Sogea - Satom SAS & another v Kenya Airports Authority (Commercial Arbitration Cause E007 of 2023) [2025] KEHC 11729 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11729 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E007 OF 2023

MN MWANGI, J

JULY 31, 2025

IN THE MATTER OF THE ARBITRATION ACT, 1995

-AND-

IN THE MATTER OF THE ARBITRATION RULES 1997

-AND-

IN THE MATTER OF AN ADHOC ARBITRATION UNDER NATIONS

COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

ARBITRATION RULES

BETWEEN

SOGEA - SATOM SAS ..... 1ST APPLICANT

RAZEL - BWEC SAS ..... 2ND APPLICANT

AND

KENYA AIRPORTS AUTHORITY ..... RESPONDENT

RULING

1. Before me is a Chamber Summons application dated 16th January 2023 filed by the applicants pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Section 36 of the *Arbitration Act*, 1995, Rule 9 of the Arbitration Rules 1997, Article 159 of the *Constitution* of Kenya, 2010 and all other enabling provisions of the law. The applicants seek an order for recognition and enforcement of the Partial Final Arbitral Award dated 1st December 2022 in PCA Case No. 2022-24 as a judgment and decree of this Honourable Court.

2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Mathieu Georges, an authorized representative of the consortium comprising the applicants. He averred that the applicants were contracted to rehabilitate airside pavements and the AGL system at Moi International Airport for Kshs.7,008,241,516.59, and that the contract required a performance guarantee and contained dispute resolution provisions, including referral to a Dispute Board and Arbitration under *UNCITRAL Rules*, seated in Mauritius.

3. Mr. Georges contended that several disputes arose, and DB Decisions Nos. 2, 6, 7 & 8 were issued, but the respondent failed to comply, which prompted Arbitration PCA Case No. 2022-24, in which the parties agreed to divide proceedings into three phases. He deposed that phase 2 focused on enforcement of the DB decisions, and the Arbitral Tribunal unanimously ruled in favour of the applicants, finding the respondent in breach of the contract for failing to comply with the DB decisions. He stated that the said Tribunal then ordered the respondent to pay the outstanding principal amounts of EUR 408,598.86 and Kshs.59,581,176.08, return the performance security and pay financial charges. Mr. Georges claimed that the respondent was duly notified of the Award and stated that the applicants now seek recognition and enforcement of the Partial Final Award as a judgment and decree of this Court.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 8th May 2023 by Ms Margaret Munene, the respondent's Acting Company Secretary. She averred that the Partial Award dated 1st December 2022 is neither final nor binding since the Arbitration is split into three phases. She averred that enforcement of the said Award would be premature as phase 3 which includes quantum adjustments and counterclaims is still pending. She claimed that the quantum awarded is in dispute due to discrepancies between DB Decision No. 2 and IPC No. 18, a revised assessment. Furthermore, the Tribunal acknowledged errors and deferred the final resolution of quantum to phase 3. She contended that financial charges are also uncertain pending the aforesaid resolution.

5. Ms Munene averred that in respect to DB decisions No. 7 & 8, the respondent issued a notice of dissatisfaction, which under sub-clause 20.4 of the GCC means the decisions are not final and binding. She emphasized that enforcement of the related Awards is premature. Ms. Munene contended that releasing the guarantee now would expose the respondent to financial risk and it would effectively result in double jeopardy in the event that the respondent is later successful in phase 3. Additionally, she contended that such enforcement would contravene Kenyan public policy, particularly regarding protection of public funds and integrity of security mechanisms in commercial contracts.

6. The instant application was canvassed by way of written submissions. The applicants' submissions were filed by the law firm of Anjarwalla & Khanna LLP on 17th July 2023, while the respondent's submissions were filed on 11th October 2023 by the law firm of Iseme, Kamau & Maema Advocates.

7. Ms Kamau, learned Counsel for the applicants relied on the case of *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] eKLR, and submitted that under Section 36(2) of the *Arbitration Act*, international arbitral Awards are binding and enforceable in accordance with the 1958 New York Convention. She submitted that Section 36(3) of the said Act requires the party seeking enforcement to provide original or certified copies of the Award and the Arbitration Agreement, which the applicants have done. She emphasized that enforcement can only be denied in exceptional circumstances such as if the Award is not yet binding, has been set aside in the seat of arbitration, or if one of the grounds under Section 35 of the *Arbitration Act* is proved. Counsel stated that the applicants have fully complied with Section 36 of the *Arbitration Act* for enforcement of the Arbitral Award. She asserted that the Award dated 1st December 2022 is final and binding under Sections 32A and 37(1)(a)(vi) of the *Arbitration Act*.

8. Ms Kamau contended that since the Award herein was received on 2nd December 2021 via a valid email notification, the only recourse was to challenge it in Mauritian Courts within three (3) months, an option the respondent failed to pursue. Counsel referred to the case of *Sharma v Military Ceramics Corporation* [2020] FCA 216 to counteract the respondent's argument that the Award lacks finality due to unresolved issues in phase 3, and affirmed that the phase 2 Award remains final and enforceable. She referred to Section 32(6) of the *Arbitration Act* and highlighted that the parties herein agreed to divide the Arbitration into three distinct phases. She explained that the Tribunal issued a "Partial Final Award" for phase 2, which conclusively resolved the respondent's obligation to comply with specific Dispute Board decisions. Counsel cited Gary Born's International Commercial Arbitration in submitting that a Partial Award can still be final and binding for the issues it addresses, even if other claims remain pending.

