Shiv Construction Company Limited v Rivatex East Africa Limited (Miscellaneous Civil Application E197 of 2024) [2025] KEHC 3924 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION E197 OF 2024

E OMINDE, J

MARCH 26, 2025

BETWEEN

SHIV CONSTRUCTION COMPANY LIMITED ..... APPLICANT

AND

RIVATEX EAST AFRICA LIMITED ..... RESPONDENT

RULING

1. The Applicant herein filed a Chamber Summons Application dated 3/07/2024 seeking the following orders:
    1. The Arbitral award dated 5/12/2023 between the Claimant and the Respondent be recognized and adopted by this Honourable Court.
    2. The award be enforced as a decree of this Honourable Court against the Respondent.
    3. Cost of this Application be provided for.
2. The Application is premised on the grounds on the face of it and it is further supported by Affidavit of even date sworn by Dilipkumar Sutar, a Director of the Applicant.
3. He deposed that the Applicant and the Defendant herein entered into two contracts with the Respondent being contract number REAL/39/2015-2016 and REAL/41/2015-2016 all for construction works. That a dispute arose between the parties on the issue of outstanding payments, that the matter was referred for arbitration by the Chairman of the Chartered Institute of Arbitrators who appointed Mr. John O. Okerosi as the arbitrator. That the matter proceeded before the arbitrator and the parties recorded a consent on all the issues in dispute. That the Arbitrator thereafter wrote a letter to the parties dated 27//11/2023 indicating that the award will be made and published on 5/12/2023, and will be available for collection by either parties on 6/12/2023 and upon payment of his fees.

4. He further deposed that the Respondent failed to pay its part of the arbitrators fees as a result of which the Appellant made the payment of Kshs. 696,000/= on 21/06/2024 and collected the award. That the Respondent despite several promises to pay has failed to pay the amount awarded to the Applicant in the arbitration. That it is therefore in the interest of justice that the award be recognized and adopted as its judgement by this Court. He also prayed that the Court do issue a decree based on the award to be enforced against the Respondent.

5. In the end, he deposed that the Applicant borrowed money to finance the construction works and is suffering by paying interest and that it is therefore fair and in the interest of justice that the orders sought be granted.

Replying Affidavit

6. In response to the Application, the Respondent filed an undated Replying Affidavit, sworn by T.Tum, the Respondent's Secretary in which Affidavit he confirmed the deposition of the Applicant in all the salient facts of the Contracts the subject matter of the arbitration proceedings.

7. He confirmed that the said contracts were duly performed by the Applicant but unfortunately the Respondent was unable to pay the contract price fully as per the certificates of payments issued due to interruption of the Respondent's cashflow caused by the financial challenges associated with the effects of the Covid-19 pandemic and the worldwide shortage of raw materials for its textile factory.

8. He confirmed the Applicant and Respondent did participate in the arbitral proceedings and both parties filed their respective submissions. That after the filing of submissions, the arbitral award appears to have been given on 5/12/2023. That however, the award was not served upon the Respondent by the said Arbitral Tribunal and that the Respondent came to learn of the award through these proceedings on 9/07/2024 when it was served with the instant Application.

9. He maintained that the Arbitral Tribunal is yet to serve the Respondent with its award and so the Respondent has had no notice of the delivery of the same. He deposed that the authenticity of the award is questionable since the Applicant, contrary to the provisions of Section 36 of the *Arbitration Act*, did not file in Court an original or certified copy of the award and neither has it served upon a copy thereof upon the Respondent. That it is therefore in the interest of justice that the subject arbitral award is not adopted as a judgment of the Court.

10. Finally, he deposed that the instant Application is an abuse of the Court process and should be dismissed with costs.

Further Affidavit

11. In a rejoinder, the Applicant through Counsel, Mr. Godfrey Nathan Kitiwa, also filed a Further Affidavit dated 23/09/2024 wherein Counsel reiterated the averments in the Replying Affidavit dated 16/09/2024.

Submissions

12. It was directed that the Application be canvassed by way of written submissions. The Applicant filed its submissions on 2/10/ 2024 while the Respondent filed on 31/01/2025.

Applicant's Submissions

13. On whether the arbitral award published on 5/12/2023 should be recognized and adopted by the Court, Counsel for the Applicant reiterated the facts in support of the Application as deposed in the

applicant's Affidavit and as already herein summarised. Counsel cited Section 36 of the *Arbitration Act* in support of his submissions.

