

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**HCCC MISC APPLICATION NO. E060 OF 2024 AND E008 OF 2025**

**LIGWARAS ENTERPRISES LIMITED .....**  
**APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MIGORI.....**  
**RESPONDENT**

**AND**

**ALUOCHIER DISPUTE RESOLUTION.....**  
**INTERESTED PARTY**

**RULING**

The Migori County Government vide Notice of Motion application dated 7<sup>th</sup> February 2025 brought an application pursuant to Section 35,36,37 and 39 of the Arbitration Act 1995, Section IA, 1B, 34 of the Civil Procedure Act, Order 5 Rule (1) and (6), Order 51 of the Civil Procedure Rules (Amendment) 2020; Rules 4 (2) (7), (11) of the Arbitration Rules, 1997 and Articles 48, 50(1), 159 and 165 (6) of the Constitution of Kenya 2010 and all enabling provisions of the Law) seeking that:

1. Spent
2. That this Honourable Court be pleased to set aside the Arbitral Award of the Arbitrator Mr. Isaac Aluochier. FCI Arb dated 11<sup>th</sup> November. 2024 in its entirety and be pleased to either: -
  - a. Substitute it with its own decision: or in the alternative: -
  - b. Order fresh proceedings on the same subject matter before another arbitral tribunal appointed as per directions of the court.

3. That pending the hearing and determination of the application, the Court be pleased to stay enforcement of the arbitral award dated 11<sup>th</sup> November, 2024 vide Migori HCCCMISC/E060/2024 Ligwaras Enterprises Limited versus County Government of Migori and Aluochier Dispute Resolution filed on 21<sup>st</sup> November 2024.
4. That this Honourable Court be pleased to set aside the Arbitral award dated 11<sup>th</sup> November 2024 by the Arbitrator, Mr. Isaac Aluochier. FCI Arb.
5. That the arbitration commences and is heard before a different Arbitrator appointed in accordance with the party's agreement that is more competent and suited to determine the dispute between the parties
6. That this court be pleased to make and/or issue any such orders as it may deem fit and to safeguard the interest of justice and fairness to the Applicant.
7. That costs of the application be provided for.

The application was supported by the grounds on the face of it and affidavit of Marbel Chanzu the Chief Officer and Accounting Officer Department of Public Health Services of the Applicant County Government.

The grounds are herein quoted verbatim and seriatim as filed by the Applicant for ease of reference as follows:

- i. THAT the Arbitral Award made and published by Mr. Isaac Aluochier. FCI Arb on 11<sup>th</sup> November 2024 in The Matter of Arbitration between Ligwaras Enterprises Limited) and County Government of Migori ("the Award") is in conflict with the public policy of Kenya hence offends the basic provisions of

the Constitution of Kenya which requires a party not to be condemned unheard.

- ii. The Claimant/Respondent did not disclose to the County Government of Migori indicating of any kind of dispute resulting from non-payments of the contract price upon completion of construction as required by Arbitration Act/Rules.
- iii. THAT the Claimant/Respondent did not communicate to the concerned department of Public Health or medical services concerned with the tenders for construction of Kangeso Dispensary project. Yago dispensary and construction of blood bank regarding the commencement of Arbitration regarding the commencement of Arbitration as well as the requisite claims information.
- iv. THAT the Claimant/Respondent never served the Respondent/Applicant (County Government of Migori or the concerned department of Public Health or medical services with an arbitration notice on declaration of a dispute notifying them the dispute that the initiating party (Ligwaras Enterprises Limited) intends to resolve through arbitration outlining the details of the claim and the desired arbitration process according to the arbitration rules and agree merit between the parties involved.
- v. THAT the Respondent/Applicant did not participate in the appointment of the Arbitrator. neither did they participate in the arbitral proceedings which gave rise to the final Arbitral Award dated 11<sup>th</sup> November 2024.
- vi. THAT the Respondent/Applicant did not participate in the Arbitration proceeding and was not given a hearing according to the rules of natural justice to wit; one should not be

condemned unheard. Article 50 of the Constitution of Kenya mandates that any party is accorded fair hearing before an impartial and independent Tribunal/forum.

- vii. THAT the Respondent/Applicant was not accorded an opportunity to be heard as there was no letter and hearing notice and pleadings by the Claimant and Arbitral Tribunal upon the Respondent/Applicant officers in the arbitration proceedings either in their official email addresses nor physical service as provided under the Civil Procedure Rules (Amendment) 2020.
- viii. That it is necessary and in the interest of justice the interest of justice for the Court to intervene by the Impugned Award by Mr. Isaac Aluochier FCI Arb on November thereby forestall the perpetuation of an illegality and manifest violation of the and public policy.
- ix. THAT there is imminent and great danger that unless the Award is set aside. the same will be binding and will have debilitating effects on the Respondent/Applicant.
- x. THAT aforesaid award frustrates the contractual intentions of parties as such the same is against justice and public policy and ought to be set aside.
- xi. THAT by overlooking such set down rules of evidence. sanctity of contracts, intention of parties in a contract, case law and set judicial precedents the Award as reached by the Arbitrator. Mr. Isaac Aluochier FCI Arb manifestly offends public policy and ought to be set aside for being manifestly unjust.
- xii. THAT the Claimant/Respondent shall not suffer any prejudice should the Orders sought be granted.
- xiii. THAT it is in the interest of justice to set aside the said Award.

The application was also supported by the Affidavit of Marbel Chanzu the Chief Officer and Accounting Office for the Department of Public Health Services Migori County Government. She made averments reiterating the grounds upon which the application is based including the fact that she received invoices for Local Purchases Orders from Ligwaras Enterprises Limited arising from Arbitral Awards made by Arbitrator, Mr. Isaac Aluochier FCI Arb dated and signed at Rongo on 11<sup>th</sup> November 2024 namely:

- Local Purchase Order No. MC-17-08-2016-2017 for Construction of Blood Bank of Kshs. 6,219,455.24
- Local Purchase Order No. CGM-PH-Q42-336 for Construction of Yago dispensary 2019-2020 of Kshs. 1,528,874.07 and
- Local Purchase Order No. CGM-PH-Q42-17V2019-2020 Kshs. **5,560,7** Construction of staff house at Kangeso dispensary respectively on 18<sup>th</sup> day of November 2024 (Annexed hereto and marked as "MC-02" MC03, MC-04 respectively are Copies of Local Purchase Orders received on 18<sup>th</sup> November 2024).

She averred that the Claimant/Respondent did not communicate to the concerned department of Public Health or medical services concerned with the tender for construction of Kangeso Dispensary project, Yago dispensary and construction of blood bank regarding the commencement of Arbitration as well as the requisite claims information.

xiv. THAT the Claimant/Respondent never served the Respondent/Applicant (County Government of Migori or concerned department of public health or medical services with an arbitration notice on declaration of a dispute notifying them on the dispute that the Initiating party (Ligwaras Enterprises

Limited) intended to resolve through arbitration outlining the details of the claim and the desired arbitration process according to the arbitration rules and agreement between the parties involved.

- xv. THAT the Respondent/Applicant was not accorded opportunity to be heard as there were no letters and notices and service of hearing notice and pleadings by the Claimant and Arbitral Tribunal upon the Respondent/Applicants officers in the Arbitration proceedings either in their official email addresses nor physical service effected.
- xvi. THAT she learnt that the Claimant/Respondent had instituted Arbitral proceedings against the Respondent/Applicant seeking for special damages, interest, general and aggravated damages and costs of the Arbitration upon service of the Final Arbitral award dated 11<sup>th</sup> November 2024 on 18<sup>th</sup> November 2024.
- xvii. THAT vide an Award dated and delivered on 11<sup>th</sup> November 2024 by Arbitrator Mr. Isaac Aluochier, FCI Arb awarded the Claimant/Respondent special damages as per the Local Purchase Order No. CGM-PH-Q42-336 for Construction of Yago dispensary 2019-2020 of Kshs. 1,528,874.07 and Local Purchase Order No. CGM-PH-Q42-17V2019-2020 Kshs. **5,560,7** for construction of staff house at Kangeso dispensary respectively on 18<sup>th</sup> day of November 2024 (Annexed hereto and marked as "MC-02" MC03, MC-04 respectively are Copies of Local Purchase Orders received on 18<sup>th</sup> November 2024
- xviii. THAT the Claimant/Respondent did not follow due process and this resulted in the infringement of the Respondent/Applicant's rights contrary to Section 12 of the Arbitration Act and Article 50(1) of the Constitution.

- xix. THAT due to the injustice to the Claimant/Respondent in this matter by failure to be accorded audience the Arbitral Tribunal, this court should refer the matter back to arbitration for it to be heard and determined on merit.
- xx. THAT she was advised by the Office of the County Attorney on record in this matter that the Claimant/Respondent is not eligible to be awarded damages, interest, costs or any prayer in their Statement of claim as it offends the basic provisions of the Constitution of Kenya which requires a party not to be condemned unheard and is in conflict with the public policy of Kenya.

The Applicants filed the above application concurrently with their Replying Affidavit of Marbel Chanzu opposing the Application dated 18<sup>th</sup> November 2024 brought by the Applicant therein seeking that Arbitral award dated 11<sup>th</sup> November 2024 be adopted and enforced as an order of the court for purposes of execution. The said Replying Affidavit is a replication of the Supporting affidavit in the application by the County Government seeking to set aside the arbitral award dated 11<sup>th</sup> November, 2024.

The Arbitral Award was filed for enforcement based on a clause in the 3 contracts between the parties to the contract which allegedly provided for dispute resolution mechanism where the parties have a dispute between them.

In the instant case there are 3 contract documents annexed to the application from which it is alleged the dispute arose namely:

- CGM/PH/Q42/170/2019-2020 Proposed construction of staff house at Kangeso Dispensary dated 10<sup>th</sup> June 2020

- CGM/PH/Q42/336/2019-2020 proposed construction of Yago Dispensary dated 22<sup>nd</sup> June 2020
- Proposed construction of blood bank at Migori County Referral Hospital dated 30<sup>th</sup> June 2017

All the three contract documents have a clause 9 entitled 'Dispute Resolution' which provides as follows:

***“the parties agree that avoidance or early resolution of dispute is crucial for the smooth execution of the contract and the success of the assignment. The parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this contractor its interpretation.”***

***“Any dispute between the parties as to matters arising pursuant to this contract that cannot be settled amicably within 30 days after receipt by one party of the one part of the other party’s request for such amicable settlement may proceed to settle the same in a competent court of law”***

The Arbitrator has referred to a clause 20 of the contract documents as having another clause for dispute resolution but this court has not been able to locate the same in the pleadings filed herein and therefore was left to consider whether clause 9 can be interpreted as expressly referring parties to arbitration as the key word in the said clause is 'may proceed to settle the same in a competent court of law'

This court finds that the Dispute Resolution clause is not clear as to the specific forum for the parties to take their dispute. The clause is not expressly couched to say that parties to the contract are obliged to be subject to an arbitration process.

The Arbitration Act provides for the form of arbitration agreement, procedure for appointment of arbitrators and the grounds upon which the appointment of arbitrators can be challenged. Section 19 emphasizes for equal treatment of parties as follows:

***“The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case”***

The arbitrator was therefore under duty to comply with the provisions of the Act and the Constitution in so far as fair hearing is concerned this includes the right to choose an arbitrator, the right to choose the procedure for hearing, the language to be used and place of the arbitration among others.

The grounds upon which an arbitral award can be set aside are provided for under Sections 35 & 37 of the Arbitration Act. The said sections deals with **setting aside arbitral awards**, allowing parties to apply to the High Court to have an award overturned. This can only be done on specific grounds, such as the award conflicting with the public policy of Kenya.

**Section 35 of the Arbitration Act** provides:

Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if—

(a) 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 laws of Kenya; or [Rev. 2012] Arbitration CAP. 49 A20-21 [Issue 1]

(iii) the party making the application was not given proper notice of            Application for setting aside arbitral award

(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

(ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the 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, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

**Section 37 of the Arbitration Act** provides for grounds upon which the court can refuse to recognize or enforcement an arbitral award as follows:

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

(i) 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, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked 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 not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made or

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if 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

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi),

the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

The complaint by the Applicant seeking to set aside the arbitral award is that it was never informed that the dispute between them had been referred to arbitration and it is only upon being served on 18<sup>th</sup> November 2024 that they learnt that there was an arbitration process.

From what the Interested Party refers to as an affidavit in support of summons filed on 29<sup>th</sup> November 2024 at page 4 claimed that the Respondent in application No. E060 of 2024 had been served and informed about arbitration request on 23<sup>rd</sup> May 2024 but the Respondent did not respond substantively and there is no statement of response from the Respondent. That failure on the part of parties to nominate an Arbitrator led to the Arbitral institution appointing the Interested Party herein as the Arbitrator.

It is indicated in the Interested Party's document that directions were taken that the Respondent having failed to respond hearing was to be by way of contract documents furnished under Section 24 of the Arbitration Act,1995 and that the parties were to be notified of the award once ready.

This court finds that the Applicant in application in No E008 of 2025 filed the application to set aside the arbitral award within the statutory period and therefore meets the criteria provided for under Section 35(3) of the Act. The Arbitral award was made on 11<sup>th</sup> November 2024 and the Respondent challenged it by an application

dated 7<sup>th</sup> February 2025 thereby beating the deadline for challenging such an award.

Section 35(3) of the Act provides:

**“An application for setting aside the 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, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.”**

Whether the Respondent was afforded an opportunity to be heard, the Interested Party has indicated so in his documents and referred the court to the institutions website where the Respondent was purportedly served and failed to attend and /or respond in order to appoint an Arbitrator of their choice and also respond to the claim. The said notices are not annexed to the Chamber Summons filed by the Arbitrator on 20<sup>th</sup> November 2024 and it is therefore apparent that neither the Applicant in Application in No. E060 of 2024 nor the Applicant in No. E008 of 2025 made their presentations before the Arbitrator in order to adjudicate upon and resolve the alleged dispute between them substantively and effectively.

Failure on the part of the Arbitrator to issue requisite notices to the parties to the arbitration to appoint an Arbitrator of their choice and to decide the issues for determination by the said Arbitrator and also decide on the manner and/ or mode of arbitration goes against the spirit and objective of Alternative Dispute Resolution mechanism which is to ensure that disputes are resolved by parties with mutual understanding expeditiously.

Section 35(2) provides for the setting aside of arbitral awards by the High Court only if—

(a) the party making the application furnishes proof—

(ii) the party making the application was not given proper notice.

(iii) the award is in conflict with the public policy of Kenya.

In consideration of the fact that the contracts are not explicit and express as to the forum for dispute resolution between the parties; and the Arbitrator having failed to ensure that parties were given sufficient and adequate notice to choose the forum and/ or arbitrator as well as choose the place and mode of arbitration the award fails to meet the threshold under the Act as well as the non derogable right to fair hearing under the constitution and the same is set aside. Parties should go back to the drawing board and agree on whether or not to appoint an arbitrator or go to court for adjudication of their dispute whichever is convenient.

Each party will bear their own costs of the 2 applications.

**DATED, SIGNED, AND DELIVERED AT MIGORI THIS 20<sup>th</sup> DAY OF NOVEMBER, 2025.**

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**ANNE ONG'INJO  
JUDGE**