



Adam v Japan International Co-operation Agency (Employment and Labour Relations Cause 559 of 2017) [2023] KEELRC 2986 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2986 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 559 OF 2017**

**AN MWAURE, J
NOVEMBER 17, 2023**

BETWEEN

SHUAIB ADAM CLAIMANT

AND

JAPAN INTERNATIONAL CO-OPERATION AGENCY RESPONDENT

RULING

1. The respondent filed a Notice of Motion dated June 26, 2023 seeking orders that:

1. The Honourable Court be pleased to recognize, adopt and enforce the final arbitral award between parties hereto issued by Kenneth Akide, SC on the June 20, 2023 as a judgment of this Honourable Court and the applicant be granted leave to execute the same as a decree of this Honourable Court being: -

a. the claim in prayer 1 of the claimant’s claim being a claim for leave succeeds. However, the same succeeds only for the last six years, 2011-2016 because the *Limitation of Actions Act*, cap 22 bars all earlier claims: -

the computation is reproduced hereunder: -

2011- consulting fee set at USD 3,914

24 days – USD 3,131

2012- consulting fee set at USD 4,110

24 days – USD 3,288

2013- consulting fee set at USD 4,110

24 days – USD 3,288

2014- consulting fee set at USD 4,110



24 days – USD 3,288

2015- consulting fee set at USD 4,110

24 days – USD 3,288

2016- consulting fee set at USD 4,110

24 days – USD 3,288

Total: USD 19,571

- b. The claim for gratuity fails.
 - c. The claim for medical expenses fails.
 - d. An award of damages of USD 24,660 equivalent to 6 months payment based on the last consultancy fee.
 - e. The claim has partially succeeded. It is fair and just that each party shall bear its own costs for this Arbitration.
 - f. The award in (a) and (d) above shall attract interest at 14% from the date of this award.
2. The respondent be condemned to pay the Claimant/Applicant's cost of this Application.
 2. The Application is grounded on the applicant's Affidavit and/ or the grounds on the face of the application.
 3. The applicant avers that it participated in the arbitration process with the respondent whose proceedings were carried out by Mr Kenneth Akide SC.
 4. The applicant avers that the arbitrator released his award in his favour on June 20, 2023, which he seeks to be adopted by this Court as its judgment.
 5. The applicant avers that on November 2, 2022, the claimant's advocate served them with a hearing notice indicating the matter was scheduled to be heard on January 24, 2023.

Preliminary objection by the respondent

6. In opposition to the Application the respondent filed a Notice of Preliminary Objection and Grounds of Opposition dated July 6, 2023 praying the same be struck out with costs on grounds that:
 1. The jurisdiction of this court to recognize, adopt and enforce the final arbitral award is wrongfully invoked;
 2. The arbitral award is erroneous and deals with a dispute not contemplated by and not falling within the terms of the reference to arbitration and it contains decisions on matters beyond the scope of the reference to arbitration and ought to be set aside;
 3. The respondent is wrongly described in the proceedings thus rendering the suit incurably defective.
7. The Application was canvassed by way of Written Submissions.



Submissions

8. The court considered the respective submissions of the claimant dated January 4, 2023 and respondents' submissions dated July 31, 2023. The two cover both the Preliminary Objection dated July 6, 2023 and Notice of Motion dated June 26, 2023.

Analysis and Determination

9. The first issue is whether the respondent's Notice of Preliminary Objection is merited.
10. The applicant submitted that Notice of Preliminary Objection is fatally defective as it does not cite the provisions of law deemed to be infringed as cited in HCCC Appeal No 34 of 2005 (Msa) [*Guinness Construction and Housing Co. v Abdul Masor*](#).
11. The applicant submitted that section 37 of the [*Arbitration Act*](#) sets out the grounds for refusal of recognition or enforcement of an arbitral award and grounds 1,2 and 4 of the Notice of Preliminary Objection are not contemplated therein.
12. The court in [*Martha Akinyi Migwambo v Susan Ongoro Ogenda*](#) [2022] eKLR observed: -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

13. The Notice of Preliminary Objection clearly does not raise pure points of law but instead raises issues which will require this court to go into the details of the arbitral award to ascertain the respondent's grounds, therefore, the same is not merited. Indeed, the respondent's preliminary objection is equivalent to appealing the arbitral award which if respondent is appealing the award the right pleadings should be filed but not by way of a preliminary objection.
14. The second issue is whether the respondent's Grounds of Opposition is merited. In the case of [*Kennedy Otiemo Odiyo & 12 Others vs Kenya Electricity Generating Company Limited*](#) [2010] eKLR the court held as follows:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit.”



15. Similarly, the Grounds of Opposition herein fails to raise only issues of law as it includes averments which would have been addressed in a Replying Affidavit. The grounds of opposition are not merited and are not appropriate in the circumstances.
16. The last issue is whether the Application herein is therefore merited.
17. Section 32A of the [Arbitration Act](#) provides that an arbitral award is final and is binding upon the parties. No recourse is provided against a final award otherwise than in the manner provided for in the Act itself.
18. Section 36(1) of the [Arbitration Act](#) provides as follows: -

“ 36.

- (1) A domestic arbitral award, shall be recognised 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 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)
- (5)”

19. Further, section 37 of the [Arbitration Act](#) states grounds for refusal of recognition or enforcement of an arbitral award as follows: -

- “ (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.”

20. Although, the respondent submits that the arbitral award is erroneous and deals with a dispute not contemplated and falling within the terms of reference to arbitration, it has failed to tender any evidence or proof before this court in support of this.
21. The issues raised concerning the jurisdiction of the court and whether there was an employer/employee relationship in the suit are not matters that should be handled at this stage. They are overtaken by events. The court finds the parties voluntarily submitted themselves for arbitration those issues notwithstanding..
22. Flowing from the pleadings and submissions this court finds the claimant’s Application is merited as provided under section 36 of *Arbitration Act*.

Accordingly the court makes the following orders: -

- a. That the final award prepared by Mr Kenneth Akide, SC on the June 20, 2023 be and is hereby recognized and adopted as a Judgement of this Court and applicant be granted leave to execute the same as judgment of this honourable court.
- b. Each party to meet their costs of the application.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 March 15, 2020 and subsequent directions of April 21, 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

