



Kenya Ports Authority v Base Titanium Limited (Miscellaneous Application 456 of 2019) [2022] KEHC 265 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)

Neutral citation: [2022] KEHC 265 (KLR)

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

MISCELLANEOUS APPLICATION 456 OF 2019

JM MATIVO, J

MARCH 31, 2022

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

BASE TITANIUM LIMITED RESPONDENT

RULING

1. Vide the Originating Summons dated 19th December 2019, the subject of this ruling, the applicant prays that: - (a) this court sets aside the interim Award on jurisdiction and the additional Award on costs of the award of the jurisdiction proceedings. Additionally, the applicant prays that the said awards be declared void and of no consequence. Lastly, it prays that it be awarded the costs of this application and all the proceedings before the Arbitrator. Prayers (a) and (b) of the application are spent.
2. The core grounds as I glean them from the applicant's pleadings are that the Arbitrator dismissed the challenge on jurisdiction without any or any proper basis in law or otherwise, and that the Arbitrator failed to address and resolve the query on his fees and expenses raised by the applicant and on which the applicant refused to sign the Arbitration Fee Agreement.
3. The applicant states that the Arbitrator is guilty of misconduct because having quoted an hourly fee of Kshs.30,000/= he has instead wrongfully charged and continues to insist on charging a fee of Kshs.60,000/= without the parties' agreement or jurisdiction, and that he continues to charge a sum of Kshs.100,000/= monthly as disbursements and facility costs and continues to refuse to address its objection to the said issue. Further, the applicant contends that the Arbitrator failed to address issues raised on the validity of his appointment by the Honourable the Chief Justice..
4. Also, the applicant states that the Arbitrator failed to treat the parties equally and fairly and by his ruling, he assumed jurisdiction over matters that he had no jurisdiction over particularly as regards the



Claimant's claim for declaratory and prohibitory order sought as well as the refund sought pursuant to Section 68(1)(a) of The [Kenya Ports Authority Act](#). Additionally, it states that the Arbitrator failed to properly or at all apply the correct tests in law regarding his jurisdiction under Section 62 on assessment of compensation. It also contends that the Arbitrator misconducted himself by wrongfully arrogating to himself jurisdiction by holding that the question of whether the power of this appointment as arbitrator was exercised contra statute or in excess or abuse of authority was a merit issue and not one that goes to the jurisdiction of the matter; and by wrongfully and unlawfully holding that he only had a duty to confine himself to the pleadings and his mandate and need not consider whether or not any circumstances has arisen for his appointment.

5. Further, the applicant states that the Arbitrator purported to tax and/or ascertain costs as against the applicant without any regard to his conduct or misconduct in failing to address its concerns on his proposed Arbitration Fee Agreement, and/or, he acted on the wrongful basis that he was entitled to an hourly rate of Kshs.30,000/- from each party (making cumulatively Kshs.60,000/-) instead of the hourly rate of Kshs.30,000/- he himself had proposed. It is the applicant's contention that the Arbitrator has charged a sum in excess of Kshs.3,200,000/= on account of facility fees thus amounting to a double overcharge. Additionally, the applicant states that the Arbitrator conducted himself in a manner that exhibits bias and contrary to the rules of natural justice particularly on the subject of the costs award and that he acted contrary to the issue of party autonomy. As a consequence of the foregoing, the applicant states that it has lost total confidence in the Arbitrator's ability to fairly and justly make any determination in this matter. Lastly, the applicant states that the awards on jurisdiction and costs are in conflict with public policy.
6. In opposition to the motion, the Respondent filed the Replying affidavit of Simon Wall, its General Manager External Affairs dated 2nd March 2020. The salient features of the Respondent's opposition to the Originating Summons are that the applicant has not justified the grant of the orders sought. Further, that the Respondent is the owner of a private Bulk Mineral Storage and Ship Loading Facility constructed on a privately owned piece of land in Likoni, Mombasa County which was constructed, at the Respondent's sole expense, to enable the Respondent to be entirely self-sufficient in its ship loading operations and independent of all external stevedoring requirements.
7. The Respondent's position is that the applicant granted it an enduring waiver to operate the Jetty pending issuance of a formal port operating license and on or about 17th February 2014, the applicant demanded payment of stevedoring charges from the Respondent in respect of the vessel carrying the first ever export shipment of the Respondent's minerals triggering a dispute which the parties could not resolve amicably, so, the Respondent declared a dispute under the Kenya Ports Authority¹ and sought that the dispute be resolved by way of arbitration.
8. It is the Respondent's case that on or about 6th February 2017, pursuant to Section 62 of the [Kenya Ports Authority Act](#), the Honourable Chief Justice appointed the Honourable Justice Joseph Nyamu (Rtd.) to arbitrate the dispute. In the interim, the Respondent filed Mombasa High Court Civil Suit No. 92 of 2016; Base Titanium Limited v Kenya Ports Authority seeking an interim measure of relief to restrain the levying of further stevedoring charges pending hearing and determination of the arbitration proceedings and on 16th September 2016, the court directed that the charges be deposited in an escrow account in the joint names of the parties' advocates, and pursuant to the said order, the parties opened an escrow account at NIC Bank, Riverside Branch, Account No. 1004195171 into which the said charges are been deposited since then.

¹ Cap 391, Laws of Kenya.



