

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

MISCELLANEOUS APPLICATION NO. E081 OF 2025
(CONSOLIDATED WITH MISCELLANEOUS APPLICATION NO.
E072 OF 2025 - DR. JAMES MWIRIGI MWITARI - VS - AMREF
INTERNATIONAL UNIVERSITY)

(Before Hon. Lady Justice Agnes Kitiku Nzei)

IN THE MATTER OF ARBITRATION ACT 1995
IN THE MATTER OF AN APPLICATION FOR RECOGNITION
AND ENFORCEMENT OF AN ARBITRAL AWARD

-AND-

IN THE MATTER OF THE EMPLOYMENT AND LABOUR
RELATIONS COURT 2011

-BETWEEN-

AMREF INTERNATIONAL UNIVERSITY.....APPLICANT

VERSUS

DR. JAMES MWIRIGI MWITARI.....1ST RESPONDENT

THE ARBITRATOR, TOM NYAGARE.....2ND RESPONDENT

RULING

1. This Ruling determines two consolidated applications, a Chamber Summons application dated 11th March, 2025 and filed by **Dr. James Mwirigi Mwitari** (herein referred to as **“the Respondent”**), and the Chamber Summons application dated 20th March, 2025 and filed by **Amref International University** (herein referred to as **“the Applicant”**). The said two applications were consolidated vide this Court’s Orders dated 7th May, 2025.

Summary of pleadings

2. In the Chamber Summons application dated 11th March, 2025, the **Respondent** seeks the following Orders:-
 - (a) *That the Final Award published on 18th January, 2025, issued by **Mr. Tom Nyagare, MCI Arb** relating to the matter of Arbitration between the Applicant and the Respondent be recognized as binding and enforced in accordance with the provisions of Section 36(1) of the Arbitration Act, 1995.*
 - (b) *That a decree be issued accordingly.*

(c) *That costs of the application be provided for.*

3. The application sets out on its face the grounds on which it is brought, and is anchored on the supporting affidavit of **Dr. James Mwirigi Mwitari** (the Respondent) sworn on 11th March, 2025. It is deponed in the said supporting affidavit:-

(a) *that the Respondent was employed by the Applicant University in the position of a Senior Lecturer (Health Systems Management & Development) vide an employment contract dated 12th June, 2019.*

(b) *that **Clause 14 of the contract provided for Dispute Resolution by way of arbitration.***

(c) *that the Respondent was summarily dismissed by the Applicant vide a summary dismissal letter dated 28th July, 2021.*

(d) *that the Respondent appealed the dismissal to the Applicant's Appeals Committee, which upheld the decision/dismissal and communicated that decision to the Respondent vide a letter dated 30th September, 2021.*

- (e) that aggrieved by the decision, the Respondent invoked the Arbitration Clause in the Employment Contract, and made an application to the Chairman of the Chartered Institute of Arbitrators to appoint an Arbitrator to handle the dispute.
- (f) that on 12th October, 2023, the Chairperson of the Chartered Institute of Arbitrators appointed Arbitrator and on 30th September, 2023, the Respondent filed his claim against the Respondent.
- (g) that the matter proceeded for arbitration and **on 18th January, 2025, the Arbitrator rendered his Award.**
- (h) that despite being fully aware of the said Award, the Applicant failed to settle the same within the Thirty (30) days stipulated period, thus rendering the proceedings herein necessary.
- (i) that the Court's intervention is necessary to enforce compliance and to prevent further injustice to the Respondent.

4. Documents annexed to the said supporting affidavit include copies of the employment contract dated 12th June, 2019, a summary dismissal letter dated 28th July, 2021, a (letter of) appeal against dismissal dated 30th September, 2021, a letter appointing an Arbitrator (dated 12th October, 2023, a statement of claim dated 30th November, 2023 and the Arbitrator's Final Arbitral Award dated 18th January, 2025.

