



REPUBLIC OF KENYA



**Masongo & another v Riruta Gardens (Arbitration Cause E065 of 2024)
[2025] KEHC 10371 (KLR) (Commercial and Tax) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E065 OF 2024**

BK NJOROGE, J

JULY 17, 2025

BETWEEN

PETER NYABOGA MASONGO 1ST APPLICANT

JULIET NYANTE MASONGO 2ND APPLICANT

AND

RIRUTA GARDENS RESPONDENT

RULING

1. The Applicants filed the Chamber Summons dated 26th September 2024 seeking the following orders;
 - a. The Arbitral Award dated 11th day of September, 2024, and delivered on the same day by Mr. Dominic N. Mbigi (FCI Arb), be adopted as the decision of this Court,
 - b. Judgment be entered in terms of the Arbitral Award dated 11th September, 2024.
 - c. Costs to be awarded to the Applicants.
2. The Application was supported by the Affidavit of Peter M. Mwangi, sworn on 26th September 2024. He stated that in accordance with Clause 12 of the Agreement for Sale dated 12th day of November 2018, the parties herein submitted the dispute as among them before the sole Arbitrator appointed by the Chartered Institute of Arbitrators (Kenya).
3. Subsequently, the Arbitration was conducted under the directions and instructions of the sole Arbitrator, Mr. Dominic N. Mbigi (FCI Arb), who delivered his Arbitral Award on 11th September, 2024. The Arbitral Award dated 11th September, 2024 has not been appealed against, set aside or opposed in any way.



4. In response, the Respondent filed the Replying Affidavit sworn by Lillian Waireri on 18th October 2024 and admitted that indeed there is an Arbitral Award dated 11th September 2024, which was issued in favour of the Applicants. That even though there is nothing in law stopping adoption of the award by the Court, the application is premature as the 90-day period allowed to apply for setting aside the award have not expired.
5. However, the Respondent stated that it is willing and ready to pay the amount awarded by the Arbitral Tribunal, but requests for a repayment plan. It is averred that the Respondent is currently experiencing cash flow challenges. The Respondent wishes to make the following settlement proposal; -
 - i. That the Applicants to freeze the interest payable as from 11th October, 2024; and
 - ii. That the Respondent shall pay the sum of Kshs.7,677,260/- in twenty-four (24) equal monthly instalments from the time of adoption of the Arbitral Award by the Court.
 - iii. That in the event of any default in repaying any of the above instalments, the Applicants shall be at liberty to proceed and execute without further reference to the Respondent.
6. The Court has considered the parties' written submissions, the Application and the response therewith. The Court frames the following as the issues arising for determination.
 - a. Whether the arbitral award should be adopted.
 - b. Whether the Court should direct the amount awarded in the Arbitral Award be paid by Respondent in instalments.

Analysis and determination

7. Under section 36 of the Act, the High Court has the power to recognize and enforce domestic arbitral award in the following terms: -
 - (1) An arbitral award, irrespective of the state in which it was made 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) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
 - (a) the duly authenticated original arbitral award or a duly certified copy of it; and
 - (b) the original arbitration agreement or a duly certified copy of it.
 - (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.
8. In *Samura Engineering Limited v Don-Wood Co Ltd* [2014] eKLR, it was held: -

“Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the *Act*, and I should add, to the *Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed...”



a) Whether the arbitral award should be adopted.

9. Firstly, the Respondent argued that the instant Application is premature since the 90-day (3-month) period is allowed and the time for filing an Application to set aside the award had not lapsed/expired as provided for under Section 35(3) of the *Arbitration Act*.

10. Section 36 on recognition and enforcement provides;

“ 36

- (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.

11. It is noteworthy that the above provision does not speak of the time when an application for the adoption of an Arbitral award should be filed in Court. The three (3) months' timeline is only applicable to the party that seeks to set aside the Arbitral Award as provided under Section 35(3) of the *Arbitration Act*. The three (3) month period provided under this section gave the Respondent a chance to respond to the Application by filing an application for setting aside the Arbitral Award.

