



**Kenya International Freight and Warehouse Association v Juden Consultancy (Miscellaneous Civil Application E500 of 2024) [2024] KEHC 14313 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14313 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E500 OF 2024**

**CW MEOLI, J**

**NOVEMBER 14, 2024**

**BETWEEN**

**KENYA INTERNATIONAL FREIGHT AND WAREHOUSE  
ASSOCIATION ..... APPLICANT**

**AND**

**JUDEN CONSULTANCY ..... DEFENDANT**

**RULING**

1. For determination is the motion dated 20.05.2024 by Kenya International Freight & Warehouse Association (KIFWA) (hereafter the Applicant) seeking inter alia that the Arbitral Award dated 26.10.2023 (hereafter the award) and published on 12.04.2024 by Mr. Andrew Mumma, (hereafter the Arbitrator), in the matter of an arbitration between Juden Consultancy (hereafter the Respondent) and the Applicant, be set aside; and that the Court makes a final determination on the matter in dispute between the parties. The motion is expressed to be brought pursuant to Section 35(2)(a)(iv) & (v) and 35(2)(b)(ii) of the *Arbitration Act*, Rule 7 of the Arbitration Rules and Article 50, 159, 165(6) of *the Constitution* of Kenya, on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Wycliffe Wachara Wanda, who describes himself as the Executive Officer of the Applicant.
2. To the effect that the Arbitrator on 12.04.2024 issued an award granting the Respondent the prayers sought in its application, including payment sought in the sum of Kshs. 4,160,000/- being fees payable for the unexpired term of the Management Contract, inclusive of payment for a non-operational office. He goes on to depose that the Arbitrator went outside the scope of his authority by ruling on a non-existent entity which was not in the arbitration agreement. That the Arbitrator further found that the Applicant should reimburse the Respondent the Arbitrator’s fee and expenses totaling Kshs. 861,300/-, yet the award had actually captured the Arbitrator’s fees at Kshs. 561,300/-, before the



- deduction of the deposit paid, and there is no evidence that the Respondent paid the said fees or any part thereof to the Arbitrator.
3. He further deposes that the Respondent had earlier raised several complaints that the Arbitrator was exploitative and had unfairly increased the Arbitrator's fees, which the Applicant believes was the reason for the Arbitrator's fees being passed on to the Applicant due, from pressure and threats from the Respondent. That the Arbitrator delivered a pre-meditated, hence biased award, which award was prepared on 26.10.2023 and delivered on 12.04.2024 after several adjournments and directions that the award would be delivered on notice.
  4. He reiterates that the Arbitrator delivered the award before the payment of the Arbitrator's fees as agreed amongst the parties thereby pointing to some sort of pressure, coercion and or undue influence from the Respondent during arbitration. He further states that the Respondent has since issued a notice for settlement of the entire award and it is just and expedient that the Court allows the instant motion, brought in good faith and without undue delay. In summation, he deposes that it is only just and expedient that the motion be allowed as sought.
  5. The Respondent opposes the motion by way of a replying affidavit sworn by Dennis Okingo dated 10.07.2024, a director of the Respondent, duly authorized and competent to depose. He views the motion as frivolous, vexatious, a non-starter, full of misrepresentations of facts, lacks material disclosures and merely calculated to deny the Respondent the fruits of the final arbitral award hence amounts to an abuse of the Court process. He goes on to state that the application does not meet the criteria for setting aside an such award under Section 35 of the *Arbitration Act*. That besides, the Applicant has no locus standi to institute these proceedings, hence the motion is null and void ab initio. That the Arbitrator specifically and exhaustively identified, set out and analyzed each of the pleadings by both parties and also identified the relevant documents and details including contract information, the management contract, the timelines for implementation of the contract and site meetings, in order to arrive at his decision.
  6. He further deposes that the Arbitrator has wide discretionary powers to charge such fees as provided for under Section 32B of the *Arbitration Act*, in accordance with the law ; that since the Applicant did not object to the same, it is estopped from raising any objection before this Court; that the Applicant deliberately failed, ignored, refused and neglected to pay its share of the Arbitrator fees so as to delay the release of the arbitral award and frustrate the arbitration proceedings to compel the Respondent to abandon its cause; and that the arbitral award was prepared on the 26.10.2023 while the letters of complaint by the Respondent annexed to the supporting affidavit were written long after the date of the award; and hence the letters would be viewed to have exerted undue influence, pressure and or threats on the Arbitrator to twist the award in favour of the Respondent.
  7. He continues to state that the law does not envision a stay of an arbitral award and that the Applicant has not proffered any reasonable explanation why stay should be granted. Further, he describes the application as an afterthought having been presented after inordinate delay thus portending prejudice to the Respondent, especially financially. He concludes by stating that the application is an appeal in disguise as it is grounded on matters of fact which need a reference to evidence, in contravention of Section 35 of the *Arbitration Act*. Therefore, the motion seeks to obstruct the cause of justice and to allow it would be repugnant to good practice as the Applicant is acting maliciously.
  8. Directions were taken on disposal of the Applicant's motion by way of written submissions. Both parties duly complied.
  9. On the part of the Applicant, counsel identified two (2) issues for this Court's consideration and anchored his arguments on the provisions of Section 35(2) of the *Arbitration Act* and the decision in