5. The Applicant opposed the application dated 11th March, 2025 vide a replying affidavit sworn on 3rd April, 2025 by **Diana Amuhaya Advocate**, the Applicant's Legal Manager. It is deponed in the said replying affidavit:-

(a) *that the dispute between the parties herein was referred to arbitration before a sole Arbitrator, **Tom Nyagare (MCI Arb)**, who issued a Final Arbitral Award dated 18th January, 2025 **upon determination of the matter.***

(b) *that being aggrieved by the decision in its entirety, the Applicant filed this Court's Misc. Application No. E081 of 2025 seeking to stay enforcement and to set aside the said Final Arbitral Award for **being contrary to the***

provisions of the law and public policy due to inconsistency with the Constitution of Kenya and the Law of Kenya (written and unwritten) applicable to termination of employment and the rules of fairness and justice (as set out in the Application filed in Misc. Application No. E081 of 2025).

(c) that the application to set aside was not filed to counter the application to enforce the award, which was filed before expiry of the 3 months within which the Applicant could seek orders setting aside the award.

(d) that the Award **dealt with and contained a decision that was not applicable to the termination of employment dispute between the parties; and is beyond the scope of the reference to arbitration by the parties.**

(e) that without sanction and/or authority of parties, the Arbitrator's Award vitiates the requirement of the arbitration law that parties in arbitration proceedings be given full opportunity to canvass their case **before an impartial competent**

tribunal. That the Award is a breach of natural justice and a derogation from the Arbitrator's terms jointly agreed by the parties.

(f) that jurisdiction of the Arbitrator is tethered by the arbitration agreement, the reference and the law. That Sections 36 and 37 of the Arbitration Act require the Arbitrator's fidelity to the arbitration agreement, reference and the law.

(g) that the **Arbitrator's prejudicial misconduct and/or incompetence in considering and determining the dispute before him was outside the scope of the terms of reference, and having wasted the time of the parties herein ought not to be remunerated for there is no valid consideration for such remuneration, and the fees paid should be refunded.**

(h) that the award is so **repugnant** to the tenets of justice that the only way **to salvage the reputation of the arbitration is to refuse to recognise and/or to enforce the same.**

6. The Applicant also filed a Notice of Preliminary Objection dated 3rd April, 2025, calling for this Court's Miscellaneous Application No. E072 of 2025 to be struck off on ground that the application is not sustainable in law as the Award sought to be enforced **is fatally defective as it does not comply with the mandatory provisions of Sections 32(4) of the Arbitration Act which requires the Award to state the Juridical Seat.** On 7th May, 2025, the Court ordered and directed that the said Preliminary Objection would be determined **alongside** the applications filed by the parties herein.

7. In the Chamber Summons dated 20th March, 2025, the Applicant seeks the following Orders:-

(a) *Spent.*

(b) *Spent.*

(c) *That the Final Arbitration Award dated 18th January, 2025 be set aside in its entirety.*

(d) *That the Court issues such other reliefs as may be deemed fit and just in the circumstances to achieve the ends of justice.*

(e) *That costs of and incidental to the application be borne by the Respondent.*

8. The application sets out on its face, and in detail, the grounds upon which it is brought, and is anchored on the detailed supporting affidavit of **Diana Amuhaya** sworn on 20th March, 2025. It is deponed in the said supporting affidavit, ***inter-alia***:-

(a) *that the Applicant entered into an employment contract with the Respondent dated 19th June, 2019, which contained an arbitration clause; and that following the Respondent's termination, Tom Nyangare was appointed arbitrator to determine the dispute.*

(b) *that the Arbitrator published his Final Award dated 18th January, 2025 determining the matter in favour of the Respondent.*

(c) *that the Award is **contrary to the provisions of the law and public policy** as it is inconsistent with the Constitution and the law of Kenya **(written and unwritten)** applicable to*

termination of employment and the rules of fairness and justice as:-

(i) the Award determined matters **outside the pleadings, evidence and submissions.**

(ii) Article 10(1)(b), (2)(a), (b) & (c) of the Constitution requires that the Arbitrator ought to have determined the matter in accordance with the values and principles of governance, including the rule of law, integrity, equity, transparency and accountability, which in the circumstances he failed to do.

(iii) that Article 27(1) requires equal protection and equal benefit of the law, which right was not balanced in consideration of the matter before the Tribunal.

(iv) that the provisions of Section 43 of the Employment Act were not taken into consideration by the Tribunal, contrary to Judicial precedent and public policy.

