



**AA Bayusuf & Sons Ltd & another v Northern Waterworks Development Agency (Formerly Known as Northern Water Services Board) & another (Miscellaneous Civil Application E80, E1100 & E080 of 2024 (Consolidated)) [2025] KEHC 8727 (KLR) (Commercial and Tax) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E80, E1100 & E080 OF 2024 (CONSOLIDATED)**

**JWW MONG'ARE, J  
JUNE 16, 2025**

**BETWEEN**

**AA BAYUSUF & SONS LTD ..... APPLICANT**

**AND**

**NORTHERN WATERWORKS DEVELOPMENT AGENCY (FORMERLY KNOWN AS NORTHERN WATER SERVICES BOARD) ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**MISCELLANEOUS CIVIL APPLICATION E1100 OF 2024**

**BETWEEN**

**AA BAYUSUF & SONS LTD ..... APPLICANT**

**AND**

**NORTHERN WATERWORKS DEVELOPMENT AGENCY (FORMERLY KNOWN AS NORTHERN WATER SERVICES BOARD) ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**MISCELLANEOUS CIVIL APPLICATION E080 OF 2024**

**BETWEEN**

**NORTHERN WATERWORKS DEVELOPMENT AGENCY (FORMERLY KNOWN AS NORTHERN WATER SERVICES BOARD) ..... APPLICANT**



**AND**

**AA BAYUSUF & SONS LTD ..... RESPONDENT**

**RULING**

1. This ruling relates to the three Miscellaneous Applications filed in the three different but consolidated suits which emanate from the same arbitral award delivered to the parties on 30<sup>th</sup> September 2024 by Dr. Arch Sylvia M. Kasanga. In the first suit, Miscellaneous Application No. E080 of 2024, The Respondent – Northern Water Works Development Agency (“northern Water”) has by an Application filed under Section 3 of the Arbitration Act and Rules 4 and 7 of the Arbitration Rules, Section 1A, 3A and 7 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedures Rules seeking the following orders:-
  1. Spent
  2. That this Honourable Court be pleased to issue to stay the enforcement of the Arbitration Award of Dr. Arch Sylvia M. Kasanga dated 30<sup>th</sup> September 2024 pending the hearing and determination of this application.
  3. That the Arbitration Award of Dr. Arch Sylvia M. Kasanga dated 30<sup>th</sup> September 2024 be set aside.
  4. That the costs of this application be provided for.
2. This application was premised on the grounds set out on its face and the supporting and supplementary affidavits of Andrew Rage Eysimkele sworn on 13<sup>th</sup> November 2024 and 9<sup>th</sup> January 2025 respectively. The Application was opposed and the Applicant, A ABayusuf & Sons Limited (“Bayusuf”) filed a replying affidavit sworn by Abdulkarim ABayusuf on 9<sup>th</sup> December 2024.
3. In Miscellaneous Application No. E098 of 2024, the Applicant (Bayusuf) filed its application under section 36 of the Arbitration Act and Rules 4(2) and 9 of the Arbitration Rules seeking the following orders:-
  1. The final arbitral award dated 30<sup>th</sup> September 2024 by Dr. Sylvia M. Kasanga, FCIARB and annexed herewith be recognized as binding and be enforced by this Honourable Court to the extent of the amount awarded under the claim for the time related costs, interest and costs of the arbitration.
  2. The Costs of this application be provided for.
4. The application was equally premised on the grounds set out on its face and the supporting affidavit of Abdulkarim ABayusuf sworn on 19<sup>th</sup> December 2024.
5. In Miscellaneous Application No. E1100 of 2024, Bayusuf filed a Notice of Motion Application brought under section 35 of the Arbitration Act, Rules 7 and 11 of the Arbitration Rules and Order 50 Rule 1 of the Civil Procedure Rules and it seeks the following orders:-
  1. The Arbitral Award dated and published on 30<sup>th</sup> September 2024, be set aside to the extent that it dismissed the Claimant’s claim of Kshs.34,744,908(Court Injunctions 1) and for Kshs. 520,024,204.34(Court injunction 2).



