



Mater Sacco Cooperative and Savings Credit Society Limited v Cooperative Bank of Kenya Limited (Commercial Arbitration Cause E035 of 2021) [2023] KEHC 18104 (KLR) (Commercial and Tax) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E035 OF 2021**

DAS MAJANJA, J

MAY 31, 2023

BETWEEN

MATER SACCO COOPERATIVE AND SAVINGS CREDIT SOCIETY LIMITED APPLICANT

AND

COOPERATIVE BANK OF KENYA LIMITED RESPONDENT

RULING

1. Before the court is the Notice of Motion dated 20th September 2021 made, inter alia, under section 35 of the *Arbitration Act*, 1995 seeking an order that the Arbitral Award dated 7th July 2021 and published by the sole arbitrator on 7th July 2021 be set aside. The application is supported by the Applicant's chairman, Tom Anyona, sworn on the same date. Apart from a preliminary objection dated 25th October 2021, the Respondent relied on the replying affidavit of its officer, John Kinyua, sworn on 15th March 2023. The parties filed written submissions in support of their respective positions.
2. In its Notice of Preliminary Objection, the Respondent contends that the application is fatally defective and incompetent as it is filed outside the mandatory timelines provided by section 35(5) of the *Arbitration Act* which does not permit an application for setting aside an arbitral award to be made after 3 months have elapsed from the date of notification of the award hence the court lacks jurisdiction to entertain it.
3. Since the Respondent has raised a preliminary issue that goes to the jurisdiction of the court, it has to be dealt with first in line with the dictates of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] 1 KLR 1 cited with approval and affirmed by the Supreme Court in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others* [2012]eKLR.



4. Section 35(3) of the *Arbitration Act* relied on by the Respondent provides as follows:

35(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. [Emphasis mine]

5. Essentially, an applicant seeking to set aside an award has three months to file its application from the date of receiving the award. The meaning of “received” in section 35(3) aforesaid has been expounded on by the courts in a line of decisions holding that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection (see *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR and *Mercantile Life and General Assurance Company Limited and Another v Dilip M. Shah and 3 Others* [2020] eKLR).
6. As and when the time begins to run is a question of fact. The Respondent contends that the time for receipt of notification was 4th February 2021 when the Arbitrator addressed a letter to the parties’ respective advocates informing them the Award was ready for delivery and that it would be delivered on settlement of the fee note. The Respondent stated that it settled its share of the Arbitrator’s fee note on 25th March 2021 but the Arbitrator did not release the Award.
7. On 5th May 2021, the Arbitrator wrote the parties’ advocates referring to a letter dated 15th February 2021 where the Applicant’s advocates had enclosed post-dated cheques for Kshs. 417,600.00 being its share of the Arbitrators fees. The Arbitrator indicated that it would not accept staggered payment as some of the Applicant’s cheques had been dishonoured. By the letter dated 5th July 2021, the Applicant’s advocates, referring to the letter of 5th May 2021, forwarded a cheque for Kshs. 417,600.00 whereupon the Arbitrator forwarded the Award by the letter dated “7th February 2021”.
8. In light of decisional law, the time for filing the application to set aside the Award was to be reckoned from the date of notification, that is on 4th February 2021. The Applicant cannot feign ignorance of this date of notification for it issued post-dated cheques as demanded by the Arbitrator in his fee note as evidenced by its own letter of 5th July 2021 which acknowledged the Arbitrator’s concern about dishonoured cheques in the letter of 5th May 2021. Even taking a most charitable view of the Applicant’s position, it knew the Award was ready for collection on 15th February 2021 when it forwarded the post-dated cheques to the Arbitrator in response to the fee note demand.
9. The Applicant makes the case that the time only started running when it received a signed copy of the Award in accordance with section 32(5) which provides that, “Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.” In *University of Nairobi v Multiscope Consultancy Engineers Limited* (Supra), Tuiyott J. held that delivery means, “the giving or yielding of possession or control of a signed copy of the award to each party.” The Applicant thus argues that delivery could only have taken place when, in fact, it received the duly signed Award, which was published on and dated 7th July 2022, on 8th July 2021. It contends that on 4th February 2021 when the notice was issued no award was published and dated 4th February 2021 pending collection.
10. The Applicant’s position is answered by the court in *University of Nairobi v Multiscope Consultancy Engineers Limited* (Supra), where the court dealt with the issue of delivery of the award vis-à-vis notification as follows:

Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to



pay the fees and expenses. So that when the arbitral tribunal notifies the parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties. Default of inaction on the part of the parties does not delay or postpone delivery.

11. In my view, the case does not assist the Applicant. The fact is that the notification from the Arbitrator indicates that the signed award is ready but for payment of fees and costs which is within the power and control of the parties. By issuing the notification that the award is ready for collection upon payment of fees, the Arbitrator, in effect, yields possession and control of the award to the parties. Arguing that time begins to run when the parties pay the arbitrator's fees and receive a copy of the signed award rather than when parties are notified of the award would defeat the object of arbitration which is to ensure a speedy and final resolution of disputes. The court in *Mabinder Singh Channa v Nelson Muguku and Another* ML HC Misc. Appl. No. 108 of 2006 [2007]eKLR cited with approval the following dicta in *Bulk Transport Corporation v Sissy Steamship Co. Ltd* [1979] 2 Lloyd's 289 which gives the reason why delivery under section 35 of the *Arbitration Act* is synonymous with notice;

Publication was something which was complete when the arbitrator became functus officio but so far as the time for moving under the statute was concerned, it was notice that mattered. He does not say in that passage so far that notice necessarily means notice of actual contents. The alternative which seems to me to wholly untenable is that time would not begin to run for a wholly indefinite period if neither side took up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the six weeks period has only just started to run and the fact that I could have had this award by walking round the corner at any moment from the date upon which I received notice of its availability cannot be held against me. Such a construction of the rule appears to me entirely unreasonable. It has never been applied and I see no reason to hold and I decline to hold, that it applies now”.

12. In *University of Nairobi v Multiscope Consultancy Engineers Limited* (Supra) and *Mercantile Life and General Assurance Company Limited v Dilip Shah* (Supra), the court was emphatic that an application under section 35 of the *Arbitration Act* that is time barred is fatal and there is no provision in the *Arbitration Act* that can salvage such an application. This position is fortified by the Court of Appeal in *Ann Mumbi Hinga v Victoria Njoki Gathara* NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR where it was stated that, “Section 35 of the *Arbitration Act* bars any challenge even for a valid reason after 3 months from the date of delivery of the award.”
13. I do not see why the present application should not suffer a similar fate as it is time barred, incompetent and therefore cannot stand.
14. The Applicant's application dated 20th September 2021 is therefore struck out for being filed out of time. The Applicant shall pay the Respondent's costs assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2023

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mochere instructed by Mochere and Company Advocates for the Applicant.

Mr Mwiruri instructed by Waweru Gatonye and Company Advocates the Respondent.

