



**County Government of Tharaka Nithi v Ethics and Anti-Corruption Commission & another;
County Assembly Services Board of Tharaka Nithi County Assembly & another (Interested
Parties) (Judicial Review E003 of 2024) [2025] KEHC 17901 (KLR) (26 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
JUDICIAL REVIEW E003 OF 2024
RL KORIR, J
NOVEMBER 26, 2025**

BETWEEN

COUNTY GOVERNMENT OF THARAKA NITHI APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

LEXUS INTERNATIONAL LIMITED 2ND RESPONDENT

AND

**COUNTY ASSEMBLY SERVICES BOARD OF THARAKA NITHI COUNTY
ASSEMBLY INTERESTED PARTY**

TERRA-CRAFT (K) LIMITED INTERESTED PARTY

RULING

1. The Applicant initiated this suit through Chamber Summons dated 20th May, 2024, seeking orders that the court grant leave to the Applicant to apply for Judicial review order as follows:-
 - (i) An order of Certiorari to remove and quash all the proceedings, decision and findings of the Arbitral award published by the sole Arbitrator, Festus M. Lituku FCI Arb on 15th December 2023.
 - (ii) An order of prohibition to issue directed to the 2nd respondent, barring the 2nd respondent from filing a pre-emptive strike intended to stop the fresh procurement of a new contract for purposes of development to completion of the County Assembly chambers, including advertisement, tender opening, award and handover of the site to the qualified contractor.



- (iii) An order of mandamus directed to the 1st respondent, 2nd respondent and the 2nd interested party, compelling them to permit bidding and application for a new construction tender, following the initiation of a new procurement process by the applicant for the completion of the premises within the current financial year 2023/2024.
 - (iii) leave so granted in b(i) and (ii) above to operate as stay of the decision of the Arbitral award published by the sole Arbitrator, Festus M. Lituku FCI Arb on 15/12/2023;(iv) any other order that the court may deem fit to grant and(v) the cost of this application be provided for.
2. The Application was premised on the grounds set out on the face of the Application and in the Applicant's affidavit dated 20th May, 2024. It was canvassed through written submissions dated 31st October,2024, filed by Office of the County Attorney.
3. Applicant's case is that the Applicant, through the 1st Interested Party, entered into a contract on 2nd February, 2016 for the construction, completion and maintenance of the Tharaka Nithi County Assembly. They contend that the 1st Respondent challenged the legality of the contract in a letter dated 25th June, 2018, thereby summarily stopping further developments on the premises. The Applicant further contends that the contractor was carted away to the Directorate of Criminal Investigation, Kiambu Road. They add that the 1st Respondent's intervention on 8th May, 2024 is a continuum of its dissatisfaction with the legality of the contract dating back to 2018.
4. The Applicant states that such interventions have left the Applicant's development agenda and completion and use of public facilities in limbo, exposing them to wastage and damage from natural causes on a matter of great public interest. They further state that while the 1st Respondent was undertaking investigations, the 2nd Respondent raised a dispute against the County Services Board, leading to the referral of the matter to arbitration vide a letter of appointment dated 13th May, 2021, wherein F.M Lituku, FCI Arb was appointed as the sole arbitrator. The Applicant added that at the end of the arbitration process, both parties entered into a consent dated 27th October, 2022, which formed the basis of the arbitral award.
5. The Applicant contends that the 2nd Respondent has an arbitral award dated 15th December, 2023 in which the Applicant is condemned to pay a revised valuation amount of Kshs. 25,000,000 for work done and an advance payment of Kshs. 36,814,450.70 within specified periods. They further contend that during the consent agreement, there was non-disclosure of the letter dated 25th June, 2018 from the Ethics and Anti-Corruption Commission (EACC), which directed the withholding of funds due to an ongoing investigation related to the tender awarded to the Claimant. The Applicant added that the non-disclosure was not intentional but a malfeasance on the part of the 2nd Respondent and an oversight by the counsels on record for the parties.
6. The Applicant adds that the material facts concerning an ongoing investigation could have had a different outcome. They state that the 1st Respondent, on becoming aware of the arbitral award, issued another letter dated 8th May, 2024, warning against the remittance of funds to the contractor and advising on potential recovery actions against public officers and involved parties.
7. The Applicant further stated that on April 2023 the Senate Report Committee paper No.25 of the Standing Committee on devolution and intergovernmental relations recommended to the EACC to withdraw the caveat placed at the Controller of Budget to ensure that once funds are made available in the subsequent budgets the monies are released to the County for purposes of construction of the County Assembly as the 1st Respondent forwards the investigation files to the Office of the Director of Public Prosecution.



