Kigio Group Company Ltd v Sichuan Huashi Enterprises Corporation (EA) Ltd (Civil Suit E049 of 2024 & Commercial Miscellaneous Application E054 of 2024 (Consolidated)) [2025] KEHC 6843 (KLR) (Commercial and Tax) (19 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6843 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E049 OF 2024 & COMMERCIAL MISCELLANEOUS APPLICATION E054 OF 2024 (CONSOLIDATED)

RC RUTTO, J

MAY 19, 2025

BETWEEN

KIGIO GROUP COMPANY LTD ..... APPLICANT

AND

SICHUAN HUASHI ENTERPRISES CORPORATION (EA) LTD RESPONDENT

RULING

1. Before me are two applications arising out of an arbitral award delivered and dated 15th May 2024. By order dated 18th November 2024, this matter was consolidated with Miscellaneous Application No. E054 of 2024 with this Miscellaneous Application E049 of 2023 being the lead file. In determining the application, I shall refer to the parties as applicants when addressing and analyzing each of their respective applications accordingly.

2. In Miscellaneous Application No. E049 of 2024, the applicant filed its Notice of Motion dated 7th August 2024. The application seeks the following orders;

    a. That the court do set aside the entire arbitral award dated 15th day of May 2024

    b. That the costs of the application be provided for.

3. This application is supported by the grounds on the face of the application and on the affidavit sworn by Stanley Njenga Ndegwa. The application was opposed by the respondent.

4. The second application is the Notice of Motion application is dated 15th August 2024 filed in Miscellaneous Application No. E054 of 2024 by the respondent in Application E049 of 2024. The

application is premised on the grounds on the face of the application and on the supporting affidavit of Deng Zheng. The application seeks the following prayers;

a. The court be pleased to set aside the part of the Arbitral award dated 15th May 2024 granting the respondent a remedy in the form of rental income of Kshs.86,356,728.60 in respect of commercial development on L.R 4953/45 & 46C, Thika Business Center

b. In the alternative, the court be pleased to correct an arithmetic error at page 13 of its award dated 15th May 2024 to reflect income loss for the 144 days in the year 2021 in respect of the 9th and 10th floor to Kshs.44,645,098.98 instead of Kshs.46,828,728.60 and to correct the affected parts of the award accordingly.

c. The costs of the application be awarded to the applicant.

5. In opposing the application dated 15th August 2024, a preliminary objection dated 29th October 2024 was filed. The preliminary objection was based on three grounds. Firstly, that this Court lacks jurisdiction to entertain the respondent' application due to effluxion of time; as the 90 days contemplated under section 35(3) of the *Arbitration Act* lapsed on 13th August 2024. Secondly, that the delay in making the application within the statute-bound timeline is fatal as it ousts the Court's Jurisdiction, and lastly that accordingly, the application dated 15th August 2024 should be struck out with costs for being incompetent.

6. I shall commence by determining the preliminary objection filed in response to the Notice of Motion dated 15th August 2024. As this goes to the Court's jurisdiction, it is prudent that it be determined in limine. The respondent, in its submissions dated 2nd December 2024 submitted that the preliminary objection is merited and meets the threshold as advanced in the celebrated case of Mukhisa Biscuits Manufacturing Co Ltd Vs West End Distributors cited with approval in the case of Neelcon Construction Services Limited v Kakamega County Assembly Service Board Sued on Behalf of Kakamega County Assembly (Miscellaneous Application E060 of 2022) [2023] KEHC20003 (KLR).

7. The respondent submitted that the preliminary objection is premised on section 35(3) of the *Arbitration Act* which bars any challenge after 3 months from the date of delivery of the Arbitral award. It cites the reasoning as captured by the Court of Appeal in Ezra Odondi Opar v Insurance Company of East Africa Limited KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR to buttress this assertion.

8. The respondent adds that it is not in dispute that the Arbitral award was delivered and/or published, on 15th May 2024. It contends that the point of dispute is when the 3-month period contemplated under Section 35 (3) of the *Arbitration Act* for filing of an application for setting aside lapsed.

