IN THE COURT OF APPEAL AT NAIROBI

(CORAM: W. KARANJA, M'INOTI & ACHODE, JJ.A.)

CIVIL APPEAL NO. E637 OF 2024

BETWEEN

GEOTHERMAL DEVELOPMENT COMPANY LIMITED……..APPELLANT

AND

LANTECH (AFRICA) LIMITED……RESPONDENT

(Being an appeal from the ruling and order of the High Court, Commercial Division at Nairobi ***(W. Okwany, J.)*** *delivered on 16th December 2020*
in
HCCOMM No. E776 of 2020
Consolidated with HC Misc. App. No. E779 of 2020)
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JUDGMENT OF THE COURT

1. A brief background to the appeal is that a dispute arose between the parties herein on the performance of the contract dated 1st July 2013 for drilling consultancy services. Parties submitted themselves to an arbitral process before a sole arbitrator, FCI Arb. Mr. Kyalo Mbobu, and an award was delivered on 12th November 2019. The arbitrator informed the parties that the award was ready, and on 13th March 2020 parties collected the copies thereof.

2. Both parties took opposing views on the award. Before the High Court, the respondent filed an application dated 3rd June 2020 for

adoption of the award. The appellant on the other hand filed an application dated 12th June 2020 seeking to set aside the arbitral award in line with **section 29** and **35** of the **Arbitration Act**. The respondent then opposed the appellant's application by filing a preliminary objection dated 23rd June 2020 on grounds that the application to set aside the award was time barred, and that it was brought three months after delivery of the award. In the impugned ruling dated 16th December 2020, the learned Judge of the High Court upheld the preliminary objection and allowed the respondent's application for enforcement of the award.

3. The appellant is dissatisfied with those findings. It filed its notice of appeal dated 28th December 2020. In its memorandum of appeal dated 22nd August 2024, the appellant raised ten grounds disputing the findings of the learned Judge. The appellant lamented that the learned Judge erred in law and in fact: by upholding the Preliminary Objection dated 23rd June 2020; in allowing the respondent's enforcement application dated 3rd June 2020 on the basis that nothing stood in the way of the enforcement of the arbitral award; in failing to consider whether the arbitral award complied with the requirements set out under **section 36** and **37** of the **Arbitration Act** before adopting the

same as a decree of the High Court; that the

decision is contrary to the express provision of **section 35(3)** of the **Arbitration Act** which focuses on the concept of delivery rather than publication of the award; by holding that the delivery of the arbitral award to the parties' respective advocates does not constitute delivery within the meaning of the term under **section 35(3)** of the **Arbitration Act**; in relying on the English decision in the case of ***Bulk Transport Corporation -vs- Sissy Steamship Co. Ltd (The "Archipelagos")[1979] 2 Lloyds Law Reports pg. 289*** that set the precedent on publication of an award, which should not have been followed by Kenyan Courts as it is based on pre-1996 **English Arbitration Act**; by computing the ninety (90) days limitation period under **section 35(3)** of the **Arbitration Act** from 12th November 2019 and not with effect from 6th April 2020; by finding that the respondent's application made under **section 34** of the **Arbitration Act** was not relevant or applicable in the computation of time; by failing to apply **section 34** while interpreting **section 35(3)** of the **Arbitration Act** and by failing to consider that the corrected award which it allowed enforcement of was corrected on account of the appellants application under **section 34** of the **Arbitration Act**.

4. In view of the foregoing, the appellant prayed that: the appeal be allowed; the ruling of the High Court in **HCCOMM E776 of 2020** as

consolidated with **High Court Misc. Application No E779 of 2020** made by W. Okwany, J. on 16th December 2020 be set aside in its entirety; the appellant's chamber summons application dated 12th June 2020 be remitted back to the High Court and the same be heard before any other Judge other than W. Okwany, J; the Court does give directions on the hearing of the respondent's chamber summons dated 3rd June 2020 for enforcement in **HCCOMM E776 of 2020** as consolidated with **High Court Misc. Application No E779 of 2020**; and that the respondents bears the costs of the appeal and subsequent costs at the High Court.

5. During the virtual plenary hearing of the appeal on 7th April 2025, learned Senior Counsel Mr. Ahmednassir appeared with Ms. Mahamud for the appellant while learned Senior Counsel Mr. Ohaga led Mr. Masika for the respondent. Parties relied on their respective written submissions that were orally highlighted.

