



REPUBLIC OF KENYA



**Wealthsmith Limited & another v Kithome & 11 others; Munyu
(Interested Party) (Miscellaneous Application E065 of 2022)
[2023] KEHC 3248 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E065 OF 2022
DAS MAJANJA, J
APRIL 20, 2023**

BETWEEN

WEALTHSMITH LIMITED 1ST APPLICANT

BARLETTA HOLDINGS LIMITED 2ND APPLICANT

AND

BEATRICE NJAMBI MAHIANYU 1ST RESPONDENT

CASPER NZIOKA KITHOME 2ND RESPONDENT

BENSON KINYUA NGURE 3RD RESPONDENT

PAUL KIRUNJA RIUNGU 4TH RESPONDENT

CAROL NYAWIRA SHIKANGA 5TH RESPONDENT

DANIEL KIMANI NDIBA 6TH RESPONDENT

EVANGELINE RICHU 7TH RESPONDENT

JOYCE NANDAKO WANYONYI 8TH RESPONDENT

MESHACK K MWANIA & CLAIRE WAITHIKI KANYIRI ... 9TH RESPONDENT

MICHAEL MBUGUA 10TH RESPONDENT

ROSEWITA ATIENO OCHALI 11TH RESPONDENT

SATISH CHAMPALAL RAJPUT 12TH RESPONDENT

AND

MARTIN MUNYU INTERESTED PARTY



RULING

1. On November 4, 2022, the applicants filed an application seeking to set aside an award published by the interested party (“the arbitrator”) on May 20, 2022 (“the award”). The applicants have invoked, *inter alia*, section 35(2)(b)(ii) of the [Arbitration Act](#), 1995 which empowers the court to set aside an arbitral award if it finds that, “the award is in conflict with the public policy of Kenya”. They pray that the court do set aside the award, “as being unjustifiable, manifestly excessive beyond the dispute referred to the arbitrator, exorbitant, punitive and issued under and contrary to the [Arbitration Act](#), Rules and general law on award and attendant principle thereto.” They also request the court to, “issue an order and review the monetary award of the amounts awarded to each of the respondents in the said award for being contradictory and excessive of the finding of the arbitrator, agreement of the parties and public policy having been issued in breach of relevant and applicable law for the award and the attendant dispute referred to the arbitrator.”
2. The application is supported by the affidavit of Gerald Munyao Mwanza, a director of the 1st applicant, sworn on November 1, 2022. In response to the application, the respondents relied on the replying affidavit sworn on December 22, 2022 by the 1st respondent. In addition, they filed a notice of preliminary objection dated December 22, 2022 stating that the applicants’ application is time barred due to the time limitation for filing such an application provided for under section 35(3) of [Arbitration Act](#). They also state that the court lacks jurisdiction to determine the application as it seeks orders beyond the scope determined by sections 10 and 35 of the [Arbitration Act](#) and that the application seeks to appeal the decision of the arbitrator who conclusively determined the issues now raised in the application and as such the application is *res judicata*. The application and preliminary objection were canvassed by way of written submissions.
3. Before I deal with the substance of the matter, a summary of the dispute between the parties is appropriate.
4. The respondents entered into individual contracts for the purchase of parcels of land owned by the applicants. The agreements entailed investment in agribusiness through greenhouse farming to be undertaken by the applicant on behalf of the respondents at agreed prices. It was agreed that the respondents would reap returns in income to be paid by the applicants. The agreements, which were standard in nature, provided for dispute resolution by arbitration.
5. In due course, the parties disagreed. The respondents accused the applicants of failing to pay the agreed return on investments despite continuing operations on their plots yet they had fulfilled their obligations and as a result the respondent claimed various sums. The applicants denied breach of the agreements and averred that they had fulfilled their part of the agreements. First, and as concerns the agreement for sale of land, they stated that they had complied with the agreement. Second, and as regards the farming agreement, they stated that no successful farming was undertaken which was a condition for payment of return on investments.
6. Having considered the evidence and material, the arbitrator published the award. The arbitrator declared that there was successful farming in the first year of contract, 2017 hence the respondents were entitled to return on investment for that year. That the applicants would pay the respondents Kshs 4,350,000.00 for that year with interest at 14% pa from December 9, 2022 in addition to nominal damages for each respondent assessed at Kshs 100,000.00 making a total of Kshs 1,200,000.00 with interest at 14% pa effective 30 days from the date of the award until payment in full. The applicants were ordered to hand over to the individual respondents their respective plots together with the installed



