



**Sameer Africa PLC (Formerly Sameer Africa Ltd) v Discount  
Tyres Galleria Limited (Miscellaneous Application E798 of 2022)  
[2024] KEHC 265 (KLR) (Commercial and Tax) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 265 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E798 OF 2022  
PM MULWA, J  
JANUARY 25, 2024**

**BETWEEN  
SAMEER AFRICA PLC (FORMERLY SAMEER AFRICA LTD) ..... APPLICANT  
AND  
DISCOUNT TYRES GALLERIA LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. By a Chamber Summons application dated 9<sup>th</sup> November 2022 brought under sections 36 and 37 of the *Arbitration Act* the applicant sought orders that it be granted leave to enforce the Final Award dated and publicized on 25<sup>th</sup> March 2022 by the Sole Arbitrator Ms. Eunice Lumallas, FCIArb, as decree of the court. The applicant further sought that the respondent be ordered to pay all costs and expenses incidental to the enforcement and execution of the decree as well as the costs of the application.
2. The application is supported by the affidavit of Mary Ngunjiri and the supplementary affidavit of Nicholas Mutinda, the Credit Manager and the Receivable Accountant respectively of the applicant company. The application is opposed through the replying affidavit of Stephen Wang'ombe, a Director of the respondent sworn on 21<sup>st</sup> July 2023. Parties were directed to file and exchange submissions in support of their respective positions. Only the applicant complied.

**Background**

3. The parties herein entered into a consignment agreement where the consignor was the applicant and the consignee the respondent. The consignor was to avail the consignment stock and the consignee was to store the same at its secure warehouse and then sell according to the parties' contractual agreement.



Following a dispute on the records of deliveries and the amounts due and payable after sales, the applicant invoked the Arbitration Clause 17.7 of the Agreement dated 30<sup>th</sup> January 2017 and parties were referred to Ms. Eunice Mumallas as the Sole Arbitrator.

4. After hearing the matter, the Arbitrator published the Final Award and found in favour of the applicant as follows:
  - i) That the respondent breached terms of the consignment agreement dated 30<sup>th</sup> January 2017 by failing to pay the claimant for stock sold as per the contract and not remitting the outstanding balance together with interest as claimed.
  - ii) That the respondent pays the claimant the amount of Kshs. 6,503,332.32 as awarded by this Tribunal. Interest will accrue on this amount from the 28<sup>th</sup> October 2020 until (re)payment in full at the obtaining commercial rates on the said date of 28<sup>th</sup> October 2020.
  - iii) That the respondent pays the claimant legal costs. No interest is awarded on the legal fees.
  - iv) That the respondent pays the claimant costs to the Arbitral Tribunal amounting to Kshs. 1,188,584 which is the Tribunal charges less the Kshs.125,000 paid by the respondent inclusive of VAT. Interest will accrue on this amount from the date of publication of this award until repayment in full at the current commercial rates.
  - v) VAT, being a Government tax on professional services, is applicable by default.

#### **The Law**

5. Section 32(A) of the *Arbitration Act* provides that 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 law.
6. Section 36(1) and (3) of the Act gives the High Court the power to recognize and enforce domestic arbitral awards on 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.
- (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.

7. And section 37 of the Act, 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 whom it is to be enforced. It provides as follows;

37. 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 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 decision 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 recognized 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.

### **The Application**

8. The applicant has provided the original agreement which contain the arbitration clause and a certified copy of the arbitral award. I therefore find that it has satisfied the pre-condition for enforcement and it is upon the respondent to demonstrate that the court should not recognize the award based on the circumstances set out in section 37 of the Act.
9. In its replying affidavit the respondent contended that the award of Kshs. 6,503,332.32 is inconsistent with public policy of Kenya for it offends the law and the tenets of justice including the right to fair hearing as envisaged under Article 50 of *the Constitution*. That the Arbitrator did not consider the respondent's defence, crucial arguments and evidence to the effect that the respondent did not receive, accept or sell goods worth Kshs. 6,588,832.24.
10. The respondent averred that the Arbitrator failed to consider its request to the applicant to produce the original invoices, LPOs and delivery notes and thus ended up relying on fraudulent and/or forged invoices by the claimant to support its claim. The respondent argued that the Sole Arbitrator generally failed to appreciate established principles of law in determining the cogency of the evidence before the Tribunal and further failed to consider and apply clear procedures governing the agreement between



the parties and failed to apply equality of arms. It was prayed by the respondent that the Final Award be set aside.

11. In rejoinder the applicant contended that the position advanced by the respondent was misconceived, hollow in fact and untenable in law for the reasons that: no application to set aside the Final Award had been filed under Rule 6 of the Arbitration Rules and in any event the statutory period within which the respondent ought to have filed such application had since lapsed. That the Arbitrator had notified the parties that the award was ready for collection on 5<sup>th</sup> August 2022 and the 3 months period had lapsed on 5<sup>th</sup> November 2022. That the present enforcement application was filed on 9<sup>th</sup> November 2022.
12. The applicant submitted that the respondent was pleading and relying on its indolence to defeat the expediency of the applicant which is against equity as the rationale of arbitration is expeditious determination of disputes. In any case, the respondent actively participated in the proceedings before the Arbitral Tribunal.

