Njau v Safaricom Investment Cooperative Society Limited (Arbitration Cause E048 of 2023) [2024] KEHC 12789 (KLR) (Commercial & Admiralty) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12789 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

ARBITRATION CAUSE E048 OF 2023

WA OKWANY, J

OCTOBER 17, 2024

BETWEEN

LEONARD NJOGU NJAU ..... APPLICANT

AND

SAFARICOM INVESTMENT COOPERATIVE SOCIETY LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect to the application dated 15th June 2023wherein the applicant seeks the following orders: -

    a. Spent.

    b. The Honourable Court be pleased to grant a stay of execution of the arbitral award issued on the 18th December, 2022 by James Mang'erere, directing the Applicant herein to deliver vacant possession of the suit properties being Houses christened as A5,B3, D6 & D10 in Kantafu Serene Homes pending the hearing and determination of this application.

    c. Upon hearing of this Application, the Honourable Court be pleased to set aside the holding, in the arbitral award issued on the 18th December, 2020 by James Mang'erere, directing the Applicant herein to deliver vacant possession of the suit properties being Houses christened as A5, B3, D6 & D10 in Kantafu Serene Homes.

    d. In the alternative, the Honourable Court be pleased to grant a stay of execution of the arbitral award issued on the 18th December, 2022 by James Mang'erere, directing the Applicant herein to deliver vacant possession of the suit properties being Houses christened as A5, B3, D6 & D10 in Kantafu Serene Homes pending the hearing and determination of Nairobi HCCMisc.

No. E100 of 2022; Safaricom Investment Cooperative Society Limited v Francis Mbugua Kinyanjui & Leonard Njogu Njau t/a Kinyanjui & Njau Advocates.

e. The Honourable Court be pleased to make such further or other order(s) as it may deem appropriate.

f. That costs of this application be provided for.

2. The Application is brought under Sections 35 (2) (a) (iv) and 35 (2) (b)(ii) of the *Arbitration Act* and is supported by the Affidavit of LEONARD NJOGU NJAU. The Application is premised on the grounds that: -

i. That on 25th May 2023, the Respondent through its advocates wrote to the occupants of Houses christened as A5, B3, D6 & D10 in Kantafu serene homes demanding that the vacate the said houses no later than 15th June 2023.

ii. That the said demand was ostensibly in furtherance of an award between the parties herein dated 18th December 2022.

iii. That the Respondent herein has yet to move this honourable court with a view to enforcing the said award and as such the demand aforesaid is un procedural hence illegal.

iv. That the Award dated 18th December 2022 is contrary to public policy in that it was premised on Nairobi HCCMisc. No. E100 of 2022; Safaricom Investment Cooperative Society Limited v Francis Mbugua Kinyanjui & Leonard Njogu Njau t/a Kinyanjui & Njau Advocates and failed to have regard to unpaid fee notes as well as bills of costs.

v. That it is in the interest of justice that this application is allowed as prayed.

3. The Respondent opposed the Application through the Replying Affidavit of its Legal Officer Ms. Agnes Anjao Bukachi who avers that the Respondent is the registered proprietor of all those parcels of land known as Title Numbers Donyo Sabuk/Koma Rock Block 1/36503, Donyo Sabuk/Koma Rock Block 1/ Sabuk/Koma Rock Block 1/36540 (hereinafter "the Suit Properties") on which houses christened as Kantafu Serene Homes Numbers. A5, B3, D6 and D10 respectively stand.

4. She avers that the parties entered into a sale agreement dated 25th August 2020 regarding the sale and purchase of the Suit Properties at an agreed purchase price of Kshs. 11,600,000/=. She states that Clause J of the said agreement contained an Arbitration agreement wherein the parties agreed to refer all disputes arising under the agreement to arbitration before a single Arbitrator in accordance with the provisions of the *Arbitration Act* of Kenya (*Act No. 4 of 1995)*.

5. She further states that the Applicant did not pay any money towards the said agreed purchase price and that on 9th July 2021, the Respondents' Advocates served a completion notice on the Applicant requiring him to pay the entire purchase price in 21 days. She explains that the Respondent issued a notice to the Applicant on 23rd July 2021, cancelling the sale of the suit properties for want of consideration.

