**Solfin Solutions Limited v Mwakima (Miscellaneous Civil Application E053 of 2024) [2025] KEHC 9464 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9464 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**MISCELLANEOUS CIVIL APPLICATION E053 OF 2024**

**AN ONGERI, J**

**JULY 2, 2025**

**IN THE MATTER OF THE ARBITRATION ACT, NO. 4 OF 1995**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF THE ARBITRATION AWARD BY ALI MANDHRY**

**BETWEEN**

**SOLFIN SOLUTIONS LIMITED ..... APPLICANT**

**AND**

**MARGARET WAWUDA MWAKIMA ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this Ruling is the one dated 10th June 2025 brought under Order 22 Rule 22, Order 45 Rule 1(b) Order 51 Rule 1 of the *Civil Procedure Rules* Sections 1A, 1B, 3A & 80 of the *Civil Procedure Act* and all other enabling provisions of the law seeking the following orders:-

    i. That the matter be certified urgent and service thereof dispensed with in the first instance.

    ii. That the court be pleased to stay execution of the Decree and Certificate of Costs dated 28.5.2025 for payment of a sum of Kshs. 7,264,749/= pending the hearing and determination of this application.

    iii. That this Honourable Court be pleased to review its decision and order of 8.4.2025.

    iv. That the costs of this case be provided for.

2. The application is based on the following grounds:-

i. That a dispute arose among the parties based upon a financing agreement referred to a sole arbitrator; who made a final award dated 6.11.2024 which the Applicant sought to set aside on account of the fact that the award was vitiated by mistake, error apparent on the face of the record against the weight of compelling evidence and the contract had been entered in breach of Public Policy.

ii. That a Ruling delivered on 8.4.2025 the Hon. Asenath Ongeri J dismissed the application for setting aside the Award principally on the premise that the Applicant failed to follow the procedure for challenging appointment of an Arbitrator.

iii. That this decision was an error apparent on the face of the record as there were numerous other grounds: (a-j) for the application which were not given full and proper consideration.

iv. That the impugned decision is clearly wrong and will result in manifest injustice.

v. That the application has been made without undue delay and substantial loss will be suffered if not allowed.

3. The application is supported by the affidavit of Nabil Adamjee sworn on 10th June 2025 as follows:-

i. That I am a male adult, officer and Director of Solfin Solutions Ltd, competent and duly authorized to swear this affidavit on its behalf and on my own behalf as I hereby do.

ii. That a dispute arose among the parties based upon a financing agreement referred to a sole arbitrator; who made a final award dated 6.11.2024 and the Applicant sought its setting aside (Exhibit N-3) for mistake, error apparent on the face of the record, against the weight of evidence, breach of Public Policy vide application for setting aside; Voi High Court *Misc 004/2025* which was heard simultaneously with an application for adoption of the Award and a Ruling delivered on 8.4.2025.

iii. That the Respondent is in the process of executing the said Judgement and Decree.

iv. That vide a Ruling by the Hon. Asenath Ongeri J on 8.4.2025. The learned Judge disallowed the application for setting aside of the Arbitral Award.

v. That in failing to allow the application for setting aside the learned Judge made an error/ omission which is prima facie visible and does not require elaborate argument to be established and is necessary to correct; hence this application.

vi. That the learned Judge made errors apparent on the face of the record in finding that Sections 35 and 37 of the *Arbitration Act* had not been met.

vii. That in addition the Applicant discovered new and important matter regarding the qualifications of the Arbitrator to wit that as a Quantity Surveyor he did not have the requisite knowledge or experience in Construction and Mining to appreciate the issues in dispute Section 13(3) of *Arbitration Act*.

viii. That the learned Judge erroneously found as the determining or principal issue the fact that the Applicant did not follow the laid down procedure to challenge the arbitrator as the turning point in the application for setting aside failed to consider alternative issues/points (A-J) and thereby dismissed the application for setting aside.

ix. That the learned Judge erroneously notes in paragraph 10 and 21 of her Ruling (page 8 and 10) that the Respondent in HC *Misc E053/24* did not file any submissions in the consolidated files.

x. That these findings are not correct at all; the application for affirmation of Arbitration Award was challenged/countered by the application for setting aside.

xi. That the said award was made contrary to public policy, and the Arbitrator acted contrary to established principles of law; rendering it fit for setting aside by inter alia demonstrating open bias; failing to consider the defense on record and evidence that the Claimants testimony was materially controverted in cross examination.

xii. That the Judge failed to appreciate the full import of the grounds adduced for setting aside; which met the required threshold set out in Sections 35 and 37 of the *Arbitration Act* of 2005 listed below:

a. The arbitrator had not exercised his judgement according to the facts of the case, exhibited open bias by making a decision without taking into account the defense on record and arrived at a decision that was against appliable principles of law; the defense traversed all the allegations in the statement of claim and Counterclaimed for:

(i) Damages for breach of contract,

(ii) Damages defamation of character,

(iii) Loss of business.

b. The Arbitrator had failed to consider that the Claimant breached principles of conflict of interest by public officials making the contract illegal for want of capacity and entrapment, breach of public policy rendering the contract invalid and unenforceable.

c. The Arbitrator had ignored pertinent issues that emerged at the hearing to make a just determination; including relying heavily upon the evidence of the complainant; proved to be untruthful upon cross examination; it was established she never in fact met the Respondent's Director Nabil Adamjee and was merely a proxy for her husband who had initiated contact by approaching the Respondent while making a presentation at Taita Investment Development Corporation with a corrupt offer in breach of the *Public Officers Ethics Act* Cap 183, Laws of Kenya. The award is therefore against Public Policy.

d. The Arbitrator had ignored the fact that the claimant's allegations were controverted in cross-examination in particular; allegations that she was personally known to the Defendant's Director were proved to be false and she could not clearly explain the circumstances under which they allegedly had their first meeting or reached 'consensus ad litem' to enter into a contract without any kind of prior association whatsoever.

e. The Arbitrator failed to note the Claimant's lies and contradictions in material facts including failure to give a reasonable explanation as to how she and her husband could possibly use an 'uber' taxi to visit the Defendant's premises as part of 'due diligence' and merely stand outside the company offices door at Ambalal house, Mombasa CBD then drive back to Taita.

f. The Arbitrator had failed to factor that the Respondent's operational expenditure incurred in the running of the Joint Venture which is a cost borne by both parties and should have been set-off. Failure by Arbitrator to accord a fair hearing.

g. The Arbitrator in his Award had failed to consider the Claimant breached the principles of Privity of Contract, confidentiality and defamation by engaging in acts that destroyed Respondent's reputation with its principal business partner Devki Steel Ltd resulting in its suspension and blacklisting as well as publishing false and misleading statements to the police which eventually led to frustration of the contract and closure of the mining site altogether.

h. The arbitrator failed to appreciate the Claimant's evidence was totally unreliable and it was in fact her husband responsible for all ensuing losses arising from closure of the mining site in Voi in January 2024 through his untoward actions and Applicant nonetheless had fulfilled obligation sto greatest extent possible.

i. The totality is that the Award was based on a skewed finding or failure to appreciate the contract had been vitiated through no fault of the Applicant; raising doubts as to his capacity and known (inappropriate) qualifications as a Quantity Surveyor made wrongful analysis of the facts and the law, abdicated his responsibility to weigh the evidence, his actions amounting to abuse or misuse of power, rendering the award null and void in limine.

j. The Arbitrator made an award against the weight of the evidence and allowed a claim that did not meet the required standard of proof; raising doubts about his impartiality or independence.

xiii. That taking in the foregoing the Learned Judge in her ruling injudiciously failed to appreciate that the sufficient grounds sufficient for setting aside an Arbitral Award had been met; including Fraud and Public Policy violation.

xiv. That in failing to appreciate the points raised above (A-J) the error made by the Judge is manifest and does not require detailed examination, scrutiny or further elucidation of facts or the legal position.

xv. That I humbly pray that based on the evidence thus adduced, this honourable court be pleased to review/set aside the Ruling of 8.4.2025.

xvi. That am advised by my Advocates on record that the decision to uphold the Award failed to comply with constitutional principles and values and was therefore unprocedural.

xvii. That I am advised by my advocates on record which advise I believe accurate that the aforementioned grounds, constitute a valid basis that meets the threshold and is sufficient reason to justify a decision to set aside/review a judgement of this Honourable Court.

4. The Respondent filed a Replying Affidavit dated 13th June 2025 opposing the application.

5. The Applicant Nabil Adamjee filed a further affidavit dated 18th June 2025 as follows:-

i. That I am a male adult officer and Director of Solfin Solutions Ltd, competent and duly authorized to swear this affidavit on its behalf and on my own behalf as I hereby do.

ii. That I have read the contents of the Replying affidavit by Margaret Wawuda Mwakima dated 13.6.2025 and wish to respond thereto as hereunder.

iii. That in reply to the contents of paragraph 3 of the Affidavit am advised by my Advocates on record which advise I believe accurate that powers of this court to review are provided for in

law particularly Orders 22 Rule 22. Order 45 Rule 1(b) and Order 51 and the remedies sought are provided for by law.

iv. That principles of *functus officio* are not applicable to review applications.

v. That I am advised by my advocates on record that the said application meets the criteria and threshold for review applications including errors apparent on the fact of the record in finding that Sections 35 and 37 of the *Arbitration Act* and discovery of new and important matter.

vi. That in failing to find there were serious mistakes of fact and law which were not mere accidental slips or omissions; the impugned Ruling of 8.4.2025 displayed an error apparent on the face and amounted to serious irregularities.