8. The Applicant avers that it is an established principle in equity that courts cannot condone or enforce contracts tainted with an illegality. They further contend that the arbitration award stands in limbo without their capability of execution. The Applicant adds that they urge the court to weigh the principle of finality of the award since it cannot supersede the need for justice and legality and the sanctity of the process in public procurement.
9. The Applicant further stated that the 1st Respondent was within its mandate to intervene in the circumstances and the Applicants are left with their hands tied in a process they have no control over. They contend that courts do not enforce contracts that are in contravention of statutes. In addition, that they filed the suit for purposes of declaring rights, obligations and liabilities while finding justice for the people of Tharaka Nithi County without prejudice to the parties bound in the contract dated 22nd April, 2018.
10. The Application was opposed through a Notice of Preliminary Objection dated 27th September, 2024 in which the 2nd Interested Party invited this court to strike out this suit on the following grounds reproduced verbatim: -
 1. The Application is bad in law, inadmissible and incurably defective of form.
 2. The entirety of the Application offends Section 10 and 35 of the Arbitration Act Cap 49.
 3. Section 10 of the Arbitration Act, 1995 states that “except as provided in this Act, no court shall intervene in matters governed by this Act. Section 32A of the Arbitration Act states that “Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”
 4. The subject matter of the application is a Final consent award published on 15th December, 2023 with respect to a contract between 2nd respondent and the 1st interested party. Upon publication, the said award is final and binding upon the parties pursuant to Section 32A of the Arbitration Act and is not subject to appeal.
 5. The Application further offends the doctrine of privity of contract. The afore-said contract was between 1st interested party and the 2nd respondent. At all material times, the Applicant herein was not a party to the contract and as such, lacks locus standi to institute Civil proceedings before this Honorable Court.
 6. The Application offends the doctrine of forum none convenience emphasized in the case of Fortis Tower Management Ltd and another v Trendmark Computers Limited [2018] eKLR. The 2nd interested party’s application at the high court in Milimani, by filing summons in the cause in which the award had been filed and served to all parties.
 7. Instead of challenging the afore-mentioned application, the applicant proceeded to hastily file an application on 20th May, 2024, to seek for leave before this Honorable Court to institute Judicial Review proceedings. It is evident therefore, that the applicant is forum shopping and as such, its application is an abuse of the courts time and resources and should be dismissed.
 8. Section 35(1) of the Arbitration Act states that; “Recourse to the High Court against an arbitral award may be made only by application for setting aside the award.” Section 35(2) of the Arbitration Act provides for specific grounds within which an application for setting aside an award can be made.



