



Wealthsmith Limited & another v Hoatt Holdings Limited; Kabata (Interested Party) (Miscellaneous Application E073 & E081 of 2022 (Consolidated)) [2024] KEHC 3519 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E073 & E081 OF 2022 (CONSOLIDATED)
PM MULWA, J
MARCH 21, 2024**

BETWEEN

WEALTHSMITH LIMITED 1ST APPLICANT

BARLETTA HOLDINGS LIMITED 2ND APPLICANT

AND

HOATT HOLDINGS LIMITED RESPONDENT

AND

DANIEL KABATA INTERESTED PARTY

RULING

Background

1. This ruling determines two applications and a notice of preliminary objection. The first application by the respondent (Hoatt Holdings Limited) seeks the adoption, recognition and enforcement of the arbitral award. The second application is by Wealthsmith Limited and another (the applicants) and seeks the setting aside of the arbitral award. The preliminary objection seeks the dismissal of the application for setting aside the arbitral award.
2. The applicants, on 26th January 2019 entered into an agreement with the respondent for the construction and management of a green house on the respondent's property known as plot no. 328. A dispute arose between the contracting parties whereupon the respondent requested the Chairman of Arbitration Institute to appoint an Arbitrator as per the arbitration clause in the agreement. The interested party, Daniel Kabata was appointed as the sole arbitrator to oversee the arbitral proceedings. After conducting the preliminary meeting, the Arbitrator notified the parties of his shortfall on



- qualifications and the parties acknowledged and agreed to have the Arbitrator proceed with the dispute. The arbitral award was published on 25th February, 2022.
3. Following the publication of the arbitral award, the respondent filed the first application by a Chamber Summons application dated 19th September 2022 in HCOMMARB No. E081 of 2022. The said application was brought under Section 36(1) of the *Arbitration Act* 1995 and Rules 6 and 9 of the Arbitration Rules 1997 and all other enabling provisions of the law, and sought the following orders:
 - i. That this Honourable court do recognize and adopt the final award made and published by Daniel Kabata MCI Arb on 25th February 2022 as a judgment of this Honourable Court.
 - ii. That leave be granted to the Applicant to enforce the said Award as a decree of this Honourable Court.
 - iii. That the costs of the application be payable by the Respondents.
 4. The gist of the application is that the applicants are indebted to the respondent as per the Arbitral Award and the respondent desires to enforce the award. The application was supported by the affidavit of Peter Okaalet JR sworn on 19th September 2022.
 5. In opposing the application Gerald Munyai Mwanza, a director of the 1st applicant swore a replying affidavit 18th December 2023 wherein he averred that arbitral award was issued by an unqualified arbitrator as per the tripartite agreement and therefore urged the court to set aside the award as it was a nullity.
 6. The second application was by Wealth Smith Limited and Barletta Holdings Limited (herein referred to as the applicants) and is dated 24th November 2022. It sought the following orders:
 - i. That the annexed impugned arbitral award by the sole arbitrator Mr. Daniel Kabata, dated 23rd February 2022 be deemed as duly filed.
 - ii. An order to set aside the entire Arbitral award as being unjustified, manifestly excessive beyond the dispute referred to the Arbitrator, exorbitant; punitive and issued by an arbitrator who was not qualified in terms of the Arbitration Agreement and therefore lacked jurisdiction.
 - iii. An order to set aside the Arbitral award as being against Arbitration Agreement of the parties, public policy having been issued in breach of relevant applicable law for the award and the attendant dispute referred to the Arbitrator.
 - iv. The Respondent and the Arbitrator be ordered to pay the costs of this Application.
 7. The application was supported by the grounds on the face of it and the supporting affidavit of Gerald Mwanza wherein he reiterated the agreement entered on 26th January 2017. That the agreement had an arbitration clause which provided for the qualification of the arbitrator to be an advocate of 15 years standing. According to the applicant the Sole arbitrator who presided over the arbitration dispute lacked that qualification having been admitted to the Bar in the year 2014, and therefore the arbitral proceedings are a nullity.
 8. Peter Okaalet JR a director of the respondent company swore a replying affidavit on 11th January 2024 and deponed that the applicants' application was filed outside the requisite 3 months' timelines for challenging the arbitral award. That arbitral award was published on 23rd February 2022 while the said application was filed on 25th November 2022. That the applicants consented to the jurisdiction of the Arbitrator and the current application was made in bad faith and aimed at unjustifiably delaying the enjoyment by the respondent of the arbitral award.



