Athi Water Works Development Agency v Stansha Limited (Miscellaneous Civil Application E216 of 2024) [2025] KEHC 4534 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4534 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E216 OF 2024

AA VISRAM, J

APRIL 8, 2025

BETWEEN

ATHI WATER WORKS DEVELOPMENT AGENCY .... APPLICANT

AND

STANSHA LIMITED .... RESPONDENT

RULING

1. I have considered the grounds on the face of the Application dated 28th November, 2024, together with the supporting affidavit sworn on even date and the grounds of opposition dated 10th December, 2024, and the replying affidavit in opposition to the same sworn on 13th January, 2025, together with the rival submissions made by the parties and applicable law.
2. The Applicant is seeking the following orders: -
   a. Spent;
   b. That this Honourable Court be pleased to grant a stay of execution of the Ruling delivered by this Honourable Court on 18th November, 2024, and/or any consequential orders arising therefrom pending the hearing and final determination of this Application;
   c. That this Honourable Court be pleased to review the Ruling delivered by this Honourable Court on 18th November, 2024;
   d. That consequently, the Applicant's chamber summons dated 13th March, 2024, be determined on merit;
   e. That the costs of this Application be provided for.

Background

3. The ruling of the Applicant's chamber summons dated 13th March, 2024, was delivered on 18th November, 2024, by this Court. The said ruling dismissed the Applicant's chamber summons dated 13th March, 2024, seeking to set aside the Respondent's Arbitral Award dated 13th January, 2023, on the basis that the same was time-barred by dint of Section 35(3) of the *Arbitration Act* 1995.

4. This Court found that the chamber summons Application was time-barred because the date of the application seeking to set aside the Award was made after three months from the date of the notification and publication of the Award.

5. The crux of the ground for review is that even though the Award was published on 13th January, 2023, it was not received by the parties until 21st December, 2023, and therefore, time ought to run from the date of actual receipt of the Award, which the Applicant contended was on 12th January, 2024. The Applicant annexed an e-mail from the tribunal as evidence of the date on which the Award was received by the parties. The same is found at Exhibit JK2 to its supporting affidavit.

6. The Applicant contended that the failure by this Court to compute time from 21st December, 2023, in respect of the three months available to the Applicant to seek recourse against the Award in question, was an error apparent on the face of the record, which deserves to be corrected by review of orders issued by this Court on 18th November, 2024.

7. The sole issue for determination is whether the Applicant has met the threshold for Review of the Honourable Court's ruling delivered on 18th November, 2024.

Analysis

8. Order 45(1) of the *Civil Procedure Rules* sets out the requirements for an application for review as follows:-

> " Any person considering himself aggrieved
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay". (Emphasis mine)

9. Looking at Exhibit JK2, an e-mail from the Arbitrator to the parties dated 21st December, 2023, it is evident that the Award had not been physically released to the parties because the Arbitrator had not been paid his fees.

10. The said letter states

> " however, noting that the Award had been ready since January this year, I will make myself available in the office today, between 11:30 AM and 1 PM, to enable parties collect the Award." (emphasis mine)

11. Based on plain and ordinary reading of the above, it is evident that the Award was ready for collection from January, 2023. The Respondent submitted that the reason the same had not been released to the parties is because the Applicant had refused to pay its share of the fees, prompting it to make full payment, albeit almost a year later. The Applicant has not denied this assertion or responded to the allegation.

12. The ground for review before this Court raises the question of what the *Arbitration Act* contemplates in respect of the word "received" for the purpose of Section 35 of the *Act*? A further question for consideration is whether calculation of the period of time in relation to the said section may be characterized as an error apparent on the face of the record, as opposed to a judicial interpretation based on application of the facts and law? For the sake of clarity, 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)

13. In my opinion, the word "received" has a legal meaning when applied to the *Arbitration Act*. Therefore, the period of time calculated in respect of Section 35 of the Act is based on a legal understanding of the term, and an application of the law to the facts. I do not think that in the present matter the calculation of time may be classified as either a mistake, or an error apparent on the face of the record.

