Kenya National Highways Authority v Interways Works Limited (Arbitration Cause E082 of 2024 & Miscellaneous Application E1018 of 2024 (Consolidated)) [2025] KEHC 15093 (KLR) (Commercial and Tax) (21 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15093 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E082 OF 2024 & MISCELLANEOUS APPLICATION E1018 OF 2024 (CONSOLIDATED)

JWW MONG'ARE, J

OCTOBER 21, 2025

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPLICANT

AND

INTERWAYS WORKS LIMITED ..... RESPONDENT

RULING

Introduction and Background

1. On 12th July 2024, the Arbitral Tribunal ("the Arbitrator") published an award in which the Respondent("Interways") was awarded inter alia Kshs 170,913,736.87 plus interest of Kshs. 110,042,902.88/= and costs of the arbitration proceedings ("the Award"). The Award was in respect of an Agreement dated 30th October 2017 for the construction of a pedestrian crossing facility across Thika Superhighway at Witeithei and Mangu Road ("the Agreement")

2. The Award forms the subject of the present applications by the parties for the Court's determination. The Applicant (KENHA), through its chamber summons dated 25th November 2024 seeks to set it aside whereas Interways seeks to enforce it as an order of the Court through its Chamber Summons dated 2nd December 2024. The applications have been canvassed by way of written submissions which are on record and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. I propose to first deal with KENHA's application which seeks to set aside the Award solely on ground that it is in conflict with the public policy of Kenya and violates basic legal principles, justice, and morality. It complains that the Arbitrator ignored facts and contract terms, falsely stating that drawings were issued late when they were part of the original contract. That he failed to consider KENHA's position that additional drawings were contingent on the contractor's geotechnical investigations and that he awarded these costs without a proper legal basis and incorrectly assumed they automatically follow an extension of time. KENHA states that the Arbitrator admitted the contractor did not fully comply with contractual documentation requirements of Clause 53.4 of the Agreement but awarded costs anyway, that he imposed an unreasonable and unattainable standard of proof on KENHA and that the calculation formula was non-transparent, defective, and the resulting sum is exaggerated and without discernible grounds.

4. KENHA further contends that the order to refund liquidated damages was based on the incorrect premise that the contractor was entitled to an extension of time and that the awarded interest rate of two percent above the CBK rate contravenes section 140 of the *Public Procurement and Asset Disposal Act* (Chapter 412C of the Laws of Kenya), which stipulates the use of the prevailing mean commercial lending rate. In general, KENHA avers that the Award is devoid of fairness, that the Arbitrator failed to provide explicit reasons for key decisions, such as the basis for the prolongation cost calculation and that the Award undermines national interests by imposing unjustified payments and results in the unjust enrichment of Interways.

5. In response, Interways filed the replying affidavit sworn by its Managing Director, JAMES MUGO, on 4th April 2025. Interways contends that the 90-day period to challenge an award, as stipulated in section 35(3) of the *Arbitration Act* (Chapter 49 of the Laws of Kenya) ("the Act") began when the award was published on 12th July 2024, not when it was physically received. That correspondence from the Arbitrator clearly stated the Award would be ready on 12th July 2024 and the delay in its release was due to KENHA's failure to pay the Arbitrator's and stenographer's fees on time. Therefore, Interways states that KENHA's application was filed outside the 90-day statutory limit and is time-barred.

6. Interways also points out that KENHA failed to attach a certified copy of the Award to its application, a fundamental requirement for such a challenge which renders the application defective. Interways emphasizes that arbitral awards are final, and the Court's role in setting them aside is extremely limited and that KENHA bears the burden of proof to show why the Award should not be recognized and enforced, a burden it has not met. Interways argues that KENHA has not fulfilled any of the strict conditions required by section 35(2) of the *Arbitration Act* to set aside an award.

7. Interways refutes KENHA's claim that the award is contrary to public policy and justice and that this argument is vague and generalized. Interways states that public policy is not engaged merely because a decision is unfavourable to one party; it must have a broader national impact or affect third parties, which KENHA has not demonstrated. Interways depones that the public policy of Kenya is to uphold the finality of arbitral awards that result from a process the parties voluntarily agreed to. It avers that the application is characterized as an impermissible appeal disguised as a setting-aside application. It urges the Court not to re-examine the merits of the case, as this is the exclusive domain of the Arbitrator. Interways points out that the Arbitrator carefully considered all evidence and provided detailed reasoning for his conclusions and believes that KENHA's application is an attempt to re-litigate a settled dispute and lacks any legal foundation. As such, it prays for the application to be struck out and/or dismissed with costs.

8. As Interways raises technical issues in respect of KENHA's application, I propose to deal with the same first before delving into its merits, if at all. First, is the contention that KENHA has failed to attach a duly certified copy of the Award in its application which is contrary to section 35 of the *Arbitration Act*, making the same fatal. However, I have gone through the entire section 35 of the Act and there is actually no provision obligating an applicant who seeks to set aside an award to attach the same in their application. The same is only obligated for an applicant seeking to enforce the award under section 36 of the Act. In any event, having consolidated the two causes for setting aside and enforcing the Award, I can confirm that the Court has sight of the Award and that the same can be perused and a determination made as to whether KENHA's claims are justified.

9. The other objection raised by Interways is that KENHA's application is time barred having been filed outside the statutory three months provided for under section 35(3) of the Act. The said provision states that an applicant is to make the application after the award has been "received". It is now settled law that "received" for purposes of the Act means notification by the Arbitrator that the award is ready for collection. Consequently, once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the signed copy of the award. Failure of the parties to collect it does not delay or postpone the delivery and the time limited in section 35(3) of the Act begins to run (see Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited [2021] KEHC 6762 (KLR)].