9. In opposition to the application dated 24th November 2022, the Arbitrator (interested party) filed the Notice of Preliminary Objection dated 29th August 2023 and the replying affidavit sworn on 2nd June 2023. In the replying affidavit he depones that on 4th February 2022 he received a request from the Chairman of the Chartered Institute of Arbitrators to be appointed as arbitrator. After several correspondence his appointment was confirmed on 14th February 2020, which he readily accepted.
10. The interested party contended that he wrote to the parties to the arbitral proceedings on 5th March 2020 seeking their concurrence to hold the preliminary meeting. This was responded to by counsel who also confirmed his appointment. On 8th September 2021 he notified the parties of his shortfall of the 15-year qualification and both counsel for parties communicated that they agreed to have him as the arbitrator, the respondent's advocate vide a letter dated 10th September 2021 and the applicants' advocate by a letter dated 14th September 2021. Further, at the preliminary meeting held on 26th July 2021, the parties mutually agreed to appoint him as the arbitrator. The interested party avers that the parties are therefore estopped from ousting his jurisdiction as per the provisions of Section 5 of the *Arbitration Act*.
11. The notice of preliminary objection dated 29th August 2023 seeks to strike out and or dismiss the applicant's application dated 24th November 2022 on the following grounds:
 - i. The Applicant is wrongly sued as a party to this suit
 - ii. The Application is in breach of Section 5 of the *Arbitration Act* of Kenya which states that if a party proceeds with arbitration without raising objections when they are aware of non-compliance with the Act or arbitration agreement, they lose the right to object later.
 - iii. The application is in breach of section 12 which specifies that an arbitrator cannot be held responsible for any matters related to the proceedings. Therefore, it is improper for them to include the arbitral tribunal in these proceedings.
12. The court directed the two applications and the preliminary objection be canvassed together by way of written submissions. The interested party filed submissions dated 11th October 2023, the respondent filed submissions on 16th January 2024 and the applicants on 26th January 2024. I have had the opportunity to consider all the submissions.

Analysis and determination

13. The respondent argues that the application dated 24th November 2022 seeking to set aside the arbitral award is time bared having been brought 8 months after the publication of the arbitral award.
14. Section 35(2) of the *Arbitration Act* provides the circumstances under which an application for setting aside an arbitral award may be brought. And subsection 3 thereof states as follows:

“An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.”
15. The applicants submit that despite the arbitrator informing the parties the award was ready in February 2022, they only collected a copy thereof from the Arbitrator's office on 24th November 2022 and that therefore the application was brought timeously and within the requisite 3 months upon receipt of the award.



16. From the record it is clear a copy of the final arbitral award was published on 23rd February 2022 and both parties informed of the same. The respondent went ahead to pay the Arbitrator's fees and collected a copy of the award.
17. The law is clear that time to set aside an arbitral award starts running from the time the parties are informed of the publication of the award. Failure to obtain a copy of the award in time cannot be a fault of the Arbitrator and as such I find the application seeking to set aside the arbitral award was filed outside the requisite timelines. The application is not deserving any other consideration by this Court and the same is dismissed with costs to the respondent.
18. Having so found, I will not dwell on the preliminary objection dated 29th August 2023 as it sought dismissal of the applicants' application.
19. Let me turn to the application dated 19th September 2022 which sought the adoption, recognition and enforcement of the arbitral award. The respondent has attached a certified copy of the contract dated 26th January 2017. Clause 11 thereof provided that any dispute emanating from the contract would be referred to one arbitrator and shall be a practicing advocate of not less than 15 years standing. The respondent has also attached a copy of the final award by the arbitrator in compliance with the provisions of Section 36(3) of the *Arbitration Act*, non-compliance of which would render the application defective.
20. The applicants opposed the application on the grounds that the arbitral award is a nullity having been issued by an arbitrator with no jurisdiction.
21. The respondent and the interested party submitted that the challenge to the arbitrator's qualification or jurisdiction should have been raised during the arbitration proceedings. Failing to dispute these matters at the appropriate forum signifies a waiver of the right to challenge them on appeal.
22. Section 5 of the *Arbitration Act* provides that:

“A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.”
23. The above provision emphasizes when a party waives his right to raise an objection of the Arbitrator.
24. I have perused the record and I note the Arbitrator prior to proceeding with the arbitral proceedings informed the parties by email on 8th September 2021 of his shortfall of being an advocate of 15 years standing. Both parties through their advocates responded to the same and agreed to have the Arbitrator proceed with the matter.
25. In the circumstances I am not persuaded that the Arbitrator acted without jurisdiction. Therefore, in the absence of any grounds to demonstrate and warrant the setting aside the arbitral award, I proceed to allow the respondent's application dated 19th September 2022 seeking to recognize and enforce the arbitral award dated 25th February 2022.

Disposition

26. The application dated 24th November 2022 lacks merit and is dismissed with costs to the respondent.
27. The application dated 19th September 2022 is allowed in the following terms:



- i. The final award prepared by Mr. Daniel Kabata MCI Arb dated 25th February 2022 be and is hereby recognized and adopted as a judgment of this Court.
- ii. The Respondent (Hoatt Holdings Limited) is granted leave to enforce the award as a decree of this court.
- iii. The Applicants (Wealthsmith Limited & Barletta Holdings Limited) shall bear the costs of the application.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Mutuku for applicants

N/A for respondent

Ms. Nzilani h/b for Mr. Owuor for interested party

Court Assistant: Carlos