greenhouses not later than 30 days from the date of the award and to re-install the beacons on each parcel that were removed during the farming project. The claim for general damages was dismissed. The arbitrator also made an award on costs and arbitration expenses.

7. I propose to first deal with the objection that the application is time barred as this determination will determine whether I will deal with the substance of the application.
8. It is not disputed that an application for setting aside an 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 of the *Arbitration Act*, from the date on which that request had been disposed of by the arbitral award. This position is aptly captured by section 35(3) of the *Arbitration Act* which provides as follows:

35 (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. [emphasis mine]
9. The meaning of “received” has been expounded by the court in a catena of decisions that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection (see *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR and *Mercantile Life and General Assurance Company Limited and another v Dilip M. Shah and 3 others* [2020] eKLR).
10. It is common ground that on August 17, 2022, the applicants sought a review of the award pursuant to section 34 of the *Arbitration Act* and the parties further agree that the arbitrator disposed of the review on September 8, 2022. On September 12, 2022, the respondents also sought a review of the award. By a letter dated September 29, 2022, the arbitrator responded to this application for review and declined jurisdiction. I find it proper to reproduce the body contents of the said letter below for ease of reference and determination:

I refer to the respondents’ advocates letter of September 12, 2022 seeking review of the award. Having considered the same, I respond as follows:-

1. By a notice to the parties dated May 13, 2022, I alerted the parties of the scheduled delivery of the award as at May 20, 2022 subject to payment of the balance of the arbitrator’s costs;
2. Following reminders, the due costs were paid in August and the award was released on August 5, 2022;
3. Despite notice to the parties that the award was available for collection from my offices as at August 5, 2022, the respondent did not collect the award until on August 17, 2022;
4. A request for review was made by the claimant on August 17, 2022 and a ruling on the same was duly issued;
5. Any request for review ought to have been made within 30 days of release of the award, that is by 5 September being 30 days from 5 August;
6. The further request for review by the respondents made on September 12, 2022 falls outside the 30 days period after release of the award. The fact that



the respondent failed to collect the award between 5 August and 17 August cannot extend the time;

7. In any event, the respondent had opportunity to raise the matters now raised while responding to the request for review filed by the claimant but did not do so. The matters now raised were not subject of the claimant's request for review and did not arise in the responses.
8. Considering the timelines under the Act, | consider that this tribunal no longer has jurisdiction under section 34 of the Act.