vii. That the Award and Arbitration proceedings were marred by serious irregularities and these arguments made by the Applicant fall within the scope or review including existence of Questions of law.

viii. That failure to find the award was not enforceable and fit for setting aside on account of irregularity was an error justifying application for review in particular that the impugned transaction had been a "Joint Venture" with expectations of 'dividend payment and not a simple loan with entirely different implications regarding liability.

ix. That in failing to find that the award was made contrary to public policy, contrary to established principles of law; the learned Judge made an error apparent on the face of the record.

x. That the Judge failed to appreciate the full import of the grounds adduced for setting aside; which met the required threshold set out in Section s35 and 37 of the *Arbitration Act* of 2005 the same amount to justifiable grounds for review being errors apparent on the face of the record.

xi. That taking in the foregoing the Learned Judge in her ruling injudiciously failed to appreciate that sufficient grounds sufficient for setting aside an Arbitral Award had been met; including Fraud and Public Policy violation.

xii. That in failing to appreciate the points raised (A-J) in supporting affidavit deponed on 10.6.2025 the error made by the Judge is manifest and does not require detailed examination, scrutiny or further elucidation of facts or the legal position.

xiii. That I humbly pray that based on the evidence thus adduced, this honorable court be pleased to review/set aside the Ruling of 8.4.2025.

xiv. That the basis of the dispute was a Joint Venture Agreement which collapsed as a result of the Respondents actions and applicant is presently in dire financial straits unable to raise even the decretal sum for deposit in court.

xv. That as things stand am unable to comply with any directions for deposit of decretal sum in court due to the dire financial straits I find myself not least due to the after effects of Covid 19 on Small and Medium Enterprises and the current state of the Kenyan economy which I beseech the court to take judicial notice of.

xvi. That the impugned transactions having been a joint venture where dividends were to be earned based on LPOs issued by Devki Steel Mills: investment contributions were in kind; stock, machines, material, license fees, all tied up to capital hence its impossible for the applicant to raise the decretal amount in the near future.

xvii. That the investment amount was used to service an Order, is tied up in capital to date and applicant cannot comply with terms of deposit of decretal sum.

xviii. That am advised by my advocates on record that the decision to uphold the Award failed to comply with constitutional principles and values and was therefore unprocedural and constitutes a valid basis that meets the threshold and is sufficient reason to justify a decision to set aside/review a Judgement of this Honorable Court.

6. The parties filed written submissions as follows;

7. The applicant submitted that he is seeking a review and stay of execution of the High Court's earlier ruling, arguing that sufficient grounds exist under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

8. The applicant contends that a review is justified due to the discovery of a new and important matter—specifically, the existence of Court of Appeal *Case No. 26 of 2017*—which was not previously known despite due diligence.

9. Additionally, they argue there is an error apparent on the face of the record, which should be self-evident without requiring extensive argumentation, as established in precedents such as *Nyamogo & Nyamogo v Koago* [2001] EA 170.

10. The application also invokes the court's inherent jurisdiction under Section 3A of the *Civil Procedure Act* to ensure justice is served, citing *Equity Bank Ltd v West Link Mbo Ltd* [2013] eKLR, where the court emphasized that inherent powers enable courts to balance competing interests within legal confines.

11. Regarding the stay of execution, the applicant asserts that substantial loss—beyond ordinary hardship—would result if the stay is not granted, referencing *Century Oil Trading Co. Ltd v Kenya Shell Ltd* [Milimani HCMCA No. 1561 of 2007], which held that financial circumstances must be considered to prevent irreparable harm.

12. The submissions further stress that the application was filed without undue delay and that there has been no laches (unreasonable delay) on the applicant's part, relying on the equitable principle from *Smith v Clay* (1767) that courts should not aid stale claims.

13. Lastly, the applicant argued that courts retain residual jurisdiction to reopen matters in the interest of justice, balancing finality of litigation with the need for fairness.

14. That the overall plea is for the court to exercise its discretion judiciously, as highlighted in *Jason Ondabu t/a Ondabu Advocates v Shop One Hundred Limited* [2020] eKLR, to correct errors and prevent injustice.

15. The Respondent on her part strongly opposed the Applicant/Judgment Debtor's application for review of the court's ruling dated 8th April 2025, arguing that the Applicant has failed to meet the legal threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*.

16. The Respondent contended that the application is essentially an appeal disguised as a review, as it challenges the merits of the court's decision rather than identifying any self-evident error on the face of the record.

17. The Respondent relied on established case law, including *National Bank of Kenya Limited v Ndungu Njau* and *Paul Mwaniki v National Hospital Insurance Fund Board of Management*, which clarify

that a review is not an opportunity to reargue the case or correct an erroneous legal conclusion but is limited to obvious errors that require no elaborate reasoning to discern.