12. It is clear that the Respondent has not filed an application seeking to set aside the Arbitral Award. Therefore, there is no hindrance to the recognition and enforcement of the Arbitral Award.

13. Further, the Applicants have availed a copy of the Arbitral Award published on 11th September 2024, as well as a copy of the arbitration agreement, which provided for arbitration under Clause 12. Accordingly. Therefore, the Final Award published on 11th September 2024, is hereby recognized and adopted as a judgment of the court.

b) Whether the Court should direct the amount awarded in the Arbitral Award be paid by Respondent in instalments.

14. On the issue raised by the Respondent regarding payment of the Arbitral Award, the Respondent submitted that it is willing and ready to pay the amount awarded by the Arbitral Tribunal, but requests a repayment plan. This is for the stated reasons that the Respondent is currently experiencing cash flow challenges.

15. It was the Applicants' concern that the Court cannot intervene or entertain the issue of payment by instalments before adopting the Arbitral award as a judgment of the Court as per the provisions of Section 10 of the *Arbitration Act*.

16. The Court, having adopted the Arbitral Award, and bearing in mind that Section 36 of the *Arbitration Act* contemplates the issue of the enforcement of the award, the Court will address the issue as hereunder;



17. The Court notes that the power to order payment by instalments of the decretal amount is purely a matter of discretion. Order 21 Rule 12 (1) of the [Civil Procedure Rules](#) provides that: -

“ 12

- (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
- (2) After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”

18. The Respondent proposed as follows; -

- a. That the Applicants freeze the interest payable as from 11th October 2024; and
- b. That the Respondent shall pay the sum of Kshs.7,677,260/- in twenty-four (24) equal monthly instalments from the time of adoption of the Arbitral Award by the Court.

19. Notably, the Applicants did not comment on the proposal given by the Respondent on the payments being made in instalments.

20. The Court has perused the Replying Affidavit and more so the proposal to liquidate the debt in instalments. The Court notes that no financial statements or proof of any prior payments have been provided or attached. It is as if the Respondent expected the Court to exercise discretion in its favour as a matter of course. The Court would have expected payment of at least a substantial sum, as a sign of good faith and ability to pay. Looking at the nature of the transaction between the parties, as well as the time that has passed, the Court would have expected at least some demonstration of good faith. Something to lend credibility to the claim that the Respondent is keen to make good the payment of this claim. As matters now stand, the Court is not able to take such matters into consideration while acting in exercise of discretion.

21. In [Freight Forwarders Limited v Elsek & Elsek \(K\) Limited](#) (2012) eKLR it was held that the Court could allow settlement of decretal sum by way of instalments if a debtor was unable to pay in lump sum, if the application was made in good faith and the monthly repayments were reasonable.

22. In [Keshavji Jethbbhai & Bros Limited v Saleh Abdulla](#) [1959] EA 260 Crawshaw J stated as follows: -

“ ... it is laid down that the mere fact that the debtor is hard pressed or unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily should be required to show his bona fides by arguing prompt payments of a fair proportion of the debt. We are in respectful agreement with this interpretation of the law but find great difficulty in construing the last observations in the ruling in the way desired by the counsel for the



plaintiff i.e. prompt payment of a fair proportion of the debt is a condition precedent for the granting of the discretion of granting instalments. Each case has to be decided on its own merits, the predominant fact being of course the bona fides of a debtor.”

23. Court finds that there is insufficient material to enable the Court to exercise its discretion in favour of the Respondent.

24. The upshot is that the Applicants’ application is allowed.

Determination

25. The Application by way of the Chamber Summons dated 26th September, 2024 is allowed as follows;

- a) The Arbitral Award dated 11th day of September, 2024, and delivered on the same day by Mr. Dominic N. Mbigi (FCI Arb), be and is hereby adopted as the decision of this Court,
- b) Judgment be entered in terms of the Arbitral Award dated 11th September, 2024.
- c) Costs are awarded to the Applicants.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 17TH DAY OF JULY, 2025.

NJOROGE BENJAMIN. K.

JUDGE

In the presence of: -

Mr. Mwangi for the Applicants

Mr. Oguye for the Respondent

Court Assistant Mr. Luyai.