9. It is the Respondent's case that in its judgment delivered on 3rd August 2017, the High Court allowed the Respondent's application and restrained the applicant from imposing, levying, charging or in any manner demanding stevedoring charges from the Respondent; and also restrained the applicant from unlawfully holding, restraining, detaining or in any way restricting the Respondent's shipments on purported account of stevedoring charges. Further, that after the judgment the applicant applied for stay of execution which was allowed vide a ruling dated 27th July 2018, subject to the Respondent continuing to deposit stevedoring charges in the escrow account pending hearing and determination of the intended appeal, which appeal is yet to be filed.
10. The Respondent filed a Statement of Claim dated 8th March 2018 before the Arbitrator seeking inter alia a declaration that the applicant's levy of stevedoring charges is illegal and contrary to statute and a permanent injunction restraining the applicant from imposing, levying, charging or in any manner demanding stevedoring charges from the Respondent. It also sought a permanent injunction restraining the applicant from unlawfully holding, restraining, detaining or in any way restricting the Respondent's shipments on purported account of stevedoring charges. It also claimed the total sum levied directly upon the Claimant and subsequently paid into the escrow account and any additional sums levied by the applicant on the Respondent on purported account of stevedoring charges during the pendency of the Appeal against the judgment delivered on 3rd August 2017. Lastly, it prayed for Interest on the sums claimed until payment in full.
11. That the applicant filed a Statement of Defence objecting to the Arbitrator's jurisdiction to hear, determine and adjudicate upon the claim and following a preliminary meeting, the Arbitrator directed that the applicant was to formally raise the jurisdictional issue which would be heard in priority of the Respondent's Claim. In compliance with the said order, the applicant filed and served its written submissions dated 4th May 2018 by which it set out its arguments against the Arbitrator's jurisdiction and the Respondent also filed its submissions on jurisdiction dated 21st May 2018.
12. The Respondent states that the parties subsequently engaged in settlement discussions with a view to resolving the dispute amicably, but the discussions failed. Further, that the Arbitrator withheld delivery of his award on jurisdiction to the parties before receiving full payment of the arbitral tribunal's fees and expenses. Vide its letters dated 31st October 2019 and 8th November 2019, the Respondent wrote to the Arbitrator seeking confirmation of the total fees due to the Arbitrator because the applicant had failed to pay its portion towards the arbitrator's fees and by way of a letter dated 8th November 2019, the Arbitrator confirmed that the amount due to him was Kshs. 5,158,752/=. The Respondent states it elected to pay the Arbitrator's fees of Kshs 5,158,752/= though it subsequently paid the sum of Kshs 6,620,352/= in error and the Arbitrator acknowledged the overpayment by his letter dated 8th November 2019 and informed the parties of the apportionment of the overpaid sum of Kshs. 1,461,800/= to "facility fees" for the period July 2018 to November 2019.
13. Additionally, the Respondent states that upon settlement of his fees, the Arbitrator issued his interim award on jurisdiction dated 25th June 2018 which award was received by the Claimant on 13th November 2019. In his 1st Award, the Arbitrator dismissed the Applicant's objection against his jurisdiction and awarded costs to the Respondent. The said Award was final except for ascertainment of costs by the parties. The Arbitrator invited the parties to file and serve written submissions on the quantum of costs payable in default he would proceed to quantify the costs payable by the applicant. Following the Respondent's indication by its letter dated 19th November 2019 that it would not submit on costs, the Arbitrator issued his award on costs dated 13th December 2019 awarding the Respondent as against the applicant cost of Kshs. 9,820,352/=.



14. The Respondent states that section 17 of the Act allows parties to an arbitration to commence, continue and conclude arbitral proceedings pending the determination of a jurisdictional challenge by the court. Additionally, that whilst the Award on jurisdiction was published on 25th June 2018, the Applicant filed this application on 19th December 2019, yet, Section 17 requires such an application to be made within 30 days of receiving notice of the ruling. Further, the Respondent states that the reasons for which this court may set aside an award are limited by Section 35 of the Act and that the applicant has not satisfied any of the said grounds to justify the setting aside of the two Awards. Additionally, the Respondent states that it has not disclosed any reason for this court to interfere with the Award on jurisdiction under of Section 17(6) of the Act, and that the said Award was issued based on the consideration of the relevant law and pertinent facts.
15. It is also the Respondent's case that the applicant in its letters to the Honourable Chief Justice dated 18th October 2016, 9th November 2016 and 20th January 2017 raised several objections resisting the appointment of the Arbitrator, and vide a letter dated 14th February 2017 the Honourable Chief Justice advised the applicant to raise all issues before the Arbitrator. It states that it is not true that the Arbitrator neglected the issue on his appointment, but the Honourable Chief Justice's jurisdiction to exercise power under Section 62 of the *Kenya Ports Authority Act* could not properly be formulated as an issue before the Arbitrator because he was functus officio – and the Arbitrator did not have jurisdiction to fault this exercise of power. Further, the Respondent states that the question of recourse to arbitration, which is directly related to the validity of the appointment of the Arbitrator, had previously been raised as an issue in Mombasa High Court Civil Suit No. 92 of 2016 – Base Titanium Limited vs. Kenya Ports Authority. The Respondent also states that the Act gives the Arbitrator the power and authority to determine his jurisdiction, that he heard both parties and issuance the Award on jurisdiction. Further, that the Honourable Chief Justice having determined by his letter of 6th February 2017 that he had jurisdiction to appoint the Arbitrator, and the High Court in High Court Civil Suit No. 92 of 2016 having confirmed that the dispute between the parties was to be determined by arbitration, the Arbitrator did not have the jurisdiction to subsequently entertain the question whether the Chief Justice's decision to appoint him was valid or whether the judgment of the High Court was sound. Further, that the Arbitrator did not arrogate to himself jurisdiction that he does not have under section 62 of the KPA Act, but he was guided by the pleadings and submissions filed. That there is no evidence to support the assertion that the Arbitrator's Award on jurisdiction was driven by his charges or fees nor can his fees suggest bias because the Act provides that each party is responsible for an equal share of the fees and expenses of Arbitrator.
16. Additionally, that a complaint on the Arbitrator's conduct is not synonymous with a challenge to the Arbitrator's jurisdiction within the contemplation of Section 17 of the Act, nor did the Arbitrator demonstrate bias against any of the parties in the making of the two Awards. Further, each party was accorded an opportunity to present their respective cases. Also, it states that the challenge procedure against an arbitrator's conduct is provided under Section 14 of the Act, and, that the applicant has filed a challenge before the Arbitrator which is pending determination, so, it would be premature for the applicant to seek to challenge the Arbitrator for "bias" before this court when the challenge of bias, is yet to be ruled upon by the Arbitrator.
17. Additionally, that the Respondent in a bid to defer or otherwise frustrate the Arbitration proceedings failed to sign the Arbitrator's Arbitration Fee Agreement yet it continues to participate in the arbitration proceedings. Lastly, the Respondent states that the Arbitrator afforded both Parties an equal opportunity to submit on costs but the applicant refused and/or neglected to make any representations to the Arbitrator in this regard.