9. It is the respondent's argument that the time for filing the application for setting aside under Section 35 lapsed on 13th August 2024 necessitating its preliminary objection on the jurisdiction of the Court; while the applicant contends that time lapsed on 15th August 2024 when it filed its Notice of Motion application. It is submitted that the calculation by the respondent is not only patently erroneous but also conveniently biased so as to come to the aid of the applicant who is plainly in default.

10. The respondent fortifies its submissions with the decisions in Kenyatta International Convention Centre Vs Greenstar Systems Limited [2019]eKLR, Bomas of Kenya Limited v Standard Investment Bank Limited (Civil Application E456 of 2021) [2023] KECA 544 (KLR), and Cytonn Investments Management PLC v Njuguna (Miscellaneous Application Arbitration E030 of 2022 & E018of 2023 (Consolidated)) [2024] KEHC 7242 (KLR) (Commercial and Tax) (14 June 2024).

11. It is submitted that because the Notice of Motion application was filed out of time, the court lacks jurisdiction and should down its tools. The respondent relies on the decision in Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR to buttress this assertion.

12. It is argued that it is immaterial that the application was filed one or two days late. It is contended that Court has no discretion and or jurisdiction to extend the statutory timelines as set under the *Arbitration Act* and the High Court decision in Cytonn Investments Management PLC (supra) is cited in this regard.

13. The respondent concludes by urging this court to uphold the Preliminary Objection and in the alternative, should the court find that the Notice of Motion application was filed within time, dismiss it on account that there is no sufficient ground that has been exhibited that meets the threshold of section 35 to warrant the setting aside of the Arbitral Award.

14. In response to the preliminary objection, the applicant filed submissions dated 13th November 2024. It submits that section 35(3) entitles a party to file an application to set aside an award within 3 months of its delivery. It submits that Section 3 of the *Interpretation and General Provisions Act* defines a "month" as a calendar month which is also the same definitions in Order 50, rule 1 of the Civil Procedure Rules.

15. It is the applicant's contention that in ordinary usage, a month does not exactly refer to 30 days since there are months with less or more days than that. Thus, a month refers to the period from a day of one month to the corresponding day of the next month. Therefore, in the present case, the first month lapsed on 15th June, the second on 15thJuly and the 3rd on 15th August.

16. The applicant submitted that the Notice of Preliminary Objection was filed very late in the day and must be characterized for what it is: an abuse of the court process aimed at vexing the applicant and embarrassing the court and should be dismissed with costs.

17. It is the applicant's submission that it seeks to set aside part of the award for being contrary to Kenya's public policy. Specifically, that the alleged award was contrary to the laws of Kenya including *the Constitution* since the arbitrator made an arithmetic error in her award which this court should correct. It relies on the decision in Reliable Concrete Works v Ngewanji Company Limited [2022] eKLR, to fortify this assertion.

18. It concludes by urging this court to allow the application dated 15th August, 2024 and dismiss the Notice of Preliminary Objection dated 29th October, 2024.

19. A Preliminary Objection was described in the Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696. In Oraro...Vs...Mbaja (2005) 1KLR 141, the court held that: -

> " Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

20. It is the respondents' case that this court lacks jurisdiction to hear and determine the Notice of Motion application dated 15th August 2024 for being filed out of time. It is trite that without jurisdiction, a court of law cannot purport to entertain any claim. (see Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)).

21. The timelines for making an application to set aside an arbitral award are set out in section 35(3) of the *Arbitration Act* as follows;

> "
>
> "35. Application for setting aside arbitral award
> (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."

22. The *Interpretation and General Provisions Act* in section 3 defines a month to mean a calendar month. In this regard I also note that the High Court in Cytonn Investments Management PLC (supra), at paragraph *10* held:

> "Section 35(3) is clear 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. The *Interpretation and General Provisions Act* defines a month to mean a calendar month and as such the 3 months period has been interpreted to be equivalent to 90 days."

23. Sections 57 (a), (b) and (c) of the *Interpretation and General Provisions Act* are also instructive in this case. They provide:

> "
>
> "57. Computation of time
> In computing time for the purposes of a written law, unless the contrary intention appears—
>
> (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
>
> (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
>
> (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."