- (v) that the Tribunal was either negligent in failing to fully and effectively review the documentation before it, or was **incapable of understanding the real issues in dispute before it**, contrary to the Arbitrator's mandate, the rule of law, and written and unwritten laws.
- (vi) that the Arbitrator's **failure to consider the reasons for termination** before arriving at a decision was unlawful, unprocedural and unreasonable, and was contrary to settled Judicial precedent and the applicable law; and contrary to the tenets of Justice requiring finality of decisions.
- (vii) that **public policy** demands that a decision should settle all matters in dispute to build confidence in the established legal structures for resolution of disputes.
- (viii) that the **integrity of the Arbitration Award is compromised as the Tribunal**

failed to apply its mind within the expectations and obligations placed on it and the required standard of reasoning contrary to reference provisions and the Fair Administrative Act.

(ix) that the Award reflects **technical misconduct, incompetence and/or inexperience** of the Tribunal, resulting in a grave miscarriage of Justice and uncertainty of rights and duties within a Judicial process.

(x) that the Tribunal **dismissed the Applicant's Counter-claim seeking the refund of an erroneous double payment of the Respondent's terminal dues, resulting in an unjust enrichment.**

(xi) that **computation of the award of damages to the Respondent was contrary to Section 49(1)(c) of the Employment Act.**

(xii) *that the Court has jurisdiction to set aside arbitration awards to cure glaring and material errors emanating from **incompetence, fraud, or bias by arbitrators, violation of the rules of natural justice, errors of law or attempts to act outside legal parameters for determining employment termination cases.***

9. The application is opposed by the Respondent (**named as the 1st Respondent in the application**) sworn on 9th April, 2025. It is deponed in the said replying affidavit, ***inter-alia:-***

(a) *that the application is purely based on speculative grounds, and does not fall within the threshold of setting aside an Arbitral Award as provided for in Section 35 of the Arbitration Act.*

(b) *that grounds raised in the supporting affidavit (paragraphs 5 and 6 thereof) are more suited to an appeal as they seem to touch on the merit and demerit of the decision.*

- (c) *that there is nothing unconstitutional, inimical to the national interest of Kenya, or contrary to justice or morality that emanates from the Award for it to reach the threshold of being contrary to public policy, which seems to be the ground upon which the Applicant seeks to base the application.*
- (d) *that the Applicant is on a fishing expedition and is throwing anything in the kitchen sink hoping that somewhat one of its baseless grounds will succeed.*

10. The Applicant filed a further affidavit, sworn by **Diana Amuhaya** on 16th April, 2016; whose contents I have noted and considered.
11. The 2nd Respondent, named in the application as **Hon. Tom Nyangare**, does not seem to have filed any response to the application (dated 20th March, 2025).
12. Both parties, the **Applicant** and the **Respondent**, filed written submissions **on each of the two consolidated**

applications pursuant to the Court's directions in that regard.

13. **Determination**

Having considered the consolidated applications, the affidavits sworn in support of and in opposition to the applications, and all documents thereto annexed, issues that fall for determination, in my view, are as follows:-

(a) Whether the Final Arbitral Award dated 18th January, 2025 is fatally defective for failure to comply with Section 32(4) of the Arbitration Act.

(b) Whether the Applicant's application dated 20th March, 2025 establishes grounds for setting aside of the Final Arbitral Award dated 18th January, 2025, and whether the application should be allowed.

(c) Whether the Final Arbitral Award dated 18th January, 2025 should be recognized and enforced as sought by the Respondent in the application dated 11th March, 2025.

14. On the first issue, that is, whether the Final Arbitral Award that the Respondent is seeking to enforce is fatally defective for failure to comply with the mandatory provisions of **Section 32(4) of the Arbitration Act** which requires the Award to state **the Juridical Seat**, it is to be noted that in the employment contract dated 19th June, 2019 (**Clause 14 thereof**), both parties herein covenanted that the governing law would be the Laws of Kenya; and that any dispute or claim arising out of or connected to the contract would be construed in accordance with the said laws, and would be referred to a single arbitrator appointed either by the parties or by the Chairman for the time being of the Chartered Institute of Arbitrators (**Kenya Branch**).
15. It is a common ground that the Arbitrator, **Hon. Tom Nyagare**, was appointed by the Chairperson of the Chartered Institute of Arbitrators (**Kenya Branch**). It is also a common ground that **both parties participated in the arbitration proceedings leading up to the award**. None of the parties has alleged that the proceedings were conducted outside Kenya.

