REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMARB NO. E094 OF 2024

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995 AS AMENDED IN 2009 AND THE RULES THERETO

-AND-

IN THE MATTER OF AN ARBITRATION CAUSE

-BETWEEN-

BATA SHOE COMPANY (K) LIMITED..…….....APPLICANT

-AND-

YETU LEATHER LIMITED…….……..…….RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 16th December 2024 filed by the applicant pursuant to the provisions of Sections 17(3) & 35 of the Arbitration Act, 1995, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Rule 51 of the Chartered Institute of Arbitration (Kenya Branch) Arbitration Rules and all other enabling provisions of the law. The applicant prays for orders that the Arbitral Award delivered on 19th September 2024, together with all consequential orders be reviewed, varied, or set aside, and that this Court finds that the dispute giving rise to the Arbitral Award did not arise from any Arbitration Agreement between the parties herein.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Kenneth Amdany, the

applicant company's Internal Audit Manager. Mr. Amdany averred that the parties herein entered into an Agreement dated 1st November 2014, for leather upper cutting and stitching of footwear components, which ran for five years up to 31st October 2019. He stated that the terms of the Agreement restricted its scope strictly to what was expressly provided therein. He further averred that in 2015, the respondent entered into a separate arrangement for the supply of complete/full uppers giving rise to orders through Local Purchase Order (LPOs), which resulted in financial losses to the applicant.

3. Mr. Amdany deposed that the respondent filed a claim before the Arbitral Tribunal, but the applicant objected to the Tribunal's jurisdiction, save for the claim of Kshs.719,990.85 under the original contract. He contended that the Arbitral Tribunal acted beyond its jurisdiction by adjudicating on disputes arising from a separate Agreement without the applicant's consent, misapplied the law, granted reliefs not pleaded, wrongly found misrepresentation and undue influence, and set aside an Agreement that was not before the Tribunal. Mr. Amdany contended that the Arbitral Award falls outside the scope of the 2014 labour contract and is therefore invalid. He expressed the view that enforcing the Award would cause substantial prejudice to the applicant, whereas setting it aside would not prejudice the respondent.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 23rd January 2025 by Mr. Kihia Mwangi, a Director of the respondent company. Mr. Mwangi averred that the parties herein executed an Agreement dated 1st November 2014 for leather upper cutting and stitching of footwear components, which Agreement contained a binding arbitration clause, at Clause 22. He further averred that the parties herein later executed an Agreement dated 28th March 2018, to establish a repayment plan, which Agreement amended the

2014 Agreement, and that the latter Agreement provided for supply of uppers from third-party leather. He affirmed that all other terms including the arbitration clause, remained enforceable. Mr. Mwangi contended that the applicant deliberately omitted the 2018 Agreement from its bundle of documents, yet it formed the basis of the arbitral proceedings.

5. He averred that the respondent's claim before the Arbitral Tribunal was premised on allegations that the 2018 Agreement was induced by fraud, misrepresentation, undue influence and corruption, and that pursuant to it, the applicant unlawfully deducted Kshs.22,400,000/= from the respondent's payments.

6. Mr. Mwangi deposed that arbitration proceedings commenced under the arbitration clause in the 2014 Agreement and the prayer for refund was pegged on the validity of the 2018 Agreement. He stated that the applicant participated in the arbitration, filed a statement of defence and raised a defence of *sub judice* but not jurisdiction as a preliminary issue, contrary to the provisions of Section 17(2) of the Arbitration Act. Mr. Mwangi asserted that by participating in the proceedings without timely objection, the applicant waived its right to challenge jurisdiction under Section 5 of the Arbitration Act, and that the Arbitral Tribunal correctly assumed jurisdiction and determined the dispute before it.

7. The applicant filed a further affidavit sworn on 7th February 2025, by Mr. Kenneth Amdany, the applicant's Internal Audit Manager. He deposed that the Agreement of 1st November 2014, was amended by the Agreement of 28th March 2018. He indicated that right after the Agreement of 2014, the parties herein got into another Agreement in 2015 totally different from the 2014 Agreement and guided by respective LPOs for the supply of full leather uppers. He stated that the said Agreement was to the effect that the applicant would

inspect and approve the quality of the said products, and confirm that the other conditions had been met.

8. Mr. Amdany contended that the bone of contention between the parties was as a result of the actions and/or omissions of the respondent herein towards the 2015 Agreement, which did not carry an arbitration clause, and that since seeking to enforce a clause that did not exist in a contract is unfounded in law, the applicant filed this Appeal.

9. He averred that the respondent in its pleadings before the Arbitrator expressly stated that it was not reliant on the Agreement dated 28th March 2018, and made it the subject of the suit as per the statement of claim dated 14th September 2023.