Yours faithfully

Signed

Sole Arbitrator

11. From the aforementioned letter by the arbitrator, it is clear that the parties were notified that the award was to be ready on May 20, 2022. Whereas the arbitrator also notified the parties that the award was ready for collection as at August 5, 2022, I note that this was in reference to the physical collection of the award once the parties had paid his fees and was not the notification that the award was ready to be 'received' in line with section 35(3) of the *Arbitration Act*. Again, the court has always held that time begins to run from the date when the parties were notified that the award was ready, which as I have found was on May 20, 2022 and not when the parties paid the Arbitrator's fees. Arguing otherwise would suggest that time begins to run when the parties pay the arbitrator's fees rather than when parties are notified of the award and such an argument would defeat the object of arbitration which is to ensure a speedy and final resolution of disputes (see *Mahinder Singh Channa v Nelson Muguku and another* ML HC Misc Appl No 108 of 2006 [2007] eKLR).
12. In this case, the other limb of section 34 applies as the parties applied for review of the award hence time is reckoned, "from the date on which that request had been disposed of by the arbitral award." The respondents applied for review by their letter dated August 17, 2022 and a decision delivered on September 8, 2022. The applicants also applied for review by their letter dated September 12, 2022 but the arbitrator disclaimed jurisdiction by the letter dated September 29, 2022 which I have reproduced above. Since the time started running on September 8, 2022, the date the decision on the review was issued, the applicants had 3 months from the date of that decision. Since the application to set aside the award was filed on November 22, 2022, it was filed within time hence the preliminary objection fails on this account.
13. Turning to the substance of the application, the applicants complain that although the arbitrator determined that there was successful farming in the year 2007 and made an award for that year, it tabulated the figures that would have accrued to each individual respondent, without taking into account the time the parties entered into the agreement to farm in 2017. That based on the dates that each respondent signed their respective farm management agreements with the applicant, it argues that it would take at least 3 months to procure, transport and erect a greenhouse hence that period should be taken into account. The applicants point out that those who executed their agreement at least 4 months before the end of 2017 would be entitled to any award. The applicants therefore submit that unless the amount awarded by the arbitrator to each respondent is reviewed, the award would occasion gross injustice and loss to the applicants hence the award ought to be set aside.
14. In response to the application, the respondent point out that the grounds or reasons proffered for the application do not fall within the grounds set out in section 35(2) of the *Arbitration Act*. They contend



- that the orders sought by the applicants should have been the basis for review of the award but they filed their application for review late. They urge the court to dismiss the application as it lacks merit.
15. The jurisdiction to set aside an arbitral award is narrow and specific and a party who seeks to invoke this jurisdiction must be clear on the grounds it seeks to rely on. In the motion before the court, the applicants have invoked section 35(2)(b)(ii) which deals with violation of the public policy of Kenya. The specific grounds on the face of the application are that the arbitrator failed to take into account the time necessary for preparation and installation of greenhouses from the date the agreements were signed in calculating the award for the return on investment of the first year.
 16. The phrase “public policy” was enunciated in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366 where Ringera J, explained the scope of public policy as a ground for setting aside an arbitral award as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.....”
 17. The court further warned that not every infraction whether of precedent or misinterpretation of law or misapprehension of facts falls within the scope of the public policy exception:

[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the *Arbitration Act*.
 18. The grounds proffered by the applicants relate to the manner in which the arbitral tribunal calculated the award for the return on investment for the year 2017. I do not see how this amounts to breach of public policy of Kenya. If the calculation was an error, then it fell within what the arbitrator was required to adjudicate.
 19. The issues now raised by the applicants are the same issues that they raised in their application made under section 34(1) of the *Arbitration Act* which provision permits a party to request the arbitral tribunal to, “correct in the arbitral award any computation errors, any clerical or typographical errors or any errors of a similar nature ... and to clarify or remove any ambiguity concerning specific point or party of the arbitral award.” In the said application, the applicants requested the arbitrator to “correct some computation errors which are apparent on the award of the May 20, 2022.” After stating and outlining their case, they pleaded with the arbitrator to, “find it appropriate, regular and competent to correct the computations on the award, and clear the apparent error in the computation of returns due for the year 2017, as outlined in table 2.”
 20. From the foregoing, it is clear that what the applicants’ seek is to correct errors and they only came before this court after the arbitrator declined their application for the reason that it was out of time. From the totality of the material before the court, I do not find any reason to hold that the errors alleged rise to the breach of public policy. In any case, the issue of the breach of the agreements and



consequences was an issue squarely within the jurisdiction of the arbitral tribunal and it reached the conclusion based on the evidence before it.

21. For reasons I have set out, I decline to set aside the award. I dismiss the applicants' application dated November 1, 2022 with costs to the respondents. The costs of the application are assessed at Kshs 100,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Mbithi instructed by Mutuku Mbithi and Butoyi Advocates for the Applicants.

Mr Gichuki instructed by Mulondo and Company Advocates LLP for the Respondents.