6. She further avers that on 12th August 2021, the Respondent served the Applicant with a notice of dispute in which it declared a dispute between itself and the Respondent and invited the Applicant to nominate an Arbitrator for its concurrence or rejection to hear the dispute. She states that Honourable Mr. James Mang'erere, MCIArb, heard the parties on the merits of the claim in which both parties presented their respective cases and that on 18th December 2022 the said Arbitrator rendered his decision in which he voided the agreement for sale dated 25th August 2020 for want of consideration. She states that the Arbitrator also awarded the Respondent herein the costs of the arbitration calculated

at the current market rates and party & party costs to be determined by the tribunal upon written submission by each party on costs.

7. She states that the Arbitrator thereafter published the final award on costs allowing the Respondent's Party & Part Bill of costs to the tune of Kshs. 1,056,717/= which award the Applicant has not settled

8. She avers that the Application is not properly on record as it was not filed within the 3 months period as stipulated under section 35(3) of the *Arbitration Act* (hereinafter "the Act"). She states that an application to set aside an 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. She noted that in this matter, the award that is the subject of the Applicants' Application was published on 18th December 2022 while the instant application was filed on 15th June 2023 which is 5 months and 4 weeks after the award was published.

9. She further avers that the application does not meet the threshold set for the setting aside arbitral awards on ground of public policy to the required standard.

10. She observes that since the Applicant has, in his supporting affidavit, conceded that the suit properties are occupied by his tenants who he referred to as "licensees", it shall be unjust, unfair and inequitable for the Applicant to be allowed to have tenants occupy the suit properties despite him having no legal right over the same.

11. She states that there is no nexus between this case and Nairobi Misc. HCCC No. E100 of 2022, Safaricom Investment Co-operative Limited vs Francis Mbugua Kinyanjui & Leonard Njogu Njau T/A as Kinyanjui Njau Advocates (hereinafter "the related case") save for the parties being the same. She explains that the Plaintiff in the related case seeks the delivery of documents illegally withheld by the firm of Kinyanjui Njau Advocates and for the said firm to render an account for the sum of Kes. 87,000,000.00 received by the said firm from the Plaintiff, yet no work was rendered. She further states that the arbitral proceedings commenced prior to filing of the related case and that it cannot therefore be said that the arbitration proceedings were based on this suit.

12. The Application was canvassed by way of written submissions which I have considered.

Applicant's Submissions

13. The Applicant noted that the impugned Award, purported to delve into the properties known as Donyo Sabuk/Komarock Block 1/36503, Donyo Sabuk/Komarock Block 1/36507, Donyo Sabuk/Komarock Block 1/36537, and Donyo Sabuk/Komarock Block 1/36540 and determined thus:

    a. The Applicant did not proffer any consideration for the purchase of the parcels known as Donyo Sabuk/Komarock Block 1/36503, Donyo Sabuk/Komarock Block 1/36507, Donyo Sabuk/Komarock Block 1/36537, and Donyo Sabuk/Komarock Block 1/36540 whether by way of a direct deposit or by way of a 'debt swap';

    b. In the end (see page 17 of the Applicant's Annexure 'LNN 7% the Tribunal decreed that the said Agreement between the parties herein dated 25th August 2020 was vitiated/voidable (a contentious holding as will be argued hereunder);

    c. It ordered the Applicant to deliver vacant possession of the parcels known as Donyo Sabuk/Komarock Block 1/36503, Donyo Sabuk/Komarock Block 1/36507, Donyo Sabuk/Komarock Block 1/36537, and Donyo Sabuk/Komarock Block 1/36540; and,

    d. Injuncted the Applicant herein whether by himself, his servants, employees, agents, assignees or any parties claiming under him from trespassing, entering into, alienating, transferring,

dealing with and/or interfering with the Claimant/Respondent's quiet possession of the aforesaid suit properties or otherwise in any manner whatsoever dealing with the aforesaid suit properties.

14. The Applicant framed the issues for determination to be as follows: -

    i. Whether or not the Applicant's application is time barred.

    ii. Whether the Award dated 18th December 2022 published by the Honourable Mr. James Mang'erere is contrary to Public Policy.

    iii. If the answer to ii above is in the affirmative, which is the appropriate remedy for the Applicant herein?

    iv. Who should bear the cost of the present application?