### Determination

13. From the foregoing the only issue which commends itself for determination by this court is whether the recognition and enforcement of the Final Award conflicts with the public policy of Kenya.
14. The term public policy as used in the *Arbitration Act* has been the subject of various definitions by courts. In *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, Ringera J., observed as follows:

“...I take the view that although public policy is a most broad concept incapable of precise definition, or that as the common law Judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you. An award could be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* of Kenya or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) Contrary to justice or morality. The first category is clear. In the second category I would without claiming to be exhaustive include the interest of the national defence and security, good diplomatic relations with friendly nations and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive include such considerations as whether the award was induced by corruption, fraud or whether it was founded on a contract contrary to public morals.”

15. The Black's Law Dictionary, 10<sup>th</sup> Edition defines public policy more narrowly as, the principle that a person should not be allowed to do anything that would tend to injure the public at large.  
Modern decisions, while maintaining the duty of the courts to consider the public advantage, have tended more and more to limit the sphere within which this duty may be exercised (William R. Anson, *Principles of the Law of Contract* 286).
16. It therefore follows that for an award to be contrary to public policy, there must be some fundamental departure from the law and legal norms (*Capture Solutions Ltd vs Nairobi City Water & Sewerage Co. Ltd - Misc. Civ. App. No. E679 of 2020*). The respondent contention is that the Sole Arbitrator failed to consider its evidence. It is appreciated that an Arbitrator, just like a Judicial Officer is expected by the parties to apply her mind to the facts and the law and come up with a decision.
17. In the Final Award, the Arbitrator herein (para. 133 - 136) found as follows:



- 133) The respondent has not dispelled with the evidence that the cheques and cash alleged to have been paid by the respondent have been factored in the claimant's statements of 23<sup>rd</sup> February 2021 and 9<sup>th</sup> March 2021 and that all the consignments claimed to have been delivered to the respondent were acknowledged as delivered to it and signed off by its officers such as the respondent's Mr. Langat.
- 134) On the other hand, I find that the sum of Kshs. 85,500 as claimed by the respondent through its letter of 9<sup>th</sup> July 2022 has not been denied by the claimant. The amount reflected in the respondent's bundle of documents at page 314 and is therefore liable to be deducted from the amount due to the claimant.
- 135) I find that the debt as claimed and outstanding as on 28<sup>th</sup> October 2020 is owing and payable minus the Kshs. 85,000 which has been satisfactory demonstrated by the respondent as having been settled.
- 136) Consequently, I decide and determine that on the evidence before me, and having listened to parties and read the documents on record together with the submissions, the respondent is indebted to the claimant and owes the claimant the amount of Kenya shillings six million, five hundred and three thousand, three hundred and thirty-two and cents thirty-two (Kshs. 6,503,332.32) as on 28<sup>th</sup> October 2020.
18. It is very clear that the Sole Arbitrator based her decision on the basis of law and the evidence before her and therefore the Final Award cannot be said to amount to a violation of public policy.
19. I will hasten to add that parties herein reserved the right of appeal to the High Court, but the respondent did not lodge any appeal within the time allowed for appeal in line with section 39(2) of the *Arbitration Act* but instead opted to oppose the application for enforcement of the Final Award.
20. In Kenya Shell Ltd vs Kobil Petroleum Limited, Civil Appeal No. 57 of 2006 [2006] eKLR as follows;
- “We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the *Arbitration Act* under which the proceedings in this matter were conducted underscores that policy...At all events the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under section 10 of the Act unless either party can satisfy that court that it ought to be lawfully set aside.”
21. I find and hold that respondent has not proved that the Arbitral Tribunal violated public policy. The Arbitrator dealt with all issues raised on the basis of the evidence availed by all parties, in making the award.

### **Disposition**

22. In view of the foregoing, I find that the respondent has not demonstrated that any of the grounds in Section 37 of the *Arbitration Act* exist in order to persuade the court to reject the application to recognize and enforce the arbitral award, and more specifically that the Final Award is contrary to the public policy of Kenya
23. On the other hand, I find and hold that the Applicant has met the conditions for recognition and enforcement of an award under section 36 of the Act.



24. Consequently, I find that the application dated 9<sup>th</sup> November 2022 is merited and I therefore allow it with costs to the applicant.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**P. MULWA**

**JUDGE**

In the presence of:

Carlos - Court Assistant

Mr. Kamau h/b for Mr. Mureithi – for Applicant

Mr. Mwanja h/b for Ms. Wamuyu - for Respondent

