**County Government of Kisumu v Coretec Systems & Solutions Limited (Commercial Arbitration Cause E001 of 2023) [2025] KEHC 13909 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13909 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**COMMERCIAL ARBITRATION CAUSE E001 OF 2023**

**JM OMIDO, J**

**SEPTEMBER 25, 2025**

**BETWEEN**

**COUNTY GOVERNMENT OF KISUMU ..... APPLICANT**

**AND**

**CORETEC SYSTEMS & SOLUTIONS LIMITED ..... RESPONDENT**

**RULING**

## A. Background.

1. A brief history of this matter is That a dispute pitting the parties herein was pursuant to an arbitration clause in a contract dated 3rd April, 2017 between the parties referred to arbitration, whereby the Applicant herein was the Respondent/Counterclaimant, while the Respondent herein was the Claimant. The parties presented their respective cases before the arbitrator Mr. Calvin Nyachoti, FCIArb and on 17th April, 2023, the arbitrator rendered his award, concluding as follows:

    335. For the reasons given above, I now AWARD and DIRECT That the Respondent's Counterclaim is dismissed and the Claimant has on a balance of probabilities proven its case against the Respondent and is entitled to:

        a. Ksh.119,106,549/- being the balance of the contractual sum That the Respondent failed to pay.

        b. Special damages of Ksh.170,000/-.

        c. Costs of this arbitration.

2. Following the delivery of the award, the Applicant filed the application dated 9th July, 2023 which sought the following orders:

1. That pending the hearing and determination of this application, this court be pleased to stay any recognition and/or enforcement of the arbitral award dated 17th April, 2023.

2. That this Honourable Court be pleased to set aside the arbitral award dated 17th April, 2023 issued by Mr. Calvin Nyachoti C.Arb in so far as the same seeks to dispense with the rules of evidence in finding That the Respondent provided a performance bond and proceeding to award the balance of the contractual sum.

3. That this Honourable Court be pleased to grant any further orders as it may deem appropriate in the circumstances including remitting the said award dated 17th April, 2023 for corrective action on the impugned portion of the award as purports to dismiss the counterclaim dated 22nd June, 2022.

4. That the costs of this application and the incidental expenses thereto be provided for.

3. A response to the application dated 9th July, 2023 was filed by the Respondent.

4. The record of this court bears it That the Respondent filed the chamber summons dated 10th August, 2023 brought under Article 159(2) of *the Constitution* of Kenya, 2010, Section 36 of the *Arbitration Act*, 1995, Rule 9 of the Arbitration Rules, 1997, Section 1A & 1B and 59 of the *Civil Procedure Act* Cap 21 Laws of Kenya and all other enabling provisions of the law, in which the following orders were sought:

    1. That this Honourable Court be pleased to order That the final arbitral award dated 17th April, 2023 issued by Mr. Calvin Nyachoti, FCIArb and filed herein be recognized, deemed as filed as a record of this Honourable Court and be adopted as a judgment of this Honourable Court.

    2. That this Honourable Court be pleased to grant leave to the Applicant to enforce the final arbitral award dated 17th April, 2023 issued by Mr. Calvin Nyachoti, FCIArb and That a decree be extracted in terms of the said final arbitral award.

    3. That this Honourable Court be pleased to grant any other order it deems fit and just to achieve the enforcement of the Final arbitral award dated 17th April, 2023.

        SUBPARAGRAPH 4.

    That the costs of this application be provided for.

5. When the matter was placed before my sister Shariff J. on 25th September, 2023 for directions, the parties addressed the court and Ms. Awuor, learned Counsel for the Applicant orally sought for leave to amend the application dated 9th July, 2023, which oral application was resisted by Mr. Otwal, learned Counsel for the Respondent. My sister proceeded to direct and/order as follows:The Respondent's application dated 10th August, 2023 is hereby allowed due to lack of opposition.The Applicant is directed to file a formal application seeking to amend its application dated 9th July, 2023.In the interim, the Applicant is directed to file its submissions to its application within 14 days from the date hereof.The Respondent is directed to file its written submissions within 14 days of service by the Applicant.Mention on 24th October, 2023 to confirm compliance.

6. Effectively, the court allowed the Respondent's application seeking the recognition and enforcement of the arbitral award in its terms "due to lack of opposition" and directed That the Applicant's application seeking to set aside the arbitral award be canvassed by way of written submissions.

