



**Merdin & 3 others v Mbaya & 2 others (Arbitration Cause  
E005 of 2022 & Commercial Case 532 of 2014 (Consolidated))  
[2025] KEHC 15664 (KLR) (Commercial and Tax) (28 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15664 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E005 OF 2022 &  
COMMERCIAL CASE 532 OF 2014 (CONSOLIDATED)**

**JWW MONG'ARE, J**

**OCTOBER 28, 2025**

**BETWEEN**

**ADNAN MERDIN ..... 1<sup>ST</sup> APPLICANT  
CENK TERZIOGLU ..... 2<sup>ND</sup> APPLICANT  
ELIF TERZIOGLU MERDIN ..... 3<sup>RD</sup> APPLICANT  
TUREA LIMITED ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ANDREW KIKUYU MBAYA ..... 1<sup>ST</sup> RESPONDENT  
NEHEMIAH ROTICH ..... 2<sup>ND</sup> RESPONDENT  
MEKAN EAST AFRICA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The core issue before this court relates to an Arbitral Award dated 27<sup>th</sup> February 2018 where the arbitral tribunal (“the Arbitrator”) directed inter alia that the Applicants shall jointly and severally pay the 3<sup>rd</sup> Respondent Kshs.108,055,118.10/= plus simple interest at 14% per annum from the date of the award until full payment, the Respondents’ costs of Kshs. 5,243,675.40/= and the Arbitrator’s costs of Kshs.4,640,000.00/= (“the Award”).
2. The Applicants seek to set aside the Award through their Notice of Motion dated 14<sup>th</sup> January 2022 whereas the Respondents seek to enforce it through their Notice of Motion dated 21<sup>st</sup> January 2022. By consent of the parties and directions of the court, the two applications were heard together and



canvassed by way of written and oral submissions by their parties' counsel which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

3. In response to the application for setting aside the award, the Respondents filed a Preliminary Objection dated 7<sup>th</sup> February 2022 stating that the same is fatally defective for being filed out of time. The Objection is based on section 35(3) of the *Arbitration Act* (Chapter 49 of the Laws of Kenya) ("the Act"), which provides that an application for setting aside an arbitral award "...may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award...". The Respondents contend this is a pure point of law and that the Arbitrator advised the parties by a letter dated 27<sup>th</sup> February 2018, that the Award was ready for collection upon payment of his shared fees. The Respondents were unable to pay their share of the fees until December 2021 and after the Applicants paid their share, the Arbitrator released the Award on 14<sup>th</sup> December 2021.
4. The Respondents cite the case of *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] KEHC 9696 (KLR) where Tuiyott J., (as he was then) took the view that a notice to the parties that an award is ready for collection is sufficient delivery and receipt of the award. As such, the Respondents argue that delivery happens when the tribunal makes the signed copy available for collection by the parties, meaning the date of notification, in this case, 27<sup>th</sup> February 2018), is deemed to be the date of delivery and receipt. That any delay in actual collection, even due to the tribunal withholding delivery under section 32B (3) of the Act because of non-payment of fees, is blamed on the parties, and the default or inaction does not delay or postpone delivery. Therefore, the Respondents assert that the application to set aside is time-barred under section 35(3).
5. In response, the Applicants submit that the Objection should be dismissed because it is founded on contested primary facts—specifically, the disputed relationship between the date of the Award and its publication or delivery. They agree that the Arbitrator exercised a statutory lien under section 32B (3) to withhold delivery of the Award for approximately 3 ½ years until his fees were fully paid and that the delay was solely and exclusively attributable to the Respondents' willful refusal to pay their 50% share of the Arbitrator's fees. The Applicants contend that a withheld Award has not been "delivered" or "received," making their application to set aside, filed on 15<sup>th</sup> January 2022, within three months of 12<sup>th</sup> December 2021 when the Award was actually released to them and thus to be within the time limit set by section 35(3) of the Act.
6. Whereas the Applicants have contended that the Objection raises contested facts, I find that the same is about the interpretation and application of section 35(3) of the Act, which determination goes to the jurisdiction of the court to determine the application to set aside the Award. This makes it a pure point of law and falls within the ambit of a Preliminary Objection as set out in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696.
7. As the court stated and found in the ruling of 11<sup>th</sup> January 2024, the decision of *University of Nairobi v Multiscope Consultancy Engineers Limited* (supra) is the subject of an appeal before the Court of Appeal. It is also common ground that the question when an award is "delivered" within the meaning of section 35(3) of the *Arbitration Act* has never been settled by the Court of Appeal but this court has pronounced itself on the same and it appears settled that delivery does not mean physical or actual delivery of the Award but notification by the Arbitrator that it is ready for collection (see *Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited* [2021] KEHC 6762 (KLR), *Lantech (Africa) Limited v Geothermal Development Company* [2020] KEHC 10419 (KLR) and *Mahinder Singh Channa v Nelson Muguk & another* [2007] KEHC 2401 (KLR))



