



**J & K Investment Kenya Limited v National Water Harvesting and Storage Authority Limited (Commercial Miscellaneous Application E366 of 2023) [2024] KEHC 1540 (KLR) (Commercial and Tax) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E366 OF 2023  
PM MULWA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**J & K INVESTMENT KENYA LIMITED ..... APPLICANT**

**AND**

**NATIONAL WATER HARVESTING AND STORAGE AUTHORITY LIMITED ..... RESPONDENT**

**RULING**

1. The applicant has filed a Chamber Summons application dated 2<sup>nd</sup> May 2023 pursuant to the provisions of Section 36(1) of the Arbitration Act, No. 4 of 1995, Sections 1A, 1, 2, 3, 3A, & 59 of the Civil Procedure Act, Cap 21, Laws of Kenya and all other enabling provisions of the law seeking the following orders -
  - i. That this Honourable Court be pleased and is hereby pleased to recognize as its decree the Arbitral Award dated 25<sup>th</sup> August 2022 published by the Hon. Justice E. Torgbor, Sole Arbitrator;
  - ii. That this Honourable Court be and is hereby pleased to grant leave to the applicant to enforce the Arbitral Award dated 25<sup>th</sup> August 2022 against the respondent in the sum of Kshs.397,440,203.93; and
  - iii. That costs of this application be provided for.
2. The application is based on the grounds on the face of the summons and is supported by an affidavit sworn on even date by Li Shunkang, a Director of the applicant company. The respondent did not file any responses to the instant application.



3. The applicant contended that the parties herein entered into a contract dated 18<sup>th</sup> March 2020 for the construction of the Turkana Peace Dam-Naku'etum site in Turkana County for Kshs. 231,114,402.64. That the site was handed over to the applicant on 17<sup>th</sup> April 2020 instead of 31<sup>st</sup> March 2020 as was agreed, thus impacting on the initial 100 days for completion of works. The applicant averred that in an unfortunate turn of events, the respondent indefinitely suspended the aforesaid works over alleged investigations into the procurement process on 30<sup>th</sup> June 2020. The delays resulted to the parties herein signing an addendum to the aforementioned contract dated 14<sup>th</sup> October 2020 where the respondent revised the project implementation date to 14<sup>th</sup> October 2020. The works were eventually completed and the respondent took possession and use of the dam, but failed to issue a Taking-Over Certificate to the applicant and pay the costs of suspension of the works, time extensions occasioned by the delay and interim certificates.
4. The applicant averred that they made several demands to the respondent for the appointment of a Dispute Adjudication Board which the respondent failed to respond to, and therefore they opted to invoke the provisions of special condition 20.6 (a), (b) & (c) of the agreement between the parties herein which provided for appointment of an Arbitrator from the Chartered Institute of Arbitrators. Upon determining the issues raised by the parties herein, the Arbitrator published his award on 25<sup>th</sup> August 2022 allowing the applicant's claim against the respondent in the sum of Kshs. 384,647,770.80 together with costs in the sum of Kshs. 12,792,433.12.
5. The application was canvassed by way of written submissions. The applicant's submissions were filed on 24<sup>th</sup> October 2023 by the law firm of Orego & Odhiambo Advocates. The respondent on the other hand neither filed written nor made oral submissions in opposition to the application.
6. Learned counsel for the applicant referred to the provisions of Section 36 of the Arbitration Act which provides for recognition and enforcement of arbitral awards and the case of Tanzania National Roads Agency v Kudahsigh Constructions Ltd [2012] eKLR and submitted that the applicant has satisfied all the conditions provided for thereunder having provided an original copy of the arbitral award published on 25<sup>th</sup> August 2022 and the original copy of the contract dated 18<sup>th</sup> March 2020 which provides for arbitration under clause 20.6. Counsel further submitted that the respondent has not demonstrated the existence of any of the grounds stipulated under Section 37(1) of the Arbitration Act to warrant this Court to refuse to recognize and enforce the Arbitral award published on 25<sup>th</sup> August 2022.

### **Analysis and Determination.**

7. Upon consideration of the application, the grounds on its face and the affidavit filed in support thereof together with the written submissions by counsel for the applicant, the issue that arises for determination is whether the instant application is merited.
8. Recognition and enforcement of an Arbitral award is provided for under Section 36 of the Arbitration Act, No. 4 of 1995 which states as hereunder -

“ 36. Recognition and enforcement of awards

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. ...”

9. Section 37 of the *Arbitration Act* on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award as follows: -

“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.

10. Upon perusal of the Arbitral award dated 25<sup>th</sup> August 2022, it is evident that the applicant was awarded Kshs. 397,440,203.93 - comprising of Kshs. 384,647,770.80 being the claim and Kshs. 12,792,433.12 costs of the arbitration. In compliance with the provisions of Section 36(3) of the *Arbitration Act*, the applicant has annexed to his affidavit in support of the instant application the arbitral award published on 25<sup>th</sup> August 2022 and the contract dated 18<sup>th</sup> March 2020 which provides for arbitration under clause 20.6.
11. The applicant averred that the respondent has filed an application seeking to set aside the said award, however copies of the said application have not been tendered before this Court in support of this averment. In any event, I opine that the respondent who failed to file any responses to the instant application and/or participate in these proceedings, was in a better position to bring this information to the Court's attention so as to enable the Court to act and/or proceed accordingly.
12. It is now well settled that Courts will ordinarily recognize and enforce an Arbitral award unless a party demonstrates that the award is affected by one or more of the grounds for refusal set out under Section 37 of the *Arbitration Act*. The Court in the case of *Tanzania National Roads Agency v Kundan Singh Construction Limited (Supra)*, in dealing with a similar application held that-

“Recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the *Arbitration Act*. The conditions set under section 37 of the Act have not been met to warrant this court not to recognize and enforce the award.”

### Disposition

13. Therefore, in the absence of any claim and/or evidence tendered before this Court by the respondent establishing any of the grounds provided for under Section 37 of the *Arbitration Act*, and there being no proof of the existence of an application seeking to set aside the Arbitral award dated 25<sup>th</sup> August



2022, there is no justification for this Court to decline to recognize and enforce the same. From the foregoing, I am satisfied that the applicant has made out a case for recognition and/or enforcement of the Arbitral award.

14. The upshot is that the instant application is merited and is hereby allowed in the following terms:
- i. The Final Arbitral Award dated 25<sup>th</sup> August 2022 and published by the Hon. Justice E. Torgbor (rtd), the Sole Arbitrator is hereby recognized and adopted as a judgment of this Court.
  - ii. Leave is granted to the applicant to enforce the Final Award as a decree of the Court.
  - iii. Costs of the application are awarded to the applicant.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Ms. Alendo for the Applicant

Ms. Kyumu h/b for Mr. Muchemi for the Respondent

Court Assistant: Carlos

