



**Neelcon Construction Services Limited v Kakamega County Assembly Service Board Sued on Behalf of Kakamega County Assembly (Miscellaneous Application E060 of 2022) [2023] KEHC 20003 (KLR) (Commercial and Tax) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20003 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E060 OF 2022**

**FG MUGAMBI, J**

**JULY 14, 2023**

**BETWEEN**

**NEELCON CONSTRUCTION SERVICES LIMITED ..... APPLICANT**

**AND**

**KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD SUED ON BEHALF OF  
KAKAMEGA COUNTY ASSEMBLY ..... RESPONDENT**

**RULING**

1. Before the court are two applications, one dated October 26, 2022 for enforcement of an arbitral award and another dated November 21, 2022 for setting aside the same arbitral award.

**Application dated October 26, 2022**

2. The first of the two applications was filed by Neelcon Construction Services Limited (hereinafter the applicant) under section 36 of the *Arbitration Act*, 1995 and rule 6 of the *Arbitration rules 1997* and all other enabling provisions of the law. It seeks the following orders;
  - i. That the applicant be granted leave to enforce as a decree, the arbitrator's final award published by the sole arbitrator, Haron G Nyakundi on November 5, 2021
  - ii. That the respondent does pay the costs of this application.
3. The application was supported by the affidavit of Naran Hiran sworn on October 26, 2022 and premised on the grounds on the face of the application.



## Application dated November 21, 2022

4. The respondent, Kakamega County Assembly subsequently filed the application dated 21<sup>st</sup> November 2022 under Articles 50, 159(2)(c)(a)(3) of the Constitution of Kenya 2010, section 35(a)(i)(ii)(iii) and section 35(b)(ii) of the Arbitration Act of 1995(as amended), Rule 7 of the Arbitration Rules, 1997, Order 51 rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. The application seeks the following orders: -
  - i. Spent
  - ii. That this Honourable Court be pleased to set aside the final award published on November 5, 2021 and released to the Applicant herein on October 3, 2022 by Haron G Nyakundi in its entirety on the ground that the proceedings before the arbitrator were res judicata in view of Kakamega High Court Civil Case Number 3 of 2018.
  - iii. That the Honourable Court be pleased to set aside the final award published on 5<sup>th</sup> November and released to the Applicant on October 3, 2022 by Haron G Nyakundi in its entirety on the grounds that the contract the subject of the arbitral proceedings herein was void hence not enforceable.
  - iv. That the Honourable Court be pleased to make such further or other order(s) as it may deem appropriate
5. The application is supported by the grounds on the face of it and the supporting affidavit sworn by John Simwa on November 21, 2022.
6. The gist of the respondent's case was that prior to the arbitration, the applicant had sued the respondent in High Court Civil Suit No 3 of 2018, a claim which was struck out for being incompetent to the extent that the applicant had sued the wrong party. It was averred that the arbitrator failed appreciate the preliminary objection raised before him that the matter before him was res judicata and the contract that was subject to the arbitration was null and void as Kakamega County Assembly lacked the capacity to enter into a binding contract.
7. The respondent further argued that while the applicant had amended its pleadings to join the Kakamega County Assembly Board as suing on behalf of Kakamega County Assembly, no directions had been issued to include the new party in the proceedings. The applicant had therefore brought arbitration proceedings against the wrong party. As a result, it was the respondent's case that the arbitrator lacked jurisdiction to entertain the respondent's claim as it was founded on a void contract and involved a party not properly introduced to the proceedings.
8. In any case, the respondent argued that the Kakamega County Assembly Service Board was not even accorded an opportunity to be heard at the arbitration proceedings as it was introduced by an amendment and no fresh notices were sent to it. The respondent therefore averred that the arbitral proceedings were inconsistent with the fundamental constitutional rights to a fair hearing and against the public policy. For these reasons it was prayed that the award ought to be set aside.
9. Although the respondent admitted to a delay in filing the application for setting aside the award, the delay was defended as excusable. Counsel submitted that the release of the award was based on the payment of the arbitrator's fee and at the time the county assembly was facing budgetary constraints which led to the delay. Further counsel submitted that the use of the word may in section 35(3) of the Arbitration Act allowed a possibility of a party filing the application out of time.