18. The applicant filed two supplementary affidavits dated 21st September 2021 sworn by Stephen Kyandih and the supplementary affidavit dated 10th January 2022 sworn by Wamuyu Waikwa Ikengu. Mr. Stephen Kyandhi, its Principal Legal Officer, Litigation & Disputes essentially reiterated the contents of his earlier affidavit and averred that subsequent to the filing of this application and owing to the Arbitrator's continued persistence in conduct lacking in impartiality and independence, it challenged the Arbitrator under Section 14 of the Act which was dismissed, as a consequence of which the applicant was compelled to approach the High Court. Mr. Stephen Kyandhi states that in its Ruling delivered in Miscellaneous Civil Application No. 82 of 2020, Kenya Ports Authority v Base Titanium Limited, this Honourable Court upheld the challenge on the grounds of lack of independence and impartiality and removed the Arbitrator, so, it is only fair and just that the present application also be allowed.
19. In her supplementary affidavit Wamuyu Waikwa-Ikegu, the applicant's Senior Legal Officer annexed photocopies of documents omitted from the Affidavit of Mr. Stephen Kyandih filed on 19th December 2019.
20. The parties filed written submissions which they highlighted orally in court essentially replicating the contents of their written submissions. The Petitioner submitted that this court in its ruling dated 26th February 2021, in Miscellaneous Application No.82 of 2020, Kenya Ports Authority v Base Titanium Limited, between the same parties made certain findings which directly impact on this application in that the court set aside the Arbitrator's decision and removed the Arbitrator underscoring the need for an arbitrator to remain independent.
21. It also submitted that Section 19 of The Arbitration Act (the Act) requires that parties be treated equally and that each party be given a fair and reasonable opportunity to present its case. Referring to the ruling dated 26th February 2021, the applicant argued that the parties were not treated equally and cited Article 27 of *the Constitution* which guarantees the right to equality, equal protection and equal benefit of the law and argued that a breach of the said provision is against public policy of Kenya and cited *Christ for all nation v Apollo Insurance Co. Ltd*² in which the court addressed the concept of public policy in the context of Section 35 (2) (b) (ii) of the Act and stated that an award could be set aside under section 35 (2) (b) (ii) of the Act as being inconsistent with the public policy of Kenya if it is shown that it was either- inconsistent with *the Constitution* or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or Contrary to justice or morality.
22. The applicant submitted that both the Award on jurisdiction and the Award on costs ought to be set aside on public policy grounds on account of the Arbitrator's lack of independence and impartiality and misconduct as already found by this court in its decision of 26th February 2021. It argued that the said conduct was not only inconsistent with Article 27 of *the Constitution* but also it is contrary to justice and morality. To further fortify its argument, the applicant relied on *Josephat Murage Miano & another v Samuel Mwangi Miano and another*³ and *Exclusive Estates Limited v Telkom Kenya Limited & Another; Afraco Limited Interested Party/Applicant*⁴ in which the court held that misconduct vitiates the Award.

² {2002} E.A. 366.

³ {1996} e KLR.

⁴ {2021} e KLR.



23. Regarding the court's finding on the Tribunal's lack of impartiality and independence and over-charging fees, the applicant referred to *Russell on The Law of Arbitration*⁵ and submitted that the interim Awards on jurisdiction and costs ought to be set aside. It urged the court to consider the reliefs sought against the principles set out in *Mistry Jadva Parbat Company Limited v Grain Bulk Handlers Limited*⁶ in support of the argument that it would be repugnant to justice and morality to allow the two awards to stand.
24. Regarding the plea to set aside the award received on 3rd December 2019, it submitted that the grounds cited by the Respondent in opposition of this ground were rendered otiose in light of this court's findings in its ruling of the 26th February 2021 which vitiates the award on jurisdiction. He submitted that even before the appointment of the Arbitrator, the applicant had challenged the Respondent's right to seek an appointment under Section 62 of the *Kenya Ports Authority Act*, but the Honourable Chief Justice, in complete disregard of the matters raised, proceeded with the appointment on 6th February 2017 and then directed that the issues be raised before the Arbitrator. Additionally, it submitted that by refusing to decide on the question directly impacting on his appointment and the jurisdiction of the Tribunal under the pre-text that it has been abandoned, the Arbitrator abdicated his duty to not only act fairly but also decide on the dispute submitted to him which amounts to misconduct on his part (Citing *Russell on the Law of Arbitration*(*supra*)).
25. The applicant also submitted that whilst Section 17 (6) requires a party aggrieved by a ruling on jurisdiction to apply to the High Court within 30 days of having received notice of the ruling to decide on the matter, Section 35 (3) allows an application for setting aside an award to be made within 3 months of the date on which the party making the application had received the Arbitral Award. He submitted that the applicant received the interim Award on jurisdiction on 3rd December 2019 at 4.30 p.m. and that the Award on costs was received on 13th December 2019. It argued that given that the present application was filed on 19th December 2019, there can be no dispute that it was filed well within the statutory time limit provided in Section 35(3) of The Arbitration Act.
26. Additionally, the applicant argued that there is no bar to apply to set aside an interim Award on jurisdiction under Section 35 if grounds under the said section exist. It submitted that time could not have, for the purposes of Section 17(6) of the Act begun to run from 25th June 2018 when notice of the interim Award on jurisdiction was first given by the Arbitrator on account of the Arbitrator's own conduct regarding his fees, so, taking into account the exceptional circumstances of the Arbitrator's conduct, the 30-day time limit under section 17(6) could only have begun on 3rd December 2019. Additionally, he submitted that there is no bar to bringing an application for setting aside an interim Award on jurisdiction under Section 35 of the Act because the jurisdiction invoked is in the alternative.
27. The applicant submitted that time bar cannot arise in an application to set aside the Award and that the Arbitrator's conduct not only lacked independence and impartiality but also it was made without affording the applicant a hearing. It argued that the applicant did not receive the interim Award on jurisdiction until 3rd December 2019. Additionally, it argued that the applicant write to the Arbitrator on 4th December 2019 complaining about his conduct and lack of impartiality and the Arbitrator notified the parties on 9th December 2019 that the costs award was ready for collection as of 13th December 2019 & the Award on costs was electronically availed to the parties on 13th December 2019.

⁵ Anthony Walton Q.C., 19TH Edition.

⁶ {2012} e KLR .



