



**Bluemoon Limited v Stamford Limited (Miscellaneous Civil Application E566 of 2023) [2024] KEHC 517 (KLR) (Civ) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E566 OF 2023  
DAS MAJANJA, J  
JANUARY 31, 2024**

**BETWEEN**

**BLUEMOON LIMITED ..... APPLICANT**

**AND**

**STAMFORD LIMITED ..... RESPONDENT**

**RULING**

**Introduction and Background**

1. On 04.11.2022, the arbitral tribunal (“the Arbitrator”) published an award it awarded the Applicant Kshs. 5,478,880.00, taxed costs of Kshs. 751,949.00 and post-award interest at a simple interest rate of 12% per annum (“the Award”). The Applicant has now filed the Chamber Summons dated 05.06.2023 as amended on 18.10.2023 made, *inter alia*, under section 36 (1) of the Arbitration Act seeking to recognition and enforcement of the Award as a decree of the court. This application is supported by the affidavit of the Applicant’s Managing Director, Benson Kimani, sworn on 18.10.2023. It is opposed by the Respondent through its Grounds of Opposition dated 16.10.2023 and the replying affidavit of its Director and Shareholder, Tabbyrose Wanja Wamwitha sworn on 10.11.2023. In addition to their pleadings, the parties have also filed written submissions.

**Analysis and Determination**

2. Under section 32(A) of the Arbitration Act, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Arbitration Act. This court, under section 36 of the Arbitration Act, has the power to recognise and enforce domestic arbitral awards in the following terms:

36



- (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) ...
- (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) .....

3. Section 37 of the *Arbitration Act* sets out the grounds upon which this court may decline to recognize or to enforce an arbitral award as follows:

37. Grounds for refusal of recognition or enforcement

- (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.

4. It is common ground that the parties entered into a Joint Venture Agreement dated 05.12.2018 (“the Agreement”) in which the Applicant was to finance and work on a tender for the supply of Industrial Diesel Oil that the Respondent had been awarded by the Nairobi City County and for a contract sum of Kshs. 5,750,000.00. Under the Agreement, the Applicant was to make 100% capital contribution of the Tender supply, provide the performance bond of Kshs. 287,500.00, supply the Industrial Diesel Oil to Nairobi County and manage the business in general. The profits were to be shared, “after completion of the Tender” in agreed proportions based on profits and expenses incurred by the business agreed. The Respondent was entitled to Kshs 280,000.00 while the Applicant was entitled to Kshs. 5,316,897.00 and a refund of the performance bond of Kshs. 287,500.00.
5. According to the Respondent, the Arbitrator did not define “Completion” and it could not be understood to mean that a party would be entitled to payment before the Nairobi City County made payments for the items supplied. The Respondent contends that it is not in dispute that the Nairobi City County had not made any payment for the tender. It complains that Award was induced by undue influence as it was only released to the Applicant after it paid the Arbitrator’s fees. That the Award is in conflict with the public policy as the Respondent is being punished for not having money yet the Nairobi City County has not honored the tender. Further, that contrary to the provisions of section 37 (1)(iii) of the *Arbitration Act*, the Respondent was not given proper notice for the appointment of an Arbitrator and that the application is pre-mature as the Tender has not been paid by Nairobi City County for parties to share profits.
6. I have considered the grounds advanced by the Respondent alongside the parties’ submissions and I find that the grounds are insufficient to stop the recognition and enforcement of the Award for the following reasons. On the ground that the Arbitrator did not define the term “Completion” or that the Award was made before payment by Nairobi City County, I am in agreement with the Applicant’s submission that the Respondent is assailing the merits of the Award and is inviting the court to make findings of fact which are within the purview of the Arbitrator. This court cannot interfere with an arbitrator’s interpretation of a contract as the court’s jurisdiction to accept or decline to enforce an award under section 36 of the Act does not allow it to sit as an appeal on the merits of the Award. The arbitral tribunal remains that master of facts and it is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrator on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators’ award on the facts (see *Kenya Oil Company Limited & another v Kenya Pipeline Company* NRB CA Civil Appeal No. 102 of 2012 [2014]eKLR).



7. On the ground that the Award was induced by undue influence as it was only released to the Applicant after it singlehandedly paid the Arbitrator's fees, section 32B of the Arbitration Act, provides that '... each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.' This provision goes on to further state that, 'The arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received'. This means that an arbitral tribunal is entitled to its fees and expenses to be paid by the parties in equal proportion and that the arbitral tribunal has a right of lien over the award until payment is made. This court cannot fault the party making full payment to the arbitral tribunal for the Award to be released and then claiming the share that is to be paid by the other party.
8. The ground that the Award is in conflict with the public policy of Kenya is premised on the argument that the Respondent is being punished for not having money yet the real reason for that anomaly is that the Nairobi City County has not honoured the Tender. I have already held the Arbitral Tribunal was entitled to consider and interpret the contract based on its appreciation of the facts and the law hence this argument is really an attack on the merits of the Award rather than an issue of public policy. The Arbitrator made factual findings that the Applicant performed its obligations under the Agreement, that the payment to it became due and payable upon acceptance by Nairobi City County of the supplied Industrial Diesel Oil on 27.12.2018 and that the Respondent's inaction to take appropriate legal steps to obtain payment from Nairobi City County was a breach of its contractual obligation to assist in realizing the Applicant's investment under the Joint Venture Agreement. The Respondent was thus held liable for breach of contract for the refusal and negligence to obtain the payment from Nairobi City County through institution of appropriate legal proceedings to recover the Applicant's investment. It is for these reasons, and not that the Respondent did not have money, that it was ordered to make the payment to the Applicant.
9. The Respondent's argument that it was not given proper notice for the appointment of an Arbitrator is an afterthought and without basis. The Award indicates that the Respondent, through counsel no less, fully participated in the arbitration proceedings without objection from commencement to its conclusion. The Arbitrator stated in the Award that as soon as she was appointed, she informed the parties of the same during the preliminary meeting held on 14.03.2022. The Respondent did not challenge this appointment as provided by section 13 of the Arbitration Act meaning that it acquiesced to the Arbitrator's appointment and waived any right to object as stated by section 5 of the Arbitration Act.
10. The reasons advanced by the Respondent do not fall within the confines of section 37 of the Arbitration Act. On the other hand, the Applicant has fulfilled the procedural requirement of an award to be recognized and enforced as a decree of the court by annexing a copy of the Award. Even though the Applicant has not annexed a copy of the arbitration agreement, I find that the contents of the Agreement are common to the parties and are not disputed. There is thus no valid reason for the court to decline to enforce and recognize the Award.

## Disposition

11. I allow the Applicant's application dated 05.06.2023 and as amended on 18.10.2023 on the following terms:
  - a. The Final Arbitration Award published on 04.11.2023 is duly recognized as binding and enforceable as an order of the court and leave is granted to the Applicant to execute it accordingly.



b. The Respondent shall pay costs of the application assessed at Kshs. 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

instructed by Philip Henry Associates Advocates for the Applicant.

instructed by Musyoki Mogaka and Company Advocates for the Respondent.

