Akoth v Harvit Credit Limited (Miscellaneous Civil Application E1118 of 2024) [2025] KEHC 13673 (KLR) (Civ) (2 October 2025) (Ruling)

Neutral citation: [2025] KEHC 13673 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION E1118 OF 2024

JN MULWA, J

OCTOBER 2, 2025

BETWEEN

SILVANUS RACHUONYO AKOTH ..... APPLICANT

AND

HARVIT CREDIT LIMITED ..... RESPONDENT

RULING

1. Before the Court for determination is the chamber summons dated 09/12/2024 filed by Silvanus Rachuonyo Akoth (hereafter the Applicant) against Harvit Credit Ltd (hereafter the Respondent) pursuant to Section 35(2), (3) & 7(1) of the *Arbitration Act*, Section 1(a),(b)&(c) of the *Movable Property Security Rights Act* and Section 67(1),(2) of the *Auctioneers Act* seeking inter alia:
    i. Spent
    ii. That this honorable Court be pleased to set aside the final award of dismissal published on 18/10/2024 excerpt Paragraph 157, 176, 177, 178 & 179.
    iii. That this honorable Court do make a final determination on the matter.
    iv. That this honorable Court to allow prayers by the Applicant unjustly denied or ignored by the arbitrator in the final award.
    v. That the honorable Court do award reliefs unjustly denied or ignored by the Arbitrator in the award to the Applicant.
    vi. Any other relief that the Court may deem just to grant.
2. The motion is premised on grounds found at the supporting affidavit sworn by the Applicant on even date. The gist of his deposition is that his arbitral claim was dismissed on 18/10/2024 however the

resultant arbitral proceedings and award were against public policy, justice and morality by derogating from the existing contractual provisions agreed upon by the parties, not adhering to the *Constitution*, Chattels Transfers Act (repealed), *Auctioneers Act* and *Movable Property Security Rights Act* among others.

3. He goes on to depose that the Arbitrator in conspiracy with the Respondent tried unsuccessfully to prevent the Applicant from appointing counsel in the middle of the proceedings. He states that the Arbitrator in his payment schedule erroneously charged for the session of 11/03/2024 as having been a four-hour session yet the same lasted less than an hour.

4. That the arbitral award failed to address the fact that the Respondent maliciously misappropriated the Applicant's loan account to force a default by introducing new late payment rate of 5% per week and a monthly tracking fee not part of the security agreement thus essentially rewriting the agreement; that the Arbitrator deliberately avoided to address the issue of fraud against the Applicant by the Respondent, tracking company & auctioneer;

5. That the arbitral award failed to address the Respondent's failure to issue the Applicant with a demand notice contrary to the Movable Security Rights Act; that the arbitral award failed to consider the auctioneer's failure to serve the Applicant with a proclamation notice; that the arbitral award failed consider that the attachment and repossession of the Applicant's motor vehicle was against an unregistered security document contrary to the Chattels Transfer Act (repleaded);

6. That the arbitral award erred by dismissing the Applicant's claim yet in the body of the award found that the Respondent was in contempt of the Small Claims Court order by proceeding to sell the Applicant's motor vehicle; and that the arbitral award failed to address the entirety of the Applicant's claim.

7. The Applicant further maintains that the arbitral award breached his right to a fair hearing, and proceeded to deal with issues not contemplated in the security agreement, not falling within the terms of reference to arbitration and thus went beyond the scope of reference to arbitration.

8. He concluded by deposing that the arbitral award was influenced and affected by unaddressed acts of fraud by the Auctioneer, the Respondent, car tracking company and therefore the same ought to be set aside save for paragraphs 157,176,177,178 and 179.

9. The Respondent opposes application by way of a replying affidavit dated 29/01/2025 deposed by John Kagotho. The nucleus of his deposition was that parties hereto executed a loan agreement where the Applicant was to repay the loan in installment with interest charged at the rate of 5% and tracking fee of Kshs. 3,000/-per month, meanwhile it was further agreed that if there was any default on the installments the same would be subject to a penalty of 5% on a weekly basis until payment in full.

10. The Respondent goes on to depose that it was an agreed term of the security agreement that should the Applicant default, the Respondent was at liberty to take possession of and dispose of the security without notice. In summation, he states that the Applicant has failed to establish how the award is in conflict with public policy whereas the Court is being invited to delve into the merits of the arbitral claim despite the Applicant submitting himself to the jurisdiction of arbitration.

11. In rejoinder by way of a further affidavit dated 28/02/2025, the Applicant reiterated that where an arbitral award is not in conformity with statute and the Constitutes the Court ought to set aside the award.

12. The chamber summons was disposed of by way of written submissions. The court has considered the rival affidavit material alongside the submissions on record.