28. It submitted that until it received the Interim Award on jurisdiction, it was not in a position to know that directions had been made requiring it to make any submissions. It argued that the arbitrator acted partially in a deliberate and calculated manner in order to saddle it with excessive and unconscionable costs despite being aware that as of 4th December 2019, it had not yet received the interim Award on jurisdiction and could not have complied with the directions and that the Arbitrators conduct vitiates the award on costs considering that the applicant never agreed to the rate of Kshs.60,000/= which the Arbitrator had himself fixed at Kshs.30,000/=.
29. In its submissions, the Respondent argued that the applicant appealed to the Court of Appeal in Civil Appeal No. 132 of 2019 Kenya Ports Authority v Base Titanium Limited against the Ruling delivered on 3rd August 2017 in High Court Commercial Case No. 92 of 2016 Base Titanium Limited v Kenya Ports Authority, is pending hearing. Further, this Court issued a ruling on 26th February 2021 in High Court Misc App No. 82 of 2020 Kenya Ports Authority v Base Titanium Limited allowing the Applicant's challenge to the arbitrator, hence, the arbitrator (Retired Justice Nyamu) will no longer preside over the matter and the parties were directed to invoke the provisions of Section 62 of the [Kenya Ports Authority Act](#) to have a new arbitral tribunal appointed.
30. The Respondent submitted that the prayer for setting aside of the interim Award is time barred under Section 17(6) of the Act which provides a 30-day limit and under Section 35 of the Act which provides a 3-month time limit. It submitted that while the application was filed on 19th December 2019, the interim Award was published on 25th June 2018 (or at least on 3rd July 2018 when the arbitrator notified the parties that it was ready for collection upon payment of his fees/charges. It argued that as shown by the applicant's stamp at page 1307, the applicant received the arbitrator's notification letter issued on 25th June 2018 on 5th July 2018. It argued that Section 17(6) of the Act provides that an aggrieved party to an arbitrator's ruling on his jurisdiction has to apply to the High Court within 30 days of receiving notice of the ruling. The Respondent also submitted that the 30-day timeline can only be determined to have started to run on 25th June 2018 (or 5th July 2018 when the applicant received the notification letter, such that it would have lapsed on or about 25th July 2018 or 5th August 2018. It submitted that to the extent that the application was filed on 19th December 2019, it is time barred per Section 17(6) of the Act.
31. Also, making reference to section 35 of the Act, the Respondent submitted that this court has in numerous decisions held that time starts to run at the point at which the parties are notified that the award is ready for collection. To buttress its argument, it cited [Dinesh Construction Limited & another v Aircon Electra Services \(Nairobi\) Limited](#)⁷ which held:
- “received” for purposes of the Arbitration Act means notification by the Arbitrator that the award is ready for collection. Consequently, once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the signed copy of award. Failure of the parties to collect it does not delay or postpone the delivery and the time limited in section 35(3) of the Arbitration Act begins to run.”
32. The Respondent also cited [University of Nairobi vs. Multiscope Consultancy Engineers Limited](#);⁸ [Transworld Safaris Limited vs. Eagle Aviation Limited and 3 Others](#);⁹ [Mahican Investments Limited](#)

⁷ {2021} e KLR.

⁸ {2020} e KLR



and 3 Others v Giovanni Gaida and 80 Others;¹⁰ *Mahinder Singh Channa v Nelson Muguku & Another*;¹¹ *P N Mashru Limited v Total Kenya Limited*¹² *Mercantile Life and General Assurance Company Limited & Another v Dilip M. Shah & 3 Others*;¹³ *Express Connections Limited v Easy Properties Limited*¹⁴ and *National Housing Corporation v Custom General Construction Limited*.¹⁵ It also relied on *Match Electricals Company Limited v Libyan Arab African Investments Company Limited & another*¹⁶ which held that the courts have held that it would be intolerable and indeed undermine the object of the Act, if the collection of the Award was left in the power of one or more parties who failed to collect it for non-payment of the arbitrator's fee.

33. The Respondent argued that the arbitrator notified the parties that the interim Award was ready for collection on 25th June 2018, there was a delay in the applicant paying its portion of the fees such that Respondent had to pay the applicant's portion resulting in the interim Award being released sometime on or about 13th November 2019. The Respondent submitted that the reason for the strict statutory timelines under the Act is because arbitral proceedings are intended to be expeditious and any challenge that may cause their delay must be raised and dealt with promptly. It submitted that the Act does not contemplate that the timeline can be extended.
34. Regarding this court's jurisdiction to set aside the interim Award under Section 35 of Act or under any justifiable or exceptional grounds, the Respondent submitted that the power of the court to determine whether the interim Award (being a decision on a jurisdictional challenge) is valid or should be set aside is prescribed under Section 17(6) and (7) of the Act which provides that any party aggrieved by such ruling may appeal to the High Court, within 30 days after receiving notice of the ruling and the decision of the High Court shall be final. It submitted that a key feature of arbitration is finality and binding nature of arbitral proceedings as provided by Section 10 of the Act which limits court intervention in matters governed by the Act. It submitted that Section 17(6) of the Act provides a limited avenue for a party to challenge an arbitrator's decision on his jurisdiction. It submitted that this court does not have the jurisdiction to determine the propriety or otherwise of the arbitrator's jurisdiction under of Section 35 of the Act. It cited *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited*¹⁷ which held that where no application is lodged under section 17(6) of the Act within the time prescribed in law, it will be contrary to law to convert the application under section 35 of the Act into such appeal.
35. Additionally, counsel submitted that even if this court is minded to hold that it has the jurisdiction to consider the prayer for setting aside of the interim Award based on Section 35 of the Act, the court ought to limit itself to the specific provisions of section 35. Additionally, the Respondent distinguished the authorities cited by the applicant. It argued that *Ringera J in Christ for All Nations v Apollo*

⁹ H.C Misc. Application No. 238 of 2003.

¹⁰ {2005} e KLR.

¹¹ {2007} e KLR.

¹² {2013} e KLR.

¹³ **{2020} e KLR.**

¹⁴ **{2021} e KLR.**

¹⁵ {2021} e KLR

¹⁶ {2021} e KLR.

¹⁷ {2015} e KLR.



Insurance Co. Limited¹⁸ refused to set aside an award based on public policy stating: - “In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards the finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act.”

36. The Respondent also distinguished *Josephat Murage Miano & another v Samuel Mwangi Miano & another*¹⁹ on grounds that the Court of Appeal did not determine the matter based on section 35 of the Act but it relied on Order XLV Rule 15 of the Repealed Civil Procedure Rules which have no application to the instant proceedings. Regarding *Exclusive Estates Limited v Telkom Kenya Limited & another: Afraco Limited (Interested party/applicant)*,²⁰ he distinguished it from the instant case citing 4 key reasons. First, that the decision was not based on section 35 of the Act but it was based on Order 46 Rule 16 of the Civil Procedure Rules 2010. As was held by the Court of Appeal in *Anne Mumbi Hinga v Victoria Njoki Gathara*²¹ “all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the Arbitration Act}} a complete code.” Secondly, Order 46 applies in the instance of “Arbitration under order of a court.” Thirdly, Order 46 Rule 16 (1) (a) of the *Civil Procedure Rules 2010* expressly lists “misconduct of the arbitrator” as one of the factors that the court should consider in setting aside an award made following the appointment of an arbitrator by the court. It argued that there no similar provision under Section 35 of the Act and the applicant’s attempt to extend the definition of public policy to include misconduct by an arbitrator as a ground for setting aside flies in the face of the express provisions of the law. Fourthly, this Court should be wary of relying on misconduct as set out in Order 46 Rule 16 (1) (a) of the Civil Procedure Rules 2010 as a ground for setting aside of the interim Award because the consequences of such a decision will be as set out under Order 46 Rule 16 (3), that the “Court shall supersede the arbitration and shall proceed with the suit.” It submitted that there are no judicial decisions supporting the setting aside of the Interim Award based on the misconduct of the arbitrator under Section 35 of the Arbitration Act.
37. Regarding Public Policy, the Respondent submitted that the court must see that such recognition and enforcement of award may endanger the interest of the state’s citizens by executing its public authority. Thus, any public policy assertion that cannot show clearly how the recognition and enforcement could damage the interest of state’s public will not be considered as a bar to recognize or enforce the award. (Citing *Express Connections Limited vs. Easy Properties Limited*²²). It argued that no public policy concerns have been presented by the applicant to enable the court to determine that the interim Award may be set aside under Section 35 of the Act.
38. Additionally, the Respondent submitted that even if the court finds that misconduct is grounded on section 35 of the Act, there are insufficient grounds to justify the setting aside. He argued that the alleged lack of independence, impartiality and misconduct relate to the Costs Award rather than