7. Prompted perhaps by the orders issued on the Respondent's application (as reproduced above) which recognized and enforced the arbitral award, the Applicant filed notice of motion dated 13th October, 2023 in which it pursued the following prayers:

    1. That pending the hearing and determination of this application, this court be pleased to stay any recognition and/or enforcement of the arbitral award dated 17th April, 2023.

    2. That pending the hearing and determination of the Applicant's notice of motion dated 9th July, 2023 [seeking] to set aside the arbitral award dated 17th April, 2023, this court be pleased to stay the proceedings in the Respondent's application for the recognition and/or enforcement of the said arbitral award instituted through the chamber summons dated 10th August, 2023.

    3. That the costs of this application and incidental expenses thereto be provided.

8. The matter was placed before Shariff J. on 24th October, 2023 and the time within which to file submissions on the application That sought to set aside the arbitral award was extended at the request of the Applicant and each party was granted 14 days apart to comply.

9. When the matter was placed before my sister on 15th February, 2024, parties proceeded to submit on the position of the application seeking to set aside the arbitral award, with the Respondent urging That the same had been rendered mute courtesy of the order of 25th September, 2023 That allowed the application for recognition and enforcement of the arbitral award and That as such, it would be superfluous for the court to proceed to entertain the application for setting aside the arbitral award. The court reserved the issue for a substantive ruling.

10. In the court's ruling rendered on 27th August, 2024, the court determined the issue as follows:

    1. In the instant application, I do note and find That the award having been adopted by the court by allowing the application seeking for its recognition, the instant application dated 9th July, 2023 is hereby dismissed for being devoid of merit.

    2. Each party shall bear its own costs.

11. The order emanating from the ruling of 27th August, 2024 then meant That the application to set aside the arbitral award stood dismissed.

**B. The Application Dated 18 Th February, 2025.**

12. The Applicant's notice of motion dated 18th February, 2025 is expressed to be brought under Sections 1, 3, 3A and 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 45 of the Civil Procedure Rules, 2010 and Article 50(1) of *the Constitution* of Kenya and all other enabling provisions of the law and seeks the following orders:

    1. [Spent].

    2. That pending hearing and determination of this application (sic) this Honourable Court be pleased to review the ruling dated 27th August, 2024 and all other subsequent and consequential (sic) orders.

    3. That pending the hearing and determination of this application, this Honourable Court be pleased to stay the Judicial Review proceedings in Miscellaneous Civil Application E037 of 2024 application dated 18th December, 2024 (sic).

4. That this court be pleased to grant any further and appropriate orders in the circumstances as it may deem fit.

5. That the costs of this application be provided for.

13. The grounds upon which the application is premised are set out on its face as follows:

1. That following a dispute That arose from a contract between the Applicant and the Respondent herein, a sole Arbitrator was appointed to hear the dispute and thereafter delivered an arbitral award dated 17th April, 2023.

2. That aggrieved by the decision of the sole Arbitrator, the Applicant herein filed an application dated 9th July, 2023 seeking to set aside the said arbitral award as the sole Arbitrator went against public policy and ignored the rules of natural justice in reaching the conclusion of the award.

3. That the Arbitrator did not take into account the evidence tendered by the Applicant in That the Respondent did not adhere to the terms and conditions of the subject contract to submit a performance bond, a mandatory requirement in the contract.

4. That the Respondent herein subsequently filed a replying affidavit dated 8th August, 2023 to the said application together with an application dated 10th August, 2023 seeking to enforce the arbitral award.

5. That the Honourable Court without first hearing, determining and addressing issues raised by the Applicant in their application dated 9th July, 2023 That sought to set aside the arbitral award, and without according the Applicant a chance to file a reply to the Respondent's application, summarily allowed the Respondent's application dated 10th August, 2023 and dismissed the Applicant's application dated 9th July, 2023.

6. That thereafter, the Respondent filed Judicial Review proceedings against the Applicant seeking an order of mandamus to compel the Applicant to pay Ksh.127,347,106/- vide Miscellaneous Civil Application E037 of 2024 dated 18th December, 2024.

7. That it is the Applicant's contention That there is a mistake and/or error apparent on the face of the record of the ruling.

8. That if the ruling is not reviewed, the Respondent herein stands to be enriched unjustly to the detriment of the Applicant.