14. Counsel submitted that the Court has jurisdiction to grant the orders sought He submitted that not only was the instant application filed on 4/07/2024 via the e-filing platform, but also physical copies of the summons, the original arbitral award and copies of the agreements were then availed in Court and the matter was heard ex-parte in the first instance. On the respondent's deposition in their Replying Affidavit that the Respondent contends that they were not served with the arbitral award by the arbitral tribunal, Counsel maintained that the Respondent took part in the arbitral proceedings and was aware of the date when the award would be delivered. Counsel further submitted that Arbitrator wrote a letter to the parties dated 27/11/2023 indicating that the award will be made and published on 5/12/2023 and that the award would be made available to parties on 6/12/2023 upon payment of the Arbitrator's fees.

15. Counsel further submitted that apart from the written correspondence the Arbitrator also sent e-mails on 8th August and 30th August all of 2024 to the parties notifying them of the publication of the award and further that the parties were required to pay the balance of the Arbitrator's fees before he could release the award. That a copy of the e-mail service delivery receipt is marked as GNKI and a copy of the notice of publication of the award is marked as GNK2 all annexed to the further Affidavit sworn on 23/09/2024. Counsel placed reliance on Order 5. Rule 22B of the Civil Procedure Rules. Counsel added that the last confirmed and used address of the Respondent is -legalofficer@rivatex.co.ke. That the said e-mail address is also cited in the Respondent's Replying Affidavit to the instant Application.

16. Counsel submitted that the Applicant on his part confirmed to receiving the said e-mail from the Arbitrator after which the Applicant made payment of the arbitrator's fees as evidenced by the banker's cheques annexed to the supporting affidavit of the instant application and marked as DS4. That after obtaining the final award, the Applicant served it upon the Respondent. In light of the above, Counsel refuted the allegation that the Respondent was not aware of the award being published. Counsel therefore submits that the actions of the Respondent aims to frustrate the Applicant and delay it from enjoying the fruits of the arbitral award.

17. Counsel cited Sections 32A and 37 of the *Arbitration Act* and submitted that the Respondent's Replying Affidavit has not raised any of the grounds for the rejection of the arbitral award as set out in Section 37 of the *Arbitration Act*. On the Respondent's reliance on Section 36 of the *Arbitration Act* to wit that the Applicant, contrary to the provisions of the *Arbitration Act* section 36 failed to file in Court an original or a certified copy of the award neither has it served upon the Respondent a certified copy of the award, Counsel urged that as per the provisions of Section 37 of the *Arbitration Act*, the Respondent's ground of objection is not one to make the Court refuse to recognize and/or enforce the award.

18. Further, Counsel submitted that Section 36 of the *Arbitration Act* provides that an original copy and/or certified copy should be furnished to Court and it does not stipulate that the same should be furnished to the Respondent. Counsel submitted that this requirement was duly complied with and the original award was physically furnished to Court and the same is in the Court file.

19. Counsel contended that notwithstanding the fact that the Respondent was a party to the arbitral proceedings and it ought to have paid the Arbitrator's fee for it to obtain their copy of the Final Award as a condition set by the Arbitrator, Counsel nonetheless still served upon the Respondent a copy of the same having complied with the condition set and obtained his copy of the Arbitral Award and that further in line with Rule 4 (1) of the Arbitration Rules, the Applicant duly served the summons upon the Respondent before inter parties hearing and swore an Affidavit of Service filed on 26/07/ 2024

to that effect. Counsel relied on the Court's decision in Pavanputra Enterprises Limited v Keroche Breweries Limited [2022] eKLR, where the Court stated that;

> (15) A Court can only vary and/or set aside a consent upon specific application made in Court. The Respondent has made no such application in Court. As such this Court cannot grant the request being made by the Respondent through their submissions.
>
> (16) It is manifest that the Claimants have met the conditions for recognition and adoption of the Final Arbitral Award. On the other hand, the Respondents have failed to demonstrate why the Final Award ought to be rejected by the Court.

20. Counsel submitted that the Respondent has not made any application in Court seeking for the award to be varied and/or set aside by this Honourable Court and that the Respondent has also not proven to this Court why the award should not be adopted as a judgment of the Court. Counsel maintained that no reason has also been given by the Respondent for the delay in settling the Award and that the authenticity of the award is therefore not in question as the Respondent has not challenged the final award dated 5/12/2023 nor have they taken any issue with the manner in which the Arbitrator conducted his proceedings.

