

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC.CIVIL APPLICATION NO. E115 OF 2024
IN THE MATTER OF THE ARBITRATION ACT NO.4 OF 1995

BETWEEN

ENVIROCHECK LIMITED-----
APPLICANT

VERSUS

THE SISTERS OF NOTRE DAME DE NAMUR RESISTERED TRUSTEED-----
RESPONDENT

RULING

1. The ruling before the court is with regard to the two applications. The first application, dated 5th July 2024, seeks to set aside the arbitral award dated 8th April 2024, and the other by the Respondent dated 25th October 2024, seeking recognition and enforcement of the same award.
2. The brief background of the matter is that the parties vide an agreement and schedule conditions of contract for building works (hereinafter referred to as "*the agreement*") dated 27th August, 2020 the Plaintiff contracted the Defendant to construct an administration block and classrooms at Malava on L.R S. Kabras/Chemuche/1488 within Kakamega County for a contract sum of Kshs. 54,808,903.45/= for a contractual term of 8 months.
3. The Plaintiff (Envirocheck LTD) was expected to have fully delivered on the project and handed it to the Defendant (Sister of Notre Dame de Namur Registered Trustees) by 30th March, 2021

which the Respondent /Plaintiff failed to deliver hence breaching the contract between the parties.

4. As a result of the breach, the Defendant commenced legal proceedings culminating in the arbitration pursuant to clause 43 of the contract which arbitration proceedings were presided over by the sole arbitrator, Eng. Henry Ndugah.
5. On 8th April, 2024 the Arbitrator found in favour of the Defendant as follows:-
 - a. That within 60 days from the date upon which this award is taken up by the Plaintiff shall pay the Defendant the total of Kshs. 10,312,260.14/= (Kenyan Shilling Ten Million, three hundred and twelve, two hundred and sixty and fourteen cents) in full and final settlement of all claims and counterclaims in this arbitration, including Interest and costs. The amount is exclusive of VAT.
 - b. That is the whole or part of the amount so payable is not paid by the due date, the respondent/Plaintiff shall pay the claimant/Defendant in addition, simple interest at 13.5% or the prevailing current CBK base lending rate with monthly rests on the amount unpaid from the date of this award until the date of payment.
 - c. The Respondent/Plaintiff shall pay the Arbitrator's fees and costs amounting to Kshs. 831,952/= and if the claimant/Defendant shall have already paid a sum of the fees payable, the Respondent/Plaintiff shall reimburse the claimant/Defendant the amount so paid.

6. The Respondent/Plaintiff failed, neglected, and/or refused to honour the arbitral award despite having been requested to do so by the Applicant's/Defendants Advocates on record.
7. I have looked at the Applications, supporting affidavits, replying affidavits and submissions.
8. In my view the following issues arise for determination as follows;
 - a) *Whether the Applicant's (Envirocheck Ltd) application to set aside the arbitral award is time-barred under section 35(3) of the Arbitration Act No. 4 of 1995 as submitted by the Respondent (The Sisters Of Notre Dame De Namur Registered Trustees)*
 - b) *Whether the Applicant (Envirocheck Ltd) has established valid grounds under section 35(2) of the Arbitration Act to have the arbitral award set aside.*
 - c) *Whether the Respondent's(The Sisters Of Notre Dame De Namur Registered Trustees) application for recognition and enforcement of the arbitral award should be granted.*
9. Before delving into the merits of the application, this court must first address the issue raised by the respondent, (sisters of Notre Dame De Namur), that the Applicant's (Envirocheck Ltd) application to set aside the award is time-barred under section 35(3) of the Arbitration Act
- 10.** Section 35(3) of the Arbitration Act provides: ***“An application for setting aside an arbitral award may not be made after three months have elapsed from the date on***

which the party making that application received the arbitral award...

d) The evidence on record indicates that the arbitrator, through a letter dated 31st January 2024, through his firm Batch Associates Limited, notified the two parties that the award was ready for collection from 5th February 2024, upon payment of the outstanding arbitrator's fees and costs. The respondents (The Sisters Of Notre Dame De Namur Registered Trustees) case is that they collected their copy on 23rd February 2024 after settling their share of arbitrator's fees. The Applicant's (Envirocheck Ltd) share of the fees was cleared later.