9. She relied on the case of *Aero Club v Solar Creations Pvt Ltd* [2020] eKLR, and stated that the Award herein is final in respect to phase 2 and is ready for recognition and enforcement. She relied on the case of *Christ for All Nations v Apollo Insurance Co. Limited* [2002] 2 EA 366, and argued that the respondent has not demonstrated any valid ground such as illegality, harm to public good, or offensiveness to public morals to justify refusal of the Award's recognition on grounds of public policy. She stated that the respondent's claim of financial hardship does not constitute a breach of public policy and emphasized that enforcing the Award would not lead to unjust enrichment as the applicants suffered losses due to the respondent's non-compliance. Additionally, she asserted that the Tribunal's findings cannot be challenged under the pretence of public policy since the Dispute Board ruled in favour of the applicants, the respondent disregarded those rulings, and the Tribunal upheld them.

10. Mr. Munyu, learned Counsel for the respondent submitted that the instant application is not only premature but is also contrary to the provisions of Section 36(2) of the *Arbitration Act*, the Conciliation Act 1996 and Article V(1)(e) of the New York Convention. He argued that the Partial Award has not yet become binding on the parties as key aspects remain unresolved before the Arbitral Tribunal. He submitted that DB Decision No. 2 is not final and binding, as the Tribunal itself has reserved substantial issues for future consideration. It was stated by Counsel that in relation to DB Decision No. 6, the Partial Award compels the respondent to release the performance guarantee prior to the final resolution of the substantive dispute. He contended that such premature enforcement undermines the commercial purpose of the guarantee and exposes the respondent to the risk of overpayment.

11. He submitted that the Tribunal has not yet determined the full financial implications of the Dispute Board decisions or the parties' respective claims and defences. He submitted that recognizing and enforcing the Partial Award now would interfere with the Tribunal's ongoing jurisdiction and pre-judge issues still under active consideration. Mr. Munyu asserted that the Partial Award does not satisfy the threshold of finality and binding effect required for recognition and enforcement under the *Arbitration Act* and the New York Convention. In submitting that Partial Awards are not recognizable and enforceable if the Arbitral Tribunal has reserved any issues for later determination, Counsel relied on the Court of Appeal case of *Kenfit Limited v Consolata Fathers* [2015] eKLR.

12. Counsel contended that enforcement of the Partial Award would violate the public policy of Kenya, contrary to Section 37(1)(b)(ii) of the *Arbitration Act*. He relied on the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A. 366 and submitted that given that the respondent is a public entity, any payments under the Partial Award would come from public resources. He submitted that Articles 201 & 227(1) of the *Constitution* of Kenya, 2010, mandate the responsible, cost-effective use of taxpayers' money, and that enforcement of the Partial Award while critical matters including quantum

remain unresolved would unjustly enrich the applicants at the expense of the Kenyan public and should therefore be declined.

Analysis And Determination.

13. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order of recognition and enforcement of the Partial Arbitral Award should be made.

14. Recognition and enforcement of Arbitral Awards is provided for under Section 36 of the *Arbitration Act* which states that -

    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. An international Arbitration Award shall be recognized 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."

15. Section 37 of the *Arbitration Act* No. 4 of 1995 on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce an Arbitral Award at the request of the party against it as hereunder-

    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.

2. If an application for the setting aside or suspension of an arbitral Award has been made to a Court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral Award, order the other party to provide appropriate security.

16. It is not in contest that Arbitration proceedings in Arbitration PCA Case No. 2022-24 were split into three phases. After the hearing of phase 2, the Arbitral tribunal made a Partial Final Arbitral Award dated 1st December 2022 which the applicants are urging this Court to recognize and enforce. The respondent opposed the recognition and enforcement of the said Award on grounds that it was not final and binding since the Arbitration was split into three phases. The respondent asserted that phase 3 includes quantum adjustments and counterclaims, thus the instant application is premature. Further, that the quantum Awarded is in dispute due to discrepancies between DB Decision No. 2 and Interim Payment Certificate No. 18, a revised assessment.

17. The respondent contended that the Tribunal also acknowledged errors and deferred the final resolution of quantum to phase 3. It averred that in respect to DB decisions No. 7 & 8, it issued a notice of dissatisfaction, which under sub-clause 20.4 of the GCC means the decisions are not final and binding. The respondent was of the view that such enforcement would contravene Kenyan public policy, particularly regarding protection of public funds and integrity of security mechanisms in commercial contracts.

18. From the pleadings filed, it is noteworthy that Arbitration PCA Case No. 2022-24 was filed since the respondent did not comply with Dispute Board Decision Nos. 2, 6, 7 & 8. As stated above herein, the aforesaid Arbitration proceedings were divided into three phases. It is not in dispute that phase 2 dealt

with the Dispute Board Decisions, while phase 3 would deal with the balance of the disputed claims including counterclaims.

