



**Sensei Limited v Agriculture Development Corporation (Commercial Arbitration Cause E071 of 2022) [2023] KEHC 18654 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL ARBITRATION CAUSE E071 OF 2022**

**DAS MAJANJA, J**

**MAY 26, 2023**

**BETWEEN**

**SENSEI LIMITED ..... APPLICANT**

**AND**

**AGRICULTURE DEVELOPMENT CORPORATION ..... RESPONDENT**

**RULING**

1. On December 2, 2021, the Arbitrator (also “the Arbitral Tribunal”) published an award dismissing the Applicant’s claim and allowing the Respondent’s counterclaim of Kshs. 1,126,837.50 (“the Award”). The Applicant has filed the Notice of Motion dated November 21, 2022, *inter alia*, under section 35(2) (a) (iv) and (v) and (b) (ii) of the Arbitration Act, 1995 seeking to set aside the Award. The application is supported by the affidavit of the Applicant’s Managing Director, John Waweru Kang’ethe sworn on November 21, 2022. It is opposed by the Respondent through the replying affidavit sworn by its Managing Director, Mohammed Bulle sworn on February 3, 2023.
2. The parties have also filed written submissions to supplement their arguments which together with the pleadings, I have considered in my analysis and determination below. Since the Respondent has raised a preliminary issue that goes to the jurisdiction of the court, I propose to deal with it.
3. The Respondent’s contention is that the present application is incompetent having been filed out of time. This is because section 35(3) of the Arbitration Act 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]
4. Essentially, an applicant seeking to set aside an award has three months to file it application from the date of receiving the said award. The meaning of “received” in section 35(3) aforesaid has been



expounded on by the court in a catena 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).

5. Both parties contend that the Award was published on December 2, 2021. However, the record indicates that in an email dated December 14, 2021, the Arbitrator informed the parties that the Award was published and ready for collection. This position is also acknowledged by the Applicant in its letter of June 7, 2022 to the Respondent where it was asking the Respondent to settle its portion of the fees due to the Arbitrator. I hold that the Award was published on December 14, 2021 when the parties were notified that the Award was ready for collection. This means that the Applicant had only until March 15, 2022 latest to make its application. However, the record indicates that the Applicant filed its application on November 23, 2022 which is outside the three-month period by over nine months and is clearly time barred.
6. 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.”
7. I do not see why the present application should not suffer a similar fate as it is time barred, incompetent and therefore cannot stand.
8. The Applicant’s application dated November 21, 2022 is therefore struck out for being filed out of time. The Applicant shall pay the Respondents cost’s assessed at Kshs 50,000.00.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of MAY 2023**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mrs Tanui instructed by Kipkoech Tanui and Company Advocates for the Applicant.

Ms Kosgey instructed by the Respondent.

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