15. On the issue of whether the application is time barred, the Applicant referred to the provisions of Section 35 (3) of the *Arbitration Act* (the Act) and submitted that the time within which it was to file an Application seeking to set aside the arbitral award had not lapsed as at the time he filed the instant application. The Applicant argued that since he only learnt of the delivery of the award through the Respondent after which he on 10th March 2023 prompted the Tribunal to favour him with a copy of the Award, it is only proper to say that he received the said award towards the end of March 2023.

16. It was further, the Applicant's case that since it was not until 19th May 2023 that the issue of costs was finally determined, the claim that the present Application is time barred is without basis.

17. On whether the award is in conflict with public policy, the Applicant referred to the decision in the oft cited case of Christ for All Nations v Apollo Insurance Co. Ltd [2002] EA 366 and the case of Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR and submitted that the High Court has powers scrutinize the Arbitral Award and that the party, adversely affected by the Arbitral Award has a right to be heard in the interest of natural justice."

18. The Applicant submitted that the Award was contrary to *Law of Contract Act*, CAP 23 of the Laws of Kenya as it dealt with the wrong subject matter thus offending the adage that parties are bound by the terms of their contract. The Applicant emphasized that while the parties contract was specifically in relation to the sale of the suit property being Donyo Sabuk/Komarock Block 1/36510, Donyo Sabuk/Komarock Block 1/36509, Donyo Sabuk/Komarock Block 1/36515 and Donyo Sabuk/Komarock Block 1/36530, the Tribunal, on the other hand delved into the parcels known as Donyo Sabuk/Komarock Block 1/36503, Donyo Sabuk/Komarock Block 1/36507, Donyo Sabuk/Komarock Block 1/36537, and Donyo Sabuk/Komarock Block 1/36540 and proceeded to give its award on 18th December 2022.

19. It was submitted that by dealing with different land parcels, the Arbitral Tribunal purported to determine matters outside of the agreement and thus the award is contrary to public policy.

20. The Applicant faulted the Tribunal for breaching the tenets of natural justice by making reference to the Respondent's documents and confirming them as adopted as the Claimant's evidence in court, when no mention was made to the Applicant's bundle of documents and additional documents.

21. On the issue of debt swap, the Applicant submitted that the issues in the case Nairobi HCCMisc. No. E100 of 2022; Safaricom Investment Cooperative Society Limited v Francis Mbugua Kinyanjui & Leonard Njogu Njau t/a Kinyanjui & Njau Advocates are important since the said issues have yet to be resolved.

22. The Applicant noted that the Respondent sought to rely on the pleadings in Nairobi HCCMisc. No. E100 of 2022; Safaricom Investment Cooperative Society Limited v Francis Mbugua Kinyanjui & Leonard Njogu Njau t/a Kinyanjui & Njau Advocates as its evidence in arbitral proceedings in its quest to demonstrate that it is the Applicant herein who owes it and not the other way around. In this regard, the Applicant submitted that the issues in the related case merited consideration of all the issues between the parties herein and not a peripheral, cursory glance.

23. The Applicant argued that the Arbitral Tribunal purported to condemn the Applicant herein, in Nairobi HCCMisc. No. E100 of 2022 by deeming him the culpable party notwithstanding the fact the issues therein and those before him were intertwined and more importantly, those before the Superior Court were yet to be determined thus dealing a death knell to the very definition of rules of natural justice to the detriment of the Applicant herein.

24. The Applicant contended that the Award lacks cogency, certainty, and is ambiguous thus contravening the tenets of section 32 of the Act which provides that an award must not be ambiguous as to affect its enforcement. In advancing this argument, the Applicant referred to page 14 of the impugned Award and claimed that the Arbitral Tribunal made two different conclusions as regards the status of the agreement by on one hand holding that that the effect of a contract without a consideration is that the same stands vitiated and voidable while in the subsequent page, the Tribunal held that such an award is void and unenforceable.

25. It was submitted that the foregoing scenario left the Applicant herein uncertain as to what the intention of the Arbitral Tribunal was.

