



**Patel & another v Race Auto Limited (Miscellaneous Application E779 of 2022)  
[2024] KEHC 10254 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10254 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E779 OF 2022**

**PM MULWA, J  
AUGUST 15, 2024**

**BETWEEN**

**KANJI KUNVERJI PATEL ..... 1<sup>ST</sup> APPLICANT**

**DHANBHAI KANJI KUNVERJI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RACE AUTO LIMITED ..... RESPONDENT**

**RULING**

1. There are two applications before the court for determination. The first one is dated 1<sup>st</sup> November 2022 and was filed by the applicants who sought an order to recognize and adopt an arbitral award dated 22<sup>nd</sup> August 2022 as a judgement of this court.
2. The second application is dated 20<sup>th</sup> January 2023 and was filed by the respondent who sought an order to set aside the aforementioned arbitral award.
3. The court will first consider and determine the second application. It is a chamber summons application filed pursuant to Sections 35 (1), (2) (a) (iii), 37 (1) (a) (iii) of the *Arbitration Act* 1995, Rule 4(2) of the Arbitration Rules 1997, Order 46 Rule 16 of the Civil Procedure Rules 2010 and Sections 3 and 3A of the *Civil Procedure Act* 2010.
4. The respondent sought an order to set aside the arbitral award published by the Arbitrator Ngeresa A. Lily on 24<sup>th</sup> August 2022 (hereinafter the award).
5. The respondent anchored its application on the grounds that the award was based on a lease agreement that was not executed by its duly appointed representatives and therefore the arbitral proceedings and resultant award were nullity ab initio.



6. The respondent's case was that the applicants applied for the appointment of an arbitrator without notifying the respondent and the arbitration proceeded without its participation. That the respondent was only made aware of the award against it when the directors were served with the application to adopt it on or about December 2022.
7. Based on the foregoing, the respondent prayed to have the award set aside.
8. In opposition, applicants filed a preliminary objection dated 22<sup>nd</sup> March 2023, wherein they sought to have the application struck out with costs on the grounds that this court lacks jurisdiction to admit and hear an application to set aside an award that is time-barred by dint of section 35(3) of the *Arbitration Act*.
9. I will first analyse and determine the arguments in the preliminary objection as it raises issues of law that may dispose of the application in limine.
10. The applicants submitted that under section 35(3) of the *Arbitration Act*, an application seeking to set aside an award ought to be made within 3 months of the award however the respondent's application was made 4 months after the award was issued.
11. On the other hand, the respondent submitted that the arbitral tribunal neither notified the respondent when it published the award on 24<sup>th</sup> August 2022 nor when the award was available for collection from the tribunal. Further that the tribunal did not effect service by leaving it at, or sending it by post to the respondent's registered office.
12. It was the respondent's argument that the delay in collection of a signed copy of the award is beyond its control as service and notices were constantly being effected to the wrong email address by the applicants and the tribunal.
13. Section 35(3) of the *Arbitration Act* states:

“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.”
14. And Section 32(5) of the *Arbitration Act* states:

“...after the arbitral award is made, a signed copy shall be delivered to each party.”
15. In the case of *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR, Tuiyott, J (as he then was) held:

“...the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.”
16. In this case the arbitrator emailed the applicants and respondent on 24<sup>th</sup> August 2022 to notify them that the award is ready. The email is annexed as “HP 13” in the applicants' supplementary affidavit sworn on 22<sup>nd</sup> March 2023. The email was sent to the respondent's email address and noted that the award would be ready for collection upon settlement of the outstanding fees owed to the arbitrator.