Respondent's Submissions

21. Counsel in his submissions reiterated the depositions of the Respondent of the factual issues as already herein summarised and I need not restate the same. Counsel maintained that the arbitral tribunal is yet to serve the Respondent with its award and the Respondent has had no notice of the delivery of the same.

22. Counsel submitted that the Claimant has in its Further Affidavit and Submissions averred and argued respectively that the arbitrator vide a letter dated 27/11/2023 informed the parties that the award was ready and was to be made available for collection by either parties on 6/12/2023. Counsel maintained that the Respondent was never served with this letter and that the Claimant has not filed in Court a copy of the said letter to prove this allegation and therefore there was no such letter.

23. Counsel further submitted that the Claimant has also in its Further Affidavit and Submissions averred and argued respectively that as per the emails dated 8th August, 2024 and 30th August, 2024 annexed to the Claimant's Further Affidavit, the Respondent was duly informed of the award by the arbitrator by the email address cited in the Respondent's pleadings being legalofficer@rivatex.co.ke. She submitted that this is the Respondent's email for purposes of the arbitration and this application.

24. Counsel further submitted that the emails purported to be from the arbitrator are dated 8th August, 2024 and 30th August, 2024. Counsel admitted that it is true that there is an email dated 8th August, 2024 indicating that the award had been published and in it parties were directed to pay the balance of the arbitrator's fees before the award could be released. Counsel however, contended that these emails refer to another proceeding between the same parties but before another arbitrator by the name Basil Odigie as can be gleaned from the contents of the said email.

25. Counsel further submitted that the award subject to this proceedings is dated 5/12/2023 and this application was filed on 3/07/2024. According to Counsel it therefore follows that even if the notice referred to the publication of the award in this application, then it appears that the same was to be published after the filling of this suit on the 3/07/2024 and this therefore demonstrates the fact that the Respondent has never had notice of the publication of the award. Counsel submitted that had the Respondent had notice of the award it would have in the interests of justice decided whether to challenge it or not as per the timelines and provisions of the *Arbitration Act*. Counsel urged that service

of notice of the award after the delivery of award and filing of this application has greatly caused a miscarriage of justice on the Respondent.

26. Counsel cited Section 37 of the *Arbitration Act* and submitted that in light of the provisions of Section 37 (1) (a) (iii) of the *Arbitration Act* the Respondent herein who the subject arbitral award is invoked was not given proper notice of the arbitral proceedings as it was never notified of the arbitral proceedings regarding the final determination of the dispute, the publication of the award and was not even served with the same. Counsel maintained that notice of delivery of the award is a very crucial part of the arbitral proceedings for purposes of Section 35 of the *Arbitration Act* as time for filing an application under the said Section 35 does not begin to run until it is established as to when exactly the Respondent was notified of the delivery of the award. Counsel cited the Court in National Housing Corporation v Custom General Construction Limited[2021] eKLR, where the Court stated that;

> "I find and hold that consistent with the object of the Act, the only logical interpretation of section 35(5) of the Act is that an application to set aside must be made within 3 months from the date the award is received and for this purpose, the date of receipt is the date which the parties are notified of the award. Once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the singed copy of award. Failure of the parties to collect it does not delay or postpone the delivery.

27. Counsel maintained that the Respondent was never notified of the delivery or publication of the award as required by law.

28. In conclusion, Counsel submitted that is also the Respondent's case that the authenticity of the award is questionable as the Applicant contrary to the provisions of the *Arbitration Act* Section 36 failed to file in Court an original or certified copy of the award neither has it served upon the Respondent a certified copy of the award. Counsel contended that the arbitral award in this application was not in compliance with Section 36 (3) of *Arbitration Act* as it was not an original or certified copy of final arbitral award.

Determination

29. Having considered the Application, the response thereto as well as the submissions filed, it is my considered opinion that the issue for determination is:

Whether the obligation to notify the Respondent of the final arbitral award is upon the Applicant and if the answer be yes, whether the Applicant satisfied that obligation.

