disadvantaged if the court did not intervene as it would be forced to comply with a skewed award.

Determination

10. The only issue for determination is whether the Claimant has made a case for recognition and enforcement of the Arbitral award made on 15th December, 2022.
11. The principles governing recognition and enforcement of arbitral awards are set forth in Sections 36 and 37 of the Arbitration Act, 2012.
12. Section 36 of the Act provides;
 1. A domestic arbitral award, shall be recognized as binding and enforced 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 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.



13. In the instant case, the Claimant availed a copy of the original arbitral award by Dr. Wilfred A Mutubwa dated 15th December, 2022 together with a copy of the Claimant’s Appointment Letter dated 30th June, 2020 whose Clause 6.2 provides as follows;

“If any dispute arises out of this contract of employment, the employer and employee (each party and jointly ‘the parties’) will first attempt to settle it by mediation. If the dispute is not settled by mediation, it shall be referred to arbitration by a single arbitrator appointed jointly by the parties. The making of an arbitration award shall be a condition precedent to any right of action by one party against the other on the matters so arbitrated.”

14. The foregoing clause constitutes an ‘arbitration agreement’ within the meaning of Section 2 of the Arbitration Act which provides;

“Arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

15. Having provided the documents identified by Section 36(3)(a) and (b) of the Arbitration Act, the court is satisfied that the provisions of this Section have been complied with.

16. The foregoing is consistent with the sentiments relied upon by Odunga J. in *Boleyn Magic Wall Panel Ltd v Nesco Services Ltd* (Supra), cited by the Claimant’s counsel that;

“Recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of Section 36 of the Arbitration Act. It confirms the binding nature of arbitral awards and requires a party seeking enforcement of such award avail to the court the duly authenticated arbitral award or a duly certified copies of it and the original arbitration agreement or a duly certified copy of it.”

17. However, under Section 37 of the Arbitration Act,

“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. . . .

ii. . . .

iii. . . .

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of 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 recognized and enforced; or



v. . . .

vi. . . .

vii. . . .

- 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."

18. Equally instructive are the sentiments of Majanja J. in *Capture Solutions Ltd v Nairobi City Water & Sewerage Co. Ltd* (Supra) as follows;

"I am satisfied that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the contracts which contain the arbitration clause and a certified copy of the arbitral award. In any event both contracts and the Final award are not in dispute since the Applicant has established a case for recognition and enforcement of the Final award, the burden is on the Respondent to demonstrate that the court should not recognize the award based on the circumstances set out in Section 37 of the Arbitration Act."

19. In the circumstances, it behooves the Respondent to isolate the relevant grounds under Section 37 of the Act.

20. The pith and substance of the Respondent's case is that the arbitrator dealt with issues or dispute not contemplated by the terms of reference to arbitration and made decisions on matters beyond the scope of the reference to arbitration as captured in Section 37(1)(iv) of the Arbitration Act.

21. It also argues that Public Policy dictated that arbitral proceedings be conducted in accordance with the law, constitution and not contrary to justice and morality.

22. In her Replying Affidavit, Mary Ng'ang'a depones that the arbitrator failed to consider the provisions of Section 29(5) of the Arbitration Act which provides;

"In all cases the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction."

23. The Respondent argues that the arbitrator entertained a dispute on alleged refusal to pay the Claimant a salary of USD 10,667 not set out in the contract which alludes to the basic salary, thus the arbitrator went outside his mandate thus violating the provisions of Section 29(5) above.

24. On this issue, the arbitrator found that the Claimant's salary in September was USD 10,667.32 and a further Kshs.829,613/= evidenced by a payment voucher.

25. It is clear to the court that the issue of the salary payable to the Claimant was contentious and the arbitrator made a finding of fact which is not before this court.



26. More significantly, Clause 6.2 of the Claimant’s Appointment Letter was unambiguous that the parties were at liberty to refer any dispute arising out of the contract of employment to arbitration including the salary payable to the Claimant.
27. In the court’s view, the fact that the arbitral tribunal came to a finding that salary due to him was higher than the basic salary in Clause 3.1 of the Appointment Letter does not necessarily mean that the arbitrator exceeded his mandate as the parties opened up the entire contract of employment during the arbitral proceedings.
28. Similarly, the Respondent has not demonstrated that the arbitral tribunal had no specific terms of reference.
29. For the foregoing reasons, it is the finding of the court that the arbitral tribunal did not exceed its mandate or violate the provisions of Section 29(5) of the Arbitration Act.
30. As regards the alleged irregularities, glaring inconsistencies, irreconcilable findings, determination of unpleaded matters bias, partiality and the miscarriage of justice to be occasioned by enforcement of the arbitral award, the Respondent provided neither particulars nor the relevant parts of the arbitral tribunal’s award as evidence in support of the allegations.
31. Granted that the parties did not draft any specific terms of reference for the arbitral tribunal, it was guided by the claims in the statement of claim and addressed all the issues as framed by the parties and made decisions thereon.
32. It is trite that he who alleges is obligated to establish the allegations by adducing the requisite evidence consistent with the provisions of Section 107 of the Evidence Act.
33. In the circumstances, the allegations were unproven as the Respondent did not discharge the burden of proof.
34. Finally, as regards public policy, the Respondent raised no substantive issue but stated that public policy demanded that arbitral proceedings be conducted in accordance with law and in a manner consistent with the Constitution and must not be contrary to justice and morality as observed by Ringera J. (as he then was) in *Christ for All Nations v Apollo Insurance Co. Ltd* (2002) 2 E.A 366.
35. The court is further guided by the sentiments of the court in *Independent Electoral and Boundaries Commission V John Omollo Nyakongo t/a H.R Ganjee & Sons* (2021) eKLR as follows;

“ . . . I chose to be persuaded by the decision of Onyancha J. in *Glencore Grain Ltd v TSS Grain Millers* (2002) 1 KLR 606 for the proposition that

“for an arbitral award to be against the public policy of Kenya, it must be shown that it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan Society. The word illegal would hold a wider meaning than just against the law. It would include contracts or acts that are void “Against public policy” would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement therefore would stand to be offensive.”



36. Similarly, in *Dinesh Construction Ltd & Another v Aircon Electronic Services (Nairobi) Ltd* (2021) eKLR, the court stated as follows;

“ Although framed broadly, public policy as a ground for setting aside an arbitral award must be narrow in scope and the assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and must then show which part of the award conflicts with that policy.”

37. The court is in agreement with these sentiments.

38. In the instant suit, the Respondent has neither identified the public policy of Kenya the arbitral tribunal’s award breaches nor the particular portions of the award the award is in conflict with.

39. In sum, the Respondent has not placed sufficient material before the court to discharge its burden of proof.

40. In the end, considered the issues raised by the Chamber Summons dated 8th February, 2023 and the Respondent’s response and the findings of the arbitral tribunal, the court is persuaded that the same is merited and the arbitral award made on 15th December, 2022 by Dr. Wilfred A. Mutubwa as sole arbitrator is hereby recognized as binding upon the parties to the suit.

41. In the upshot, judgement is entered in terms of the arbitral award together with costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