24. According to Section 57 (a) as outlined above, the 90-day period for the filing of an application under section 35(3) of the *Arbitration Act* commenced the day after the award was published. The award was delivered on 15th May 2024. Therefore, time started running on 16th May 2024. A simple calculation reveals that the 3 months period lapsed on 13th August 2024, which was neither a weekend nor a public

holiday. Thus, the application dated 15th August 2024 to partially set aside the award was filed two days late.

25. The Court of Appeal in Anne Mumbi Hinga v Victoria Njoki Gathara [2009] KECA 466 (KLR) is instructive in this regard:

> " Besides the issue of jurisdiction as explained above, 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. The last date for the challenge was 15th February, 2008. All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction. Arising from the above findings concerning the competency of the application the next logical question to address is whether this appeal is properly before us."

26. In Cytonn Investments Management PLC v Njuguna (Supra) the High Court stated at paragraphs *16* and *17*:

> " 16. The strict timelines under Section 35, supported by jurisprudence, emphasize that parties in arbitration must adhere to these deadlines so as to ensure finality, predictability, and expeditious dispute resolution.
>
> 17. While I appreciate that this application was filed only one day beyond the strict timelines prescribed, this court is nonetheless bound to interpret the provisions rigidly and thus lacks jurisdiction to consider the application."

27. In light of the above, I find the Preliminary Objection dated 29th October 2024 meritorious. Consequently, the Notice of Motion dated 15th August 2024, is hereby found to be incompetent due to non-compliance with filing within the statutory period of 3 months prescribed by statute. The same is hereby struck out for want of jurisdiction.

28. Having found that, I now proceed to deal with the Notice of Motion dated 7th August 2024. The application is premised on the following grounds;

> "
>
> " (a) The Arbitral Tribunal failed, neglected and/or refused to deal with all the issues that were put to it for determination;
>
> (b) The Arbitral Tribunal contrary to known principles of law proceeded to rewrite the contractual document of the parties through her award;
>
> (c) The Arbitral Tribunal disregarded and overlooked the parties' pleadings as such arrived at a plainly erroneous decision that is causing substantial injustice to the applicant;
>
> (d) The Arbitral Tribunal failed, neglected and/or refused to consider relevant matters that were put before her and considered irrelevant issues so as to arrive at a favourable decision for the respondent.
>
> (e) The Arbitral Tribunal deliberately contradicted herself both in law and fact so that she could grant the respondent a favourable decision that was against the facts and evidence, a plain indication of bias;

i. when she found at Paragraph 63.2.2 that the Respondent was holding some floors even during the pendency of the Arbitration as lien for the amounts it claimed in the Arbitration.

ii. The Tribunal at Paragraph 63.2.1 made a finding that there was no contractual provision under the JBC that provided for lien.

iii. Then went ahead to make a finding at Paragraph 64.3.4 that the respondent collected Rental Income from all the retained floors for the entire period.

iv. Then in the most controversial twist at Paragraph 65.3.5 went ahead to find that rental income from 25th May 2021 to the date of Judgment was entitled to unnamed third parties; who the Claimant never showed that he remitted the same to.

(f) The Arbitral award is unconscionable as it guarantees that the respondent unjustly enriches itself, which is against all principles of equity in view of the fact that the respondent collected rental income from the retained floors for the period of 25th May 2021 to the time the valuation report was done, kept it and the Tribunal strangely indicated that this amounts were entitled to other third parties who were not before it and yet the retained floors were supposedly retained on account of amounts owed by the Applicant.

(g)The Arbitral Tribunal failed take cognizance of the simple fact that the rental income being sought was not because the respondent was a rent collecting agent on behalf of anybody but damages for the consequence of the

illegality of retaining of the floors by the respondent in the first place.

(h)The Arbitral Tribunal did not take cognizance that the respondent did not remit this particular rental income to any party as the ruling of the High Court in E140 of 2023 indicated that the rent was entitled to the third parties but did not indicate that the same was being remitted to them; as they

(i) The Arbitral Tribunal did not seek for the account of the rental income collected by the respondent whether it was applied to defray the alleged amounts owed by the applicant.