18. The Respondent further dismissed the Applicant's claim of discovering new evidence regarding the Arbitrator's qualifications, noting that no proof of the Arbitrator's alleged lack of expertise in construction and mining has been provided.

19. Even if true, the Respondent argued that such a defect is not a valid ground for setting aside an arbitral award under Section 35 of the *Arbitration Act*, nor was it raised through the proper procedural channels.

20. The Respondent concluded that the application lacks merit and should be dismissed with costs.

21. The issues for determination in this application are as follows:-

    i. Whether stay of execution of the decree of the Arbitral award should be granted.

    ii. Whether this court should review its Ruling dated 8th April 2025.

22. The application before this Court seeks two primary orders: a stay of execution of the decree arising from the Arbitral Award dated 6th November 2024 and a review of this Court's Ruling delivered on 8th April 2025.

23. The application is grounded on Sections 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, as well as the inherent jurisdiction of the Court under Section 3A of the *Civil Procedure Act*.

24. The Applicant contends that there are sufficient grounds for review, including the discovery of new and important matter and an error apparent on the face of the record.

25. The Respondent, on the other hand, opposes the application, arguing that it is an attempt to re-litigate issues already determined and does not meet the threshold for review.

26. On the Issue of Stay of Execution, the principles governing the grant of a stay of execution are well settled in Kenyan jurisprudence.

27. Under Order 42 Rule 6 of the *Civil Procedure Rules*, the Court must be satisfied that the Applicant has demonstrated substantial loss should the stay not be granted, that the application has been made without undue delay, and that such security as the Court may order has been provided.

28. In *Century Oil Trading Co. Ltd v Kenya Shell Ltd* [Milimani HCMCA No. 1561 of 2007], the Court emphasized that the Applicant must show that the execution would render the appeal nugatory or result in irreparable harm.

29. There is no appeal that has been filed in this case.

30. The Applicant has averred that it is in dire financial straits and unable to raise the decretal sum, which is tied up in capital investments.

31. However, while financial hardship is a relevant consideration, it must be coupled with evidence of substantial loss that goes beyond ordinary inconvenience.

32. The Applicant has not provided concrete evidence to demonstrate that the Respondent would be unable to refund the decretal sum should the review succeed.

33. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that the mere assertion of financial hardship without proof of the Respondent's inability to repay does not constitute substantial loss.

34. Consequently, the prayer for stay of execution is not merited at this stage.

35. On the Issue of Review, the power of the Court to review its decisions is circumscribed by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*.

36. For a review to be granted, the Applicant must establish either

    (a) the discovery of new and important matter which was not within their knowledge or could not be produced at the time of the ruling,

    (b) an error apparent on the face of the record, or

    (c) any other sufficient reason.

37. The Applicant has argued that the learned Judge erred in focusing solely on the procedural challenge to the Arbitrator's appointment while ignoring other substantive grounds for setting aside the Award under Sections 35 and 37 of the *Arbitration Act*.

38. It is further contended that the Arbitrator lacked the requisite expertise in construction and mining, a fact allegedly discovered after the ruling.

39. The Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR clarified that an error apparent on the face of the record must be one that is self-evident and does not require an elaborate argument to establish.

40. A review is not an avenue for rearguing the case or correcting a perceived erroneous decision on the merits.

41. Similarly, in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, the Court reiterated that a review cannot be used as a substitute for an appeal.

42. The Applicant's grievances largely pertain to this court's evaluation of the evidence and interpretation of the law, which are matters more suited for an appeal rather than a review.

43. The alleged discovery of the Arbitrator's lack of expertise is belated and unsupported by credible evidence.

44. Moreover, Section 13(3) of the *Arbitration Act* provides a specific mechanism for challenging an arbitrator's qualifications, which the Applicant failed to utilize during the arbitral process.

45. As held in *Nyamogo & Nyamogo v Koago* [2001] EA 170, a review cannot be granted on grounds that could have been raised earlier with due diligence.

46. The Applicant's reliance on public policy and fraud as grounds for setting aside the Award is equally unpersuasive.

47. This court considered these arguments and found them unsubstantiated.

48. The Applicant has not demonstrated how this court's conclusion amounts to an error apparent on the face of the record.

49. In *Jason Ondabu t/a Ondabu Advocates v Shop One Hundred Limited* (*supra*), the Court emphasized that the discretionary power of review must be exercised judiciously and only in clear cases of injustice.

50. The Applicant has not met this threshold.

51. In the final analysis, the Applicant has failed to establish sufficient grounds for the grant of either a stay of execution or a review of the Court's Ruling dated 8th April 2025.

52. The application is devoid of merit and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED THIS 2ND JULY 2025 VIRTUALLY VIA MT AT VOIHIGH COURT.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistant: Millicent

..... for the Applicant

..... for the Respondent