Issues Determination

i. Whether the Court ought to set aside the arbitral award published on 18/10/2024?

ii. Who ought to bear the costs of the application?

13. Arbitral proceedings are codified in Article 159(2)(c) of the *Constitution* and operationalized by the *Arbitration Act*. Further, consensus emanating from superior Court decisions within our jurisdiction is that interference with arbitral proceedings must be limited, as an encroachment would negate the purpose and intent of the Act towards expeditious yet fair dispute resolution. See Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch [2019] KESC 11 (KLR).

14. Nevertheless, the scope with which the High Court can and ought to interfere with an arbitral award has been the subject of replete discussions and interpretation within our jurisdiction. However, the position appears to have since been settled, as to the parameters and ambits within which a Court may interfere with an arbitral award by way of setting aside.

15. To the foregoing end, Section 35(1) & (2) of the *Arbitration Act* provides that: -

1. Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

2. An arbitral award may be set aside by the High Court only if—

a. the party making the application furnishes proof—

i. that a party to the arbitration agreement was under some incapacity; or

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

b. the High Court finds that—

i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. the award is in conflict with the public policy of Kenya.

16. At the outset, the impugned arbitral award having been published on 18/10/2024 and the instant application filed on 09/12/2024, it would appear the reference complies with the provisions of Section 35(1) & (3) of the *Arbitration Act*, on timelines within which to lodge a reference. That said, an ex facie review of the reference, it anchors on the fact that the arbitral award dealt with issues not contemplated in the security agreement or not falling within the terms of reference to arbitration thus exceeding the scope of reference to arbitration; and that award went against public policy, justice and morality, as provided for in Section 35(2)(a)(iv) as read with Section 35(2)(b)(ii) of the *Arbitration Act*.

17. With the above in reserve, before addressing the issues at fore, this Court must remind itself of its role with respect to Section 35 of the *Arbitration Act*. The Court of Appeal in Gachuhi & another v Evangelical Mission for Africa & Another; Law Society of Kenya (Interested Party) [2023] KECA 51 (KLR), fittingly set out the role of this Court as follows; -

> "……It is trite that in an application to set aside an arbitral award under Section 35 of the *Arbitration Act*, the court is not sitting on appeal from the merits of the decision of the Arbitral Tribunal…… If that were so, arbitral awards would be impeached and set aside on all manner of grounds outside the confines of Section 35 of the *Arbitration Act*. The decisions of the Supreme Court in Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Another [2019] eKLR and Synergy Industrial Credit Ltd v Cape Holdings Ltd [2019] eKLR reaffirm the closed nature of the grounds for setting aside an arbitral award under section 35."

Whether the Court ought to set aside the arbitral award published on 18/10/2024?

18. Firstly, concerning whether the arbitral award runs afoul of Section 35(2)(a)(iv) of the *Arbitration Act*, it warrants reminder that where parties subject their dispute for resolution by way of arbitration, it involves consensus akin to a contract by contracting parties. The duty of this Court while adjudicating a dispute between contracting parties was succinctly settled in the of-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd. Thus, while keeping in mind the latter dicta, contracting parties are always at liberty to delineate terms of engagement, which may include contracting on an arbitration clause.

19. As to the nature of the such a clause, the Court of Appeal in Synergy Industrial Credit Limited v Cape Holdings Limited [2020] KECA 208 (KLR), while referencing in brief Section 17 of the *Arbitration Act* observed that: -

> "As we stated earlier, the primary consideration in determining the scope of the reference is the arbitral clause or agreement. It is in the arbitral agreement that the parties have agreed to submit their dispute to arbitration and it is that agreement therefore which provides the basis of the arbitration. By dint of section 17 of the *Arbitration Act*, the arbitral agreement in a contract is an independent agreement, separate and independent from the other terms of the contract and a finding that the contract is void does not invalidate the arbitral agreement." [emphasis mine]

20. Having set out the above, the question that begs at this juncture is whether the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contained pronouncements on matters beyond the scope of the reference to arbitration?

21. The Arbitral Agreement can be found at Clause 38 of the Security Agreement (See Annexure SRA-1). For the benefit of the Court and parties herein it necessitates setting out ad verbum the relevant facets of Clause 38 in order to contextualize the reference. Clause 38 of the Security Agreement provides that-;

