Milicons Limited & 2 others v National Commissions for Service Technology & Innovation (Miscellaneous Application E396 of 2024) [2025] KEHC 1535 (KLR) (Commercial and Tax) (25 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E396 OF 2024

AM MUTETI, J

FEBRUARY 25, 2025

BETWEEN

MILICONS LIMITED ..... 1ST APPLICANT

SOULCO LIMITED ..... 2ND APPLICANT

FITNESS SOLUTIONS LIMITED ..... 3RD APPLICANT

AND

NATIONAL COMMISSIONS FOR SERVICE TECHNOLOGY & INNOVATION ..... RESPONDENT

RULING

Introduction

1. The applicant seeks the adoption and enforcement of the Arbitral award dated the 16th March 2022 as a decree of this court in terms of the award.

2. The cracks of the applicant's argument is that since an Arbitral award has been given their favor this court should adopt it order its enforcement as a decree of this court.

3. The applicant has taken the position that the law seeks to protect the enforcement of arbitral awards by declaring that they shall be final and binding between the parties.

4. The applicant further submitted that arbitral awards by their nature are final and binding between the parties and as such should be enforced without undue delay.

5. The final award according to the applicant was published on 16th March 2022.

6. The applicant seeks the adoption and enforcement of the award to bring to a close the dispute.

7. According to the applicant the respondent has not filed any application to set aside the award or seek its stay.

8. The respondent on his part argues that the application should not be granted since there is a pending application for correction of errors before the Arbitral Tribunal.

9. The Respondent thus contends that this court cannot usurp the role of the tribunal and proceed to correct the errors and adopt the Arbitration Award.

Analysis and Determination

10. The parties agreed to have this matter disposed by way of written submissions when they filed and asked the courts to deliver a ruling based on the same.

11. I have perused the submissions of both parties and there is an agreement between them that there is an Arbitral Award that is recognized by both parties.

12. In fact when the Arbitral Award was made the applicant moved the high court for partial setting aside which was vehemently opposed by the respondents and the late Justice Majanja dismissed the setting aside application.

13. The respondent in answer to the application for setting aside filed a very detailed affidavit in opposition. The affidavit by the respondent was sworn by Professor Walter O. Oyawa who at paragraph 6 of the affidavit deposed that public policy demands finality of arbitral proceedings and precisely for that reason urged the courts to dismiss the application for partial setting aside and the court agreed with them.

14. To my understanding therefore the finality demanded by the respondent then was that the award be adopted and enforced as a decree of the Court as pronounced by the arbitrator.

Applicant's Case.

15. The applicant has maintained that the respondent in resisting the enforcement of the award has not set out any of the grounds contemplated under Section 37 of the *Arbitration Act*.

16. According to the applicant if indeed the respondents did not believe in the finality of the award they would have supported the application for partial setting aside made by the applicant or made an application seeking to set aside the award. Having failed to do so the applicant contends that the respondent is precluded from challenging the adoption and enforcement of the award.

17. The applicant has also contended that the issues the respondent is bent on raising now are resjudicata and all those matters were canvassed before the late Majanga, J and if the respondents were not satisfied with the court's decision then the recourse open to them was to appeal and seek to have the decision overturned.

18. The applicant's further urged this court to consider that the respondent has not prosecuted the application pending before the arbitrator for rectification of errors for over 2 years.

Respondent's Case.

19. The respondent on his part has urged the court to consider that the award sought to be enforced is not final and binding.

20. According to the respondent since there is a pending application for correction of errors in the final award that is pending determination before the arbitral tribunal the award is not final and binding thus it is incapable of adoption and enforcement before this court.

21. The application before the tribunal is said to be filed under Section 34 of the *Arbitration Act* which allows for rectification of errors, any clerical or typographical errors.

22. The existence of the application before the tribunal is not denied by the applicant.

23. The applicant simply dismisses the application as incompetent and in his view an attempt to frustrate the realization of the fruits of the arbitral award.

24. The respondent takes the position that the jurisdiction to determine any application under section 34 of the Arbitral Act is a preserve of the arbitral tribunal and this court cannot usurp that jurisdiction.