¹⁸ {2002} EA 366.

¹⁹ {1996} e KL

²⁰ {2021} e KLR.

²¹ {2009} e KLR.

²² {2021} e KLR.



the interim Award. It submitted that if at all the arbitrator erred in issuing the interim Award, such errors were committed within the scope of his mandate as opposed to independence, impartiality and misconduct. It relied on *Total (U) Ltd v Buramba General Agencies*²³ in which the High Court of Uganda stated that while the arbitrator's conduct could perhaps be stated to have been mistaken and naive, it certainly did not exhibit any dishonesty, bad faith, ill motive, fraud, collusion or corruption - to bring it anywhere near the ambit of the traditional areas of misconduct.

39. Further, the Respondent submitted that the decision in *Josephat Murage Miano & another v Samuel Mwangi Miano & another*²⁴ cited by the applicant in which the Court of Appeal set aside an arbitral award related to the arbitrator's failure to adjudicate the real dispute between the parties unlike this case. He argued that the Arbitrator clarified the manner in which he was charging fees at the commencement of the arbitration. It argued that it cannot be said that the Respondent was advantaged by the arbitrator's recalcitrance in insisting on his fee. Further, he argued that the fact that the Respondent paid the applicant's fees for the release of the interim Award is not indicative of any bias that the arbitrator may have developed to the applicant's detriment. This avenue was necessitated by the considerable delay in the progression of the arbitration caused by the applicant such that the Respondent had no choice but to pay the Arbitrator to move the matter forward because the applicant had refused to pay his share.
40. Additionally, the Respondent submitted that the proper avenue for challenging fees is provided under Section 32B (4) of the Act, hence, the applicant ought to have deposited the demanded fees in court and apply for an order for the fees to be determined. It submitted that the fact that the applicant elected to file a challenge cannot afford it an opportunity to raise the issue of fees as a basis to seek the setting aside of the interim Award.
41. The Respondent also submitted that the applicant in its submissions failed to present any substantive arguments regarding the merits of the interim Award. It submitted that the question of recourse to arbitration was conclusively determined in *Mombasa High Court Civil Suit No. 92 of 2016, Base Titanium Limited vs. Kenya Ports Authority* in which the court held that the reference and recourse lies in arbitration. It submitted that this court's decision in *High Court Misc App No. 82 of 2020 Kenya Ports Authority v Base Titanium Limited* emphasised the fact that it is the arbitral tribunal that has jurisdiction to determine the dispute between the parties. It submitted that despite the court's directions, the parties are yet to have a new Arbitrator appointed pending the hearing and determination of the multiple challenges the applicant has filed. The Respondent further submitted that the arbitrator's power under Section 17 of the Act to decide the parameters of his jurisdiction was duly exercised (after the parties had provided their respective pleadings).
42. The Respondent also argued that the Honourable Chief Justice having determined that he had appointed an arbitrator to preside over the dispute, the arbitrator did not have jurisdiction to subsequently consider, at the stage of the jurisdictional objection, whether the Chief Justice's decision to appoint him was valid, or whether the decision of the High Court in *High Court Civil Suit No. 92 of 2016 – Base Titanium Limited vs. Kenya Ports Authority* in referring the dispute to arbitration, was sound, and he could not subsequently sit on appeal on the decision of the Honourable Chief Justice in appointing him as arbitrator.
43. Also, it was the Respondent's submission that the fact that the arbitrator mentioned in his interim Award that the issue of the appointment of the arbitrator by the Chief Justice had been abandoned is borne out of the arbitrator's Order for Directions and this matter was never isolated as an issue to

²³ {1998} UGHC 8.

²⁴ {1996} e KLR.



be raised in the preliminary objection. The Respondent urged the court not to fall into the trap of reopening matters that were effectively and conclusively determined by a properly constituted arbitral tribunal and relied on *Mahican Investments Limited v Giovanni Gaid & 80 others*²⁵ which cautioned courts against interfering with arbitral awards lest the court place itself in the position of an appeal court.

44. The Respondent submitted that if the applicant desired to challenge the Chief Justice's exercise of power under the *Kenya Ports Authority Act*, it ought to have done so by way of a judicial review application, so, it is estopped from raising the issue as a basis of misconduct on the arbitrator's part. It cited *DB Shapriya and Co. Ltd v Bish International BV*²⁶ in which it was stated that "courts cannot interfere with findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct. The court's intervention is limited to errors of law which are apparent on the face of the award."
45. The Respondent submitted that since the Arbitrator is a master of facts, this court must resist the temptation to sit on appeal on an arbitrator's decision in the context of a setting aside application and cited *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited*²⁷ which followed dicta by Steyn LJ in *Geogas S.A v Trammo Gas Ltd (The "Balears")*²⁸ that: -

"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

46. It is the Respondent's argument that the instant application is a further instalment of its attempts to scuttle the ultimate resolution of the long-standing dispute which has been pending since February 2014. Additionally, the Respondent's counsel submitted that even though the court on 26th February 2021 in High Court Misc. App No. 82 of 2020 *Kenya Ports Authority v Base Titanium Limited* removed the arbitrator, the said decision did not have the effect of vitiating the interim Award. To buttress its argument, it cited Section 14 (8) of the Act as read with Section 16 (3). It argued that the parties did not continue with the arbitration proceedings after the applicant challenged the Arbitrator's jurisdiction, so, it may not be said that the arbitral proceedings were either commenced, continued, or concluded during the pendency of the challenge so as to render any award void. It cited Section 14(8) of the Act which provides: -

While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings

²⁵ {2005} e KLR.