- Midco Holdings Limited v Summit Textiles (EA) Limited [2014] eKLR to assert that the motion has met the threshold for setting aside of the award, described as not only against the interests of justice and morality, but delving into matters outside the scope of what was referred for arbitration.
10. Addressing the Court on whether the Applicant has established sufficient grounds to set aside the award, counsel submitted that firstly, the Arbitrator committed material errors on the face of the award, particularly regarding the fee payable for the non-operational office in Mombasa, and secondly regarding the payment of his fees. Counsel contending that any determination that imposes on parties an obligation and right ought to have a sound foundation or justification and that the Applicant's motion demonstrates a plausible instance of undue influence and bias arising from undue pressure, and leading to the unfair allocation of the Arbitrator's fees and a premature issuance of the Award.
  11. That in light of the above, it is fair to doubt whether the Arbitrator did indeed act impartially and independently throughout the process, and whether the pressure and threats from the Respondent influenced the allocation of fees and the delivery of the award. Moreso in view of the premature issuance of the award before the settlement of the Arbitrator's fees, thereby undermining the legitimacy and enforceability of the award under the [Arbitration Act](#).
  12. Concerning whether the Applicant is entitled to an order staying the enforcement and execution of the award, it was posited that the Applicant is obliged to demonstrate that substantial loss may result to the applicant unless the order is granted, and that the application has been made without unreasonable delay. Submitting on the former, it was argued that the Respondent seeks to actualize the award by way of execution, which event would render the motion nugatory, by forcing the Applicant to pay an exorbitant sum, hence occasioning it substantial loss.
  13. It was further contended that the Respondent's means are not known as it has not disclosed nor furnished the Court with any documentary evidence to prove its financial standing. Therefore, the Applicant is apprehensive that it would not be able to recoup the impugned arbitral sum should its motion succeed. Submitting on the question of expedition in bringing the motion, it was argued that the award was published on 12.04.2024 whereas the instant motion was filed on 20.05.2024 hence without undue delay. In summation, the Court was urged to allow the motion with costs.
  14. On behalf of the Respondent, counsel began by restating the history leading up to the application before identifying four (4) issues for the Court's consideration. On whether the Applicant has locus standi bring the motion, counsel cited the provisions of Section 41 of the [Societies Act](#) and the decision in Law Society of Kenya Vs. Commissioner of Lands & 2 others [2001] eKLR and Kipsiwo Community Self Help Group vs. Attorney General & 6 Others [2013] eKLR to posit that the Applicant as a society registered under the [Societies Act](#) is an incorporated entity and does not have the locus standi to sue or be sued in its own name. That Societies established under the [Societies Act](#) can only sue and be sued through its registered officials and that locus standi is a jurisdictional issue. Asserting that the Applicant being an association, lacked capacity to sue in its own name, counsel asserted that the application is incompetent, defective and bad in law.
  15. On whether the motion has met the criteria for setting aside the Arbitral Award, while calling to aid the provisions of Section 35 of the [Arbitration Act](#), counsel asserted the need for proof and stated that pursuant to Section 35(3) of the Act an application for setting aside an award may not be brought after the lapse of three (3) months from the date of receipt of the award. That as at October 2023 the arbitral award was published and ready for collection however the same was subject to the settlement of his fees. Therefore, failure by the Applicant to collect the award stop time from running. Therefore, the motion having been filed outside the three (3) months prescribed in Section 35(3) of the Act, is incompetent and ripe for striking out.