(j)The Arbitral Tribunal overlooked and/or failed to consider and/or take proper account of the applicant's evidence tendered before it in view of the fact that the rental income collected by the respondent was unaccounted and if accounted for it could have set off the respondent's claim as found by the Tribunal.

(k) The Arbitral Tribunal failed, neglected and/or refused to consider that without account for the Rental Income the respondent's claim could not be ascertained as the same had to be tabulated against the rental income collected from the retained floors.

(l) The Arbitral Tribunal erred in law and fact by charging 13.5% interest on the global amount allegedly owed until payment in full without taking cognizance of the fact that the respondent had retained some floors and was collecting rent as per the finding of the Tribunal as such interest could only be charged on a reducing balance; which again goes to show the aspect of unjust enrichment on the part of the Respondent.

(m) The Arbitral Tribunal disregarded the fact that the respondent only retained the floors as lien for amounts owed; which was found to be illegal and all the rental income collected and/or valued then was to be applied to set off all amounts found to be due and owing to the respondent.

(n) The Arbitral Tribunal disregarded the facts that the Applicant to could meet his financial obligations to the financiers out of the consequence of the illegal act of the respondent to retain 7 floors leading to the property being auctioned as such the Applicant was entitled to attendant damages.

(o) The Arbitral Tribunal was compromised which can be noted from the admission of the Tribunal at Paragraph 64.3.3 where the Arbitral Tribunal confirms that the respondent did not comply with its Order for Directions No. 14 dated 15th August 2023; interestingly the Arbitral Tribunal did not seek compliance or in the very least draw adverse inferences against the respondent on account of the non-compliance.

(p) The Arbitral award is against public policy of Kenya in view of the matters raised above as the same was deliberately skewed to the benefit of the respondent and does not meet the threshold of equity as contemplated under Article 10 (2) (b) of *the Constitution*."

29. This application was also disposed of by way of submissions. The applicant, in its submissions dated 23rd October 2024 submits that the award offends public policy on six grounds. Firstly, because the Arbitral Tribunal contrary to established principles of law found that the respondent had proved its special claim of Kshs. 37,906,447 /- when there was no such evidence. To buttresses this contention, reliance was placed on the decision of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR. Secondly, it is submitted that the Tribunal rewrote the contract between the parties by making an unsupported finding that the contract was revised to the contract sum of Kshs.623, 502,213.22/

30. Thirdly, the applicant submits that the award was against public policy as it guaranteed unjust enrichment by the respondent. It reinforces this contention with the decision in Joel Mwangangi Kithure v Priscah Mukorimburi [2022] eKLR. It was submitted that the Tribunal applied interest on the amount allegedly owed to the respondent being Kshs.37,9o9,447.25 but not on the applicant's money of rental income of Kshs.109,204,773.75 thus the respondent acquired an unfair advantage which translates to unjust enrichment.

31. Fourthly, it is the applicant's case that the Tribunal disregarded and overlooked the parties' pleadings and arrived at an erroneous decision that is causing substantial injustice to the applicant. Fifthly, the applicant submitted that the Tribunal failed, neglected and/or refused to deal with all the issues that were put to it for determination and lastly, that the Tribunal failed, neglected and/or refused to consider relevant matters and considered irrelevant matters to the benefit of the respondent.

32. The respondent, filed its written submissions dated 13th November 2024. It submitted that the applicant's application does not fall squarely within the parameters of section 35 of the *Arbitration Act*. It is its submission that the application is styled as one under section 35 of the *Arbitration Act* yet, in essence it is intended to serve as an appeal against the arbitral award dated 15th May 2024. It urged the court not to allow this and referred to the Supreme Court decision in Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR to bolster this contention.

33. It is further submitted that from the application and the Supporting Affidavit, the applicant does not shed any light on exactly what issues the Tribunal neglected and/ or refused to deal. That the applicant has not provided any details in the application or the supporting affidavit of the contract that it refers to and the particular aspects that had been re-written by the Arbitrator or details of how the Arbitrator ignored the parties' pleadings.