25. The respondent further contends that the applicant upon losing the application for partial setting aside before the honorable Majanja , J filed a notice to the Court of Appeal seeking to challenge Justice Majanja's ruling. The respondent has submitted that the status of that notice of appeal and the competence of any appeal arising therefore is a matter for the Court of Appeal and not this court.

26. In support of that argument the respondent has cited rules 84 , 85(1) and 86 of the Court of Appeal rules.

27. The respondent further contends that since there is no order of the Court of Appeal indicating that the appeal before the court has been abandoned, withdrawn or struck out the applicant cannot move this court to adopt the award and enforce it relying on the Majanja, J decision which he has challenged.

28. In conclusion the respondent has urged the court to find that the arbitral award is not final and therefore this court should decline to grant the Chamber Summons dated the 7th May 2024.

Determination

29. The applicant seeks adoption and enforcement of an arbitration award against which he concedes there is a pending application under section 34 of the *Arbitration act*.

30. The prospect of rectification of awards is a statutory process which in my view was meant to ensure that the award that the court finally adopts and enforces is an award that is final and binding upon parties.

31. The respondent having filed the application in the tribunal basically raised the question of the correctness of the award its finality and binding nature.

32. That process in my view must be completed before this court can be invited to adopt the arbitral award as being final and binding against the parties.

33. The correction and rectification of an award is an inbuilt procedure within the *Arbitration Act* which must be exhausted before an arbitral award can be declared final and enforceable.

34. Under the doctrine of exhaustion where a statute prescribes certain remedies the parties to a dispute must as a matter of law first exhaust the procedure under the relevant act before resorting to the court process.

35. In Wahome Vs *Public Health Officers & Technicians Council & Another (Constitutional Petition E418 of 2021*) [2023] KEHC 2680 (KLR) Para 59 the court held :-

> " However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)"

36. The court cannot deviate from a statutory provided procedure and intervene in a matter except where from a reading of the pleadings it occurs to the court that salient constitutional interpretation issues arise.

37. In the instant case I do not find any issue that would warrant the intervention of this court at this stage.

38. The matter before the arbitral tribunal must be disposed off first.

39. The applicant has submitted that the application before the tribunal is hopeless. I would say that the submission of the applicants in this regard would best be made before the tribunal which is seized of the matter.

40. If this court were to assume jurisdiction to determine the issues before the tribunal that would be improper for it would be exercising a jurisdiction specifically reserved for the tribunal.

41. It should not be the business of this court to indulge in matters that are reserved for the tribunal.

42. The predominant purpose of the *Arbitration Act* was to promote resolution of disputes in a less acrimonus environment that Arbitral process provides unlike the traditional justice system which is rigid in its processes.

43. *The Constitution* of Kenya under Article 159 promotes the purposes of alternative justice mechanisms.

44. Arbitration process being a statutory process must be undertaken in strict adherence to the Act without dragging issues reserved for the tribunal to this court.

45. The applicant in this matter has alleged that since the filing of the application before the Arbitral tribunal steps have not been taken by the respondent to prosecute the application. If that is indeed the case, then the most prudent cause for the applicant to take would be to seek to have that application determined by the tribunal first.

46. The applicant needs no advice from this court as to what kind of move to make before the tribunal in order to bring the proceedings before the tribunal to a close.

47. It is upon the applicant to elect how to proceed before the tribunal since it is the applicant who is being kept away from the fruits of the Arbitration Award.

48. As regards the argument that the respondent opposed the application before the late Majanja J, which sought partial setting aside, all this court would say is this, by so doing the respondent did not buy operation of the law extinguish its rights under Section 34 of the *Arbitration Act*.

49. The respondent was under no duty to assist the applicant in prosecuting the application before the court.

50. I have however noted that the applicant has some powerful arguments regarding the position they responded to before Majanja J.

51. It would be interesting to see how the Arbitration tribunal will deal with the response when the application for rectification or correction of the Award comes up before them.

52. It is the view and finding of this court that the arbitral tribunal is still seized of the matter and as to the correctness of the award words it would be premature for this court to adopt the award as being final and binding upon the parties.

53. The upshot of this at the Chamber Summons dated 7th may 2024 is hereby dismissed with no orders as to costs since the respondent is guilty of delay in prosecuting the application before the Tribunal.

54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Kimondo Gachoka absent for the /appellant

Nguma for the 1st & 2nd Respondent