16. Submitting on whether the award deals with a dispute not falling within the terms of reference to arbitration, counsel relied on the Clause 8.2 of the Management Contract, Section 10 of the *Arbitration Act*, the decision in *Nyutu Agrovot Limited vs. Airtel Network Limited* [2015] eKLR to argue that the claim by the Applicant's claims in that regard were misplaced; that the Arbitrator correctly interpreted the Management Contract and hence the award is valid and enforceable.
17. As to whether the award was induced by undue influence, it was contented that the letters attached to the affidavit in support of the motion were addressed to the Chartered Institute of Arbitrators – Kenya Chapter and the Competition Authority of Kenya primarily complaining concerning increase in the Arbitrator's fees, and in no way indicated any elements of threats and undue influence. Besides, the Arbitrator has never reported any threats from the Respondent, making it difficult for the Applicant to prove otherwise. While placing reliance on the decision in *Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd* [2015] eKLR and *Midco Holdings Limited (supra)*, counsel submitted that the Applicant has failed to establish that the award is a product of threats and undue influence, to bring the matter within the strict grounds of setting aside of an award. Thus, this court lacked the jurisdiction to set aside the same.
18. On the Arbitrator's power to determine that the Applicant should pay costs, as he did, counsel relied on Section 35A of the Act. In submitting that the Arbitrator had indicated to both parties that the award was subject to the settlement of his fees and that the Applicant engaged the Respondent in dilatory tactics by declining to contribute its share of the Arbitrator's fees. And to bring the matter to a close, the Respondent paid the entire fees subject to reimbursement from the Applicant. Therefore the Arbitrator cannot be faulted for awarding costs to the Respondent, as it was within his authority, which matter does not form a ground for setting aside an award. In conclusion, it was submitted that the award is final and ought to be enforced while the Applicant's motion is dismissed with costs. The provisions of Section 32 of the *Arbitration Act*, the decisions in *Mahican Investments Limited & 3 others vs. Giovanni Gaida & others* [2005] eKLR and *Jasbir Singh Rai & others vs. Tarlochan Singh Rai and 4 others* [2014] eKLR were all relied on in that regard.
19. The Court has considered the material canvassed in respect of the motion. In the Court's view, the matter turns on the legal objections raised concerning competence of the Applicant's motion. At the outset, the Respondent submits that by dint of Section 41 of the *Societies Act*, the Applicant as a society registered under the *Societies Act* is an incorporated entity and does not have the locus standi, to sue or be sued in its own name, which goes to the question of jurisdiction. That Societies established under the *Societies Act* can only sue and be sued through registered officials and the Applicant has no capacity to sue in its own name. Hence, the application is incompetent, defective and bad in law.
20. Secondly, the competency of the motion was challenged pursuant to Section 35(3) of the *Arbitration Act* which provides that an application for setting aside an award may not be brought after the lapse of three (3) months from the date of receipt of the award. That the motion having been filed outside the three (3) months prescribed in Section 35(3) of the Act, is incompetent and ripe for striking out. The Respondent offered no answer to Applicant's objections.
21. I propose to first deal with the issue concerning the Applicant's locus standi to bring the instant motion. Black's Law Dictionary, Tenth Edition defines locus standi as:

“...the right to bring an action or to be heard in a given forum.” The Court of Appeal in *James Teko Lopoyetum v Rose Kasuku Watia & 4 others* [2021] eKLR reiterated its decision in *Alfred Njau & 5 others vs. City Council of Nairobi* [1983] eKLR where it held:



“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

22. In *Sheila Nkatha Muthee v Alphonse Mwangemi Munga & Another* [2016] eKLR where it was held that:

“Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent.”