2. As a consequence of granting prayer 1 above, the court do remit the matter to the Chartered Institute of Arbitrators, Kenyan Branch, to appoint another tribunal to hear and determine the claims on injunction 1 and 2.
3. The Costs of this application be awarded to the Applicant.
6. Similarly, like the two Miscellaneous Applications, the application is premised on the grounds set out on its face and the supporting affidavit of Abdulkarim ABayusuf sworn on 19<sup>th</sup> November 2024.
7. In responding to the two applications by Bayusuf, Northern Water has filed a notice of Preliminary Objection dated 3<sup>rd</sup> January 2025 raising issues of res judicata and res sub-judice on account of the two applications. However, once these three matters were brought to the attention of the court of their interrelatedness, the court directed that the same be consolidated and be heard together and hence the need to consider issues of res judicata and res sub-judice abated. Noting that Northern Water did not file additional responses to the two applications by Bayusuf, the court will treat its application and affidavits filed in support of its application in Misc. App. No. E080 of 2024 thereto as its responses to the two applications by Bayusuf.
8. A brief background to the dispute between the parties, Bayusuf was the successful bidder in a tender floated by Northern Water for Rehabilitation and Augmentation of the Existing Garissa Sewerage System – Phase 1 (NSWB – T/002/2008/2009). Parties signed a contract for the works on 30<sup>th</sup> April 2009 and Bayusuf commenced the works. In the ensuing contract period two separate suits were filed that led to the stoppage of works pursuant to injunctive orders of the Court. The matter was referred to Arbitration and an Award issued to the Parties by the sole Arbitrator Dr. Arch. Sylvia M. Kasanga on 30<sup>th</sup> September 2024. It is this award that the three miscellaneous applications are premised upon.
9. Parties therefore filed consolidated submissions on the directions of the court which I have carefully considered. I note from the three applications this court is called upon to determine three substantive issues, to wit:-
  - i. Whether the court should set aside the Arbitral Award of 30<sup>th</sup> September 2024 on the grounds that the same is against public policy;
  - ii. Whether the Court should recognize and enforce the Award to the extent of the amount awarded under the claim for time related costs, interests and costs of the arbitration;
  - iii. Whether the Court should refer the portion of the claim by Bayusuf on costs related to the injunctions back for determination by a different Arbitral Tribunal;
10. I will, in making this ruling, proceed to address the first issue identified as to “Whether the court should set aside the Arbitral Award of 30<sup>th</sup> September 2024 on the grounds that the same is against public policy;” since if the court finds that the award should be set aside, then it will not be necessary to consider the other two issues identified. In its application filed in Miscellaneous Application No. E080 of 2024, Northern Water has urged the Court to set aside the Arbitral award of 30<sup>th</sup> September 2024 by Dr. Arch. Sylvia M. Kasanga on the grounds that the award is against public policy.
11. Section 35 of the *Arbitration Act* provides the grounds upon which the court may set aside an arbitral award. The said section provides as follows; “35. Application for setting aside arbitral award.
  - (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).



- (2) 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.
- (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.
- (4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

12. Justice Ringera J., (as he then was) in the locus classicus case in *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366 cited with approval in *Intoil Limited & another v Total Kenya Limited & 3 others* [2013] eKLR and defined what amounts to a decision contrary to public policy as follows:

“An award could 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 to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.”