11. In **University of Nairobi v Multiscope Consultancy Engineers Limited HC Comm Misc Application No. E083 of 2019 [2020] eKLR**, the court stated that the date on which a party receives an arbitral award is the date when the tribunal makes the signed award available for collection, regardless of when the party physically collects it.

12. In this case, the arbitrator's notification dated 31st January 2024, saying that the arbitration award was ready for collection from 5th February 2024 meant that the limitation period started running from that date, therefore, the three months grace period lapsed on 5th May 2024.

13. This strict timeline is not subject to extension by the court.

14. In the case of **University of Nairobi v Multiscope Consultancy Engineers Limited (supra), where Tuiyott J**

emphasized that the provision promotes finality and expeditious disposal, precluding any discretion to condone delay in absence of any exceptional circumstances.

15. The Supreme Court in **Anne Mumbi Hinga v. Victoria Njoki Gathara [2009] eKLR** held that:

“Courts have no jurisdiction to enlarge time under section 35(3). Once the three months’ lapse, the Court becomes functus officio.”

16. The Applicant’s (*Envirocheck Ltd*) argument that its late collection of the award extended time has no legal basis. Section 35(3) is pegged on the date set for the parties to access/collect the arbitration award so long as the set date is communicated to the parties.

17. Therefore, this court finds that the Application dated 5th July 2024 is incompetent and time-barred.

18. Notwithstanding the finding on limitation, I will address the substantive grounds raised by both parties for completeness.

19. The applicant(*Envirocheck Ltd*) submits that the Defendant (The Sisters Of Notre Dame De Namur Registered Trustees) failed to discharge the evidential burden under section 35(2).

20. The Applicant(*Envirocheck Ltd*) alleged fraud, misrepresentation, concealment of VAT records and falsified statements of account.

21. On the allegation of fraud under section 35(2)(a)(vi) (*Envirocheck Ltd*) stated that the award focused on the

Respondent's witnesses who had made false representation regarding tax exemptions on the payment of the VAT, undervaluation of the extra work that (*Envirocheck Ltd*) had done such as exclusion of as-built drawings and VAT at 16% which brought the amount of the work done to Kshs. 62,057,254.91/= and stated that there was an overpayment of Kshs. 10,312,260.14/= as the accounts failed to include the various variations by the applicant (*Envirocheck Ltd*) denied attending the meetings held on 19th March 2020 and 10th March 2022.

22. Under Section 47 of the Evidence Act, false evidence does not *ipso facto* invalidate an arbitral award unless the fraud directly induced the tribunal's decision and the false evidence was unknown to the party complaining at the time, as required under section 35(2)(a)(vi) of the Arbitration Act.

23. In **National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited [2014] KEHC 8680 (KLR)**, the court held that allegations of fraud in arbitral awards demand clear proof beyond the original record, lest they become tools for endless collateral attacks; here, the Applicant's (*Envirocheck Ltd*) denials of meetings and valuations were fully traversed in the arbitration, with the tribunal preferring the Respondent's evidence after hearing both sides.

24. I do note that the Applicant(*Envirocheck Ltd*) did not place before this Court any new material evidence that was not before the arbitrator.

25. I have perused the award and note that (*Envirocheck Ltd*) had the chance to cross-examine the respondents' witnesses.

26. The allegations of false representations by the respondent's witnesses were canvassed before the tribunal and fully addressed in the award.

27. In **Kenya Shell Ltd v Kobil Petroleum Ltd [2006] eKLR**, the court stated that ***"An arbitral award cannot be set aside merely because a party is dissatisfied with the merits or would have reached a different conclusion."***

28. In my view there was no substantiated fraud, bribery, or procedural misconduct, undue influence, or corruption which was demonstrated against the arbitrator, Eng. Henry Ndugah, and the Applicant's (*Envirocheck Ltd*) invocation of section 47 remains unsubstantiated, failing the test set by Ringera J(as he was then) in **Christ for All Nations v Apollo Insurance Co. Ltd HCCC No. 477 of 1999 [2002] eKLR** when he held ***"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."*