23. Regarding jurisdiction, the famous words of Nyarangi. JA (as he then was) in the locus classicus case of *Owners of the Motor Vessel “Lillian S”* that “.....jurisdiction is everything. Without it, a court has no power to make one more step.....” still ring true. Section 41 of the *Societies Act*, provides that; -

1. Where a society is charged with an offence under this Act or any rules made thereunder, the society may appear by a representative, who may enter a plea on behalf of the society and conduct the society’s defence on its behalf.
2. In this section, “representative” in relation to a society means a person who the court is satisfied has been duly appointed in writing by the society to represent it, but a person so appointed shall not by virtue of such appointment be qualified to act on behalf of the society before any court for any purposes other than those specified in this section.

24. Section 2 of the Act defines a “Society” as: -

“Includes any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not, except in paragraphs (i) and (ii) of Section 11(2)(f) of this Act, include—

- a. a company or foreign company registered under the *Companies Act* (Cap. 486);
- b. any corporation incorporated by or under any other written law;
- c. a registered trade union within the meaning of the *Labour Relations Act* (Cap. 233), including a branch of a trade union registered under that Act, a probationary trade union within the meaning of that Act and a trade union or a branch of a trade union whose application for registration has been made and not determined;
- d. a company, firm, association or partnership consisting of not more than twenty persons, formed and maintained with a view to carrying on business for profit;
- e. a co-operative society registered as such under any written law;
- f. a school registered under the *Basic Education Act* (Cap. 211), Advisory Council, Board of Governors, District Education Board, School Committee or similar organization established under and in accordance with the provisions of any written law relating to education;
- g. a building society as defined by the *Building Societies Act* (Cap. 489);
- h. a bank licensed under the *Banking Act* (Cap. 488);
- i. any international organization of which Kenya is a member, or any branch, section or organ of any such organization;



- j. any combination or association which the Cabinet Secretary may, by order, declare not to be a society for the purposes of this Act;
25. The Applicant has been described in the application as “Kenya International Freight & Warehouse Association”. That said, no material has been placed before this Court to establish whether the Applicant is a registered association under the Societies Act or any other statute. The deponent in support of the motion, by his affidavit merely states that “I am Executive Officer (EO) of the Applicant, well conversant with the facts of this matter hence competent to swear this affidavit” without more. Therefore, there is no clear description as to what the Applicant is, save for the submissions advanced by the Respondent.
26. The question concerning the legal capacity to bring or defend a suit is not a mere technicality but goes to the root of the entire pleading and even jurisdiction to entertain it. The Societies Act does not specifically provide on the capacity of Societies to sue or be sued in their own names as legal entities. This Court in *Republic v Registrar of Societies Ex-parte Narok Muslim Welfare Association* [2017] eKLR had opportunity to consider the question.
27. The court associated itself with the sentiments of Githua, J. in HCCA No. 128 of 2013 *Peter Taracha & Anor -Vs- Holiness Church & Anor* [2016] eKLR, where the Court stated:-

“I have carefully gone through the entire Societies Act Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act. I thus wholly agree with the sentiments expressed by Justice Bosire (as he then was) in *John Ottenyo Amwayi & others V Rev. George Abura & others* HCCC No. 6339 of 1990 when he stated as follows:-

“The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names ....”