9. The application is incurably defective as Section 35(1) does not provide for recourse to the High Court through Judicial Review and should therefore be dismissed in its entirety. Further, even if the application were in the correct form, of which it is not, the grounds relied upon by the applicant are not within the grounds provided for in section 35(2) of the *Arbitration Act*.
 10. Section 35(3) of the *Arbitration Act* provides that an application for setting aside an arbitral award may not be made after 3 months have lapsed from the date of publication of the award. The Arbitral award was published on 15th December, 2023. Even if the application were in the correct form, of which it is not and is in fact incurably defective, the same is time-barred and should be struck out in limine.
 11. Based on the forgoing, this Honorable Court lacks jurisdiction to hear this application and should therefore down its tools.
 12. The Application is therefore an abuse of the court and should be dismissed in limine.
11. The 1st Respondent filed a response to the Application and the Preliminary objection through a replying affidavit dated 19th August 2024, sworn by Everline Odipo a forensic investigator with the 1st Respondent. She deposed that the 1st Respondent has the legal mandate under Article 252 (1) (a) of *the Constitution*, Section 11(1) (d) & section 13(c) of the *Ethics and Anti-Corruption Commission Act*, 2011 to conduct investigation on its own initiative and on complaint on any acts of corruption under section 13(2) (b) as read with section 11(1) (g) of the same Act to initiate preventive measures against unethical and corrupt practices.
 12. She averred that on or about 3rd April 2016, the 1st Respondent received a report of allegations of irregular procurement of tender for the proposed construction of the Tharaka Nithi County Assembly Tender No. TNCA/T/01/2015-2016 worth Kshs. 369,642,688 by the Tharaka Nithi County Officials.
 13. She stated that investigations were initiated and it was established that on 10th December 2015 and 9th December 2015, Tharaka Nithi County Government placed an advertisement in the Standard and Star Newspapers, respectively, for the subject tender. That the tender was an open National Tender and the closing date for submitting the tender was 23rd December 2015, which was later extended to 29th December 2015.
 14. The 1st Respondent further stated that investigations found that seven bidders picked up the tender documents but only five returned their bids. The five companies include Ernie Campbell Company Limited, Farjano Construction Company Limited, Crescent Construction Company Limited, Terracraft (K) Limited and Lexis International Company Limited.
 15. That on 21st December 2015, the Tender Opening Committee was appointed and the tender opening exercise was undertaken on 29th December, 2015 and the Tender Opening minutes were signed on 30th December 2015. Additionally, that on 4th January 2016, the Tender Evaluation Committee was appointed and it included Paul Thirika, Joshua Mwenda, Monica Wangari, Arch Motanya, Q.S Bernard Sang and Charles Murua, adding that Arch Motanya and Q.S Bernard Sang were not employees of the County Assembly, contrary to Regulation 7(3) of the Public Procurement and Disposal (County Government Regulations 2013.) That the accounting Officer failed to seek advice from the Public Procurement Oversight Authority before appointing the two.
 16. That on 8th January 2016, the Tender Evaluation Committee evaluated the five bids and only three bidders were found responsive after subjecting the five companies to mandatory requirements. The



- 1st respondent added that upon conclusion of the evaluation exercise, the Evaluation Committee recommended Lexis International Limited as the lowest bidder with the highest final mark of Kshs. 368,144.507.
17. The 1st Respondent deposed that the investigation established that the tender evaluation process was done without regard to the provisions of the tender requirements and the procurement processes. They further claim that the winner did not possess the essential equipment for construction as indicated in the tender document, and they also did not comply with the mandatory financial requirement. In addition, that the evaluation committee did not evaluate the bids in strict compliance with the law.
 18. The 1st Respondent stated that investigations established that the land handed over to the 2nd Respondent for the project had not been approved by the County Management Board, since there was a dispute on land ownership, as it had been reserved for a cattle dip. They further stated that the County Assembly inaugurated the construction without obtaining the requisite Environmental Impact Assessment report from the National Environmental Management Authority (NEMA) as required by section 58 of the Environment Management and Co-ordination Act of 1999.
 19. Finally, the 1st Respondent added that failure by the Applicant and the 2nd Respondent to inform the arbitrator of the ongoing investigations and the 1st Respondent's advisory dated 25th June 2018, indicated a lack of good faith in carrying out the arbitral process.
 20. The Preliminary Objection was canvassed by way of written submissions as directed by the court.
 21. The 2nd Interested Party filed their written submissions dated 16th April 2025 framing the following issues for determination: -
 - i. Whether the honourable court's jurisdiction has been invoked correctly.
 - ii. Whether the 2nd Interested Party's P.O is valid in law.
 - iii. Whether the Applicant has locus standi to file the Judicial Review suit.
 - iv. Whether the timing of the Judicial Review is justifiable.
 22. The 1st Respondent filed their written submissions dated 21st November 2024 framing the following issues for determination: -
 - i. Whether there was non-disclosure of material facts during arbitration.
 - ii. Whether the award is in conflict with public policy of Kenya.
 23. The Applicant filed their written submissions dated 31st October 2024 raising the following issues for determination: -
 - i. Whether the Applicant's Application is incurably defective in form and if the Preliminary Objection arrives at the requisite threshold.
 - ii. Whether Section 10 of the Arbitration Act limits the court's jurisdiction over the matter.
 - iii. Whether the finality of the arbitral award under Section 32 A of the Arbitration Act precludes the court from setting aside the award on grounds of public policy and illegality.
 - iv. Whether the Applicant has locus standi despite the doctrine of privity of contract.
 - v. Whether the doctrine of forum non conveniens applies to Judicial Review Application.
 - vi. Whether the Application is time barred under Section 35 (3) of the Arbitration Act.