8. I therefore find and hold 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. Whereas the Applicants have blamed the Respondents for not paying their portion of the arbitrator’s fees as the reason for the delay in physically receiving the Award, I agree with the Respondents that since the parties are responsible for paying the arbitrator, they cannot rely on the delay to defeat the statutory period for making the application to set aside an award (see Pavanputra Enterprises Limited v Green Dairy (K) Limited [2023] KEHC 20357 (KLR)). This fortifies the position that receipt and delivery of an Award is not dependent on payment of fees but notification by the Arbitrator that the Award is ready for collection. In the present case, the Arbitrator notified the parties on 27<sup>th</sup> February 2018 that the Award was ready for collection. This act of notification is the operative event that triggered the three-month period under section 35(3).
9. While the Applicants’ argument that a party should not benefit from their own wrong has moral force, the statutory limitation period is a strict procedural requirement. The Applicants had the legal right to pay the entirety of the fees themselves to lift the lien and then seek reimbursement from the Respondents, thus safeguarding their right to apply to set aside the Award within the statutory timeframe. Their failure to do so, for over three years, cannot serve to postpone the mandatory limitation period and the existence of an Arbitrator’s lien under section 32B(3) does not also operate to suspend the said period.
10. Consequently, the three-month period for filing the application expired on or about 27<sup>th</sup> May 2018 meaning the application filed on 15<sup>th</sup> January 2022 is therefore filed more than three years out of time. An application under section 35 that is time barred is fatal and there is no provision in the Act that can salvage such an application either by seeking leave or otherwise (see University of Nairobi v Nyoro Construction Company Limited & another [2021] KEHC 380 (KLR)). This position is buttressed by the Court of Appeal in Anne Mumbi Hinga v Victoria Njoki Gathara [2008] KECA 30 (KLR) where it was stated that, “Section 35 of the *Arbitration Act* bars any challenge even for a valid reason after 3 months from the date of delivery of the award.”
11. As such, the Objection raised by the Respondents is upheld and the Applicants’ Notice of Motion dated 14<sup>th</sup> January 2022, seeking to set aside the Arbitral Award, is hereby struck out for being time-barred pursuant to section 35(3) of the Act.
12. Turning to the Respondents’ application for recognition and enforcement of the Award, having struck out its application to set aside the same, it follows that nothing stops the Award from being recognized and enforced as an order of the court under section 36 of the Act.

### **Conclusion and Disposition**

13. In the upshot, the Applicants’ application dated 14<sup>th</sup> January 2022 is dismissed. The Respondents’ application dated 21<sup>st</sup> January 2022 is allowed on terms that the Final Award published by Anthony M. Lubulellah on 27<sup>th</sup> February 2018 be and is hereby recognized as binding and leave be and is hereby granted to the Respondents to enforce it as a decree of this court. Each party shall bear their own costs of the application noting that this matter has taken a long period of time to conclude.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF OCTOBER 2025**

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**J.W.W. MONGARE**

**JUDGE**

In The Presence Of

Mr. Fred Ngatia (SC) for the Applicant.

Ms. Njoroge holding brief for Mr. Mereka for the Respondent.

Amos- Court Assistant