6. We have read the appellant's written submissions and list of authorities both dated 26th March 2025, and summarise the same as hereunder. The appellant submitted that the issue in this appeal gravitates around two cardinal issues, the first being when time starts running for purposes of an application to the High Court

under **Section 35(3)** of the **Arbitration Act, 1995**. It was submitted that from the impugned ruling, the trial Judge, W. Okwany, J. in her analysis of issues concluded that time starts running from the date of notification of publication of the award and not actual receipt of the award. It was submitted that the Judge ignored the requirement under **section 35(3)** which provides that time starts to run from the date on which the award is received by the parties.

7. According to the appellant, in the ruling the Judge held that time started running on 12th November 2019, the date of the award publication and ignored the fact that the award was corrected by the arbitrator in his letter dated 20th May 2020 following the application by the respondent under **section 34** of the **Act** on 26th March 2020. It was contended that the ruling starkly reveals the untenable nature of the Judge's stance because from the ruling, neither of the parties had received the award and despite the arbitrator's express confirmation in his letter dated 12th March 2020 that the award was ready for collection with effect from 13th March 2020, it was submitted that the learned Judge embraced a position of profound legal irrationality. It was submitted that it is inimical to logic to expect parties to challenge and/or enforce an

award that has not been issued to them yet. It was further submitted that for the

respondent, time did not have an effect on its application under the **Act** but for the appellant time was of the essence as it could only apply to set aside the award within three (3) months of its receipt.

8. Counsel submitted that the second cardinal issue underpinning this appeal was that the learned Judge after having struck out the appellant's application under **section 35** of the **Act** on a technicality automatically found in favour of the enforcement application under **section 36** of the **Act** without weighing the application against the parameters set out under **section 37**. Learned counsel contended that the reasoning of the Judge by passes the statutory checklist governing enforcement of arbitral awards and assumes that the dismissal of the setting aside application automatically clears the path for the enforcement application.

9. The learned trial Judge is accused of having formulated an erroneous legal framework lacking statutory foundation. **Section 36** of the **Act** governs the recognition and enforcement of arbitral awards, providing that such awards shall be recognised as binding and enforced upon application to the court. This is subject to the provisions of **Section 37**, which sets out the

grounds upon which enforcement may be refused, namely, where the award contravenes

public policy, where a party lacked capacity, or where the award has been set aside or suspended. It was contended that these provisions establish an independent enforcement mechanism that operates separately from any application to set aside an award under **Section 35.**

10. With regards to grounds 1, 2, and 3, it was submitted that the appellant raised substantive concerns in its setting aside application that overlap with **section 37** grounds, notably that the award of USD 18,206,548.72 was contrary to public policy and involved decisions beyond the scope of the arbitration reference which mirrors **section 37(1)(a)(vi)** on public policy and **section 37(1)(a)(iv)** on award exceeding the arbitration agreement scope. It was contended that even though the application under **section 35** was struck out, these issues remained relevant to the enforcement application under **section 36** and ought to have been reviewed as separate issues. It was submitted that the Judge's failure to consider this even in the enforcement context, is a glaring omission.

11. It was submitted that the final award was contrary to public policy as the arbitral tribunal granted special damages without proof of such damages. It was contended that the respondents

claim which

was entirely based on alleged loss was not supported by sufficient documentary evidence and that even after the further amendment of the statement of claim, the respondent did not adduce any evidence in support. Further it was submitted that the appellant argued that the enforcement proceedings are nullity *ab initio* as the final award was liable to be set aside under the very grounds recognised under **section 37** especially where there were serious breaches including violation of public policy, denial of fair hearing and excess of jurisdiction tainted the award.

12. Further it was submitted that the learned Judge shunned the notion that public policy is a broad concept that is cited in the **Act** as a ground for setting aside or refusing the enforcement of an arbitral award under **section 35(2)(b)(ii).** Reliance was placed on ***Christ for all Nations -vs- Apollo Insurance Co. Ltd [2002] 2 EA 366***. It was submitted that the tribunal's failure to apply the law on proof of special damages, denial of fair hearing after the amendment of the statement of claim and the excessive damages awarded all fall squarely within the categories rendering the award contrary to Kenya's public policy. It was contended that the very least the learned Judge could have done in respect of the application under

section 36 was to consider the arguments by the appellant under

this application and form an opinion on whether indeed the enforcement meets the threshold of **section 37** which was not done.