13. in supporting its contestation before the court, Northern Water has faulted the Arbitrator for proceeding to hear and determine a matter that has already been concluded by a court of law thereby publishing an award that conflicts with the public policy of Kenya. It contends that the dispute before the arbitral tribunal was heard and determined by the in HCCC No. 395 of 2017 wherein it awarded Bayusuf Kshs.102,739,393.90 comprised of Kshs.4,381,784/= (claims arising from court injunction 1), Kshs.12,480,320/= (claims arising from court injunction 2), Kshs.56,256,451.57 (delayed certified interim payments), Kshs.29,620,838.83 (2<sup>nd</sup> half of moiety/retention). Northern Water therefore faulted the present award on the grounds that the claim had been fully settled and that what Bayusuf was doing in pursuing the claim at the Tribunal was improper and amounted to unjust enrichment and double jeopardy.
14. Bayusuf in its response to the issue that the matter before the Arbitrator was concluded by the court in its decision has argued that Northern Water raised the same issue before the tribunal and the Arbitrator made the following determination at paragraph 16.7 and 16.8 of the Award; -
  - “ 16. 7. The common law doctrine of Res Judicata indicates that if there is a final judgment based on merits, then a Claimant cannot re-litigate the same matter for the same cause of action.
  16. 8 in this case, the High Court did make a determination on special damages which form part of the claim before this Tribunal. It is noteworthy however that not all claims currently in this reference were determined by the High Court so as to say that the matter is Res Judicata. Res Judicata does not arise.”
15. Therefore, Bayusuf argues that the said grounds being raised in the present application, the tribunal having pronounced itself on the same, are an invitation to the court to make an appraisal of evidence and findings of fact by the Arbitrator, and therefore outside the jurisdiction of the court in the context of an application to set aside arbitral award. This according to Bayusuf is contrary to section 35 of the Act, which prohibits the Court to revisiting and upsetting findings of fact reached by the Arbitrator.
16. Several court decisions reinforce this principle; in Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others [2005] eKLR the court stated thus:
  - “ A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties. This reasoning also applies to the award of damages that was solely in the jurisdiction of the Arbitrators to determine. The courts will not and cannot interfere with such an award.” See also the decision in Synergy Industrial Credit Limited v. Cape Holdings Limited (2019)eKLR.
17. I have considered the arguments on both parties in respect of this issue as to whether the matter had been concluded before the High Court and hence the claim before the tribunal was res judicata. I agree with the Bayusuf that this issue having been raised before the Arbitrator and a determination having been therein made on the same, the court has no right to reopen and re-examine the same. In any event, the purpose and objectives of Arbitration as set out in the Act are to bring finality to matters referred to Arbitration and there is no room for courts to reopen the same even when a party feels dissatisfied with the outcome. It is therefore my finding on this issue that the claim that the award is contrary to the public policy has not been proved and the same therefore cannot stand. This finding therefore means



that the court is satisfied that the application seeking to set aside the arbitral award is without merit and the same is dismissed forthwith.

18. Turning the two miscellaneous applications filed by Bayusuf in Misc. App. No. E098 of 2024 and E1100 of 2024 and having found that the application seeking to set aside the Arbitral Award by Northern Water is without merit, what the court is called to consider is whether a party can at the same time seek to enforce an award and also request that a portion of it be referred back to a new Arbitrator for determination.
19. Section 36 of the Act provides as follows; - 36. Recognition and enforcement of awards (1) A domestic arbitral award shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
  - (2) .....
  - (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—
    - (a) the original arbitral award or a duly certified copy of it; and
    - (b) the original arbitration agreement or a duly certified copy of it.
20. I have examined the application filed as Misc App. No. 098 of 2024 and note that the Applicant, Bayusuf, has complied with the provisions of section 36 of the Act and has annexed to the pleadings a copy of the Arbitral Award duly certified and a duly certified copy of the original arbitration agreement. To this end I find that noting that no objection by way of replying affidavit was raised to this application by Northern Water, there is no sufficient grounds to refuse to recognize the said award. In line with the above provisions of the Act, the Award by Dr. Arch. Sylvia M. Kasanga issued on 30<sup>th</sup> September 2024 is hereby recognized and adopted as a judgment of this court and the same shall be enforceable as such.
21. The remaining issue is to determine whether the application in Misc. App. No. E1100 of 2024 is one that the court can allow. I have found in Misc. App. No. E098 of 2024 that the award is proper. However, I note in the present application the applicant, Bayusuf argues that their right to be heard was violated at the hearing by the tribunal and that the proceedings were conducted in a manner to deny them to argue their case. I agree with their submissions that Article 50(1) of *the Constitution* provides for the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
22. Section 19 of the *Arbitration Act* reinforces this principle by providing that parties in an arbitration shall be treated with equality and that each party shall be given a fair and reasonable opportunity to present his case. Section 35 of the *Arbitration Act* then allows a party to have recourse to the High Court against an arbitral award if, among others, he proves that he was unable to present his case, which is the same thing as he was denied a fair hearing. The right to a fair hearing is more critical in arbitration due to the principle of finality of arbitral awards.
23. In the present application, Bayusuf argues that it was not given an opportunity to make submissions on their claim in regards to costs arising out of the two injunctions that resulted in temporary halting of their project. That what the court determined in HCCC No. 395 of 2017 were costs as assessed by the Engineer in line with the contractual dictates of the contract and that they objected to the said assessment and in filing their claim before the arbitral tribunal, they had hoped for an opportunity to establish their claim under the two items but were instead denied that opportunity since the Arbitrator,