16. A Juridical Seat is the legal home or domicile of an arbitration, which is the Country whose law governs the arbitration proceedings and whose national courts have supervisory jurisdiction over the proceedings. A Juridical Seat is distinct from the physical location or venue where the hearings take place.

17. In my view, failure by the single arbitrator to indicate the Juridical Seat of the arbitration is **a legal technicality** which cannot invalidate the legality and validity of the Award. **Article 159(2)(d) of the Constitution of Kenya 2010** states that justice shall be done without undue regard to such technicalities. I return a finding that the said Preliminary Objection is without merit, in the circumstances of the case herein. The same is overruled.

18. On the second issue, **Section 32A of the Arbitration Act** provides as follows:-

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against

the award otherwise than in the manner provided by this Act.”

19. The foregoing provision is an amplification of **Section 10 of the Act** which provides as follows:-

“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”

20. Under **Section 35(2) of the Arbitration Act**, an arbitral award may be set aside by the High Court only:-

(a) If 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 law 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 falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; provided that 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**
- (j) the award is in conflict with the public policy of Kenya.”**

21. The term **“High Court”**, in the context of the proceedings herein, refers to this Court, in view of **Article 162(2)(a) of the Constitution of Kenya 2010.**

22. The Black’s Law Dictionary (Tenth Edition) defines **policy** as:-

“A standard course of action that has been officially established by an organization, business, political party, etc.”

23. In my view, and in view of the foregoing definition of the word **policy**, the term **“public policy of Kenya”** cannot be

blanketly used or relied on while calling for the setting aside of an arbitral award for being **“in conflict with the public policy of Kenya”** as the term **“public policy”** is a compendium of different segments of public policy. That is why there are segments of public policy like foreign policy, economic policy, education policy etc. There is at least a public policy in each public sector. In the present case, the Applicant has not stated or demonstrated which public policy of Kenya the arbitral award dated 18th January, 2025 is in conflict with. Section 35(2)(a) of the Arbitration Act puts **the burden of proving the existence** of the grounds set out in that Section on the person seeking the setting aside of an arbitral award.

24. It was stated as follows in **Vishnu Builders & Developers Limited - vs - Maow Holdings Limited [2020] KEHC 2341 (KLR):-**

“Public policy was canvassed with clarity in the case of *Set and Sit Contractors - vs - Mare Nostrum Limited [2020] eKLR* where the Court stated:-

“Public policy has been stated to be an indeterminate and fluid principle which fluctuates with time and circumstances. There is nevertheless a beaten path in terms of precedents which show the key factors to take into consideration in determining whether or not an award is in conflict with public policy. A case in point is the often cited *Christ for all Nations - vs - Apollo Insurance Company Limited* [2002] EA 366 where Ringera, J. (as he then was) had occasion to consider the concept of public policy from the prism of Section 35(2)(b)(ii) and had the following to say;

“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 is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of

Kenya or (c) contrary to justice or morality.”

25. In **Grain Limited - vs - TSS Grain Millers Limited [2002] eKLR**, it was held that:-

“A contract or Arbitral award will be against public policy of Kenya if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word illegal here would hold a wider meaning than just “against the law”.

It would include contracts or contractual acts or award which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.”

26. I have perused the arbitral award dated 18th January, 2025, which the Applicant seeks to set aside. I have noted that the Arbitrator made a finding that the Respondent’s dismissal was unlawful, and awarded him (the Respondent)

Kshs.6,244,040/=. The Applicant's Counter-claim was dismissed, and full costs of the arbitration were awarded to the Respondent. The **correctness or otherwise** of the award is **not** for this Court to determine, as the Court is **not** sitting on appeal over the arbitrator's said award.

27. The Applicant has not demonstrated that the award is inconsistent with the Constitution and other laws of Kenya, written and unwritten; neither has it demonstrated that the award is illegal and immoral. None of the parties has alleged denial of a fair hearing by the sole arbitrator or discrimination during the arbitration proceedings. No breach of the Constitution or other law during the hearings has been demonstrated by any of the parties.