10. In response to the application, the applicant raised a preliminary objection dated January 24, 2023 on the grounds that;
  - i. The Notice of Motion application by the respondent/applicant is filed out of time as the same was filed on November 21, 2022 whereas the award was published on November 5, 2021, which exceeds the statutory three months (90-days) period prescribed under section 35 of the *Arbitration Act*, 1995 to file an application to set aside an award. The same ought to be struck out in limine;
  - ii. The Notice of Motion application by the respondent/ applicant offends the provisions of Section 5 of the *Arbitration Act*, 1995 which provides that a party is deemed to have waived their right to object whereupon such party proceeds with the Arbitration without stating its objection without undue delay or, if a time limit is prescribed, within such period of time. The application raises issues which ought to have been raised during the arbitral proceedings and since the respondent/applicant failed and/or neglected to do so it has waived its right to raise any objection by dint of section 5 of the *Arbitration Act*, 1995.
  - iii. The application offends the provisions of section 17(2) of the *Arbitration Act*, 1995 which provides timelines within which an arbitral Tribunal's jurisdiction can be challenged which ought to be not later than the submission of the statement of defence. This Honourable Court does not have the jurisdiction to issue the orders sought.
11. The applicant further filed a replying affidavit dated January 24, 2023 sworn by Naran Hiran buttressing the preliminary objection and in opposition to the application by the respondent. In summary the applicant argued that the question of jurisdiction came up during the arbitral proceedings and the arbitral tribunal addressed the issue in the final award. Further, the applicant averred that the application did not meet the conditions set out in section 35 of the *Arbitration Act* for setting aside the award.
12. With respect to the issue of representation, the applicant's contention was that it made an application on March 1, 2021 to amend the proceedings before the tribunal and Kakamega Assembly Service Board was made to be a party to the proceedings. As a consequence, the County Government of Kakamega ceased being a party. The applicant submits that in fact, the respondent participated in the proceedings through Mr Laban Atemba who is the Clerk of Kakamega Assembly Service board who testified on behalf of the respondent. The firm of Mulanya & Maondo advocates participated as advocates for the respondent and received all documents on its behalf.
13. Counsel submitted that the respondent willingly participated in the proceedings by filing documents, attending meetings, presenting its case and filing submissions. It was therefore submitted that failure to raise issues of representation within reasonable time meant that the respondent had waived its right to do so.

### **Analysis**

14. The applications as well as the preliminary objection were all canvassed by way of written submissions which I have considered together with the pleadings and authorities cited by parties.
15. There are two issues for determination. The first issue is whether the preliminary objection dated January 24, 2023 is merited and the second is whether the award should be adopted or set aside.



16. By the very nature of the preliminary objection, it follows that it ought to take precedence in determination. The legal ambit of what constitutes a preliminary objection was set out in the celebrated case of *Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors* where it was held that
- ' A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit'.
17. The preliminary objection is premised on section 35 of the [Arbitration Act](#) and that the application offends section 5 and 17(2) of the [Arbitration Act](#). Section 35(3) of the [Arbitration Act](#) provides that;
- ' (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.'
18. The respondent acknowledged that indeed the application was filed out of time. In justifying the delay, the respondent's contention was that the respondent was a public body and since its finances have to be budgeted for, it experienced delay in obtaining the relevant budgetary approvals and settlement of the arbitrators fees. The respondent asks this Court to consider this reason as justifiable for the delay. I note that there are sufficient judicial pronouncements whereby Courts have declined to enlarge the time for setting aside awards even where these involve public bodies and Institutions. Of interest is the case of [Dinesh Construction Company \(K\) Limited v Kenya Sugar Research Foundation \[2018\] eKLR](#). The High Court held that: -
- ' Thus, there being no specific provision in the [Arbitration Act](#) for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either to grant stay of execution, or set aside the enforcement order of July 11, 2017, or to extend time for purposes of setting aside the Arbitral Award.'
19. Again, in [University of Nairobi v Multiscope Consultancy Engineers Limited \[2020\] eKLR](#) the court emphasized this point and stated as follows;
- ' This leads me to an issue raised by the Applicant. That it was late in collecting the award because it had difficulties raising its share of the tribunal fees and expenses. It then makes the submission that financial disposition should not be allowed to lead to inequality before the law. This in my view can hardly be a reason for putting off the effective day to a later date. It may perhaps be a premise upon which a request for expansion of time can be made. That is, for an application for time to be expanded. Whether or not the University will be able to persuade the court that this amounts to an extraordinary circumstance that merits an exceptional extension of time is, of course, a different matter. The Court makes this observation well aware that there is a school of thought, with large numbers, that because of the absence of specific provisions for expansion of time under Section 35(3), then the timelines set are cast in stone and can never be expanded.'
20. I take queue from these and numerous other decisions that the period for setting aside the arbitral award under section 35(3) of the [Arbitration Act](#) is 90 days. In any case, the reason given for the one year delay is not justifiable as the arbitration proceedings were a process and the payment of the arbitral



tribunal's fees ought to have been planned for and provision made for payment within the 90-day period.

21. It has been stated that the Arbitration Act does not envisage circumstances whereby the court is called upon to extend time for filing applications. In fact, section 10 of the Act limits the courts interference save for where it is specifically stated. Consequently, this court is bereft of the jurisdiction to extend time for the application for setting aside the award. The preliminary objection is hereby upheld and the application dated November 21, 2022 is struck out.
22. Having so found, I now turn to the application for enforcement of the award. The High Court, under section 36 of the Arbitration Act, has the power to recognize and enforce domestic arbitral award. In order to do so, a party is required to meet the requirements set out in section 36(2). For the avoidance of doubt, section 36(2) provides that:-
  - (2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—
    - (a) The duly authenticated original arbitral award or a duly certified copy of it; and
    - (b) The original arbitration agreement or a duly certified copy of it.

### **Determination and orders**

23. From a perusal of the application, I note that the respondent filed the certified copies of the award and agreement. The award has not been affected by the grounds set out in section 37 of the Act. Since the application for setting aside the award is not successful, I find that the application to recognize and enforce the award has met the required threshold and is therefore allowed on the following terms: -
  - i. That the final award published on December 15, 2021 by the sole arbitrator Haron G Nyakundi is hereby recognized and adopted as a decree of this court
  - ii. Leave is hereby granted to the respondent to enforce and execute the award.
  - iii. The respondent in that application shall bear the costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>th</sup> DAY OF JULY 2023**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