²⁶ (2) {2003} 2 EA 404.

²⁷ {2014} e KLR

²⁸ 1 Lloyds LR 215.



shall take effect until the application is decided, and such an award shall be void if the application is successful.

47. It also submitted that there has not been any agreement between the parties to invalidate the terms of the interim Award (if deemed as an order or a ruling) as contemplated under the Section 16 (3) of the Act which provides:

Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalidated solely because there has been a change in the composition of the arbitral tribunal.

48. The Respondent also submitted that section 10 of the Act forbids court intervention unless as provided under the Act and urged the court to reject the plea to declare the interim Award void and of no consequence. It cited the Supreme Court decision in *Nyutu Agrovot Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*²⁹ which held that section 10 is meant to ensure that a party will not invoke the jurisdiction of the court unless the Act specifically provides for such intervention. It submitted that in its decision dated 26th February 2021 removing the arbitrator, the court did not in any way impugn the interim Award but its findings were in the context of the Costs Award.

49. The Respondent submitted that the arbitrator in the interim Award afforded the parties an equal opportunity to submit on the costs but the applicant refused and/or neglected to submit, so, it cannot impugn the Costs Award. The Respondent relied on *VV v VV*³⁰ where the Singapore High Court dismissed the Plaintiff's application to set aside an arbitral award on costs in an International Arbitration as it was of the view that even though arbitrators should at least follow established legal principles when assessing costs payable by one party to another, Singapore legislation did not provide the court with authority to ensure that costs in arbitration had to adhere to any particular principle. Therefore, even an unreasonable costs award could hardly be one which violated public policy and could not be set aside. The Respondent also relied on *Express Connections Limited v Easy Properties Limited*³¹ which held that: -

“ Even if the arbitrator had either misinterpreted the agreement, failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. In my view, it only means that he erred in the performance of his duties. An arbitrator ‘has the right to be wrong’ on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. “

50. In addressing the instant application, I must bear in mind an undisputedly preliminary legal position that is the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. Section 10 in peremptory terms restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section exemplifies the acknowledgement of

²⁹ {2019} e KLR.

³⁰ {2008} 2SL 929.

³¹ {2021} e KLR, Para 76.



the policy of party's #autonomy” which underlie the arbitration generally and in particular the Act. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.³² The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

51. Section 10 leaves no doubt that it permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. As the Supreme Court stated in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*,³³ (the Nyutu case), this judicial intervention can only be countenanced in exceptional instances. The Apex court expressed stated: -.

(72) Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in *AKN and another (supra)* that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the ‘no Court intervention’ principle. (Emphasiss added)

52. The Supreme Court in the Nyutu case did not define exceptional circumstances nor is it defined in the Act or any other statute. The applicant argues that since the High Court faulted, he Arbitrator for alleged misconduct, then exceptional circumstances exist in this case. I find it necessary to attempt to define exceptional circumstances. I may profitably refer to the following points from a leading South African decision: -³⁴

- i. What is ordinarily contemplated by the words “exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . .”
- ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
- iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

³² See Sutton DJ et al (2003), *Russell on Arbitration* (Sweet & Maxwell, London, 23rd Ed.) p. 293.

³³ {2019} e KLR.

³⁴ In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.



- iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
 - v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.# In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.
53. The Supreme Court in the Nyutu case at paragraph 57 of the judgment stated that Section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds such as a challenge under section 17 (6) of the Act.
54. Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.³⁵ However, by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in the Act, and, by necessary implication, they waive the right to rely on any further grounds of review, “common law” or otherwise.³⁶
55. The objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator’s jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal’s statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal’s statutory duty to conduct the proceedings in a fair and impartial manner.³⁷
56. Section 17 of the Act provides for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration

³⁵ Redfern and Hunter Law and Practice of International Commercial Arbitration 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr “Arbitration and the Courts – The UNCITRAL Model Law” (1984) 50 Arbitration 3 at 4-5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278

³⁶ See *Northwood Development Company Limited V Shuaib Wali Mohammed* Misc. Civil Application No. E 1200 of 2021.

³⁷ See *Northwood Development Company Limited V Shuaib Wali Mohammed* Misc. Civil Application No. E 1200 of 2021.



Rules.³⁸ Article 16(1) of the Model Law and Article 23(1) of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

57. The plea for lack of jurisdiction should be raised before submitting the statement of defence. Where the issue is that the tribunal has exceeded the scope of its authority, the plea must be raised as soon as the matter alleged to be beyond scope is raised during the proceedings. The tribunal decides the matter either as a preliminary question or in an arbitration award on the merits. Any party aggrieved by the ruling can apply to the High Court within 30 days to decide the matter. The High Court's decision is final and not capable of appeal.
58. Section 17 is a wide provision conferring on the Arbitral Tribunal the power to rule on all jurisdictional issues pertaining to its own competence to adjudicate on the matter. However, for a better understanding of this provision, it is important to know what falls within the ambit of the Arbitral Tribunal's jurisdiction. It is important to note that there is no jurisdiction given to the Arbitral tribunal as a matter of right or inherence or by the statute. Rather, the jurisdiction of the Arbitral Tribunal is derived through the Arbitration Clause or Arbitration Agreement between the parties. The jurisdiction of an Arbitral Tribunal is, thus, determined in accordance with the Arbitration Agreement between the parties and subject to the provisions of the Arbitration Act.
59. Section 17 (1) of the Act specifies that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose— (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.
60. The word "including" in the above provision is indicative of the fact that the provision is inclusive in nature. Some of the factors considered to be within the jurisdiction of an Arbitral Tribunal are the existence or the validity of an Arbitration Agreement can be determined by the Arbitral Tribunal as per Section 17. The existence and validity of the Arbitration Agreement is left to be determined by the Arbitral Tribunal, amongst other jurisdictional issues. If the subject matter of the dispute falls within the category of a non-arbitrable dispute, the Arbitral Tribunal has no jurisdiction to adjudicate the dispute and an objection can be raised under Section 17 stating that the subject matter of the dispute is beyond the jurisdiction of the Arbitral tribunal.
61. Section 17 (2) of the Act provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator. The above position was upheld by the Supreme Court India in *M/s MSP Infrastructure Ltd v/s M.P. Road Development Corporation Ltd* which held that it is undoubtedly clear that an objection that the Arbitral Tribunal lacks jurisdiction must be raised before or at the time of submission of the Statement of Defence. However, I must hasten to point out that the Arbitral Tribunal may admit a plea of objection at a stage later than the stages mentioned above. An example is where the Arbitral Tribunal exceeds the scope of its authority in the course of the proceedings.
62. Section 17 elaborates on the time within which a plea objecting to the jurisdiction can be raised. The party making such a plea is strictly required to adhere to this time bracket. However, apart from the excepted circumstances mentioned in the said section, any objection that goes beyond the confines