The Respondent's Submissions

26. The Respondent isolated the following issues for determination:

    i. Whether the Applicant's application dated 15th June 2023 is time barred by dint of the provisions of Section 35(3) of the *Arbitration Act*.

    ii. Whether the application meets the threshold required under Section 35 (2)(b)(ii) of the *Arbitration Act* to set aside an Arbitral award.

    iii. Whether the Applicant entitled to the remedies sought?

27. On whether the Application is time barred, the Respondent argued that since the Arbitrator wrote to the parties, through their counsel, on 18th December 2022 informing them that the arbitral award would be published on the same date, the instant application, having been filed on 3rd July 2023 was filed way beyond the 3 months grace period granted to parties to challenge the outcome of the arbitration process.

28. The Respondent maintained that time began to run on 18th December 2022 when the award was published regardless of when a copy was picked up by the parties.

29. It was submitted that the instant application having been filed 5 months and 4 weeks after the award was published on 18th December 2022 is time barred by virtue of section 35(3) of the *Arbitration Act* and ought to be dismissed forthwith.

30. On whether the Award is conflict with public policy in Kenya, the Respondent also referred to the oft cited case of Christ for all Nations vs. Apollo Insurance Co. Ltd. (supra) and submitted that public policy of Kenya leans towards finality of arbitral awards and that parties to arbitration must learn to accept awards and not seek to appeal the decision of an impartial arbitrator after a fair hearing.

31. The Respondent reiterated that its claim before the Tribunal was in respect to the agreement dated 25th August 2020 which was found to be void for want of consideration. According to the Respondent, the Applicant's allegation/defence of a "debt swap agreement" was also presented before the Arbitral Tribunal for consideration which defence was dismissed.

32. On the Applicant's submissions that the Award deals with or addresses the wrong subject matter, the Respondent submitted that the Suit Properties over which it claims an interest are in the Award. It was further submitted that the title documents over the Suit Properties are annexed to the Replying Affidavit sworn by Agnes Bukachi as annexures in AB-1 to AB-4 and that the Applicant has not produced proof of its interest in different properties other than the Suit Properties that were the subject of the Award.

33. The Respondent submitted that section 34 of the *Arbitration Act* sets out the procedure for correction and interpretation of arbitral award and noted that no such application for correction of the award has been made by the Applicant who claims that the award addressed the wrong subject matter.

34. It was the Respondent's case that since Section 34 of the *Arbitration Act* reserves the power to correct an award on the Arbitral Tribunal, the instant Award cannot be amended by the High Court nor can an alleged error be a ground for setting aside an award and that there being no application to correct the Award, no such order ought to be granted.

Analysis and Determination

35. I have carefully considered the pleadings filed herein, the parties' respective submissions to the Application dated 15th June 2023 together with the authorities that they cited. I find that the main issues that fall for my determination are as follows: -

    i. Whether the instant application is time barred.

    ii. Whether the Application meets the threshold set for the granting of an order to set aside an arbitral award.

36. On the issue of whether the application is time barred, the Applicant argued that since he only learnt of the delivery of the award through the Respondent sometime in March 2023 and that he requested for a copy of the Award 10th March 2023, the instant application was filed within the requisite period stated under Section 35 (3) of the *Arbitration Act*. The Applicant further submitted that it was not until 19th May 2023 that the issue of costs was finally determined by the Tribunal. According to the Applicant, the time for filing the present application had not lapsed as at the time it was filed.

37. The Respondent was of the contrary view and submitted that the application is not properly on record having been filed outside the period stipulated under Section 35(3) of the *Arbitration Act*. The said section stipulates as follows: -

> 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."

38. It was not disputed that the impugned Award was published on 18th December 2022 and the instant Application filed on 3rd July 2023. From the Applicant's submissions, it is clear that he holds the view that time for filing an application to set aside an arbitral award started to run from the time he requested

for a copy of the award and/or the time of publishing the decision on the costs of the arbitration. The question that begs an answer is when an Award is deemed to have been received by the parties.

39. In Ann Mumbi Hinga vs. Victoria Njoki Gathara NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR the Court of Appeal reiterated the contents of Section 35(3) of the Act, and was categorical that: -

> " Section 35 of the *Arbitration Act* bars any challenge, even for a valid reason, after 3 months from the date of delivery of the award."

