



REPUBLIC OF KENYA



**Minimix Agencies Limited v Coast Water Services Board (Civil Appeal
154 of 2017) [2024] KEHC 10330 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 154 OF 2017**

**F WANGARI, J
APRIL 18, 2024**

BETWEEN

MINIMIX AGENCIES LIMITED APPELLANT

AND

COAST WATER SERVICES BOARD RESPONDENT

RULING

1. The application subject of this ruling is dated 28/4/2023. It is brought under the provisions of section 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act, Fair Administration Act and all other enabling provisions of the law. It seeks the following orders: -
 - a. That this Honourable Court be pleased to order the Registrar or the Arbitrator Eunice Lumallas to review, rescind, or set aside the award and/ or orders on termination dated 20th August 2020 and issued in February 2022
 - b. That this Honorable Court be pleased to order the Registrar or the Arbitrator Eunice Lumallas to issue a ruling/ award pursuant to the arbitration proceedings conducted.
 - c. That this Honorable Court be pleased to issue any other order in the strict observation of the directives herein and in the interest of justice, fairness and equity.
 - d. That cost of this application being the cause.
2. The grounds in support of the application is based on the Supporting Affidavit dated 28/4/2023 sworn by Robert Wachira Kamau, the Managing Director of the Applicant Company. It was deponed that the arbitration award dated 20/8/2020 and issued on February 2022, be set aside and the Registrar or the Arbitrator to consider the all the documentary evidence presented in the proceedings and have a ruling, which includes all the evidence adduced, be delivered.



3. The Applicant was careful to state that this application does not seek to appeal the arbitral award, to reopen the litigation or proceedings. He prayed that the application be allowed as prayed.
4. The Respondent did not oppose the application as to Replying Affidavit was filed despite leave being granted on 5/2/2024. Even though this application has not been opposed, this court being a court of record, it must consider and determine the application on merits.
5. The Applicant filed it written submissions dated 28/3/2024. It was submitted that the issues before arbitration were not determined to conclusion. The case having not been heard and determined on merit, and proceedings having been terminated before hearing was inconsistent to public policy and contrary to Article 47 (1) and (2) and section 4 (1) (2) (3) of the [Fair Administrative Action Act](#).

Analysis and Determination

6. I have considered the application, supporting affidavit and the submissions filed by the Applicant, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the arbitration award ought to be set aside and or reviewed.
 - b. What is the order as to costs?
7. Though the application was not hinged on the provisions of the [Arbitration Act](#), 1995. In the submissions, the Applicant relied on Section 35 (2) of the [Arbitration Act](#), seeking to have the award set aside. The law on setting aside arbitration award is very clear in black and white. Section 35 provides as follows;

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.
8. From Section 35 (3) above, this application though brought under other provisions of the law other than the *Arbitration Act*, is time barred, and ought not get any further attention from this court. The Application has been brought almost 3 years after the arbitration award.
 9. In *Midco Holdings Limited v Summit Textiles (EA) Limited* [2014] e KLR where it was held:
 - “(36) Section 35(2) of the *Arbitration Act* circumscribes the grounds upon which an arbitral award can be set aside, and an applicant seeking to set aside an arbitral award must bring himself strictly within the legal bounds of that Section. See the case of *Transword Safaris Ltd V Eagle Aviation Ltd & 3 Others Nbi Misc Application No. 238 OF 2003*, Nyamu J. (as he then was).”
 10. From the above, I find no merit in the application dated 28/4/2023. The same is hereby dismissed.
 11. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury’s Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -
 - “The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”
 12. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion,



courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

13. Although the Respondent did not file any Replying Affidavit, it was dragged into these proceedings by the Applicant’s application that failed as at the time of filing. I award the Respondent the costs of the application.
14. Having found as above, the following orders flow therefrom: -
 - a. The application dated 24/8/2023 is devoid of merit and the same is hereby dismissed;
 - b. Costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 18TH DAY OF APRIL, 2024.

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F. WANGARI

JUDGE

In the presence of:

Mola Advocate for the Applicant

M/S Kinuva Advocate for the Respondent