- vii. Whether this honourable court has jurisdiction under Article 165 of *the Constitution* to grant the reliefs sought by the Applicants.
24. Upon considering the arguments presented by the parties, I find that several issues have been raised in the Preliminary Objection. Most of the issues touch on the substance of the judicial review as opposed to the P.O which is the subject of the ruling.
25. The first issue that distils itself for determination is whether this court is divested of jurisdiction to hear this case. The starting point is section 10 of the *Arbitration Act*, which provides for the extent of court intervention in the following words: -
10. “Except as provided in this Act, no court shall intervene in matters governed by this Act.”
25. The language, purport and effect of this provision is replicated in section 32A of the act which provides for the effect of an award in the following terms: -
- 32A. Effect of award Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”
26. In Republic v Attorney General & Another Ex parte Nyoro Construction Limited [2019] KEHC 11938, Mativo J stated as thus:-
- “It cannot be by accident that Parliament used identical language in two separate provisions in the same statute to speak with such clarity on the issue. This is a rare occurrence in Parliamentary enactments. Rarely does Parliament repeat itself in legislative drafting. Why the emphasis? What was the intention of the drafter? Our Constitution requires a purposive approach to statutory interpretation.”
27. Section 10 of the Act has been the subject of judicial construction by our superior courts on many occasions. In the case of Prof. Lawrence Gumbo & Another Vs. Honourable Mwai Kibaki & Others High Court Miscellaneous No.1025 of 2004. The above provision was explicated by Nyamu J. eloquently expressed himself as follows:
- “Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented...”
28. The Court of Appeal in Anne Mumbi Hinga v Victoria Njoki Gathara (2009) eKLR addressing applications that are not expressly provided for in the *Arbitration Act*, and which purport to rely on the *Civil Procedure Act* and the Rules stated as follows: -
- “A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act* which states: “Except as provided in this Act no court shall intervene in matters governed by this Act.”
29. The provisions of the *Arbitration Act* make it clear that it is a complete Code except as regards the enforcement of the award/decrees where the Arbitration Rules 1997 apply the Civil Procedure Rules



where appropriate. No application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement, both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to this court to intervene and all the applications filed against the award should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd 1989 KLR 1.”

30. The same position was expressed by the High Court in Nyutu Agrovet Limited v Airtel Networks Limited 201 as follows: -

“Certainly, I do not agree that the *Civil Procedure Act* applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that, the *Arbitration Act* is a complete code excluding any other law applicable in civil-like litigation; I do not see where the *Civil Procedure Act* applies in this matter. Rule 11 of the Arbitration Rules states:

“11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules.” The subject, is only as far as it is appropriate, Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10.”

31. Section 10 of the *Arbitration Act* is couched in mandatory terms. It ousts this court’s jurisdiction in matters governed by the Act except as provided in the Act. This position is replicated in section 32A of the Act.

32. Section 35 of the Act, Part VI provides for recourse to the High Court against an Arbitral Award in the following words: -

“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
 - iii. the party making the application 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 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, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or



- v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
 - 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.”
33. Section 35(1) limits recourse to court against arbitral awards to only applications for setting aside the award and only under the grounds or circumstances listed in subsections (2) and (3) of the said section. It is beyond argument that section 35 of the Act, which is reinforced by section 32A of the Act provides for recourse to the High Court against an arbitral award. Section 35 is explicit. Subsection (1) provides that 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). The section sets out the grounds for setting aside.
34. The Applicant did not approach the court for setting aside as the law provides. It applied for Judicial Review orders to challenge an arbitral process as opposed to setting aside, as the law provides. The only recourse under the Act is to set the award aside. It follows that the Application is incurably defective for offending the said section, and on this ground, P.O on the court’s jurisdiction to quash the award must succeed.
35. The second issue for determination is whether the Applicant has locus standi to file the instant application. The term ‘Locus Standi’ connotes the right of a party to bring an action. It seeks to determine whether a party has properly brought an action or is properly before the court. There are many decisions on the subject from the court and to quote the decision in the case of Michael Osudwa Sakwa –v- Chief Justice and President Supreme Court of Kenya & Another. [2016] eKLR which referred to the matter of Ms Priscilla Nyokabi Kanyua –v- Attorney General & I.E.B.C, Nairobi H.C CP NO. 1/2010 stated that: -

“In Kenya the court has emphatically stated that what gives Locus Standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that it would not be more affected than any other member of the population.”



36. Such interest must be vested legal interest giving the party a right to enforce the claim by way of a lawsuit. It follows that for a party to have a locus standi he must have a vested interest in the subject matter before court. ‘Locus Standi’ is point of law that touches on the jurisdiction of the court.
37. The 2nd Interested Party pleaded that the Application offends the doctrine of privity of contract. They contend that at all material times the Applicant was not a party to the contract and, as such, has no locus standi to institute civil proceedings before this court.
38. The Applicant’s argument is that, the Applicant through the 1st interested party, entered into a contract on 2nd February 2016 for the construction, completion and maintenance of the Tharaka Nithi County Assembly building with the 2nd respondent. It is my view that the County Services Board and the County Government work in liaison to represent the interests of the people of Tharaka Nithi.
39. The nexus between the county Government and the County Assembly Board is affirmed in cases such as *Graham Rioba Sagwe v Fina Bank* [2017] eKLR which emphasized on institutional relations. As such, I find that the Applicant has sufficient interest in the matter and locus standi has been established.
40. The third issue for determination is whether the Application offends the doctrine of forum non convenience? Both parties admit there is a similar matter before the High Court at Milimani known as HCOMMISC No. E417 of 2024 for the enforcement of the arbitral award. The subject matter of the suit as well as the parties are situate in Tharaka Nithi County. The award enforcement proceedings have been filed in Milimani. It appears to this court that the parties were not litigating above board by litigating in different courts. Suffice to state that the practice of litigating over the same matter in different courts must not be allowed as the same amount to abuse of court process.
41. In the end, I find that the Preliminary Objection partially succeeds to the extent of ousting the jurisdiction of this court with regards to prayer b (i) of the Chamber Summons dated 20th May 2024.

Determination

42. I have said enough to show that the P.O. on the jurisdiction of this court to entertain the proceedings on the enforcement of the award must be upheld.
43. I however observe that prayers b (ii) and b(iii) of the Judicial Review Application do not relate to the Arbitral Award but to the activities related to the completion of the Applicant’s County Assembly. This court finds that the two prayers can still be properly litigated. Consequently, I make the following orders: -
 - i. That this Court has no jurisdiction to intervene in arbitration proceedings in any manner not specifically provided for in the *Arbitration Act*. Thus, the P.O on Prayer b (i) of the Chamber Summons succeeds and is upheld.
 - ii. For avoidance of doubt Prayers b (ii) and (iii) do not relate to the jurisdiction of this court on the arbitral award. They are accordingly struck out.
 - iii. Each party to bear their costs.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 26TH DAY OF NOVEMBER, 2025.

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R. LAGAT-KORIR

JUDGE



Ruling delivered in the presence of Ms Kyengo for the 2nd Interested Party and Mr. Munene holding brief for Mr. Mwendani for the Applicant. Muriuki (Court Assistant.)