40. In the case of Ezra Odondi Opar v Insurance Company of East Africa Limited KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR, the Court of Appeal reiterated that:

> " (22) The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015 "the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient..." while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made."

The Court then proceeded to state that,

> " The three months' period within which an application for setting aside an arbitral award may be made is to be computed from the date the award is received."

41. What then is the meaning of the word "received" in the context of an arbitral award? The answer to this question can be found in the decision of Tuiyot J. (as he then was) in the case of University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR where the Court rendered itself on the correct interpretation of Section 35 (3) of the Act follows: -

> " 16. To discern the true meaning of Section 35(3), a short journey begins from Section 32(5) of The Act. Section 32, as stated earlier, is on the forms and contents of an arbitral award. Subsection 5 reads:-
>
> "Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party."
>
> 17. Section 32 (B) (3) permits an arbitral tribunal to withhold the delivery of an award to the parties until full payment of the fees and expenses is received by it. Assuming that the arbitral tribunal has no reason to withhold the delivery of an award, what is the exact obligation imposed on the tribunal by Section 32(5)? Put differently, what does delivery mean on the context of Section 32(5)?
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> 18. So as to put this in good perspective, it seems to this Court that the duty of an arbitral tribunal differs from that of a Judge delivering a Judgment or Ruling. Order 21 Rule 8(1) of the Civil Procedure Rules provides that a decree shall bear the date of the day on which the judgment was delivered. In that context delivery of a judgment or ruling is to the official statement of a formal decision or judgment of the court.

19. Contrasted, Section 32(5) of the Act talks about the signed copy of the arbitral award being delivered to each party. The University referred this Court to the definition of delivery in Black's Law Dictionary "Ninth Edition" which means:-

"1. The formal act of transferring something, such as a deed, the giving or yielding possession or control of something to another. 2. The thing so transferred or conveyed."

20. I would like to think that in the context of Section 32(5), delivery of the award means the "giving or yielding possession or control" of a signed copy of the award to each party. It means releasing to or making available for collection the signed copy of the award to the parties. A plain reading of provisions does not require the arbitral tribunal to send or dispatch the signed copy of the award to the parties.

21. It is against this understanding of the law that the provisions of Section 35(3) should be interrogated. For good measure I, again, set out those provisions: -

"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."

22. It seems to this Court that whether or not the party making an application under Section 35 is deemed to have received the arbitral award depends on how the arbitral tribunal delivers the signed copy of the award. In the case decision of Union of India (Supra), the award was physically delivered to the office of the General Manager, Southern Railway on 12.3.2001 but the Chief Engineer of the Corporation received it on 19.3.2001. Since the Court took the view that only delivery to the Chief Engineer was effective then it held that actual receipt by him of a copy of the award was the starting pointing for purpose of calculating the time to challenge the award in Court.

23. In the Matter of Lowe (supra) statute there required the Arbitrator to deliver a copy of the award to each party "in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested". The Court held that in the circumstances of the case delivery had to be construed as the date on which the award was received.

24. This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties."

42. In *Transworld Safaris Limited vs. Eagle Aviation Limited and 3 Others H.C Misc. Application No. 238 of 2003*(UR). Nyamu J., reviewed various decisions and expressed the view that: -

> " Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the *Arbitration Act* reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

43. In Mahinder Singh Channa v Nelson Muguku & Another ML HC Misc. Application No. 108 of 2006 [2007] eKLR, Warsame J., (as he then was) observed as follows:

> " Publication is something which is complete when the arbitrator becomes functus officio but so far as the time for moving under the statute is concerned, it is the notice that matters. It is wholly untenable that the time would not begin to run for a wholly indefinite period if neither side takes up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the period has only just started to run and the fact that he could have had his award by walking round the corner at any moment from the date upon which he received notice of its availability cannot be held against him. Such a construction of the rule appears to be entirely unreasonable. It has never been applied and there is no reason to hold that it applies now ... As the parties in this matter were aware that the award was published and this information was supplied to the applicant after it made an inquiry as to the effective date of publication of the award, the letter stating that the award had been issued cannot change the earlier factual and legal position. Any other interpretation or holding would result in dilatory tactics that would defeat the arbitral process denying it of the virtues associated with it such as speed and cost effectiveness...