without having accorded them an opportunity to submit on the same, proceeded to dismiss it in the final award.

24. Section 35(2)(iii) provides as follows; “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;” the above provision is identical to the UNCITRAL Model Law on International Commercial Arbitration provides at Article 34(2)(a)(ii) that an award can be reviewed if:

“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.”

This provision has been interpreted by other jurisdictions to mean that the court can allow a party who has come asking for an opportunity to be heard. In the case cited by the applicant from the Australian Supreme Court the Court interpreted the said provision in *Interbulk Ltd v Aiden Shipping Co. Ltd* [1984] 2. as follows; -

“There is plain authority that for Arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted....In truth, we are simply talking about fairness. It is not fair to decide a case against a party to an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument of the facts or the law to the tribunal.”

25. Similarly, in *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, the Supreme Court of New South Wales held:

“If, as appears to be the case, the tribunal took a different view and considered that it remained open to it to deal with that claim and possibly make an order against the defendant for payment of US \$50,000, I think that fairness required the tribunal to give notice of its view to the parties (especially to the defendant) and invite them to address the claim, including by the making of submissions.....

26. I am persuaded by the said courts findings. In the case before me, I find that the assertions by the Applicant, Bayusuf were not rebutted. That the Respondent, Northern Water having filed its Notice of preliminary objection to this application did not file a replying affidavit to controvert or rebut the allegations that the Applicant was not given an opportunity to present its case before the tribunal on the two aspects on the Injunctions. I find therefore in the interest of justice and calling to mind the constitutional dictates under Article 48 on Access to Justice which commands the state as follows; -

“Access to justice. 48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Courts are called upon, under article 50(1)(k) of *the Constitution* to guarantee a fair hearing to all persons before them. Article 50 provides as follows:-

- “Fair hearing. 50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.....(k) to adduce and challenge evidence;”



27. I am satisfied therefore that the Applicant, Bayusuf has laid sufficient grounds to allow this court to remit the claim under injunctions 1 and 2 for rehearing before another tribunal other than the one chaired by Dr. Arch. Sylvia M. Kasanga in line with the arbitration agreement herein and under the dictates of the Arbitration Act.

28. In conclusion, I make the following dispositive orders: -

1. Miscellaneous Application No. E080 of 2024 is dismissed.
2. Miscellaneous Application No. E098 of 2024 is allowed with the consequence that the arbitral award of 30<sup>th</sup> September 2024 by Dr. Arch Sylvia M. Kasanga recognized and adopted as an order of this Honourable Court.
3. Miscellaneous Application No. E1100 of 2024 is allowed with the consequences that the Applicant's claim on the two injunctions is referred back to arbitration in line with the Arbitration agreement by a different Arbitrator other than Dr. Arch Sylvia M. Kasanga.
4. Costs of the three applications are awarded to the Applicant-Bayusuf.

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF JUNE 2025**

.....  
**J.W.W. MONGARE**

**JUDGE**

**IN THE PRESENCE OF:-**

Mr. Musyoka for the Applicant (BAYUSUF)

Mr. Mohammed Noor for the Respondent (NORTHERN WATER)

Amos- Court Assistant