14. I say so guided by the decision of the High Court in *Match Electricals Company Limited v Libyan Arab African Investments Company Limited & another* [2021] KEHC 12907 (KLR), where the court addressing itself to the meaning of the word "received" stated as follows:

> " 24. What then is the legal position regarding the time for filing the application to set aside the Award under Section 35 of the Act" Without belaboring the point, this issue has been dealt with in a number of decisions. In *Mercantile Life and General Assurance Company Limited & Another v Dilip M. Shah & 3 Other* (Supra) I concurred with the decisions of the court in *Transworld Safaris Limited v Eagle Aviation Limited and 3 Others* H.C Misc. application No. 238 of 2003, *Mahican Investments Limited and 3 Others v Giovanni Gaida and 80 Others* [2005] eKLR and *Mahinder Singh Channa v Nelson Muguku & Another* ML HC Misc. application No. 108 of 2006 [2007] eKLR where it was held that "received" for purposes of the Act means notification of the Award irrespective of the date the Award was actually or physically received by the parties or delivered by the Arbitrator.
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> 25. The courts have adopted this position in light on the general object of speedy resolution of disputes and finality of the arbitral Award under the *UNCITRAL Model Law on International Commercial Arbitration*. In *University of Nairobi v Multiscope Consultancy Engineers Limited* (Supra), the court held that when the arbitral tribunal notifies parties that a signed copy

of the Award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the Award because it is on that date that the tribunal makes the signed copy available for collection by the parties. In that regard, delivery merely means that it is the power of the parties to collect the Award. 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 the Award for non payment of the arbitrator's fee.

> 26. The Applicant does not dispute that its Advocates were notified of the Award on 8th October 2020 and therefore, time begun to run from this date meaning that the Applicant ought to have filed the application to set aside latest by about 9th January 2021. The application to set aside the Award, having been filed on 5th February 2021, is time barred and is accordingly struck out" (Emphasis mine)

15. The Applicant, on the other hand, urged the court to adopt a literal interpretation of the word received. It submitted that 'received' ought to mean actual physical receipt of the award.

16. Surprisingly, the Applicant relied on the decision of the High Court in *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR, in support of its position, which authority, actually undermines the said position. In the said decision, the court stated as follows in relation to a situation where an Award was withheld owing to late payment by the Applicant, and pronounced itself as follows in relation to the applicable timelines within which the application for setting aside ought to have been made:-

> "This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the Award to the parties. Actual receipt of the signed copy of the Award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the Award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the Award because it is on that date that the tribunal makes the signed copy available for collection by the parties.
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> 25. Should it be any different because the arbitral tribunal has withheld the delivery of the Award because of none payment of fees and expenses (Section 32B (3)? Counsel Ngatia argues that it would be a legal absurdity to deem that the Award has been delivered when in fact it has been withheld. With respect I am unable to agree. Once the arbitral tribunal notifies the parties that the Award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the Award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the Award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.
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> 26. The rationale for taking this stance has been explained on several occasions and I am content to cite just one such occasion. In *Mahican Investments Limited*

& 3 others v Giovanni Gaida & 80 others [2005] eKLR, Ransley J was happy to identify with Nyamu J,

> " The question arises as to the meaning of "had received" the arbitral Award."

This question was raised before Mr. Justice Nyamu in the case of *Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others*. H.C Misc. Application No. 238 of 2003 where he held that in order to comply with Sec 35(3) the application to set aside the arbitral Award may not be made after 3 months have elapsed from the date notice had been received that the arbitral Award was ready for collection.

In its normal meaning "receipt" means the actual obtaining of the arbitral Award.

In his ruling Nyamu, J has this to say about "receipt": at page 27 B

> " Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an Award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

27. And although not raised by the parties, I have had to ponder why limitation of time is imposed on a setting aside application and not that for recognition or enforcement (Section 37 of The Act). And it is instructive that the *UNCITRAL Model Law on International Commercial Arbitration* from which our statute heavily borrows is similar in this respect. It has to come down to, again, the finality and expeditious principles of Arbitration. Arbitration is a binding dispute resolution mechanism contracted by parties. It is expected that parties will accept the answer an arbitral tribunal gives to a dispute they place before it. If, however, any party is aggrieved then it should raise its grievance at once so that it is addressed in speedy fashion that it is not inimical to expeditious disposal of the dispute. For that reason, setting aside motions are time bound. On the other hand, enforcement is open ended (save perhaps for the law of limitation on execution) so as to give parties an opportunity to abide by the outcome without the need for coercion that may follow enforcement or recognition." (emphasis mine)

17. Guided by the above, I am satisfied that this court interpreted the word "received" in accordance with settled law, and further, computed the dates and period of time based on the law set out above.

18. Finally, I am satisfied that computation of time in present matter requires an application of the law to the facts, and is therefore more properly characterized as judicial interpretation. I do not think the same may be considered an error apparent on the face of the record; a mistake; or any other appropriate ground for review within the provisions of Order 45.

19. Based on the reasons set out above, I find and hold that the Application is without merit. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8TH DAY OF APRIL, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.... Court Assistant

.... Applicant

.... Respondent