



**Kenya Alliance Insurance Company Ltd v Riro (Miscellaneous Application E693 of 2023)  
[2024] KEHC 10219 (KLR) (Commercial and Tax) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10219 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E693 OF 2023**

**A MABEYA, J  
AUGUST 16, 2024**

**BETWEEN**

**KENYA ALLIANCE INSURANCE COMPANY LTD ..... APPLICANT**

**AND**

**PETER OWINO RIRO ..... RESPONDENT**

**RULING**

1. This ruling determines the application dated 7/8/2023. The same was brought under section 35A of the *Arbitration Act* Cap 49 Laws of Kenya, Order 10 rule 11, Order 51 rule 1 of the *Civil Procedure rules* and sections 1, 3 & 3A of the *Civil Procedure Act* Cap 21.
2. The application sought the extension of time for filing an application for setting aside the arbitral award of Hon Mohammed S Balala dated 10/2/2023.
3. The application was premised on the grounds set out its face and supported by the affidavit of Theresa Mwendu of even date. The applicant contended that it had a fall out with the law firm that had handled the arbitration and the firm failed to forward the file to the new law firm.
4. That as a result, the applicant learnt of the award when the respondent filed the application for enforcement of the award. That the application was filed 3 months from the time it had knowledge of the award. The applicant contended that there were sufficient grounds for setting aside the award as it was inconsistent with the public policy of Kenya.
5. In opposition, the respondent filed a replying affidavit sworn on 6/10/2023 by Peter Owino Oiro. He contended that the award was delivered virtually on 20/2/2023 and transmitted to the parties via email. That the applicant's issues with its advocates was an internal issue that did not affect the respondent's



- rights on the award. Further, contended that the Court lacked jurisdiction to hear and determine the application.
6. Simultaneously with the replying affidavit, the applicant raised a preliminary objection dated 6/10/2023. The grounds thereof were that there was no legal provision for extension of time prescribed in section 35 of the Arbitration Act (“the Act”).
  7. This application was canvassed by way of written submissions which I have considered. It was submitted for the applicant that it was not notified of the award and a mistake of an advocate should not be visited upon the client. That the arbitral award ought to be set aside as it re-wrote the laws applicable to insurance policies. It was further submitted that the arbitrator failed to enforce the duty of full disclosure owed to the applicant.
  8. For the respondent, it was submitted that the Arbitration Act was clear under section 35(3) that an application for setting aside an arbitral award cannot be made after the expiry of 3 months. That there was no legal provision for extension of time under the Arbitration Act and the Court was prohibited by section 10 from intervening unless as provided for in the Act. It was submitted that even if the Court was to exercise its discretion, the reasons for the delay were not plausible as they were just a dishonest distortion of facts.
  9. The two issues for determination are; whether the preliminary objection is sustainable and whether the time for filing the application for setting aside the award should be extended.
  10. The preliminary objection was raised by the respondent on the grounds that the Court lacks jurisdiction to hear and determine the application as the section 35(3) of the Act did not provide for extension of time.
  11. In *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, a preliminary objection was defined as one that consists of a point of law which is pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.
  12. It is trite that the issue of jurisdiction should be determined at the earliest time possible. This is so on the authority of the celebrated case of, *Owners of the Motor Vessel ‘Lillian’ (S) versus Caltex Oil (Kenya) Ltd* [1989] KLR 1. In that case, it was held that jurisdiction is everything without which, a court has no power to make one more step.
  13. The respondent’s contention was that section 35(3) of the Act did not provide for extension of time and therefore, the Court was barred by section 10 of the Act from intervening.
  14. Section 35(3) of the Arbitration Act provides: -
    - “(3) 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. In *Dinesh Construction Company (K) Limited v. Kenya Sugar Research Foundation* [2018] eKLR, it was held that in the absence of any specific provision under the Arbitration Act governing a procedure sought by a party, the court would lack jurisdiction to entertain such an application: -
    - “Thus, there being no specific provision in the Arbitration Act for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either grant stay



of execution, or set aside the enforcement order of 11<sup>th</sup> July 2017, or to extend time for purposes of setting aside the Arbitral Award."

16. In *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR, the court observed that: -

"By filing the present application, the applicant has acknowledged that indeed the application has been filed out of time. ... This leads me to an issue raised by the Applicant. That it was late in collecting the award because it had difficulties raising its share of the tribunal fees and expenses. It then makes the submission that financial disposition should not be allowed to lead to inequality before the law. This in my view can hardly be a reason for putting off the effective day to a later date. It may perhaps be a premise upon which a request for expansion of time can be made. That is, for an application for time to be expanded. Whether or not the University will be able to persuade the court that this amounts to an extraordinary circumstance that merits an exceptional extension of time is, of course, a different matter. The Court makes this observation well aware that there is a school of thought, with large numbers, that because of the absence of specific provisions for expansion of time under Section 35(3), then the timelines set are cast in stone and can never be expanded."

17. So much for the foregoing. What is clear is that section 35(3) of the *Act* has set out strict timelines for filing an application for setting aside the award. The application ought to be filed within 90 days after receipt of the arbitral award. Nowhere in the *Act* is there a provision for extension of the timelines set out therein. The *Act* is clear on the jurisdiction of this Court. That it can only exercise its jurisdiction as has been expressly set out in the *Act*.

18. In this regard, I find that the preliminary objection is meritorious and I allow the same. Consequently, the Motion dated 7/8/2023 is hereby struck out with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

