



**Merdin & 3 others v Mbaya & 2 others (Commercial Arbitration Cause E005 of 2022)  
[2024] KEHC 60 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 60 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E005 OF 2022**

**JWW MONG'ARE, J  
JANUARY 11, 2024**

**BETWEEN**

**ADNAN MERDIN ..... 1<sup>ST</sup> APPLICANT  
CENK TERZIOGLU ..... 2<sup>ND</sup> APPLICANT  
ELIF TERZIOGLU MERDIN ..... 3<sup>RD</sup> APPLICANT  
TUREA LIMITED ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ANDREW KIKUYU MBAYA ..... 1<sup>ST</sup> RESPONDENT  
NEHEMIAH ROTICH ..... 2<sup>ND</sup> RESPONDENT  
MEKAN EAST AFRICA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Motion application dated 30<sup>th</sup> May 2023 filed under the provisions of Articles 10, 25, 27(1) & (2), 47, 48, 50(1), 159, 165 & 259, the 7<sup>th</sup> schedule of *the Constitution* of Kenya, and Sections 32, 32B & 35(3) of the *Arbitration Act*. The Applicants seek the following orders –
  - i. That an order be issued that the motion dated 14<sup>th</sup> January 2022 raises substantial questions of law meriting certification as envisaged by Article 165(4) of *the Constitution* of Kenya; and
  - ii. Costs of this application be provided for.
2. The application is premised on the grounds on the face of the motion and is supported by affidavits sworn on 30<sup>th</sup> May 2023 & 19<sup>th</sup> July 2023 by Adnan Merdin the 1<sup>st</sup> Applicant and Director of the 4<sup>th</sup> Applicant. In opposition thereto, the Respondents filed a replying affidavit sworn by Nehemiah



- K. Rotich the 2<sup>nd</sup> Respondent and Director of the 3<sup>rd</sup> Respondent on 8<sup>th</sup> June 2023, and grounds of opposition dated 8<sup>th</sup> June 2023.
3. The Applicant's case is that vide a letter dated 27<sup>th</sup> February 2018 the Arbitrator notified the parties herein that the Arbitral award was ready for delivery subject to payment of his fees of Kshs.4,040,000/= to be paid by the parties herein equally. The Applicants averred that it took the Respondents 3 years 9 months to pay their share of the Arbitrator's fees thus the Arbitral award was delivered on 12<sup>th</sup> December, 2021. Thereafter, the Applicant's filed an application seeking to set it aside which application was opposed by the Respondents on grounds that it was filed out of time contrary to Section 35(3) of the *Arbitration Act*.
  4. It was submitted by the Applicants that there was a jurisprudential issue for determination regarding interpretation of what constitutes "delivery" vis a vis the Arbitral tribunal exercise of its right to lien pursuant to Section 32B of the *Arbitration Act*, and whether the notification of the award is equivalent to delivery of the award. They further stated that Section 35(3) of the *Arbitration Act* imposes a time restriction on when a party can approach the High Court to have an Arbitral award set aside but there is no time limitation to file an application for enforcement of the said award. For this reason, there are Constitutional issues of equality before the law, right to fair trial, and access to justice as envisaged by Articles 10, 25, 27(1) & (2), 47, 48 and 50(1) of *the Constitution* of Kenya 2010 which issues are substantial, novel and require consideration by an uneven number of Judges.
  5. The Applicants asserted that it is a jurisprudential issue whether an award whose delivery is withheld by an Arbitrator pursuant to Section 32B (3) can be assumed to have been delivered and/or received by the parties. There are two divergent schools of thought by the High Court on the interpretation of delivery for purposes of Section 35(3) of the *Arbitration Act* thus the need for an expanded bench.
  6. The Respondents, in opposition thereto argued that they had filed a Preliminary Objection, which by law should be heard first. The Respondent averred that where parties are to share an Arbitrator's fees equally, any of the parties can pay the said fees and recover the amount paid on behalf of the other party as provided for under paragraph 122 of the Arbitration Rules. It was stated by the Respondents that the issue of notification and delivery has already been determined by the High Court in *UON v Multiscope Consulting Engineers Ltd [2020]* eKLR, and the High Court decision is currently pending appeal at the Court of Appeal after the University of Nairobi lodged an appeal against it hence it would be redundant for the High Court to reconsider issues that are already before the Court of Appeal.
  7. The Respondents further stated that paragraph 18 of *UON v Multiscope Consulting Engineers Ltd* CA No. 129 of 2020 relates to a ruling by the Court of Appeal on stay of execution pending hearing and determination of the Appeal therein, it is not a judgment. They averred that the instant application does not meet the threshold for reference to a 3 Judge bench as envisaged under Article 165 (4) of *the Constitution*, and does not raise a substantive issue of law or jurisprudence.
  8. The application herein was canvassed by way of written submissions that were highlighted on 15<sup>th</sup> November 2023. I shall not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination.

### **Analysis and Determination**

9. I have considered the instant application, the grounds set on the face of the motion, and the affidavits filed in support thereof. I have also considered the replying affidavit and grounds of opposition by the Respondents as well as the written and oral submissions by Counsel for parties. Accordingly, the issue that arises for determination is "whether interpretation of Section 32(5), 32B(3) and 35(3) of



the *Arbitration Act* amounts to a substantial question of law as envisaged under Article 165(4) of *the Constitution* of Kenya 2010 to warrant empanelment of a three Judge bench”.