44. There are however instances where courts have adopted the line of argument taken by the Applicant herein in respect to the issue of receipt of an award such as the case of Dewdrop Enterprises Limited v Harree Construction Limited HC Misc. No. 684 of 2008 [2009] eKLR, where the court accepted that the time for filing the application to set aside the award is to be calculated from the date the award was received. The court observed as follows: -

> " Whereas it is true that Arbitrator notified the parties that award was ready for publication as early as November 2007, it was evident that Arbitrator did not publish or avail copies of the said award to the parties on account of failure by the parties herein to pay the outstanding balance of the Arbitrator's fees. The Arbitrator withheld publication of the said award till 11th August 2008. I therefore hold that the date of publication of the said award was 11th August 2008. The applicant stated that it received the award on 15th August 2008. Taking either dates as the date on which the award was published, under Section 35(3) of the Act, the applicant was required to file the application to set aside the arbitral award before this court required to file the application to set aside the arbitral award before this court by either 11th November 2009 or 15th November 2008. The present application was filed on 23rd September 2008. The application was therefore presented to court within the period provided under the *Arbitration Act* 1995. I find no merit with the respondent's objection in this regard."

45. Similarly, in United (EA) Warehouses Limited v Care Somalia and Southern Sudan (Supra), HC Misc. Appl. No. 182 of 2013 [2015] eKLR where the respondent therein contended that the application to

set aside the award was time barred under section 35(3) of the Act as the award was published on 23rd April 2012. In dismissing the objection, the court observed as follows:

> "Clearly, the foregoing averment under oath confirms the Claimant's position that the Arbitral Award was dated 23rd April 2013 but was received by the parties on 12th July 2013. I do not understand the about turn made by the Respondent to later claim that the Claimant received the award on 23rd April 2013. Since Section 35 (3) provides that time should start running from the date the applicant received the award, the Claimant's application was filed within time. The Respondent's challenge to the Respondent's application on the basis that the same was filed out of time should therefore be rejected."

46. In resolving this matter, I will adopt the position that I took in Lantech (Africa) Limited v Geothermal Development Company ML HC Misc. Appl. No. E776 of 2020 [2020] eKLR, where this court held that: -

> "(33) [D]elivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties."

47. In the instant case, a perusal of the record reveals that the Tribunal wrote to the parties herein, through their advocates, on 18th December 2022, to inform them that the arbitral award would be published on the same date. In the said communication, the Honourable Arbitrator asked the parties to clear his fees so as to facilitate the dispatch of the Award to them. I note that the email from the Tribunal to this effect was attached to the Respondent's Supplementary Affidavit as annexure marked "AB-21".

48. Guided by the decisions in the above cited cases, I find and hold that bearing in mind the object of the Act, which is the expeditious disposal of arbitral disputes, the only logical interpretation of section 35(5) of the Act is that an application to set aside must be made within 3 months from the date the award is received. To this end, the date of receipt is the date the parties are notified of the award. The arbitral Tribunal discharges its obligation of delivery once it avails the signed copy of award to the parties and the failure by the parties to collect it does not delay or postpone the delivery. Indeed, once the parties are notified of the award, it is within their power to collect it.

49. I find that in this case, the Award was received on 18th December 2022 when the parties were notified by the Arbitrator that it was ready for their collection. I find that the instant application having been filed on 3rd July 2023 was filed outside the 3 months prescribed period in section 35(3) of the *Arbitration Act*, is incompetent. It is therefore struck out with costs to the Respondent.

Public Policy

50. My above finding on the issue of the delay in the filing of the application would have been sufficient to determine the application but I am still minded to determine the issue of whether the award is in conflict with the public policy in Kenya.

51. Public policy was discussed in the landmark case of Christ for All Nations v Apollo Insurance Co. Ltd (Supra) where the court held: -

> " Public policy is a broad concept incapable of precise definition. An award can 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 any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality".