³⁸ Bantekas, Ilias. *An introduction to international arbitration*. New York. p. 109. ISBN 9781316275696. OCLC 917009113; Croft, Clyde Elliott; Kee, Christopher; Waincymer, Jeff (2013). *A guide to the UNCITRAL arbitration rules*. Cambridge: Cambridge University Press. p. 249. ISBN 9781107336209. OCLC 842929920.



of section 17 precludes the party from raising such an objection by means of waiver under Section 5 of the Act which enshrines the provision to waiving the right to object. It provides that a party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

63. Any party aggrieved by the ruling can apply to the High Court within 30 days to decide the matter. The High Court's decision is final and not capable of appeal. Other than the communication by the Arbitrator that the Ruling on jurisdiction was ready, the Respondent also made reference to a document on record bearing the applicant's receiving stamp clearly indicating the date the communication was received. As the law permits, the Respondent paid the full fees to enable the Arbitrator to release the Award. In *University of Nairobi v Nyoro Construction Company Ltd and Another*³⁹ Justice Majanja held that the Act deliberately limits the timeframe in which a litigant can challenge the jurisdiction of an arbitrator to reduce the interference by courts in arbitral proceedings. The court upheld section 17(6) of the Act which states that such an application challenging a ruling by an arbitrator on their jurisdiction must be made within 30 days of the ruling. In upholding the provisions of the act, the court held that it did not have jurisdiction to entertain a late application or extend the time for filing an application for the following reasons: (a) section 10 of the Act limits what a court can do in arbitration proceedings and an extension of time for filing such an application is not provided for; (b) the Act is a complete code and therefore the provisions of the *Civil Procedure Act* on time extensions cannot be relied upon unless expressly imported by the Arbitration Act; (c) the intention of the time limit is to ensure that neither party frustrates the arbitration; and, (d) parties to arbitration agreements make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.
64. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (Supra) the Supreme Court stressed the importance of limiting the involvement by courts in arbitration proceedings. As such, parties to commercial agreements must abide by the rules set out in the *Arbitration Act*. The practical effect of the kompetenz-kompetenz principle is that the court allows the arbitrator to make its determination and render an award while only intervening in the clearest instances of misdirection by the arbitrator. This principle, facilitates arbitration and restricts pre-emptive court challenges.
65. The jurisdiction conferred upon this court to entertain a challenge on a ruling on jurisdiction under section 17 of the act is time bound. The court has no jurisdiction to entertain a matter filed outside the period of 30 days because the law provides in peremptory terms that such a decision becomes final after the lapse of the 30 days. A simple calculation of the time from the date the applicant herein acknowledge the communication leaves no doubt that the 30 days had lapsed by the time this application was filed. Absence of jurisdiction as contemplated under section 17 of the Act connotes that this court has no power to entertain the instant application challenging the Arbitrators ruling on jurisdiction. On this ground alone the applicants challenge on the ruling on jurisdiction collapses.
66. The applicant challenges the Award on jurisdiction and the decision on costs invoking section 35 of the Act. The argument as I understood it is that section 17 is not a bar to invoking section 35 grounds provided an applicant can mount grounds cited under section 35. It also argued that the impugned awards offends public policy and that the award ought to be invalidated because the arbitrator was biased.

³⁹ {2021} KEHC 380 (KLR).



67. Under Section 35(1), recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the court will not act in such matters unless an aggrieved party invites it to do so. Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.
68. The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section 35(3) of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation may serve to prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest. This was the holding in *Nancy Nyamira & Another v Archer Dramond Morgan Ltd*,⁴⁰ where it was observed that:- "...Given the objectives of the *Arbitration Act* stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act."
69. By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.⁴¹ Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel. By agreeing to arbitration, the parties limit interference by courts to the ground set out in section 35 of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise.
70. It is a principle of common law that a final award must deal with all the issues put to the tribunal. A final award that does not do so is imperfect. This does not mean that arbitrators must deal with each individual item separately but they must take each item into consideration in arriving at their conclusion. The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive.
71. The applicant's main grounds as I glean them from the pleadings and submissions are that the Arbitrator dismissed the challenge on jurisdiction without any proper basis in law, that he failed to address or resolve the query on his fees and expenses raised by the applicant. Other grounds cited are that the applicant is guilty of misconduct in that he charged amounts not quoted without agreement of the parties. He is accused of purporting to tax costs without regard to his conduct and that he acted on the wrongful basis that he is entitled to costs.

⁴⁰ {2012} e KLR.

⁴¹ They may even reduce the level of procedural fairness by, e.g, agreeing that the arbitrator may decide the matter without hearing them.



72. Additionally, the Arbitrator is accused of bias and failing to address the validity of the appointment by the Hon. The Chief Justice. It is also alleged that he assumed jurisdiction over a matter he had no jurisdiction and or failed to apply the correct tests regarding his jurisdiction. Lastly, the applicant seeks to assail the Awards on grounds that they offend Public Policy in that the decision/conduct of the Arbitrator offends Article 27 of *the Constitution*.
73. Section 35 (2) requires in peremptory terms that an application to set aside an arbitral award can only be allowed if the party making the application furnishes proof of the grounds provided therein. I have herein above addressed the applicant's assault on the Award on jurisdiction which collapsed for failing to surmount the hurdle erected by section 17(6). The applicant now attempts to breathe life into the application challenging the Award on jurisdiction by trying to clothe it with grounds to qualify to fall under the ambit of section 35 (2). To me this attempt is futile. The two sections deal with totally different scenarios. Parliament in its wisdom provided two distinct sections. It is impermissible for a party once caught up by the rigid time frame erected by section 17 (6) to attempt to convert the same application and same grounds into a section 35(2) application. Attempting to convert a jurisdictional ground under section 17 into a ground under section 35(2) is tantamount to inviting this court to infer grounds not contemplated in the two provisions.
74. The Arbitrator is accused of bias and failing to address the validity of the appointment by the Hon. The Chief Justice. It is also alleged that he assumed jurisdiction over a matter he had no jurisdiction and or failed to apply the correct tests regarding his jurisdiction. This is a jurisdictional question which ought to have been raised as provided by section 17 of the Act. In terms of section 5 of the Act, the Applicant cannot raise it at this stage, either under section 17 or section 35 of the Act. Section 5 provides for waiver of right to object as follows: -