> " 38. Save as hereinbefore provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled or agreed between the parties shall be referred to arbitration and such arbitration to be held in Kenya by a single arbitrator to be appointed in default of agreement by the parties hereto by the chairman for the time being of the Chartered Institute of Arbitrators (Kenya Chapter) and every award made under this Clause shall be expressed to be made under the *Arbitration Act* No. 4 of 1995 or other Act or Acts for the time being in force in Kenya in relation to arbitration.
>
> 38.1. .....
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> 38.2. .....
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> 38.3. .....
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> 38.4. Subject to any agreement of the parties to the contrary, the arbitrator shall have power, inter alia to:
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> a. rule on its own jurisdiction;
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> b. decide all procedural and evidential matters;
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> c. appoint experts
>
> d. make more than one award for example, on a preliminary issue;
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> e. make a declaration/order payment of money/ restrain certain acts;
>
> f. award simple or compound interest;
>
> g. correct an award to remove a mistake or error;
>
> h. make an award allocating costs of the arbitration between the parties; or
>
> i. limit recoverable costs.
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> 38.5. .....
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> 38.6. .....
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> 38.7. The award of the Arbitrator shall to the extent permitted by law be final and biding.
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> 38.8. ....." (sic)

22. Addressing itself on the purport of Section 35(2)(a)(iv) of the Act, the Court of Appeal in Synergy Industrial Credit Limited (supra) succinctly put it that a court seized of an application to set aside an arbitral award pursuant to Section 35 of the Act, has no jurisdiction to review the merits of the

arbitral award whereas the Applicant bears the burden of satisfying the Court that the arbitral tribunal determined a dispute not contemplated or not falling within the terms of the reference to arbitration or that the arbitral award contains decisions on matters beyond the scope of the reference.

23. The Court went on to posit that in determining whether the burden has been discharged, the Court must pay due regard to the strong constitutional, statutory and national policy commitment to dispute resolution through arbitration and other alternative dispute resolution mechanisms.

24. The court went further to state its mandate regarding Section 35(2)(a)(iv), thus- "In our perception, Section 35(2) (iv) .....requires the court, taking a broad view of the application to set aside an arbitral award, and guided by the principles we have set out above, to be satisfied by the applicant that the arbitral tribunal failed to act within the terms of the reference, say for example, by determining an entirely different dispute from that submitted to it by the parties.

> In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. (sic)

25. Indubitably, by the wording of the arbitration clause (Clause 38) earlier captured ad verbum in this ruling, ex facie its scope was broad and unrestrictive as may concern the questions or disputes that were to be referenced towards arbitration. That said, it is not in dispute that prior to the arbitration proceedings the Applicant had filed suit before the Small Claims Court (See Annexure SRA-4) and that pursuant to a preliminary objection (See Annexure SRA-5) on jurisdiction, premised on the Arbitration Clause in the Security Agreement, the lower Court vide a ruling delivered on 04/08/2022 (See Annexure SRA-6) referred the matter to Arbitration.

26. Consequently, by Applicant's amended statement of claim presented for Arbitration, he summarized the grounds in respect of his claim to constitute-;

> whether there was deliberate and malicious misappropriation of the Applicant's loan accounts by the Respondent to force default? whether there was attachment when the Applicant when the Applicant's account was not in actual default? whether the Respondent's failed to issue the Applicant with demand notice as provide by law? whether the Auctioneer failed to issue the Applicant with proclamation notice as provided by law? whether there was attachment by the Auctioneer against an unregistered security agreement contrary to the law? whether there was failure by the Auctioneer to advertise the motor vehicle KCE 814Y before sale as provided for in law? whether the failure by the Auctioneer to notify the Applicant of the intention to sell the attached motor vehicle is provided for in law? whether there was in force a Court order and ruling barring the sale of motor vehicle KCE814Y? whether there was failure by the Respondent and Auctioneer to declare accounts after auction as provided for by law? and whether there was failure by the Auctioneer to conduct a public auction of motor vehicle KCE 814Y as provided for in law?

27. In rejoinder, the Respondent filed Response and Counter-claim, to wit, it sought judgment against the Applicant in the sum of Kshs.766,016/-, general damages for breach of contract, cost of the claim and counter-claim plus interest.

28. By his submissions, the Applicant coined thirteen (13) issues for the Arbitrator's consideration drawn from the grounds in the amended statement of claim and attendant reliefs sought therein.

29. In his final award (See Annexure SRA-8) the Arbitrator summarized the respective parties' submissions, with issues as framed therein meanwhile addressed himself to the issues of jurisdiction, parties to the matter, breach of security agreement, service of demand notice, service of proclamation notice, attachment in respect of an unregistered security agreement, merits of the Respondent's counterclaim and costs of the arbitration.

30. In my estimation, the above were all issues within the scope of the arbitral reference as captured in Clause 38 of the Security Agreement further were issues equally identified by the respective parties for determination before the Arbitrator. By the award, the Arbitrator rendered a decision on each of the issues as framed and or coined by implication of the arbitration clause, pleadings and submissions.

31. By the instant motion, the Applicant has raised a raft of issues that he asserts were not considered by the Arbitrator whereas a cursory review of the same, it seems they were addressed by the latter and or formed the scope of the disputes within which the Arbitral agreement was premised upon. Thus, my reasoned deduction is that the Applicant has not discharged the burden of proof with respect to Section 35(2)(a)(iv) of the Act.