34. It is submitted that the Tribunal did not contradict itself in law and fact and the award did not allow the respondent to unjustly enrich itself. It is the respondent's case that it is evident from the award that the Tribunal condemned the respondent to account to the applicant for all rental income from the time when they started to retain the alleged floors up to the time when the subject building was sold to a third party. Once the subject property was sold to a third party, the applicant's property rights including the right to collect rental income from the subject premises ceased to exist. It is argued that the Tribunal was right in this regard and the reasoning on this is clear.

35. The respondent disputes that the Tribunal was compromised and urges that the applicant proffered no evidence to support the claim. It is submitted that this being a civil suit, the applicable standard of proof is that of a balance of probabilities which the applicant has not met.

36. I have considered the parties' contestations and submissions on record. The main issue for determination is whether the application meets the required threshold for setting aside an arbitral award as set out under section 35 of the *Arbitration Act*.

37. It is important to state from the onset that the jurisdiction of this court in this regard is limited. Section 10 of the *Arbitration Act* is categorical on the extent of the Court's intervention. It provides that except as provided in this Act, no court shall intervene in matters governed by this Act. It is evident therefore, that the jurisdiction of the court is limited and restricted and may only be invoked in very clear circumstances specified under the Act. Further, section 32A of the Act provides: "Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."

38. Section 35(2) of the *Arbitration Act* prescribes when the High Court can set aside an Arbitral award. It provides as follows:

> " An arbitral award may be set aside by the High Court only if—
>
> (a)the party making the application furnishes proof—
>
> (i) that a party to the arbitration agreement was under some incapacity; or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii)the award is in conflict with the public policy of Kenya."

39. The Supreme Court has interpreted these provisions through some of its decisions. In Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] eKLR, the Court noted, "one of the significant features of the *Arbitration Act*, Cap 49, (the Act) is the principle of party autonomy, which entitles parties to have their dispute resolved by the forum and in the manner of their choice. For that very reason the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act".

40. In Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019) [2020] KESC 1 (KLR) (18 December 2020) (Judgment) at paragraph *41* the Supreme Court rendered itself thus:

> " 41. Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary."

41. It is against this background that the court will examine the application before it to determine whether the award is against public policy, that being the only ground raised and relied upon by the applicant in the present application. The issue of public policy has been elucidated in the case of Christ for All Nations v Apollo Insurance Co. Ltd, Nairobi, H.C.C.C No. 477 of 1999 where the court held: -

> " 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".

42. According to the applicant, the arbitrator went against the established principles of law, by awarding the respondent Kshs.37,906,447/- as special damages of which damages were not particularized or strictly proved. A thorough reading of the award reveals that the Arbitrator referred to minutes of the parties for a meeting held on 18th October 2020 which were signed and filed by all the parties. The Arbitrator recorded that the content of the minutes indicated that the parties agreed that in the final account the applicant owed the respondent was Kshs.37,909,477.25 plus interest at 13.5% amounting

to Kshs.19,882,222.55. The award stated that the respondent in its submission explained that this outstanding sum was the difference between valuation of work done as per the Revised Final Valuation for Final Payment Certificate No. 10 Payment Advice Sheet and sums paid by the applicant. The award recorded that the applicant did not adduce any evidence to rebut this explanation. Further, that while the applicant did not dispute that it attended this meeting, it alleged that the meeting was calculated to subdue its representatives and coerce them to agree to pay amounts that were not due.

43. The arbitrator further noted, "Considering that the applicant neither provided any evidence to support this allegation nor called its representatives at the meeting to substantiate the assertion, I find its contention not persuasive. Moreover, I note that the minutes indicate the applicant did not raise any issue with the time that had lapsed after completion of the project or the final account sums claimed by the respondent and the interest rate claimed by the respondent was negotiated to the one which was tabled by it. I am accordingly persuaded that the contents and figures recorded in the minutes were negotiated and agreed by the parties and in the absence of any evidence to the contrary, the applicant may not appropriately renege on the agreement. I find that the minutes represent the parties' agreement on the Final Account Sum owed to the respondent and interest thereof."