30. The common ground from the pleadings and the submissions is that pursuant to the arbitration clause in the contracts between the parties, they voluntarily submitted themselves to arbitration and their matters were heard and concluded. The only issue of contestation is the delivery of the final arbitral award. The guiding clauses on the implementation of arbitral awards are Sections 36 and 37 of the *Arbitration Act*. However, on the issue that the Court has raised as being for determination, the relevant provision of the law is Section 36 of the Act and it provides as follows;

Section 36;

(1) 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) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

(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) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

(5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

31. Of significance to this Application is Section 36(3). From my perusal of the said subsection, it is provided that all that a party seeking to enforce an arbitral award through the court as the applicant herein is seeking to do, is to furnish the court with the original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it unless the court otherwise orders and/or directs. A perusal of the Application shows that copies of both the agreement and the award were annexed to the Affidavit in support of the Application (see annexures DS1, DS2 and DS5).

32. It follows therefore that from the very onset the Applicant was compliant with the requirements of this section. Further, the final award was also availed to court and is in the court file. The Court notes that nowhere in the said Section 36(3) is it provided that an applicant must serve upon a respondent a copy of the award. The only requirement is that they be availed to court. In this regard, the decision of the court in the case of Structural Construction Company Limited v International Islamic Relief Organization High Court Nairobi, Miscellaneous Case No. 596 of 2005 where it was held that a copy of the arbitration agreement annexed to the applicant's supporting affidavit is acceptable for purposes of enforcement of the award is relevant.

33. On whether the applicant was aware of the delivery of the final arbitral award, from my perusal of the pleadings and more particularly the Further Affidavit, I do agree with the submissions by Counsel for the Respondent that the emails annexed thereto is with respect to communication from a different arbitrator from the one who was seized of the arbitration whose final award is the subject matter of this Application. The possibility that these particular emails are with respect to a different arbitration therefore does exist. This is particularly so in light of the fact that the dates of the said emails is August of 2024 yet this application was filed in July of the same year and I agree that as submitted, the parties cannot be asked to avail to themselves for the final arbitral award after the fact of the filing of this application seeking to enforce the award.

34. The above notwithstanding, even as Counsel for the Respondent submits that he was not aware of the fact of the delivery of the final award and/or even when it was to be delivered, annexure DS3 to the affidavit in support of the Application does negate this assertion. The same is dated 27th November 2023. It is communication addressed to the two firms of advocates representing the parties herein. It is specifically marked for the attention of the two Advocates being Mr. Godfrey Nathan Katiwa and Mr. David Omboto who are directly involved with the case. It is from one John O. Okerosi, the Arbitrator who it is agreed handled the arbitration the subject of the award in question.

35. Apart from the hard copies sent to the counsels for the parties, it is also indicated to have been sent to the Claimant and the Respondent by email. In a nutshell, the letter was communicating to the parties that the final arbitral award was ready, when it would be delivered and how to obtain the said award. It is on the strength of this letter that Counsel for the Applicant obtained the award upon payment of the requisite fees. Because the Respondent or their Counsel in this particular instance do not dispute the addresses therein used are the ones that they ordinarily use and the date of the letter is very well synchronised with the date of the delivery of the award and the subsequent filing of this application, I am satisfied that the notification of the delivery of the award was sent to each of the parties and was duly received by the parties including the Respondent and his Counsel. I further note that the notification is in one letter addressed to all the parties and their Counsel. It is not in separate letters to the different parties individually. I therefore find it improbable that one party would receive the same and the other does not.

36. In this regard, the decision of the court in the case of National Housing Corporation v Custom General Construction Limited[2021] eKLR cited by the Respondents is relevant as follows;

> " .... Once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the singed copy of award. Failure of the parties to collect it does not delay or postpone the delivery."

37. In light of my consideration of the Application as herein summarised, I am satisfied that the same has merit. The Court is satisfied that the Applicant is under no obligation at all to notify the Respondent of the final arbitral award. So even as the Applicant deposed that he did serve the Respondent with the said award which the Respondent denied, in my very well considered opinion, the success or otherwise of this Application is not hinged on whether or not the Applicant effected the said service because as is provided by the relevant provision of the law the only obligation upon the Applicant in an Application of this nature is that they avail the agreement and award and/or the copies thereof to the court. The onus and obligation then is upon the Respondent to also avail to themselves the same and not seek that they be served by the Applicant. Accordingly, the Application is allowed in its entirety as follows:

    i. The Arbitral award dated 5/12/2023 between the Claimant and the Respondent be and is now hereby recognized and adopted by this Honourable Court.

    ii. The said award is to be enforced as a decree of this Honourable Court as against the Respondent.

    iii. The Respondent is to bear the costs of the Application.

READ DATED AND SIGNED AT ELDORET ON 26TH MARCH 2025

E. OMINDE

JUDGE