In *Kiserian Isinya Pipeline Road Resident Association & others V Jamii Bora Charitable Trust and Another Civil Appeal No. 307 of 2006* Hon. Justice Alnashir Visram (as he then was) relying on several authorities including the case of *Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank* HCC No. 5116 of 1992 (O.S) struck out an appeal with costs on grounds inter alia that it had been lodged by appellants whose majority consisted of unincorporated entities which did not have capacity to sue. In the *Free Pentecostal Fellowship in Kenya* case (supra) Justice Bosire (as he then was) expressed himself in the following terms :-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.

In the instant matter, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name”.

..... It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural



issue. The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law.”

28. Thus, if the Applicant is a society, it can only sue through its officials. If however, it is an unregistered association, it would lack the requisite locus standi to institute any legal proceedings. However, if for arguments sake, the Applicant is registered pursuant to Section 10 & 19 of the *Societies Act*, then invariably it would have office bearers as required by the Schedule to the Act. The instant motion does not name the office bearers as the instigators of the motion and proceedings. The Applicant was reticent on the question. It is therefore doubtful that the motion is properly before the court, hence competent. The true legal character of the Applicant, and by extension its capacity to sue as it has done is indeterminable on material before the court. A party who approaches the court with any proceedings is under duty to disclose his capacity to sue, and when challenged for lack of locus standi, has the onus of demonstrating that standing. In the court’s view, the reticence of the Applicant herein regarding its locus standi speaks volumes.
29. However, there is more. Any registered association or society, though not stricto sensu a body corporate, would under Order 4 Rule 1(4) and Order 9 Rule 2 of the CPR ordinarily be expected to act in proceedings through a duly authorized officer. The Court of Appeal in Kenya *Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu* [2019] eKLR stated that: -

“The question we have to determine is; who is a ‘duly authorized’ officer” This question was answered in *Makupa Transit Shade Limited & Another vs. Kenya Ports Authority & Another* [2015] eKLR as follows:

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”

Here is a person, who on oath stated that he is duly authorized and in the absence of evidence to counter or contradict him, it cannot fall for the Judge to rule otherwise. It is obvious that whether or not the deponent was an authorized agent is a matter to be decided on evidence and none has been adduced by the respondent.

In *Spire Bank Limited vs. Land Registrar & 2 others* [2019] eKLR the court in discussing Order 4 Rule 1(4) Stated as follows:

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

30. The deponent in the affidavit in support of the motion, does not expressly state whether the deponent was duly authorized to swear the supporting affidavit on behalf of the Applicant and to act as he did in this matter. It is true as held in *Makupa Transit Shade Limited* (supra) cited with approval in Kenya



Trypanosomiasis Research Institute (supra) that the provisions of Order 4 Rule 1(4) and Order 9 Rule 2 of the Civil Procedure Rules are not “intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized”. However, it was imperative for the deponent to an affidavit sworn on behalf of a registered association or society to state that they were duly authorized to depose by its official or members. In this instance, the deponent does not expressly state that he has such authority to depose on behalf of the Applicant, its official or members but merely states that he is an Executive Officer of the Applicant and therefore competent to depose.

31. Without a clear demonstration of the authority of the deponent to swear the supporting affidavit, it would seem that the said deponent lacked the requisite competence to swear the supporting affidavit in this case or to act on behalf of the Applicant as he did.
32. In the circumstances, the Court is persuaded that the supporting affidavit must in the absence of proof of authority to the depose be treated as one sworn by an incompetent person purportedly on behalf of the Applicant. Hence, incapable of supporting the motion before the Court. A motion that is not supported by an affidavit is incompetent and liable for striking out.
33. This finding is sufficient to dispose of the matter, and the court will not proceed to consider the objection based on section 35(3) of the *Arbitration Act*, although ex facie, the objection is not well taken given the text of the section vis-à-vis the relevant facts before the court. Accordingly, the motion dated 20.05.2024 is hereby struck out with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of

N/A for the Applicant.

Mr. Wakiaga for the Respondent.

C/A: Erick