10. Interways has annexed a letter from the Arbitrator informing the parties that the Award was to be ready on or before 12th July 2024. In the said letter, the Arbitrator stated that prior to issuance of the Award, he would "circulate [his] final invoice of the Arbitrator's fees for settlement by the parties..." The Arbitrator, in a letter dated 8th July 2024 issued the final invoice but then sent another final invoice on 26th August 2024 which revised the previous invoice. From the aforementioned, I am inclined to agree with KENHA that whereas the parties were informed that the Award would be ready on 12th July 2024, it was only accessible and available to the parties as from 26th August 2024 when the revised final invoice was sent to the parties and that time begun to run from this date. I think it would be unfair to state that time begun to run as from 12th July 2024 when the Arbitrator had not even issued the final invoice which he had stated was contingent and appendaged to the Award. None of the parties could access the Award and the same was not available to be "received" until the final invoice was issued. The same, having been issued on 26th August 2024, meant that time begun running from this time and lapsed on 26th November 2024. As the application was filed on 25th November 2024, I find that the filing was within time. Interways' technical objections are hereby dismissed.

11. Turning to the merits of KENHA's application, it is common ground that under section 35(2)(b)(ii) of the *Arbitration Act*, an Award can be set aside if it "...is in conflict with the public policy of Kenya." The parties rightly submit that the term "public policy" was broken down by the Court in Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 E.A 366, where Ringera J., explained the scope of public policy as a ground for setting aside an arbitral award as follows:

> "I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will 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 it was either (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....."

12. In the case of Deustsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Company [1987] 2 All ER 769, cited by the Court of Appeal in Centurion Engineers & Builders

Limited v Kenya Bureau of Standards [2023] KECA 1289 (KLR), Sir Johnson Donaldson MR. observed that 'consideration of public policy can never exhaustively be defined, but they should be approached with extreme caution'. Also, Burrough J remarked in Richardson v Mellish:

> " it is an element of illegality or the enforcement of the award would be clearly injurious to the public good or possible that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the power of state are exercised."

13. I have gone through KENHA's grievances on the Award and I am inclined to agree with Interways that KENHA is largely attempting to re-litigate the parties' dispute before the Arbitrator and that it is urging the Court to come to different factual conclusions. It is not lost to me that the Court, in dealing with an application for setting aside an arbitral award under section 35(2) of the Act must exercise great circumspection and limit itself within the bounds of what is permissible under the Act. The Court does not have the power or jurisdiction to set aside an award on grounds that are not provided for under the Act. The Court cannot also interfere with an Arbitrator's interpretation of the law and/or interpretation of a contract as the Court's jurisdiction to set aside an award under section 35 of the Act is different from that of an appeal under section 39 thereof. The arbitral tribunal remains that master of facts and it is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the Arbitrator on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. Parties who submit their disputes to arbitration bind themselves by agreement to honour the Arbitrators' award on the facts (See Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] KECA 851 (KLR)]

14. I find that the Award explicitly addresses the delay in drawings and the basis for the extension of time at Para. 3.1.3.12 and the evidence and submissions raised by the parties are also aptly captured in the Award. The prolongation costs were considered at Para. 3.2 of the Award and the Arbitrator held that from the evidence before him, the valuation and costing of the same was to be calculated using a formula derived from the contract's Bill of Quantities. The Arbitrator justified awarding prolongation costs despite procedural lapses and Interways not making a claim for the said costs by referencing Clause 53.4 that allowed him to do so based on verified contemporary records. On the interest awarded being above that of prescribed by section 140 of the Public Procurement and Disposal Act, I am in agreement with Interways that the provisions of this statute cannot supersede those of the Agreement between the parties. The provisions of the Public Procurement and Disposal Act were never referred to in the Agreement nor raised by KENHA in their submissions or arguments before the Arbitrator. The parties agreed to be bound by the provisions of their own contract which lay out the manner of awarding interest at Clause 60.10(iii). KENHA, being a public entity used a private document whilst engaging Interways to undertake works for it. It cannot be seen to hide under the provisions of the Public Procurement and Disposal Act the yet it was never referred to in the contract between the parties. KENHA, being a public body ought to have governed itself as such and not at the last-minute try and turn tables (see Centurion Engineers & Builders Limited v Kenya Bureau of Standards(supra)]. I find that this issue as raised by KENHA on the contravention of the Public Procurement and Disposal Act is a mere afterthought aimed at avoiding liability to fulfil its contractual obligations.

15. It is for the above reasons that I decline to set aside the Award as urged by KENHA and dismiss its application dated 25th November 2024. Turning to Interways' application for recognition and enforcement, as I have declined to set aside the Award, I do not find valid any reason to reject its recognition and enforcement. The application is thus allowed.

***Conclusion and Disposition**

16. In the upshot, I find and hold that KENHA's application dated 25th November 2024 is without merit and the same is dismissed. Consequently, Interways' application dated 2nd December 2024 is allowed on terms that the Final Award published by DR. Kenneth Wyne Mutuma on 12th July 2024 be and is hereby recognized as binding and leave be and is hereby granted to Interways to enforce it as a decree of this Court. KENHA shall bear the costs of both applications assessed at Kshs. 100,000.00/=. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF OCTOBER 2025

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J.W.W. MONGARE

JUDGE

In the presence of:-

1. Mr. Kangethe for the Applicant (Interways).

2. Ms. Leyla Ahmed holding brief for the Respondent (KENHA).

3. Amos - Court Assistant