9. That it is in the interest of justice That the application be allowed.

14. The application is supported by the affidavit of Duncan Ogango, the Applicant's Legal Officer, sworn on 18th February, 2025. The said deponent restates and expounds on oath the above grounds.

15. The Respondent resists the Applicant's application and to That end filed a replying affidavit sworn by Tobias Otieno on 10th March, 2025.

16. It would appear from the material presented by the parties That subsequent to the order recognizing and enforcing the arbitral award and the order dismissing the application That sought to set aside the award, the Applicant herein proceeded to file against the Respondent Judicial Review Miscellaneous Civil Application E037 of 2024 Coretec Systems & Solutions Limited v County Government of Kisumu in which an order of mandamus is sought to compel the Respondent to pay to the Applicant the amount awarded by the arbitrator, whose award was recognized and enforced on by Shariff J. on

25th September, 2023. Among the prayers sought in the motion dated 18th February, 2025 is an order of stay of the Judicial Review proceedings.

17. The application proceeded by brief oral arguments That the parties made on 3rd July, 2025.

18. The argument proffered by the Applicant in the application for review and for stay of the Judicial Review proceedings is That there is an error apparent on the face of the record in That the court ought not to have proceeded with the application That sought for recognition and enforcement or the arbitral award when there was already filed an application for setting aside the award.

19. The Applicant urged That by proceeding to allow the Respondent's application for recognition and enforcement of the arbitral award, the Applicant was denied its right, under Article 50 of *the Constitution*, to be heard.

20. The Applicant stated That the above amounts to an error apparent on the face of the record and That this court has jurisdiction to review the same.

21. In urging That this court has powers to grant the order for review, the Applicant relied on the authority of National Bank of Kenya v Ndung'u Njau [1997] eKLR in which the Court of Appeal (Kwach, Akiwumi & Pall JJA) stated as follows:

> " A review may be granted whenever the court considers That it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established."

22. But I will proceed to add That the court in the above case observed further That:

> " It will not be a sufficient ground for review That another Judge could have taken a different view of the matter. Nor can it be a ground for review That the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review."

23. The Applicant further relied on the authority of the High Court in Samba t/a JO Samba & Co. Advocates v Mengich (Miscellaneous Application 7 of 2022) [2023] KEHC 26997 (20 December 2023) (Ruling) Neutral Citation: [2023] KEHC 26997 (KLR) in which Mrima J. rendered himself as follows:

> 12. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules was considered by the High Court in Miscellaneous Application 317 of 2018, Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:
>
> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
>
> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show That such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

24. Further reliance was placed on the decision ofParliamentary Service Commission v Wambora & 36 others (Application 8 of 2017) [2018] KESC 74 (KLR) (21 December 2018) (Ruling) in which the Supreme Court of Kenya (Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Ojwang, & Ndung'u, SCJJ) held That:

32. Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.

ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate That the judge(s) misdirected themselves in exercise discretion and:

(a) as a result a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole That the judge has been clearly wrong and as a result, there has been an apparent injustice."

25. The other decision That the Applicant relied on in urging That this court has jurisdiction to entertain the application for review was That of Victoria Furnitures Limited v Zadock Furniture Systems Limited [2019] eKLR in which Nzioka J. rendered herself as follows:

52. From the application, it is quite clear That, the Applicants are relying on the ground of an error apparent on the face of the record. In my considered opinion, even if the failure to take cognizance of the award, is not a mistake or an error on the face of the record, it falls under the ground of "any other sufficient reason" as held in the case of; The official Receiver and Liquidators v Freight Forwarders Kenya Limited [2001] eKLR. I am therefore satisfied That the application falls under the provisions of Section 80 of the *Civil Procedure Act* and Order 45(1) of the Civil Procedure Rules, 2010 (See also Benjoh Amalgamated Limited vs Kenya Commercial Bank Limited, [2014] eKLR).

53. The Respondent further argued That, the provisions of *Arbitration Act* and the Rules do not provide for review proceeding, however I agree with the Applicant's submissions That the same provisions do not exclude the power of the Court to review a decision under Order 45 Rules the Civil Procedure Rules. In the same vein Section 1(2), of the *Civil Procedure Act*, states That: "this Act applies to proceedings in the High Court and, subject to the Magistrate's Courts Act to proceedings in subordinate courts" I therefore find That the court has the power under Page 38 of 51 the constitutional provisions of Article 165, the statutory provisions of the *Civil Procedure Act* and Rules and its inherent power to entertain the application herein.

54. .....