44. Based on the foregoing, it is clear to me, that the Arbitrator did not make an erroneous finding as on the sum of Kshs.37,909,477.25 owed by the applicant.

45. On the issue of re-writing the contract, the applicant is alleging that because the Tribunal made a finding that the contract sum was Ksh.623, 502,213.22/-, the Tribunal rewrote the contract. I am not convinced that the Tribunal rewrote the contract between the applicant and the respondent. I say so because in making this finding, the Arbitrator was dealing with the issue of whether the JBC contract has provision for the variation of the contract under Clause 30. To my mind, the Arbitrator made a finding on an issue in dispute between the parties and this cannot be said to be re-writing the contract. In addition, from a perusal of the award and the pleadings, I am not convinced the Arbitrator re-wrote the contract between the parties.

46. On the issue of unjust enrichment, it is the applicant's case that the Arbitral Tribunal through its award, went contrary the doctrine of unjust enrichment and ensured that the respondent unfairly and unjustly acquired a benefit at the expense of the applicant. The applicant claimed that the respondent retained some floors after completion of the construction as lien for unpaid amounts as being claimed by the respondent in their claim. It was argued that the respondent confirmed on oath that they collected rent from the retained floors; which amounts they did not remit to the applicant and/or disclose even after being directed by the arbitrator to render on account through Order for Direction No. l4. It was argued that the respondent retained a benefit of Ksh.22,848,045.93 which it acquired through its illegal and unlawful conduct of retaining floors belonging to the applicant and that this amounted to unjust enrichment. It was also submitted that the Tribunal applied interest on the amount allegedly owed to the respondent being Ksh.37,9o9,447.25 but not on the applicant's money of rental income of Ksh.109,204,773.75 thus the respondent acquired an unfair advantage which translates to unjust enrichment.

47. From the Award, it is evident that the Arbitrator found that the respondent was not entitled under the JBC Contract to retain any floors after completion of the building. Despite this, the Arbitrator found that the respondent, by its own admission, collected rental income from the retained floors, but due to lack of evidence, the Tribunal made no determination on how much rental income was collected. Ultimately, the Arbitrator found and determined that the applicant lost rental income due to the respondent's irregular retention of some floors in the completed building, in the amount of Kshs.86,356,728.60 and thus the applicant's claim for loss of rental income succeeded. The Arbitrator went on to find that because the applicant succeeded in its claim for loss of rental income, in the amount

of Kshs.86,356,728.60, the applicant was entitled to simple interest on this amount at 13.5% calculated from the date of the award, 15th May 2024. With this, it is my finding therefore that the arbitrator, did not facilitate any unjust enrichment of the respondent as she merely made a finding on a contentious issue before her, which was bound to go either way. In light of this, the ground that the award should be set aside due to unjust enrichment fails.

48. On the applicant's arguments that, this award is against public policy because the Tribunal disregarded and overlooked the parties' pleadings and arrived at an erroneous decision causing substantial injustice to the applicant; the Tribunal failed, neglected and/or refused to deal with all the issues that were put to it for determination and that the Tribunal failed, neglected and/or refused to consider relevant matters and considered irrelevant matters to the benefit of the respondent, I find this an attempt to invite this court to take over the role of the Tribunal and to determine the issues that were before the tribunal afresh. Particularly so because the applicant has not set out with specificity which irrelevant issues were considered to the benefit of the respondent and which pleadings were disregarded. If anything, the applicant in its submissions finds fault with the findings of the arbitrator on the issues it raised. Accordingly, these grounds have no merit.

49. Consequently, I do not consider that the applicant's complaints justify the allegation that the award was against the public policy of Kenya.

50. The upshot of the findings is that:

    a. The applicant's Preliminary Objection dated 29th October 2024 is merited and the respondent's Notice of Motion application dated 15th August 2024, seeking to set aside part of the arbitral award, is struck out for want of jurisdiction.

    b. The application dated 7th August 2024 is not merited and is dismissed with costs to the respondents.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE