

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT LIKGORIS

ELC MISC NO. E008 OF 2025

SIMION OLEMOI NGATUNY MUSEKENYA.....

PLAINTIFF

VERSUS

TRANSMARA SUGAR CO. LTD.....

DEFENDANT

RULING

1. The Application dated 16th of June 2025 filed by the Applicant Simion Olemoi Ngatuny Musekenya seeks the court to recognize and enforce the arbitral award for the year 2024, on the grounds that a dispute between the Applicant and Respondent was referred to an Arbitration whose award has never been challenged as part Section 34 of the Arbitration Act, and thus seek recognition and enforcement of the said award.
2. The application is supported by the supporting affidavit of the Applicant who reiterates the grounds in support of the application but has annexed *inter alia* a copy of the crop yield assessment report dated 20th September 2023 and a copy of the Arbitration award.
3. The Application is strenuously opposed. A Replying Affidavit of Mr. Frederick North Coombes, the Chief Executive Officer of the Respondent Company was filed. Mr. Coombes depones in opposition to the application, *inter alia*, that` : -
 - (i) Clause 28 of the sugarcane growing and supply contract dated 2nd January 2018 provided for Arbitration as the forum for any dispute. The Arbitration committee was to be comprised of 5 people.
 - (ii) That the Applicant filed a civil suit wit, Kilgoris CMCC ELC No. E051/202 in which he claimed that the Respondent had declined

to harvest his sugarcane thus was in breach of the Agreement dated 2nd January 2018, and sought vide a Notice of Motion filed contemptuously with the suit for an order to compel the Respondent to harvest sugarcane on his parcel 45524/610 in Transmara Sikawa sublocation.

- (iii) That a Notice of preliminary objection was filed in respect of Kilgoris CMCC ELC No. E051/2021 and the matter was referred for Arbitration; and the Arbitration committee made a finding inviting the trial court to determine the dispute but gave no monetary award; and since the Kilgoris civil suit sought the relief for breach of contract and did not plead any special damages ,hence it was not a liquidated suit and the arbitral award is thus ambiguous and incapable of being implemented because the same was nonexistence.
 - (iv) That the issue before the trial court did not involve an interest in Land but was purely a breach of contract where parties had entered into a care growing and supply contract hence the Honourable court herein lacks jurisdiction to adjudicate on the issues raised in the instant application.
 - (v) That the applicant had 30 days to seek interpretation of the Arbitral award and seek correction of the same under the provisions of Section 34/35 of the Arbitration Act but failed to do so, and that the Honorable court cannot interpret the award.
4. The Applicant filed a further affidavit in which he deposes *inter alia* that the arbitration committee gave the award based on their pleadings and the agricultural report, hence this application for recognition and enforcement of the award.
 5. The court directed that the application be canvassed by way of written submissions.

Applicant's Submission

6. It is the Appellant's submission that section 36 of the Arbitration Act provides circumstances in which an Arbitral award can be recognized and enforced thereof. The Applicant submits for the recognition of the award of Kshs.2,893,440 as per the agricultural report.
7. The Applicant submits that it is only the process of the Arbitration and conduct of the Arbitrator that can be challenged as was stated in the case of Talewa Road Contractors Limited Vs. Kenya National Highway Authority ML HC Mis Civil App. No. 535 of 2018 (2019) eKLR.
8. The Applicant submits that however erroneous the finding of an arbitral award, this court cannot intervene. In support of this limb of submissions the Applicant places reliance on continental Homes Ltd Vs. Suncoast Investments Ltd MLD HC Mis App. 62 of 2016.
9. The Applicant further submits that the court when seized an application for recognition and enforcement of an arbitral award does not act as an Appellate court in support of this the Applicant cites the decision. In the case of Kenya Ole Company Ltd Vs. Kenya Pipeline Co. Ltd.
10. On costs the applicant submits that costs follow the event, and urges the court to award the costs of the application.