55. Based on the reasons stated herein, I find That the Applicant has made out a case for review and I allow the Application in terms of (2) of the application as prayed. That leads to the second limb to evaluation of the Application dated 19th February 2016, on merit."

26. On the prayer for an order of stay of the Judicial Review proceedings, the Applicant invited this court to look at the decision of Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited [2015] eKLR in which Gikonyo J. held That:

> " [5]. The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, Daniel Walter Rasugu Nbi Hccc No 15 of 2006; Global Tours & Travel Limited; Nairobi

HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR. The guiding legal principles gathered from these cases may be summarized as follows:

a. The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.

b. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

c. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.

d. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

27. The Respondent opposed the application on the argument That this court cannot review the order of 27th August, 2024 as it lacks jurisdiction to do so, for the reason That the *Civil Procedure Act* and Rules (particularly Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules) are inapplicable in matters under the *Arbitration Act* and That the orders sought were therefore not available. To That end, reliance was placed upon the case of Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR where the Court of Appeal (Bosire, Okubasu & Nyamu JJA.) held as follows:

> "A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows That, all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act* which states: "Except as provided in this Act no court shall intervene in matters governed by this Act". In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the *Arbitration Act*. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note That because of the number of the applications filed in the High Court outside the provisions of the *Arbitration Act* the award has not yet been enforced for a period close to 10 years now. The provisions of the *Arbitration Act* make it clear That it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us That no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1989 KLR 1."

28. On the same issue, the Respondent referred this court to the High Court case of Attorney General v N.K. Brothers Limited (Commercial Arbitration Cause E047 of 2021) [2024] KEHC 7806 (KLR) (Commercial and Tax) (20 June 2024) (Ruling) in which A.A. Visram J held thus:

> " 5. Having considered the above, in my view, court intervention is strictly limited in arbitration matters. The extent of intervention is governed by the provisions of Section 10 of the *Arbitration Act* No.4 of 1995. The effect of Section 10 of the Act is That the ordinary rules of Civil Procedure do not apply to arbitration matters. The Act is a complete code and is a self-governing regime."

29. The Supreme Court decision of case Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Petition 12 of 20160 [2019] KESC (KLR) (6 December 2019) (Judgment) (with dissent – DK Maraga, CJ & P) was also relied upon by the Respondent, whereby this court was referred to the passage below:

> 52. We note in the above context That, the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the *Arbitration Act* indicates That,
>
> > "the time limits and the finality of the High Court decision on some procedural matters was to ensure That neither party frustrates the arbitration process thus giving arbitration advantage over the usual judicial process."
>
> It was also reiterated That the limitation of the extent of the courts' interference was to ensure an,
>
> > "expeditious and efficient way of handling commercial disputes."

30. The last decision of a superior court That the Respondent relied on was That of Direct Pay Limited v Tum (Miscellaneous Application E351 of 2021) [2023] KEHC 2906 (KLR) (Civ) (28 March 2023) (Ruling) in which the case of Anne Mumbi Hinga (supra) was cited with approval. Sergon J. rendered himself as follows:

> " 22. The courts have generally stated That the provisions of the *Civil Procedure Act* and its Rules do not apply in arbitral proceedings, save in the manner set out under the Section 10 of the *Arbitration Act* which provides That no court shall intervene in matters governed by theArbitration Act except in the manner provided therein and echoed under Rule 11 of theArbitration Rules which provides That the Civil Procedure Rules shall apply to all proceedings under these Rules in so far as is appropriate.
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> 23. The above position was echoed by the Court of Appeal in the case of Anne Mumbi Hinga v Victoria Njoki Gathara (supra) and whose decision I am guided and bound by, namely:
>
> > "A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows That, all the provisions including the *Civil Procedure*

*Act* and rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act* which states:

> "Except as provided in this Act no court shall intervene in matters governed by this Act".
>
> In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the *Arbitration Act*. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award...The provisions of the *Arbitration Act* make it clear That it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate.
>
> In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us That no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1."

24. In view of all the foregoing circumstances, I am inclined to find That this court lacks jurisdiction to grant the order for a stay of execution sought by the applicant."

31. I have considered the application before me, the submissions by the parties and the record in its entirety. Although the parties herein addressed the prayer for stay of proceedings in the related Judicial Review matter, I note That the manner in which the prayer was couched is That the order was sought pending the hearing and determination of the application That is the subject of this ruling. Thus then, the prayer for stay of proceedings is not one to be determined herein as it was sought on a temporary basis.