19. From the foregoing, this Court notes that the respondent's major objection to the recognition and enforcement of the Partial Award is based on the fact that the instant application is premature due to unresolved issues surrounding the quantum Awarded under DB Decision No. 2. The respondent contends that the sums Awarded under DB Decision No. 2 were based on erroneous Interim Payment Certificates No. 1 to 15 as these were later re-assessed by the Engineer, culminating in Interim Payment Certificate No. 18 issued in January 2022, which corrected the sums and was fully paid by the respondent.

20. It is not in contest that the Tribunal acknowledged at paragraph 79(ii) that the dispute regarding errors in the Interim Payment Certificates was not an issue before it at the current stage, deferring it to phase 3 of the Arbitration. It further reiterated at paragraph 79(iii)(b) that the question of errors in the Interim Payment Certificates underlying Dispute Board Decision No. 2 could be raised in phase 3, in the event that the respondent maintains its request for review. It is noteworthy that while the Tribunal noted the binding nature of a DB decision under Sub-Clause 20.4 of the General Conditions of Contract, it acknowledged the impact of Interim Payment Certificate No. 18 and the fact that the parties had not exhausted reconciliation mechanisms to resolve the dispute. From the foregoing, it is evident that there are issues on quantum, especially in respect to Dispute Board decision No. 2 that are yet to be amicably agreed on by the parties herein or determined by the Tribunal.

21. The Court of Appeal in *Kenfit Limited v Consolata Fathers* (*supra)* addressed itself on the issue of recognition and enforcement of Partial Arbitral Awards as hereunder –

> We find merit in the reasoning by the learned judge. There can only be one Award from a decision and determination of an arbitrator; this is not to say that the one Award cannot be contained in two or more documents or made at different times. What we say is that the one Award must be the final or composite Award that determines all issues referred to the arbitrator for consideration. An Award does not become final merely because the word "final" has been inserted as its heading; an Award is final when all issues for consideration have been canvassed and a finding or determination made.
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> We have examined the contents of the Award dated 30th November 2000. Although it is titled "Final Award" the arbitrator at paragraph 10.0 thereof expressly reserved the issue of costs either for Agreement between the parties or determination bide taxation. We are satisfied that the Award dated 30th November 2000 was not final as the quantum of costs was left in abeyance for determination. We find that the Award dated 30th November 2000 was a Partial Award. It is only after the quantum of costs of Arbitration reference has been determined that a final arbitral Award can come into existence.
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> ... Courts must discourage piecemeal litigation over the same subject matter and a party should not be vexed twice over the same issue. The High Court cannot recognize a Partial arbitral Award and then later through another application recognize and enforce costs relating to the same arbitral proceedings.
>
> In the instant case, the arbitrator did not become functus officio when he made the Partial Award dated 30th November 2000; he could only become functus officio if the Award did not reserve costs for consideration and Agreement by the parties or taxation master. By stating that the parties can agree on costs or taxation to ensue if there is no Agreement, the arbitrator delegated his functions to other parties and these parties can only be exercising the power to ascertain costs as part of the Arbitration proceedings. The High Court can

only recognize and enforce the final Award by an arbitrator if the Award does not reserve any matter for consideration by the Arbitration or any other person. We clarify that in this matter the High Court did not refuse to recognize the arbitral Award; what the learned judge ruled was that the application before Court was premature. Subject to all relevant laws, the right of the appellant to make an application at a later date for recognition and enforcement of the arbitral Award remains unfettered.

22. In this instance, the Tribunal in its Partial Final Arbitral Award dated 1st December 2022 addressed the issue of financing charges and at paragraph 72 and held that due to the dispute over the proper quantum between Dispute Board Decision No. 2 and Interim Payment Certificate No. 18, further assessment on financing charges would be undertaken in phase 3. In addition, at paragraph 92 of the Award, the Tribunal held that the exact amounts payable under Dispute Board Decision No. 2 may differ from those currently stated and left the issue open for further determination, either by the parties or by the Tribunal in phase 3, with the parties herein being at liberty to call expert evidence.

23. This Court is of the considered view that when a Tribunal defers substantial issues to a later phase, it can be implied that the matter is not concluded with finality. Bound by the decision cited above from the Court of Appeal, it is my finding that the Dispute Board decision No. 2 has not yet become final and binding.The lack of a conclusive, final determination on quantum especially in respect to Dispute Board decision No. 2 which has an impact on the calculation of financing charges, means that the Partial Final Arbitral Award dated 1st December 2022 does not meet the standard of finality.

24. In the circumstances, I agree with Counsel for the respondent that recognition and enforcement of the Partial Final Arbitral Award dated 1st December 2022 at this stage would be premature. The parties herein should await determination of the issues on quantum in phase 3. Thereafter, either of the parties herein can approach the Court for orders under Sections 36 or 37 of the *Arbitration Act*.

25. The upshot is that the instant application is premature. It is hereby struck out with costs to the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence:

Ms Kamau for the applicant

Ms Kyalo holding brief for Mr. Munyu for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.