5. Waiver of right to object

A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

75. The applicants' grounds in support of its urge to upset the award on costs are essentially grounds of appeal which fall outside the ambit of section 35. For example, the applicant argues the Arbitrator dismissed the challenge on jurisdiction without any proper basis in law, that he failed to address or resolve the query on his fees and expenses raised by the applicant. Other grounds cited are that the applicant is guilty of misconduct in that he charged amounts not quoted without agreement of the parties. He is accused of purporting to tax costs without regard to his conduct and that he acted on the wrongful basis that he is entitled to costs. These grounds do not fall within the permissible grounds under section 35.
76. I may profitably refer to *Telcordia Technologies Inc v Telkom SA Ltd*⁴² in which the Supreme Court of Appeal of South Africa stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. This same position was reiterated by our Supreme Court in the *Nyutu Case*. There is uncontroverted evidence that the parties were invited to submit on costs but the applicant opted not. The applicant cannot

⁴² [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 4.



now purport to blame the Arbitrator for consequences of its omissions nor it open to suggest that the dispute was not conducted in a procedurally fair manner.

77. Even if the arbitrator had either misinterpreted the law on costs or failed to apply the law correctly, or had regard to inadmissible material, it does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. In my view, it means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry or misconduct – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry.
78. The power given to the arbitrator was to interpret the issues before him, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.⁴³ Errors of the kind mentioned have nothing to do with him exceeding his powers; or misconduct or bias. They are errors committed within the scope of his mandate. To illustrate, an arbitrator in an arbitration has to apply the law but if he errs in his understanding or application of the law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.
79. The other ground cited by the applicant is that the award is against public policy. The basis for this ground is that the impugned Award offends Article 27 of *the Constitution*. It is common ground that one of the grounds for the court to reject the award enforcement is if the award is violation of 'public policy.' In fact, arbitrability and public policy are closely related. Arbitrability relates to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that either the agreement or the award might contravene.⁴⁴ Arbitrability and public policy thus overlap in arbitration practice. A violation of public policy, may render an agreement in arbitrable.⁴⁵ Courts often refer to "public policy" as the basis of the bar.⁴⁶ Thus, if the court feels that an issue falls in the scope of public policy, the court may intervene only, to protect the benefit of the public.
80. Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.⁴⁷ Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction, and it also can be the obstacle to the arbitration of certain disputes. The concept of public policy often is used to describe the imperative rules of each country. Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.⁴⁸

⁴³ *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in *Anisimic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 223D-F.

⁴⁴ 3 Julam D M Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, 32 (2003).

⁴⁵ Id

⁴⁶ 4 Laurence Shore, *Defining "Arbitrability": The United States vs. The Rest of the World*, *New York Law Journal*, 15 (2009).

⁴⁷ Pierre Lalive. *Transnational (or Truly International) Public policy and International Arbitration*, : *Comparative Arbitration Practice and Public Policy Arbitration ICCA International Arbitration Congress*, 261(1987).

⁴⁸ 3 Bockstiegel, K., *Public Policy and Arbitrability*, *Comparative Arbitration Practice and Public Policy Arbitration: ICCA International Arbitration Congress*, 179(1987).



81. Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states.⁴⁹ Hence, public policy is a legal principle founded on the concept of public good. It can be used to protect the morale of a country or justify a court's intervention where an agreement is considered harmful to the public welfare. Even though such public policy will disturb only one part of community, the court should weigh the whole of the community in applying public policy considerations if it believes that such actions may impact their own public good and morale. Public policy has three distinct levels: domestic, international, and transnational.⁵⁰ Domestic public policy is when only one country is involved in arbitration, the parties come from the same country, and thus the laws and standards of that country's domestic public policy apply. Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes within their jurisdiction. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity.
82. The main case regarding public policy in England is *Deutsche Schachtbau-und Tiefbohrergesellschaft MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*.⁵¹ In this case, the court reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised."⁵² In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply. The English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception.⁵³ The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.
83. A review of all the grounds propounded by the applicant in support of the plea that the award on costs or portions thereof offend public policy leave me with no doubt that the applicant has not satisfied the tests laid down in the above cited case. It is not enough to recite a Constitutional provision or a statutory provision or an enactment as has happened in this case. The party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. Even if the Article 27 breach had been proved (and it has not been proved), the violation and consequential loss if any will essentially against

⁴⁹ *Parsons & Whitmore Overseas Co. v. Societe Generale de L' Industrie du Papier*, 508 F.2d 969, 974 (2d Cir 1974).

⁵⁰ Kelllth Michael Curtin.. *Redefining Public Policy in International Arbitration o/Mandatory National Laws*, 64 DEF. COUNS. J., 271, 275, 281 (1997).

⁵¹ *Deutsche Schachtbau-und Tiefbohrergesellschaft MB.H (D.s. T.) v. Ras Al Khaimah Nat 'I Oil Co. (Rakoil)*. 2 Lloyd's Rep. 246, 254 (K.B.)(1987).

⁵² *Ibid*

⁵³ Alexander J. Belohlavek, *Arbitration, Order Public and Criminal Law: Interaction of Private and Public International and Domestic Law*, 1347 (2009),



the applicant alone, but not to the public. Its not clear what loss will the public suffer if the applicant pays costs ensuing from an Arbitration dispute which have been imposed in a dispute it is a party.

84. Arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. The applicant cannot now purport to rewrite the Arbitration clause by attempting to free itself from the arbitration outcome which is binding upon the parties by hiding behind the concept of public policy.
85. A reading of the Act leaves no doubt that the arbitrator is subject to the limitations in the Act. The Act confers the Arbitrator with exclusive jurisdiction over questions of fact and law which flows from the provisions of the Act which exclude appeals and limits reviews. The court may only be approached as provided by the Act. The circumstances under which the court can intervene are enumerated in section 35 and as the Supreme Court stated in the Nyutu Case in exceptional circumstances otherwise the arbitral award is final. Unless the arbitration agreement provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms. Clearly, the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions submitted to it, including any question of law. That is what the parties agreed.
86. Flowing from my discussion on the issues discussed above, I find and hold that the applicant has failed to establish any grounds for this court to set aside the two arbitral awards. The upshot is that the Originating Summons dated 19th December 2019 is hereby dismissed with costs to the Respondent.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF MARCH
2022**

JOHN M. MATIVO

JUDGE