32. From the material before me, I deduce the issues for determination to be as follows:

    i. Whether this court has jurisdiction to grant the order sought in the application dated 18th February, 2025 i.e. to review the order of 27th August, 2024, and subject thereto, whether I should proceed and review the said order.

ii. A determination as to costs.

33. I will proceed to address the two issues seriatim. The first issue is whether this court has jurisdiction to review the order of 27th August, 2024.

34. In a nutshell, the argument fronted by the Applicant is That, it is irregular for the court to hear an application for recognition and enforcement of an arbitral award before hearing and determining a pending application to set aside the same award and That if the court did so, That would contravene both the *Arbitration Act* and Article 50 of *the Constitution*, which provides for the right to a fair hearing.

35. While Section 36 of the *Arbitration Act* provides for recognition and enforcement of an arbitral award, Section 37 of the Act allows a party to apply for setting aside an arbitral award on specific grounds.

36. Notably, Section 36(2) provides That:

> "An arbitral award shall be recognized as binding and enforced in accordance with the provisions of this section unless it is set aside or suspended by a court of competent jurisdiction."

(Underlined emphasis).

37. This, in my view, implies That recognition and enforcement can only proceed if the award is not subject to a pending setting aside application, or unless the court determines That such an application is unmeritorious.

38. Courts have generally held That applications for recognition and enforcement and applications to set aside should be considered together or That the setting aside application should be determined first. This, I think is meant to avoid a possibility of conflicting decisions and premature enforcement of an award That might be invalidated and to avoid undermining the right to challenge an award under Section 37.

39. In the case of Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366 the Court of Appeal held That where an application to set aside an arbitral award has been filed, it is prudent for the court to defer enforcement proceedings until the setting aside application is heard and determined. The court stated That:

> "It would be imprudent for the High Court to recognize and enforce an award That is under challenge."

40. The correct approach would in my view therefore be for the court to either order for the consolidation of the two applications (for recognition/enforcement and for setting aside), or to hear them together or to determine the one seeking for the setting aside of the award first, then proceed with enforcement if the award survives.

41. The record of the court indicates That my sister Shariff J. took a divergent view from mine and proceeded to determine the application for recognition and enforcement before the one for setting aside, which she ultimately dismissed for want of merit.

42. Being a court of concurrent jurisdiction, it is not within my province to fault the learned Judge. I am however entitled to note down my views, as the issue has been presented by the Applicant in the application before me, which I have done. I will in the premises leave the matter at That lest I risk "sitting on appeal" on the decision of a court of concurrent jurisdiction.

43. Having said the above, the application is brought under Article 50(1) of *the Constitution*, Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. As we have seen above, the motion is premised on the grounds That at the time the enforcement ruling was made, there was a pending and undetermined application to set aside the arbitral award, dated 9th July, 2023 which the Court did not consider.

44. It is not in dispute That the Applicant had filed an application under Section 35 of the *Arbitration Act* seeking to set aside the arbitral award. That application was on record, and in my most respectful view properly filed and pending hearing at the time the enforcement application was allowed.

45. The position taken by the Applicant is That failure to consider the pending setting aside application amounts to an error apparent on the face of the record and a breach of the rules of natural justice, particularly the right to be heard under Article 50 of *the Constitution*.

46. The pertinent issue raised by the Respondent is That the *Civil Procedure Act* and Rules, (under which the application is presented) are not applicable in Arbitration proceedings and That as such, this court does not have jurisdiction to grant the orders sought. The Applicant takes a contrary view.

47. The answer as to whether this court can apply provisions of the *Civil Procedure Act* and its rules is, happily, to be found in the Court of Appeal case of Anne Mumbi Hinga (supra) in which it was held That once a matter is governed by the *Arbitration Act*, the *Civil Procedure Act* and the Rules thereunder are not applicable.

48. Notably, the decisions of National Bank (supra), Samba (supra) and Wambora (supra) That were relied upon by the Applicant are distinguishable as they dealt with review in matters That did not involve the *Arbitration Act*. Although I note That the decision of Victoria Furnitures (supra) which provides the position That the *Civil Procedure Act* and Rules may be applied in matters under the *Arbitration Act*, the same is from the High Court. This court, pursuant to the doctrine of stare decisis is bound by the authority of Anne Mumbi Hinga which is from the Court of Appeal. My understanding of the holding in Anne Mumbi Hinga is That applications related to arbitration (such as for setting aside or enforcing awards) are governed strictly by the *Arbitration Act*, and not the *Civil Procedure Act* or Rules, including Section 80 of the Act and Order 45 of the Rules.