32. The contestation further appears misplaced if not a tacit invitation for this Court to sit on appeal over the Arbitral award of which must not be countenanced and or condoned, in light of recent decisions within our jurisdiction impressing on the necessity of reasonable restraint towards Courts interfering with arbitral proceedings or awards.

33. Consequently, I can do no more than echo the words of the late Majanja, J in Associated Motors Limited v Sekura International Limited [2023] KEHC 3125 (KLR) wherein while addressing himself to the provisions Section 35 of the Act, stated that-;

> " ....this is not an appeal and the Arbitrator is the master of facts and sitting as a tribunal, had the authority to interpret the parties' Agreement and the law and that since the Agreement gave him enough latitude to interpret it together with the evidence adduced by the parties in a manner which makes it more effective, without re-writing the Agreement, then the court will accept a genuine attempt by Arbitrator to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties"

34. On the second limb, on whether the arbitral award was in conflict with public policy by dint of Section 35(2)(b)(ii) of the Act, the definition of 'Public Policy' as captured in the above provision was succinctly addressed by the Court of Appeal in Kenya Shell Limited v Kobil Petroleum Limited [2006] KECA 389 (KLR) wherein it was stated that:

> " Public policy, which is a factor we may consider in the exercise of our discretion, is of course an indeterminate principle or doctrine. In years of yore, it was branded "an unruly horse, and when you get astride it, you never know where it will carry you"- Richardson v Mellish (1824) 2 Bing 229. Nevertheless, it clearly has reference to ideas, which for the time being prevail in a country as to the conditions necessary to ensure its welfare. It is variable and must fluctuate with the circumstances of the time.

35. Ringera J (as he then was) examined several authorities in Christ For All Nationals vs. Apollo Insurance Co. Ltd [2002] 2 EA 366 and formed the view that: -

> " although public policy is a most broad concept incapable of precise definition.... . an award could be set aside under section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it was shown that either it was:-

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."

36. The Applicant has assailed the arbitral award specifically for being against public policy-; on accord of the Arbitrator's omission to find that failure to issue a demand and proclamation notice went against provisions of the *Movable Property Security Rights Act* and *Auctioneers Act*; given that the award went beyond the scope of reference; given the exclusion of the Auctioneer from the arbitration proceedings; given that by construing that 5% penalty rate was weekly and not monthly, given that the Arbitrator re-wrote the Security Agreement; by failing to find that attachment against unregistered Security Agreement was null and void; and by finding the Respondent in Contempt of Court yet proceeding to dismiss the Applicant's claim.

37. I have taken the liberty of reviewing the Security Agreement and various Paragraphs in the assailed arbitral award, particularly Paragraphs 134, 135, 152,153, 154, 159, 160, 161, 170, 171, 177, 178, 179 & 180. In the latter Paragraphs, the Arbitrator sufficiently addresses the earlier captured queries, to wit, the Applicant contends that the Arbitrator's determination on the same went against public policy. Again, and at the risk of repetition, it is well-trodden that this Court is mandated to set-aside an Arbitral award if it is in conflict with Section 35(2)(b)(ii) of the Act, particularly where the award is inconsistent with the *Constitution* or other laws of Kenya, whether written or unwritten.

38. Juxtaposing the relevant provisions of the *Constitution* and statute cited by the Applicant alongside the arbitral award, it must be stated that the same cannot be construed in isolation of the Security Agreement executed by the parties.

39. The summation of the Arbitrator's works was premised on the dicta in National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd meanwhile the Applicant has not demonstrated that the Arbitrator's decision was in conflict with the settled position in law and or exceeded the scope of reference.

40. Introspectively, reviewing the Applicant's argument, he is tacitly inviting this Court to sit on appeal over the arbitral award and consequently arrive at a different determination from the Arbitrator. As stated in Associated Motors Limited (supra) such an invitation must not be countenanced by the Court and must in all attempts be frowned upon given that "the Arbitrator is the master of facts and sitting as a tribunal, had the authority to interpret the parties' Agreement and the law.."

41. Ogola J. in Evangelical Mission of Kenya and Another v Kimani Gachuhi and Another [2015] eKLR that:-

> " A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration."

Having examined the arbitral award, it is my logical conclusion that there was a rational manner in which the Arbitrator arrived at his decision, and that he did not exceed the scope of reference towards arbitration for reasons earlier captured in this ruling.

42. Consequently, the only logical conclusion is that Applicant has not justifiably demonstrated that the award was in conflict with Section 35(2)(b)(ii) of the Act. Thus, without belaboring further on the

matter, the Court is of the considered view that the Applicant's motion lacks merit. It is dismissed with each party to bear own costs of the application.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF OCTOBER, 2025.

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JANET MULWA.

JUDGE