28. Once parties voluntarily choose arbitration as their preferred mode of dispute resolution, courts must respect that choice and refrain from **re-evaluating the merits or otherwise of arbitration awards;** which can only be set aside within the **narrow** confines of Section 35 of the Arbitration Act.

29. The Court of Appeal stated as follows in **Talewa Road Contractors Limited - vs - Kenya National Highways Authority [2021] KECA 276 (KLR):-**

“20. This Court had occasion to determine a similar appeal in the case of *DOCK WORKERS UNION LIMITED - VS - MESSINA KENYA LIMITED [2017] eKLR*, in which the High Court’s finding that the Court’s Jurisdiction was ousted by an arbitration agreement contained in the grievants’ contracts of employment was challenged. Affirming that Court’s finding, the Court stated thus;

“On the contrary and as rightly held by the learned Judge, the parties herein had categorically agreed to refer any ensuing dispute as regards the contract of employment herein to arbitration. Parties have the freedom to choose the regime of the law they want to be governed under and embody it in their contracts. *If parties opt to have an arbitration agreement in their contract of*

employment which spells out how disputes between them would be resolved, that is perfectly within their rights. The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other than arbitration. They cannot turn around and denounce the arbitration agreement. It is also worth of note that the Constitution of Kenya itself has given prominence to arbitration by acknowledging it as one of the alternative dispute resolution that Courts should encourage. The learned Judge cannot therefore be faulted for finding that the arbitration agreement in the parties contracts was valid.”

30. The Applicant has not raised any issue with the **arbitration agreement** or with the **appointment of the arbitrator**, and the **proceedings** leading upto the arbitral award dated 18th January, 2025. The Applicant has not identified any particular part of the arbitral award that relates to a matter

or matters that **had not** been referred to arbitration, and has not demonstrated what that matter is. **I say this after perusing the pleadings presented to the arbitrator by both parties, their witness statements and volumes of evidential documents, which the Applicant annexed to its application herein.**

31. Although the Applicant questioned the arbitrator's **integrity**, no proof was tendered by the Applicant to demonstrate that the making of the award was induced or affected by **fraud, bribery, undue influence or corruption.**

32. It was deponed on behalf of the Applicant, and in support of the application for setting aside, **that the arbitrator acted incompetently and negligently, and did not possibly understand the documents presented before him during the arbitration.** Indeed, the affidavit sworn in support of the Applicant's application dated 20th March, 2025, which I have substantially reproduced in this Ruling, reads/sounds more of a memorandum of appeal than grounds in support of an application for setting aside of an arbitral award pursuant to Section 35 of the Arbitration Act. This Court **cannot re-evaluate or interrogate the**

evidence presented before the arbitrator *vis-à-vis* the pleadings filed by the parties, as it is not sitting as an appellate Court.

33. This Court cannot sit on appeal over the findings of the arbitrator, as the law has not donated to it such **jurisdiction**. An arbitral award is by law final and binding on parties thereto, and courts will **only** interfere and/or intervene where circumstances necessitating such intervention fall within the parameters outlined in Section 35 of the Act.

34. In view of all the foregoing, and having **carefully read** the parties' rival written submissions on the Notice of Motion dated 20th March, 2025; that is the Applicant's written submissions dated 5th May, 2025 and the Respondent's written submissions dated 2nd May, 2025, I find **no** merit in the Application dated 20th March, 2025, and the same is hereby dismissed.

35. On the third issue, and having overruled the Preliminary Objection dated 3rd April, 2025 and considered and

dismissed the application seeking the setting aside of the final arbitral award; and having considered the Respondent's Notice of Motion dated 11th March, 2025, the affidavit sworn in opposition thereof and rival submissions filed by both parties thereon, I proceed to allow the said application in the following terms:-

- (a) The Final Arbitral Award published on 18th January, 2025 and issued by Tom Nyagera, MCIArb relating to the matter of arbitration between Dr. James Mwirigi Mwitari and Amref International University, is hereby recognized and enforced in accordance with the provisions of Section 36(1) of the Arbitration Act, 1995.**
- (b) A decree shall issue accordingly.**
- (c) Each party shall bear its own costs of these proceedings.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS
31ST DAY OF OCTOBER 2025**

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Onyango for the Applicant

Mr. Gomba for the Respondent