49. While the *Arbitration Act* does not provide an express "review" mechanism, the inherent powers of the High Court under Section 3A of the *Civil Procedure Act* (for ends of justice) may in my view be invoked, albeit cautiously, particularly in a situation where the error in question emanates from the court. This however, I must confess is a grey area but my anxious thoughts and views are That the court may allow limited use of its inherent powers to prevent injustice so That substantial justice is rendered.

50. Section 3A of the *Civil Procedure Act* is one of the provisions under which the Applicant moved the court. The Section provides That:

> 3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

51. Section 3A does not create new authority but confirms existing judicial authority of this court.The inherent power of this court is grounded in Article 165(3)(a) of *the Constitution*, which confers upon this courtunlimited original jurisdiction in criminal and civil matters. I am of the view That this court's unlimited jurisdiction under Article 165(3)(a) can be properlyinvoked as the constitutional basis for the High Court's inherent powers, enabling the court to act flexibly to administer justice beyond clear statutory authority. It allows the court to act beyond strictly written law when necessary to: ensure

justice is done, fill procedural gaps, prevent abuse of court process or craft remedies not expressly provided for in statutes.

52. In addition to Article 165(3)(a), two other constitutional principles reinforce the High Court's inherent powers. The first one is Article 159(2)(a) which provides That justice shall be done to all, irrespective of status, and the second one is Article 159(2)(d) which provides That justice shall be administered without undue regard to procedural technicalities. These provisions underscore That this court must prioritize substantive justice over rigid technicalities or insufficiencies in statutes, which then requires the use of its inherent powers.

53. The undisputed position as presented by the Applicant is That its application for setting aside of the arbitral award, though filed within time and properly on record, was not heard. The Applicant therefore states That as a result, its rights under Article 50(1) of *the Constitution* were violated.

54. Article 50(1) of *the Constitution* provides That:

> 50(1). Every person has the right to have any dispute That can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

55. This Article guarantees the right to a fair hearing. The reference to "every person" in Article 50(1) explicitly includes both natural and juristic persons, when the said Article is considered alongside Article 260. Article 50(1) applies to all disputes That can be resolved through legal means, whether civil, criminal or administrative and guarantees the right to a fair hearing, which includes due notice of proceedings, the opportunity to present one's case and the right to be heard before adverse orders are made. Under Article 25 of *the Constitution*, the right to a fair trial under Article 50(1) is non-derogable.

56. In light of the above, this Court is persuaded That its earlier ruling was made in error and without considering material facts on record. The error is one on the face of the record. Although review of the same is not available under the *Civil Procedure Act* and Rules, the same is available under the inherent powers of the court under Article 165(3)(a) of *the Constitution*, noting That the Applicant has in its application cited Article 50(1) of *the Constitution*, which provides for the non-derogable right to a fair hearing.

57. I think I have said enough, and the result of all the foregoing is That I hereby review and set aside, under Articles 50(1) and 165(3)(a) of *the Constitution* and the inherent powers of this court, the order of 25th September, 2023 That allowed the application for recognition and enforcement of the arbitral award dated 10th August, 2023.

58. With regard to the order of 27th August, 2024 That dismissed the application for setting aside the arbitral award and the subsequent Judicial Review proceedings in Judicial Review Miscellaneous Civil Application E037 of 2024, there is no doubt That the same followed the course, following the recognition and adoption of the arbitral award vide the order of 25th September, 2023. I opine That as the same were a consequence of the recognition and enforcement of the arbitral award, it will be up to the Applicant to consider pursuing appropriate orders in the said file, as I cannot make any orders in respect thereof in the present file.

59. This file to be mentioned on 7th October, 2025 for further orders.

60. Orders accordingly.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF SEPTEMBER, 2025.**

**JOE M. OMIDO.**

**JUDGE**

For Applicant: Ms. Kavoche.

For Respondent: Mr. Otwal.

Court Assistants: Mr. Ngoge.

Mr. Otwal: I seek leave to appeal.

Court: Parties to address the court and directions on leave to be issued on 7th October, 2025.

**JOE M. OMIDO**

**JUDGE**