Respondent's Submission

11. The Respondent submits that the suit before the trial court that gave rise to the arbitration proceedings and the arbitral award was a claim seeking damages for breach of contract and was not a liquidated damage claim.
12. The Respondent submit that there was no monetary award of Kshs.2,893,440/= awarded by the arbitration committee that the Applicant seeks recognition of and enforcement vide this application. The Respondent submits that the court is being asked to recognize a none existing award.

13. The Respondent further submits that the application is an abuse of the court process in so far as the same was filed herein hurriedly before a preliminary objection in the lower court matter was filed.
14. The Respondent submits further that the arbitral committee issued an award in terms that ***“the committee agreed that the suit at Kilgoris PMCC ELC No. 51 of 2021 had merit”*** yet by virtue of section 10 of the Arbitration Act, the jurisdiction of the trial court had been ousted; thus submits the Respondent the application before court is an abuse of the court process.
15. In support of this limb of submissions, reliance was placed in the decisions in the cases of Alice Kerubo Nyambati Vs. Ochoki Mogaka and Another as well as Gitau Kamau Vs. Ndungu Kamau and Another 2017 (eKLR).
16. The Respondent thus submits the application should be dismissed with costs.

Issues for determination

17. The court has recognized a challenge on its jurisdiction as raised at paragraph 17 of the Replying affidavit although the submissions by both parties are silent on the issue, the court must on its own motion determine whether it has jurisdiction to hear and determine this application.
18. Thus, having reviewed the application, the replying affidavit, rival submissions and considered the law, the court frames the following as issues for determination.
 - (i) Whether or not the court has jurisdiction to hear and determine this application.
 - (ii) Whether the arbitral award is recognizable and enforceable?
 - (iii) Whether or not the application is merited.
 - (iv) Who bears the cost of the application.

Analysis and Determination

19. As noted in the foregoing paragraphs, the issue of jurisdiction was raised vide paragraph 17 of the Replying affidavit of Fredrick North Coombes in response to the application. Neither the Respondent's Advocate nor the Applicants Advocates, submitted on the same, the court was thus denied an invaluable insight on this issue of jurisdiction by the Advocates of the parties herein. Nonetheless the court did consider the law generally its jurisdiction as provided for in Article 162(2) (b) of the Constitution as well as section 13 of the Environment and Land Court Act; as well as decisions of superior courts in relation to similar matters.
20. The dispute before the trial court which led to the Arbitration whose award, the court is urged to recognize and enforce emanated from a breach of contract from a sugarcane growing and supply contract between the parties, herein.
The court views the dispute to be in more of a commercial dispute, than an issue of occupation, use and title to land being the cornerstone of jurisdiction of this court.
21. The cause of action herein relates to a fire that destroyed sugar cane and hence the Applicant seeks compensation for the said loss and urges the court to consider the Arbitral award by the Arbitration committee in respect of that cause of action and recognize the same.
22. The courts have had occasion to consider similar issues, and when faced with a similar situation, where the cause of action was a fire that had glazed warehouses and an action for compensation filed before the ELC court, Wabwoto J, declined jurisdiction in the case of Gami Properties Ltd Vs. Charming General Trading Ltd ELC E382 of 2021 (2022), the Learned Judge considered and applied the pre-dominant purpose test as was stated in Suzanne Butter and 4 Others Vs. Redhill Investments and Another.

23. Applying the said pre-dominant test to the facts giving rise to the arbitral award, I'm equally persuaded by the said decision of the Learned Judge in the case of Gami Properties Ltd, that the dispute does not relate to ***“occupation, use and title to land”*** so as to be in the jurisdiction of the court but rather is a compensation suit, arising out of fire that destroyed sugarcane and consequently a commercial dispute whose enforcement of the arbitral award ought to have been filed before the High court.
24. Having found that the court lacks jurisdiction, the next cause is for court to down its tools, hence the substantive issues in respect of the merits or otherwise of application shall not be dealt with as the application dated 16th June 2025 is hereby struck out with costs to the Respondents.

Dated at Kilgoris this 3rd day of November, 2025.

Hon. M.N Mwanyale
Judge

In the presence of

CA - Emmanuel/Sylvia/Sandra

Mr. Mulisa for Respondents

Mr. Miruka for the Applicants