17. The respondent argued that it did not receive the email and that the email address used was incorrect and sent to an individual email address rather than the correct registered email address of the company.
18. The email used to notify the respondent was info@raceautoltd.com. The respondent has not provided evidence that this is not its official email address. To the contrary, under paragraph 10 of the replying affidavit sworn by the director of the respondent on 20<sup>th</sup> January 2023, it was averred that the company's correct email address is info@raceautoltd.com.
19. Based on the foregoing, I am of the view that the respondent was duly notified when the award was issued.
20. Having made this finding and guided by section 35(3) of the *Arbitration Act*, the application to set aside the award ought to have been made 3 months from 24<sup>th</sup> August 2022. In this case the application was filed on 20<sup>th</sup> January 2023, which is beyond the 3-month period.
21. The court finds merit in the grounds set out in the preliminary objection and therefore the application to set aside the award is time barred and is struck out with costs.
22. I will now consider the applicants' chamber summons application dated 1<sup>st</sup> November 2022 which sought an order to recognize and adopt the award as a judgment of this court.
23. The grounds of the application were that the parties entered into a lease agreement over the applicants go down located on L.R Number 20260 and the respondent defaulted in making timely rent payments. A dispute arose and was referred to arbitration before a sole arbitrator.
24. The arbitrator issued a final award on 24<sup>th</sup> August 2022 in favour of the applicants who now wish to enforce it pursuant to section 36(1) of the *Arbitration Act*.
25. In opposition, the respondent filed grounds of opposition dated 20<sup>th</sup> January 2023 and a replying affidavit sworn on even date by its director, Julius Ng'ang'a.
26. In the grounds of opposition, the respondent stated that the supporting affidavit to the application was signed by someone who was not a party to these proceedings and therefore she could not prove the allegations contained therein. That the annexures HP-1 to HP-6 are improperly before the court as they are not signed and dated nor are they commissioned by a commissioner for oaths.
27. On that basis, the respondent argued that the entire application is fatally defective and ought to be struck out.
28. It was averred in the respondent's replying affidavit that the applicants had attached and relied upon an agreement dated 2018 while claiming that the lease agreement was dated 1<sup>st</sup> March 2015 to support their claims.
29. That the agreement upon which the arbitration proceedings were anchored was never executed by the authorised representatives of the company and that the directors of the respondent were never duly notified of the appointment of an arbitrator and the subsequent proceedings.
30. The respondent's director averred that the applicants' advocates had been using an incorrect email address, that is kimaniriungu@gmail.com to effect service upon the respondent instead of the correct email address being info@raceautoltd.com and therefore the respondent was denied an opportunity to participate in the said arbitration proceedings.
31. The respondent contended that adopting the arbitration award would be greatly prejudicial to it and will occasion a miscarriage of justice.



32. In a supplementary affidavit sworn on 22<sup>nd</sup> March 2023 by Hasmita Patel, a representative of the applicants, it was averred that the lease agreement was executed by mutual consent on 1<sup>st</sup> March 2015 which was the commencement date and that the respondent together with their advocate have always been served by the arbitrator at each step of the proceedings however they refused to be part of the proceeds.

### **Analysis and determination**

33. The parties filed written submissions which the court has considered. This is an application to recognize and adopt an arbitral award as a judgement of the court.

34. Section 36(1) and (3) of the *Arbitration Act* states:

- “(1) (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.”

35. Section 37 of the *Arbitration Act* goes on to provide instances where the court will reject to enforce an arbitral award. These instances include where evidence is furnished to prove that 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.

36. In this case the applicants stated that the agreement to arbitrate was found under Clauses 3.9 and 3.10 of the parties’ lease agreement. The agreement was annexed as ‘HP 2’ in the supporting affidavit.

37. I have scrutinised the agreement. Clause 3.9, which is the arbitration clause, is non-existent in the agreement. Another peculiar feature of the lease agreement is that it is dated 2018 on the first page. However, on the second page, under clause (e) it states that the commencement of the agreement was 1<sup>st</sup> March 2015. The signatures of the directors and/or representatives of the respondents are also not appended to the agreement.

38. In the supplementary affidavit, another lease agreement was attached as “HP 8”. This agreement is dated 1<sup>st</sup> March 2015 and has a completely different appearance from the lease agreement attached in the supporting affidavit. In fact, what was attached is a one-page document and an arbitration clause is not present.

39. It is an oddity that the lease agreements relied on by the applicants do not include the ‘agreement to arbitrate’ clause. Section 36 of the *Arbitration Act* is clear, the original arbitration agreement or a duly certified copy of it must be furnished by the party that wishes to have it recognised as binding and enforced by the court.

40. Without such proof of such an arbitration clause in a validly executed agreement, this court’s hands are tied and the arbitral award cannot be recognized and adopted as a judgement of this court. The application seeking to recognize and adopt the award fails.



**Disposition**

41. From the foregoing, both applications, dated 1<sup>st</sup> November 2022 and 20<sup>th</sup> January 2023 are dismissed.  
I make no orders as to costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2024.**

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**P. MULWA**

**JUDGE**

In the presence of:

Mr. Anyango for applicants

Mr... Muhaya h./b for Mr. Monari for respondent

Court Assistant: Lilian

