



**CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH LIMITED
SUMMARY CASE LAW**

HCCOMMISC/E1301/2020

DINESH CONSTRUCTION LTD. AND KENYA RETIREMENT BENEFIT SCHEME VS. AIRCON ELECTRA SERVICES

FACTS

The Applicant invited tenders in 2009 for the construction of a project called Runda Park Housing Development on Plot 112/2 in Runda, Nairobi. The Respondent was later engaged by a sub-contract dated 8th October, 2009 to carry out electrical works for a contract sum of Kshs. 64,551,596.82/=. A dispute arose in 2016 between the parties in respect of the final account owed to the Respondent and the same was referred to arbitration before the arbitrator, Festus M. Lituku. The Arbitrator published the Arbitral Award on 13th November, 2020 awarding the Respondent Kshs. 14,298,310/= and Kshs.3,154,968/= as costs inclusive of VAT and was to be paid within 21 days of publication of the award failing which it was supposed to attract simple interest of 12% per annum until payment in full.

The Applicant moved the Court vide Chamber Summons dated 17th December, 2020 under Sections 32(3) and 35 of the Arbitration Act, 1995 seeking the Court to set aside the award for being contrary to public policy. The Respondent filed its Replying Affidavit and Notice of Preliminary Objection in response to the Applicant's application and later filed a Chamber Summons dated 1st February, 2021 seeking to enforce the same award under Section 36 of the Arbitration Act and Rule 6 of the Arbitration Rules, 1997. Both parties filed their submissions.

ISSUES

1. Whether the application to set aside the Award is time barred?
2. Whether the Award should be set aside for being contrary to public policy?
3. Whether the Award should be enforced?

RULE OF LAW

The Arbitration Act, Section 32(3)
The Arbitration Act, Section 35
The Arbitration Act, Section 36
The Arbitration Rules, Rule 6

RULING

The Court found that the application dated 17th December, 2020 was filed out time and that the Applicant had not established that the Award is contrary to public policy. In the circumstances, the application was dismissed.

The Respondent's application dated 1st February, 2021 on the other hand was allowed on terms that the Final Award dated 1st July, 2020 published by the Arbitrator together with the Award of Costs dated 18th March, 2021 is recognized as binding and leave granted to the Respondent to enforce it as a decree of the Court.

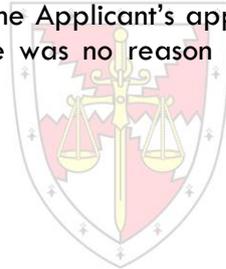
Lastly, it was ruled that the Applicant should bear the costs of both applications.

RATIONALE

For the first issue, the Court stated that resolution of the issue turns to interpretation of Section 35(3) of the Arbitration Act and that the time began running from 1st July, 2020 when the Arbitrator notified the parties that the Award was ready for collection. Hence, the Applicant ought to have filed the application to set aside by 30th September, 2020. This decision was also informed by a number of authorities where it was held that actual receipt of the signed copy of the award by the party is not necessary but when the Arbitral Tribunal notifies the parties that a signed copy of the award is ready for collection, then, the date of such notice is deemed to be the date of delivery and receipt of the award.

For the second issue, the Court stated that public policy as a ground for setting aside an arbitral award must be narrow in scope. Further, it cannot be vague and generalized. The Court was of the opinion that a party seeking to challenge an award on the ground of public policy must identify the public policy which the award allegedly breaches and must show which part of the award conflicts with the public policy. The claim was pleaded and the arbitrator considered the evidence before him in line with his jurisdiction. Whether the arbitrator got it right or wrong is not a ground for intervention less so on the basis of public policy.

For the third issue, the Court stated that since the Applicant's application seeking to set aside the award had already been dismissed, there was no reason to reject the application for recognition and enforcement of the award.



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