The learned Judge went onto hold that;-

> " I also do not accept the Applicant's contention that the award is contrary to justice. To accept the Applicant's contention would be tantamount to accepting a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, injustice is perpetrated. Justice is a doubt edged sword. It sometimes cuts the Plaintiff and other times the Defendant. Each of them must be prepared to bear the pain of justice cut with fortitude and without condemning the law's justice as unjust.
>
> In my Judgement this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by involving the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law of construction of statute or contract on the part of an arbitrator cannot be by any stretch of legal imagination, said to be inconsistent with the public policy of Kenya".

52. Similarly in Mahican Investments Limited v Giovanni Gaidi & 80 Others [2005] eKLR the court held that;-

> " A court will not interfere with the decision of arbitration even if it is apparently a misinterpretation of contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the 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.

53. In the Christ for All Nations case (supra), the court adopted the position that was advanced by the Supreme Court of India in the case of Renusagar Power Co. v General Electric Co. AIR [1994] S.C 860 where it was held that in order to succeed in an application for setting aside an arbitral award on the grounds of public policy, an applicant must establish that the award is contrary to fundamental policy of Indian Law, violation of India's laws and further that the enforcement of such an award would be contrary to justice and morality.

54. In the instant case, I note that the Applicant's grievance over the impugned award was that it dealt with the wrong subject matter by referring to different land parcel numbers as opposed to the parcel numbers codified in the parties' agreement. According to the Applicant, by giving an award in respect to different land parcels, the Tribunal determined matters outside of the agreement thus making the award contrary to public policy.

55. The Applicant also faulted the Tribunal for breaching of the tenets of natural justice on account of failure to make reference to the Respondent's documents while making no mention to his bundle of documents. The Applicant also referred to the issue of 'debt swap' that had been raised in the related case and further accused the Tribunal of giving an award that was ambiguous, lacking in cogency and certainty.

56. In a rejoinder, the Respondent submitted that public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards and not seek to appeal the decision of an impartial arbitrator before the High Court after a fair hearing.

57. The Respondent submitted that the he Applicants' argument that he paid for the Suit Properties through a 'debt swap' arrangement did not persuade the Arbitral Tribunal.

58. On the Applicant's claim that the award referred to the wrong subject matter, the Respondent submitted that the Suit Properties over which it claims an interest are in the Award and that the Applicant had not presented any evidence to show its interest in any other properties apart from the Suit Properties that were the subject of the Award. It was the Respondent's position that any error in the land parcel numbers is a matter that can be corrected by the Tribunal under Section 34 of the Act.

59. In Intoil Limited & another v Total Kenya Limited & 3 others [2013] eKLR the court explained the scope of public policy in respect to the setting aside an arbitral award 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."

60. It is trite that an applicant challenging an award on the basis of public policy must identify the public policy breached and then demonstrate which part of the award conflicts with that public policy. Public policy does not provide a window for the court to exercise appellate jurisdiction and it must connote something greater than personal or contractual interests of the parties. This is the position that was adopted in Mall Developers Limited v Postal Corporation of Kenya ML Misc No 26 of 2013 [2014] eKLR where the court observed that: -

> "Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the claimant and the respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy."

61. My finding is that the issues raised by the Applicant mainly relate to the arbitrator's findings of fact which the Applicant interpreted to be contrary to the law. My understanding of the Applicant's argument is that the award contained errors of fact and the interpretation of the terms of the agreement. The Applicant did not however demonstrate that the award had a national interest connotation or if it affected, impacted or infringed the rights of third parties, so as to qualify to be deemed as offensive to public policy. I am not persuaded that the Applicant proved that the award affected any other party other than the parties that appeared before the arbitrator so as to justify this court's exercise of its limited jurisdiction to set aside the award.

62. Pursuant to the foregoing, it is the finding of this court that there was neither a breach of public policy nor an illegality in the conduct of proceedings of the Arbitral Tribunal, and that the Award arrived at lawfully.

Disposition

63. For the reasons that I have stated in this ruling, I find that the instant application does not meet the threshold required under Section 35 (2)(b)(ii) of the *Arbitration Act* to set aside the Arbitral award published on 18th December 2022 on ground of conflict with public policy.

64. Consequently, and having found that the application was filed outside the set timelines, I find that the application is not merited and I therefore dismiss it with costs to the Respondent.

65. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH OCTOBER 2024.

W. A. OKWANY

JUDGE