



**Proctor & Allan EA Limited v EPCO Builders Limited (Miscellaneous Application E1044 of 2023) [2025] KEHC 848 (KLR) (Commercial and Tax) (3 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E1044 OF 2023**

**A MABEYA, J**

**FEBRUARY 3, 2025**

**BETWEEN**

**PROCTOR & ALLAN EA LIMITED ..... APPLICANT**

**AND**

**EPCO BUILDERS LIMITED ..... CLAIMANT**

**RULING**

1. This ruling is in respect of the applications dated 7/12/2023 and 18/6/2024, respectively. They were lodged pursuant to the arbitration award by Hon. Walter Aggrey Odundo made on 11/9/2023.

**Summons dated 7/12/2023**

2. This is by the applicant and is brought under section 35 of the *Arbitration Act* for setting aside the arbitral award dated 11/9/2023. The grounds were that the parties entered into a construction agreement in April, 2014. A dispute arose and the matter was referred to arbitration. By an award dated 11/9/2023, the tribunal made several orders including a sum of Kshs. 74,751,009/96, Kshs.1,844,400/- as refund to the respondent on its arbitration fees and expenses and simple interest 14% pa on the said sums.
3. The applicant challenged the award on the basis that it is against public policy of Kenya as there was no foundational basis for the amounts awarded. That there was also no justification or foundational basis to award interest at 14% pa on the amounts awarded. That the award amounts to unjust and unfair enrichment.
4. The application was opposed vide the replying affidavit of Ramji Devji Varsani sworn on 3/1/2024. He deposed that the application was filed out of time as the letter informing the parties that the award



was ready was communicated to the parties on 27/6/2023. That the award was sound and not against public policy.

#### **Application dated 18/6/2024**

5. This is a Summons by the respondent/ claimant. It was brought under section 36 of the Arbitration Act. It sought to enforce the arbitral award published on 27/6/2023 and further enforcement of award costs published on 27/6/2023. It further sought that the applicant do refund the respondent a sum of Kshs.407,160/- paid to the tribunal towards the fees and expenses of the taxation of party and party costs.
6. The grounds were set out on the face of the application and the affidavit of Ramji Devji Varsani sworn on even date. It set out the background of the dispute and how the same was referred to arbitration It also set out the various awards made by the tribunal and the assessment of the coats. That it had paid a sum of Kshs. 407,160/- to the tribunal on 7/6/2024 and was entitled to a refund therefor.
7. The Court has considered the parties respective contestations and the entire record. The applicant argued that the order for reimbursement of paid fees is unfair and amounts to unjust enrichment. That arbitrator also misapplied the law and acted against public policy. It relies on the case of Teejay Estates Limited vs. Vihar Construction Ltd KEHC 1 KLR.
8. That the award failed to uphold the principle of equality of arms and perpetrated inequality when it attributed a specific share of fees to the respondent. Lastly, that the application was brought within 3 months and is the requisite within time lines.
9. The respondent's submissions are not on record, the respondent file bundle of authorities which I have considered.
10. The issue for determination is whether the award should be set aside or it should be recognized and leave be granted for it to be executed as a judgment of this Court.
11. An application for setting aside must be brought within the statutory time lines failure to which the Court would lack jurisdiction to determine it. Section 35(3) of the Arbitration Act sets the timelines within which a party may apply to set aside an award. It provides that: -

“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.”
12. The respondent produced a copy of the Notice of the award advising parties to collect the award on 27/6/2023. It contended that the time started running from that date. On the other hand, the applicant contended that time began running from the date the award was signed which is on 11/9/2023.
13. In the Indian case of India v Tecco Trichy Engineers & Others Supreme Court No. 20446 of 2002, the Supreme Court of India held as follows: -

“The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received"



by the party. This delivery by the arbitral tribunal and receipt by the party of the award sets in motion several periods of limitation.”

14. In *National Housing Corporation v Custom General Construction Limited* [2021] eKLR, the High Court held that the date the award is received and for the purposes of section 35(5) of the *Arbitration Act* (“the Act”) is the date which the parties are notified of the award. 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.
15. In *Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No. 8 of 2009* [2009] eKLR, the Court of Appeal held 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.”
16. The date of collection must be distinguished and is separate from the date which the arbitrator publishes the award. The date of publication of the award is the date when the arbitrator concludes, signs the award and notifies the parties that it is ready for collection. In this case, that should have been the 27/6/2023.
17. However, it seems that although the arbitrator notified the parties that the award was ready for collection on 27/6/2023, he never signed it until 11/9/2023. Can it be said that the award was published on 27/6/2023 but signed on 11/9/2023. I find it difficult to hold that an award is ready when it is not signed to authenticate the same. In my view, by the time the arbitrator notifies the parties that the award is ready, it should be signed by then.
18. In this case, I find that although the award was dated 11/9/2023, its existence and ready for collection was published on 27/6/2023 when time for the purposes of section 35(5) of the Act started to run. Accordingly, the application dated 7/12/2023 was made out of time and is for striking out.
19. If the Court is wrong on the time from when it started running because of the award being dated 11/9/2023, I would nevertheless consider the application on merit.
20. In an application to set aside an award, an applicant must bring himself within the provisions of section 35 of the Act. Sub-section 2 thereof lists the limited circumstances under which this Court can interfere with an award of a tribunal. One of those grounds under which the present application was brought is that the award is inconsistent with the public policy of Kenya.
21. In *Nyutu Agrovet Limited v Airtel Network Limited* [2015] eKLR, it was held that: -

“The rationale behind the limited intervention of Court in Arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through arbitration, intervention by the Courts in the dispute is the exception rather than the rule”
22. In the present case, apart from broadly stating that the award is against the public policy of Kenya, the applicant did not demonstrate how it the award contravened the public policy of Kenya.
23. Under the ground that an award contravenes public policy of Kenya, a party must first establish that public policy, ie. upholding the rule of law, then plead the facts that in the award that contravene that



public policy. On what amounts to public policy, Ringera J held in *Christ for All Nations Vs. Apollo insurance Company Limited* [2002] EA 366 that: -

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

24. In *Mall Developers Limited vs Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR, the court observed that: -

“Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.”

25. The grounds set out in the Summons and affidavit in support seek to fault the arbitrator in his decision. In this Court’s view, that challenge is on the merit of the decision and amounts to an appeal. That is beyond the jurisdiction of this Court.

26. In *Kenya Oil Company Limited & Another vs. Kenya Pipeline Co.* NRB [2014] eKLR, the Court of Appeal cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd (The "Balears")* 1 Lloyds LR 215: -

“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.”

27. In this regard, the Court is of the opinion and holds that the application has not established that the award contravenes public policy of Kenya and hereby dismisses the same.

28. That leaves the Court with the application for enforcement under section 36 of the Act. In such an application, the applicant is required to produce an authenticated or certified copy of the final award and the agreement of parties allowing arbitration. These have been furnished to the Court by the respondent and have not been disputed.

29. I find that from the record, the parties entered into a contract and designated the dispute resolution as arbitration. Arbitral proceedings were under taken and concluded with an award being published by Hon. Odundo. The challenge to that award has been dismissed. Accordingly, the application has merit and is allowed.

30. In view of the foregoing, the Court makes the following orders: -



- a. The application dated 7/12/2023 is hereby struck out with costs.
  - b. The application dated 18/6/2024 is allowed with costs.
- It is so ordered.

**SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2025.**

**F. GIKONYO**

**JUDGE**

