

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**MISC. APPLICATION NO. E1108 OF 2024**

**BETWEEN**

**HAROLD F. FENWICK &  
ASSOCIATES.....APPLICANT**

**AND**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED.  
.....RESPONDENT**

**RULING**

**Introduction and Background**

1. This matter is in respect of an Arbitral Award dated 13<sup>th</sup> August 2024 where the arbitral tribunal (“the Arbitrator”) dismissed the Applicant’s claim and ordered them to pay the Respondent’s and the Arbitrator’s costs (“the Award”). The Applicant seeks to set aside the Award through their Notice of Motion dated 20<sup>th</sup> December 2024 whereas the Respondent seeks to enforce it through their Chamber Summons dated 17<sup>th</sup> January 2025. The two applications have been canvassed by way of written submissions which together with the pleadings I have carefully considered and I will be making relevant references to the same in

my analysis and determination below.

## **Analysis and Determination**

2. In response to the application for setting aside the award, the Respondent relies on the replying affidavit of its Head of Legal Department, BENSON NZUKA, sworn on 17<sup>th</sup> January 2025. It raises a technical objection that the Applicant's application was filed on 20<sup>th</sup> December 2024 which is more than four months from the date of publication of the Final Award on 13<sup>th</sup> August 2024 in contravention of **section 35(3)** of the ***Arbitration Act(Chapter 49 of the Laws of Kenya)*** which provides that an application for setting aside an 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...*".
3. In response, the Applicant has stated that the application is not time barred as it was filed after the Award was made available to the parties and after payment of the Arbitrator's fees. I am in agreement with the Respondent's submission that this court has always held that the time within which an application to set aside ought to be filed starts running from the date the arbitral tribunal notifies the parties that the Award is ready for collection. Once the parties are notified of the award, it is within their power to collect it.

The arbitral tribunal discharges its obligation of delivery once it avails the signed copy of the award. Failure of 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. (see **Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited [2021] KEHC 6762 (KLR)**, **Lantech (Africa) Limited v Geothermal Development Company [2020] KEHC 10419 (KLR)** and **MAHINDER SINGH CHANNA v NELSON MUGUK & another [2007] KEHC 2401 (KLR)**]

4. It is not in dispute that the Arbitrator notified the parties that the Award was ready for collection through its letter of 13<sup>th</sup> August 2024 and therefore, time started running from this date and the present application ought to have been filed by 13<sup>th</sup> November 2024 latest. It would appear that the Applicant mistakenly thought that time begins to run after payment is made to the Arbitrator. However, since the parties are responsible for paying the arbitrator, they cannot rely on the delay of payment to defeat the statutory period for making the application to set aside an award (see **Pavanputra Enterprises Limited v Green Dairy (K) Limited [2023] KEHC 20357 (KLR)**].
5. This fortifies the position that receipt and delivery of an Award is not dependent on payment of fees but notification by the Arbitrator

that the Award is ready for collection. This act of notification is the operative event that triggers the three-month period under **section 35(3)** and consequently, the three-month period for filing the application expired on or about 13<sup>th</sup> November 2024 meaning the application filed on 20<sup>th</sup> December 2024 is time barred. An application under **section 35** that is time barred is fatal and there is no provision in the **Act** that can salvage such an application either by seeking leave or otherwise (see **University of Nairobi v Nyoro Construction Company Limited & another [2021] KEHC 380 (KLR)**). This position is buttressed by the Court of Appeal in **Anne Mumbi Hinga v Victoria Njoki Gathara [2008] KECA 30 (KLR)** where it was stated 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.*”

6. As such, I find that the objection raised by the Respondent has merit and is upheld. This therefore means that the court has no jurisdiction to entertain the Applicant’s application dated 20<sup>th</sup> December 2024 and the same is hereby struck out.
7. Turning to the Respondent’s application for recognition and enforcement of the Award, under **section 32(A)** of the **Arbitration Act**, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise

than in the manner provided by the **Arbitration Act**. This court, under **section 36** of the **Arbitration Act**, has the power to recognise and enforce domestic arbitral awards in the following terms:

*36 (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37*

*(2) ...*

*(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish*

*(a) the original arbitral award or a duly certified copy of it; and*

*(b) the original arbitration agreement or a duly certified copy of it.*

*(4) .....*

*(5) .....*

8. **Section 37** of the **Arbitration Act** sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award as follows:

**37. Grounds for refusal of recognition or enforcement**

*(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 recognised 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.*

9. The Applicant responded to this application for recognition and enforcement through the replying affidavit of its Principal, BASHIR-UD-DEEN HASSANALI JUMA HAJEE sworn on 20<sup>th</sup> March 2025. It avers that the Award is against public policy and that the Arbitrator dealt with issues that had not been referred to him for determination and therefore went beyond the scope of arbitration, more specifically, that the Arbitrator made a determination on the amount in Fee No. 8 that had already been admitted by the Respondent.

10. It is not lost to me that a claim that an award is "contrary to public policy" is a high-threshold argument and it has been held that this ground is not a backdoor for appealing the merits of an award. It is reserved for awards that shock the conscience, are inherently immoral, or violate the fundamental principles of justice and morality in Kenya (see **Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 E.A 366** and **Centurion Engineers & Builders Limited v Kenya Bureau of Standards [2023] KECA 1289 (KLR)**). One of the Arbitrator's key findings was that the contractual rate of interest was not agreed upon. The contract itself, at Clause 5.2.2 provides for "Agreed Penalties for Late Submissions" but does not specify a rate. The Arbitrator concluded he could not re-write the contract for the parties which is an acceptable legal and contractual interpretation, not a violation of public policy.

11. On the scope of the Arbitrator's jurisdiction and going through the Partial Consent dated 8<sup>th</sup> May 2024, I find that the same only reduced the total amount claimed in respect of Fee Note No. 8 and its para. 5 explicitly stated that the Arbitrator was to determine "other issues in the claim." The arbitrator's decision on interest and other unresolved matters falls squarely within this remaining scope. The Arbitrator further issued a procedural order, "*Order for*

*Directors No.1*” where Clause 13 gave him the power to "settle the final list of issues for determination in the Award." The parties were given the liberty to come up with their list of issues and the Arbitrator noted that they identified 4 issues for determination which were included in his summation of the issues while considering the said Partial Consent. Further, since the Consent only reduced the total amount claimed in respect of Fee Note No. 8, it was not beyond the Arbitrator’s scope to determine the element of interest that had not been captured in the Consent.

12. My findings above lead me to conclude that the Applicant has failed to satisfy the grounds necessary for the court to refuse to recognize and enforce the Award under **section 36** of the ***Arbitration Act***.

### **Conclusion and Disposition**

13. In the upshot, the Applicant’s application dated 20<sup>th</sup> December 2024 is struck out for being time barred. The Respondent’s application dated 17<sup>th</sup> January 2025 is allowed on terms that the Final Award published by **Anthony M. Lubulellah** on 13<sup>th</sup> August 2024 be and is hereby recognized as binding and leave be and is hereby granted to the Respondent to enforce it as a decree of this court. The Applicants shall bear the costs of both applications assessed at Kshs. 70,000.00/=.

**DATED SIGNED and DELIVERED virtually at NAIROBI this  
1<sup>ST</sup> DAY of DECEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Wangari holding brief for Mr. Shago for the Applicant.
2. Ms. Maina holding brief for Mr. Njuru for the Respondent.
3. Ivan - Court Assistant

ORIGINAL