29. About the applicant's (*Envirocheck Ltd*) claim of procedural flaw in the arbitration process, which includes a lack of notice of dispute, the appointment of the arbitrator, which was not in mutual agreement, denial of fair hearing, and non cross-examination of the witnesses, in my view, lacks merit. Clause 43 of the contract page 54 provided settlement of disputes through arbitration upon notice of dispute, which was properly served by the (*The Sisters of Notre Dame De Namur Registered Trustees*).
30. Envirocheck Ltd also participated in the proceedings in Kakamega Civil Case No. 2 of 2022, where Hon. P.J. Otieno's ordered on 14th June 2022 the disputed be remitted for arbitration with appointment of arbitrator within 60 days.
31. The subsequent appointment of the arbitrator by the Chairperson of the Chartered Institute of Arbitrators on 2nd November 2022 was upheld as lawful by a ruling by Hon. Mabeya J on 14th April, 2023.
32. Envirocheck Ltd participated in all those processes.
33. The Applicant's (*Envirocheck Ltd*) full participation in proceedings, exchange of pleadings, and opportunity to present evidence, cross-examining the respondents' witnesses, negate any claim of improper notice or incapacity under section 35(2)(a)(i)-(iii).
34. On the allegation that the arbitrator exceeded the scope under section 35(2)(a)(iv), I note that the tribunal's valuation at Kshs. 51,744,993.47/= which led to a finding that a refund of Kshs. 10,312,260.14/= was due, the tribunals consideration of VAT due,

final accounts and completion delays were part of issues which led to the dispute therefore they fell squarely within the scope of the arbitrators jurisdiction.

35. In **Rupra Construction Company Limited v Longonot Place Limited [2021] KEHC 700 (KLR)**, an arbitrator exceeds jurisdiction only if the award introduces unpleaded claims; here, the VAT issue arose from the Applicant's counterclaim, and severability under section 35(2)(a)(iv) proviso does not apply.

36. The composition of the tribunal and procedure under section 35(2)(a)(v) were in accord with the parties' agreement and section 12 of the Act, as a sole arbitrator was contemplated, and no mutual agreement for a panel was breached. The Applicant's challenge to cross-examination rights ignores the tribunal's discretion in managing hearings under section 19, and no evidence shows an inability to present its case. These grounds, even if proven, would not shock the conscience or violate public policy.

37. In **Gulf Canada Limited v Moneycontrol Limited (No. 2) [2021] KEHC 10384 (KLR)**, the court held that procedural irregularities must be material to vitiate an award.

38. With regard to the Respondent's (*The sisters of Notre Dame De Namur Registered trustees*) request for recognition and enforcement pursuant to section 36(1) of the Arbitration Act, the requisite documents that is the authenticated arbitral award and the arbitration agreement were duly placed before the Court, thereby meeting the statutory procedural requirements.

39. Under section 37(1) of the Act. This Court may decline enforcement only on the specific grounds listed therein. None of those grounds have been demonstrated.

40. The arbitration agreement is valid and binding; the parties were properly notified of the proceedings; the award remains within the confines of the issues submitted to arbitration; and, as analysed earlier, no evidence of fraud or breach of public policy has been shown. Accordingly, enforcing the award as a decree of the Court accords with both the letter and the spirit of the Act, which favors the recognition and enforcement of arbitral awards.

41. In conclusion, the Applicant's(*Envirocheck Ltd*) application dated 5th July 2024 is dismissed with costs for being time-barred and, in any event, devoid of merit. The Respondent's(*The sisters of Notre Dame De Namur Registered trustees*) application dated 25th October 2024 succeeds: the arbitral award dated 8th April 2024 is recognised as binding, adopted as a decree of this court, and leave is granted for its enforcement.

42. From the foregoing analysis, I make the following orders:

a) *The Notice of Motion dated 5th July 2024 by (Envirocheck Ltd) is hereby struck out for being time-barred under section 35(3) of the Arbitration Act.*

b) *In the alternative, and for completeness, the Application would still fail on merit for failure to satisfy section 35(2) of Arbitration Act).*

- c) *The Respondent's (The sisters of Notre Dame De Namur Registered trustees) Chamber Summons dated 25th October 2024 is merited and is hereby allowed.*
- d) *The arbitral award dated 8th April 2024 by Eng. Henry Ndugah is hereby recognised and adopted as a judgment of this Court.*
- e) *Leave is granted to the The sisters of Notre Dame De Namur Registered Trustees to enforce the award as a decree of the Court.*
- f) *Envirocheck Ltd shall bear the costs of both applications.*
- g) *Right of Appeal 30 days .*
- h) *File closed.*

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Wabuko holding brief for Mr. Naswati for the The sisters of Notre Dame De Namur Registered trustees present online.

Ms. Omollo for Envirocheck Ltd Absent.