13. It was submitted that the tribunal denied a fair hearing by failing to allow oral testimony and cross-examination of the respondent's key witness, Mr. Aquinas Wasike after the amendment of the statement of claim. It was contended that this procedural flaw violates the appellant's constitutional right to a fair hearing and contravenes **Article 50(1)** of the **Constitution** which mandates that parties be given a reasonable opportunity to present their case. Further it was contended that **Section 19** of the **Arbitration Act** emphasizes the equal treatment of parties and their rights to a fair and reasonable opportunity to present their case. Reliance was placed on ***Kenya Alliance Insurance Co. Ltd -vs- Annabel Muthoki Muteti [2020]*** ***eKLR***.

14. With regards to ground 4, 5 and 6, it was submitted as to whether for purposes of computation of time under **section 35** the term receipt of the award can be interpreted to mean the date of publication of the award, it was submitted that a plain and ordinary meaning of the word "received" implies actual

possession or control of the award by the party, not merely notification of its availability. It was contended that the learned Judge redefined “received” to mean

the date the arbitrator makes available the award for collection.

Reliance was placed on ***University of Nairobi -vs- Multiscope Consultancy Engineers Limited [2020] eKLR*** and ***Mahican Investments Limited -vs- Giovanni Gaidi [2005] eKLR*** to urge that

this interpretation contradicts the statute's plain language and

undermines Parliament's intention to anchor computation of time on

actual delivery.

15. It was argued that equating "receipt" with "notification" unjustly

shifts the burden to the party to collect the award rather than placing

the duty on the arbitrator to effect delivery. The appellant contended

that time ought to have been computed from 20th May 2020, when

the corrected award was issued under **section 34**, and not from the

12th November 2019 publication date. Accordingly, its application

filed on 12th June 2020 was within the three-month statutory period.

The appellant maintained that the award was only physically

delivered on 13th March 2020 after both parties paid the tribunal fees

as required under **section 32B(3).**

16. As regards grounds 7 to 10, the appellant submitted that the learned Judge erred in holding that the respondent's **section 34** application was computed from 12th November 2019 rather than from 20th May

2020, when the award was corrected. It was contended that since the award was withheld pending payment of arbitration costs and the respondent's correction application dated 26th March 2020 was only determined on 20th May 2020, the three-month period under **section 35(3)** could only begin to run from that latter date. The

appellant thus urged the Court to find its setting-aside application

as properly filed within time and to allow the appeal.

17. In opposing the appeal, and in its written submissions and list of authorities dated 27th and 28th January 2025, the respondent submitted that the simple question for determination is whether the

appellant's application seeking to set aside the final award was made

within three (3) months from the date when the appellant received

the award, or alternatively whether the application was made within

three (3) months from the date which a request under **section 34** of

the **Arbitration Act** had been disposed of.

18. It was contended that the first question for determination is when the final award was received by the parties and the proper

meaning to be assigned to the words delivered and received in **section 32(5)** and **35(3)** of the **Arbitration Act, 1995**. It was submitted that the High Court has grappled with this question in several decisions in

including ***University of Nairobi -vs- Multiscope Consultancy***

Engineers Limited [2020] eKLR where while upholding the preliminary objection that the application for setting aside was bad in law having been filed out of time, stated that delivery occurs when the arbitral tribunal makes the signed award available for collection,

and that actual receipt is unnecessary. Comparative authorities

cited included ***Union of India -vs- Tecco Trichy Engineers and***

State of Maharashtra and Others -vs- Ark Builders Pvt Ltd, and

Matter of Lowe (Erie Insurance Co.) 2008 NY Slip Op 07735.

19. The respondent also cited to ***Kenyatta International Convention***

Centre (KICC) -vs- Greenstar Systems Limited [2018] eKLR and

Hinga -vs- Gathara & 5 others [2024] KECA 974 (KLR) to

emphasise that the timelines set out in **Section 35(3)** of the **Act** are

strict, admit no extension of time and safeguard the principle of

finality in arbitration. It was submitted that any interpretation

departing from these authorities would inject uncertainty

into

sections 32, 34, and **35** of the **Arbitration Act**.