10. The substance of the instant application is whether interpretation of Section 32(5), 32B(3) and 35(3) of the *Arbitration Act* amounts to a substantial question of law as envisaged under Article 165(4) of *the Constitution* of Kenya 2010 to warrant empanelment of a three Judge bench to hear and determine the application dated 14<sup>th</sup> January 2022. The Applicants filed the said application seeking an order setting aside an Arbitral award which application was opposed by the Respondents vide a preliminary objection on grounds that it was filed out of time contrary to the provisions of Section 35(3) of the *Arbitration Act*.
11. I am of the considered view that in determining the aforementioned application and preliminary objection, the Court would need to determine at what point is the Arbitral award considered to be delivered to parties, is it upon notification that the award is ready or upon collection of the said award. Section 32(5) of the *Arbitration Act* provides that –

“Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.”
12. Section 32B (3) of the *Arbitration Act* states that –

“The arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received.”
13. The Applicant submitted that there are two principal schools of thought on the issue but in those decisions, the statutory lien conferred by Section 32B(3) has not been considered fully and/or sufficiently. The Applicants cited the case of *UON v Multiscope Consulting Engineers Ltd* (Supra) and stated that the said decision does not offer guidelines on how without receipt of the copy of the award the unsuccessful party can be able to challenge the award. The Respondent on the other hand submitted that empanelment of a 3 Judge bench should be made only where it is absolutely necessary, and there must be cardinal issues of law or jurisprudence requiring an order for certification to be made.
14. Empanelment of a three Judge bench is provided for under Article 165(4) of *the Constitution* of Kenya 2010 which states as follows –

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”
15. In support of their submissions, the Applicants relied on the case of *Okiya Omtatah Okoiti & another v Anne Waiguru- Cabinet Secretary, Devolution and planning & 3 others [2017]* eKLR where the Court of Appeal tabulated the relevant governing principles enumerated by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnechi-Rusacone [2013]* eKLR on certification under Article 163(4) as follows -
  - i. “For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
  - ii. The applicant must show that there is a state of uncertainty in the law;



- iii. The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;
  - iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
16. It is noteworthy that both parties herein have referred to the High Court case of UON v Multiscope Consulting Engineers Ltd (Supra) in support of their submissions. Upon perusal of the said decision, I note that the issues arising therein are similar to those in the Applicants application dated 14<sup>th</sup> January 2022 and the preliminary objection in opposition thereto, The High Court therein extensively discussed the issue of at what point is the Arbitral award considered to be delivered to parties and held that pursuant to the provisions of Section 32(5) of the Arbitration Act, an Arbitral award is deemed to be delivered to the parties upon notification by the Arbitrator that the award is ready.
17. Dissatisfied by the said holding, the applicant therein filed an application at the Court of Appeal in UON v Multiscope Consulting Engineers Ltd CA No. 129 of 2020 seeking orders for leave to appeal against the High Court decision and for stay of further proceedings in the High Court. In allowing the said application, the Court of Appeal held that –
- “An issue has been raised by the applicant regarding the interpretation of section 35(3) and this is a jurisprudential issue that ought to be addressed. The striking out of the Applicant’s motion has also resulted in the applicant being shut out from the seat of justice, and there is an issue whether the learned Judge of the High Court properly directed himself in striking out the Applicant’s motion or whether the learned judge made a decision that is so manifestly wrong and which has completely closed the door of justice to the applicant. We find that these are exceptional circumstances and it is appropriate that leave to appeal to this Court be granted so that these pertinent issues are fully ventilated and addressed by the Court.
18. It is not disputed that an appeal has since been lodged against the High Court’s decision in UON v Multiscope Consulting Engineers Ltd (Supra) that is pending hearing and determination which means that the issues that the Applicants seek to be determined by a 3 Judge bench are already before the Court of Appeal for determination. It is now settled law that a decision by a High Court 3 Judge Bench is not binding on the other Judges of the High Court as was observed by Mativo .J (as he then was) in David Ramogi & 4 others v Cabinet Secretary of Energy & Petroleum and 4 others [2017] eKLR as follows –
- “In this regard, I propose to recall with approval the observation made in the case of Vadag Establishment vs. Y A Shretta & Another[29] where the High Court held that:-
- “It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”
19. Accordingly, I am of the considered opinion that a 3 Judge bench will not solve the uncertainty in the interpretation of Sections 32(5) & 32B(3) as read with Section 35(3) of the Arbitration Act as it will



not be superior to the other High Court decisions on the same issues, and it will also not be binding on the other High Court Judges. I am cognizant of the different interpretations of the provisions of Sections 32(5) & 32B(3) as read with Section 35(3) of the *Arbitration Act* by different Judges of the High Court, and I agree with Counsel for the Applicants that there is need to have one interpretation on the same that should not only be followed by other High Court Judges when faced with similar question, but also be binding to them.

20. In view of the fact that the issues that the Applicants herein seek certification for them to be heard by a 3-judge bench are already the subject of an appeal at the Court of Appeal fact which is not disputed, and in the spirit of the doctrine of stare decisis, it is in the interest of justice to let the Court of Appeal address itself on the same and give guidelines that will ultimately be binding on the Judges of the High Court on how to deal with these issues henceforth.
21. In the end this Court finds that the application dated 30<sup>th</sup> May 2023 is devoid of merit and it is hereby dismissed with costs to the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF JANUARY, 2024.**

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**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Ngatia SC for the Applicant.

Ms. Njoroge holding brief for Mr. Mereka for the Respondent.

Amos - Court Assistant