20. It was submitted that the final award was published on 12th November 2019 with notice to the parties on the same date and that the same was not collected by the parties until 13th March 2020. The

delay in collecting the award was attributed to the appellant's failure to pay its share of the tribunal's fees, which the respondent eventually settled. Under **section 32B(3),** the tribunal's right to withhold the award for unpaid costs did not suspend the running of time. Consequently, the **section 34** correction period expired on 11th December 2019, and the **section 35** setting-aside period expired on 11th February 2020. Both the respondent's 26th March 2020 correction request and the appellant's 12th June 2020 setting-aside application were therefore time-barred.

21. It was further submitted that there was no additional award published within the meaning of **section 34**, and the appellant's own letter dated 30th March 2020 admitted that the tribunal lacked jurisdiction under that **section**. The respondent contended that the appellant could not approbate and reprobate by first asserting lack of jurisdiction and later relying on the same provision to extend time.

22. In conclusion, the respondent argued that the appellant had until 11th February 2020 to file its application but failed to do so. The 12th June 2020 filing was, therefore, four months late. The

respondent urged the Court to dismiss the appeal with costs to the respondent.

23. We have given due consideration to the record of appeal, the rival submissions by the parties and the authorities cited by both counsel along with all other relevant law while being cognizant of our mandate as a first appellate court as circumscribed under **rule 31(1)a** of the **Rules** of this Court. See also ***Selle -vs- Associated Motor Boat Co. Ltd [1968] EA 123***. We also bear in mind that we must defer to the findings of the first instance court and will not lightly depart from them unless we are satisfied that the learned Judge misapprehended the facts; or misdirected herself on the law; or that she took into account matters which she should not have; or failed to take into account considerations which she should have; or that her decision was plainly wrong.

24. With the above mandate in mind, we discern the principal issue calling for our determination to be the meaning to be assigned to the words delivered/received and publication in **section 32(5)** and **35(3)** of the **Arbitration Act**. Our determination of that core issue will determine whether the application to set aside the Award was time- barred or not as provided in **section 35(3)** of the **Arbitration Act.**

25. Resolution of this issues turns on the interpretation of **section 35(3)**

of the **Arbitration Act** which provides as follows:

> ***"Section 35(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."***

26. **Section 32(5)** on the other hand stipulates that after an award is made, the arbitral tribunal shall deliver a signed copy to each party. The act of delivery under this provision is closely linked to the concept of "receipt" under **section 35(3).**

27. The matter before us is not novel and the same has been addressed by our courts in a litany of decisions over the years. Kenyan courts have consistently held that the three-month limitation period begins to run upon notification to the parties that the signed award is ready for collection, and not upon physical collection of the award. The rationale underpinning these decisions is to uphold expedition and finality in arbitration, the golden thread that traverses all arbitral processes and the main reason why parties by agreement opt out of the tedious, cumbersome court driven litigation which more often than not takes eons to conclude.

28. This principle was reiterated by the Supreme Court of Kenya in

Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited;

Chartered Institute of Arbitrators-Kenya Branch (Interested

Party) [2019] eKLR which stated that

> ***"…arbitration was introduced into our legal system to provide a quicker way of settling disputes …in a manner that is expeditious, efficient… while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made."***

See also ***Synergy Industrial Credit Ltd -vs- Cape Holdings Ltd***

[2020] eKLR.

29. So, when is an Award "delivered" and "published" within the meaning of **section 35(3)** of the **Arbitration Act**? In one of the older decisions, ***Transworld Safaris Ltd -vs- Eagle Aviation Ltd & 3 Others H.C***

Misc. Application No. 238 of 2003 (Nyamu J. (as he then was)), held that notice to the parties that the award is ready constitutes sufficient delivery, and that time for purposes of **section 35(3)** starts to run from that date.

30. See also ***Mahican Investments Limited and 3 Others -vs-***

Giovanni Gaida and 80 Others [2005] eKLR, Mahinder Singh

Channa -vs- Nelson Muguku & Another ML HC Misc. Application

No. 108 of 2006 [2007] eKLR, P N Mashru Limited -vs- Total Kenya Limited ML HCCC No. 47 of 2008 [2013] eKLR, Mercantile Life and General Assurance Company Limited & Another -vs-

Dilip M. Shah & 3 Others ML HC COMM No. 550 of 2006 [2020]

eKLR, National Housing Corporation -vs-Custom General

Construction Limited ML HC Misc. Appl. No. E38 of 2020 [2021]

eKLR and ***Dinesh Construction Limited & another -vs-***
Aircon

Electra Services (Nairobi) Limited [2021] eKLR, all which affirm

the position that "received" for purposes of the **Arbitration Act** means notification by the Arbitrator that the award is ready for collection and that delivery does not mean physical or actual delivery of the Award. We have cited a multiplicity of decisions above to demonstrate that this is a well-trodden path.

31. In the appeal before us, when confronted with the same issue, Okwany J., observed as follows:

> ***"33…delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties."***

32. The learned Judge was just pronouncing what the courts have severally restated over the years.

33. Once an award is signed and parties notified that the same is ready for collection, it is their responsibility to collect the same after settling the arbitrator's fees. The arbitrator has no obligation to send the signed copy of the award to the parties before his fees are settled. Once notified, it behooves the parties to do the needful and collect the award. Failure by the parties to collect it does not delay or postpone the delivery and the time limited in **section 35(3)** of the **Arbitration Act** begins to run. It would be an absurdity to interpret this any other way.

34. Turning to the facts of the case, the parties submit that on 12th November 2018 the Arbitrator through his letter informed parties that the award had been published in accordance with **section 33(1)** of the **Arbitration Act** and that the same may be collected from his chambers upon payment of his attached final fee note. From the record, it took the parties about 4 months to settle the arbitrator's fee note. On 12th March 2020, the arbitrator issued a letter to the respondent informing them that:

> ***"….I have confirmed receipt of Kshs.3,855,387.50 in our account in connection with the above matter. The said amount having been paid by the parties save for the outstanding interest of Kshs.212,586.65 which is hereby retained the same is herewith reimbursed. Please acknowledge receipt and***

confirm. Meanwhile,

the Arbitral award is available for collection with effect from 9.00am on 13/3/2020."

35. Counsel for the appellant therefore submits that from the foregoing it is clear that the notification communicating that the signed award was ready for collection was made on 12th November 2019. Counsel points out that on that date the Award had not even been published hence the time calculation for purposes of bringing an application ought to start running from 13th March 2020 when the award was available for collection from the arbitrator.

36. It was submitted by the respondent that assuming that the publication was made only after both parties paid their arbitrator's fees would be defeating to the arbitral process as parties can take whatever amount of time to make payment. He, therefore, urged the Court to follow those decisions which hold that time is calculated from the date of publication and not the notice after payment of fees and uphold the ruling of the trial court. The respondent maintained that the appellant failed to pay its portion of fees to the arbitrator and that it was the respondent who cleared the entire fees and hence the release of the award by the arbitrator.

37. It is not in dispute that the arbitrator notified the parties that the Award was ready for collection on 12th November 2019 hence time

begun to run from that date, meaning that the appellant ought to have filed the application to set aside by 11th February 2020 as rightly held by the trial Judge. Counsel for the appellant suggested that since the respondent made an application under **section 34** of the **Act** on 26th March 2020 which was disposed of on 6th April 2020, then **section 35(3**) contemplates that the 3 months' period commenced when that application was disposed of which means that the 3 months would run until 6th July 2020.

38. This Court in ***Anne Mumbi Hinga -vs-Victoria Njoki Gathara [2009] eKLR***_was categorical 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."***

39. Also, in ***Ezra Odondi Opar -vs- Insurance Company of East Africa Limited KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR***, this Court reiterated *that:*

> ***"[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration."***

40. We reiterate the holding that the 3 months from the date of

“notification”, which is when time starts running is not extendable.

41. This time constriction also applies to a **section 34** of the **Arbitration Act** request for correction or interpretation of an award as made by the appellant. Such an application only pauses and resets the time limit only when properly lodged within time. In this case the three

(3) months had already lapsed by the time the appellant filed the application under **section 34** of the **Arbitration Act**, and the said application was inconsequential as far as the statutory timelines are concerned. The three-month period is absolute, and courts lack jurisdiction to enlarge it once it has lapsed. Any application to set aside filed beyond this period is fatal and cannot be salvaged by equitable arguments or procedural extensions.

42. Our conclusion is that the learned Judge did not err in striking it out for being filed out of time. We agree with her findings. Having properly found that the court was bereft of jurisdiction to entertain the application to set aside the award, the learned Judge could not consider the merits of the application. Nor can we accept the invitation to delve into the merits of the application to determine whether or not there were sufficient grounds to demonstrate that the award ought to have been set aside.

43. Ultimately, we find that the appeal is devoid of merit and dismiss it accordingly with costs to the respondent.

Dated and delivered at Nairobi this 28th day of November 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.