10. He contended that the respondent has now changed tact and admitted that there was existence of the said Agreement and that the same was entered into by both parties and of importance to note, is the fact that the respondent has seemingly abandoned its primary allegations against the applicant in relation to the Agreement dated 28th March 2018, as seen in successive clauses and statements made.

11. Mr. Amdany averred that the respondent did not produce any evidence that indeed there was a report made after the alleged coercion and fraud and if there was coercion, the respondent's representatives ought to have reported the same after leaving the place where the contract was signed, but there was no evidence of such a report having been made.

12. He contended that the respondent cannot change its position by stating that it was owed Kshs.22,400,000/= from a contract that was not operational at the time (2014 agreement), while it admitted that it operated on a separate and

distinct Agreement (2015). That in its demand letter the respondent clearly stated *"accrued from deliveries made under the supply of ready uppers…."*

13. He deposed that from its pleadings, the respondent stated and admitted that its scope extended to supply of ready uppers, which was not in the 2014 Agreement. He asserted that the allegation that the dispute arises from the 2014 and 2018 contract is false and unfounded, a fact that the respondent itself admits when convenient and abandons when it is not convenient for it.
14. Mr. Amdany averred that the issue of sourcing was clear that the respondent was meant to source the leather from the applicant's tannery, and upon default that had been even flagged by consumer protection authorities, it was discovered that the respondent was in breach.
15. He contended that the respondent raised the issue of jurisdiction at the preliminary hearing of the matter, and in its pleadings, as well as in highlighting, of submissions, and by stating that a similar matter had been filed at the Chief Magistrate's Court at Kiambu under **MCC E106 OF 2022**. He asserted that the allegation that the issue of jurisdiction only came up at submissions is false.
16. The instant application was canvassed by way of written submissions. The applicant filed written submissions dated 13th February 2025 through the law firm of Daniel Henry & Co. Advocates. The respondent's submissions were filed on 28th February 2025 by the law firm of COL Advocates LLP.
17. Mr. Gachau, learned Counsel for the applicant gave a brief background to the dispute by stating that the crux of the suit is based on allegations of breach of contract by the applicant as against the respondent and a refund of Kshs.22,400,000/=. He further stated that the matter was taken before the Arbitrator on the premise and belief that there existed an arbitration clause to

warrant the action taken by the respondent to get the matter before the Arbitrator.

18. He stated that on 1st November 2014, parties got into an Agreement wherein the respondent was tasked with cutting and stitching uppers and footwear components. He further stated that in 2015, parties got into another arrangement wherein the scope of the respondent's obligation was increased to supply of ready uppers to the applicant, provided that the respondent sourced the leather from the applicant's tannery. He indicated that the said arrangement was not written, but the parties adhered to the terms therein.

19. Mr. Gachau submitted that the 2015 arrangement was informed by quotations and the resultant LPOs, which means that every time the respondent made a supply and a quotation was raised, it would form a distinct and separate agreement, from the one of 2014.

20. Counsel stated that on 22nd March 2018, parties got into another Agreement which was a variation to the 2014 Agreement, to the extent of payment and costing schedule. He submitted that the 2018 Agreement took into consideration acts between the period of October 2016 to March 2018. He indicated that the significance of the said period is that during the pendency of the 2015 arrangement, a complaint was raised by the oversight authorities in regard to the quality of the applicant's products. That upon investigation by the applicant, it realized that the respondent in cahoots with some employees of the applicant were circumventing the arrangement that all leather was to be sourced from the applicant's tannery. He stated that that instead of the respondent sourcing it from the applicant's tannery, it was sourcing from other third parties, which led to flagging of the product by the authorities, which means that the respondent was in breach of the arrangement of 2015.

21. Mr. Gachau cited the case of **Euromec International Limited v Shandong Taikai Power Engineering Company Limited** (Civil Case E527 of 2020) [2021] KEHC 93 KLR, where the Court emphasized on the importance of an arbitral clause in an agreement to vest jurisdiction on an arbitrator to hear a dispute. He also cited the provisions of Section 4 of the Arbitration Act. He stated that the LPOs and quotations resulting from the 2015 Agreement did not have an arbitral clause and the dispute should not have been dealt with, by the Arbitrator.

22. He submitted that the applicant filed its statement of defence elaborating the facts from the initial contracting with the respondent to the arrangement of 2015 and eventually, the 2018 Agreement, which was meant to vary the payment schedule. He contended that the respondent herein did not offer a rebuttal to the facts and the position advanced by the applicant despite being given time to offer a rejoinder. He asserted that in the event of failure to rebut the position of one party, that party's facts remain and ought to be construed as being agreed on.

23. On the respondent's contention that the applicant herein did not raise a Preliminary Objection, Mr. Gachau submitted that the said contention is untrue and unfounded. He submitted that the applicant raised the objection in its pleadings and it was the duty of the Arbitrator to scrutinize the pleadings and see the disparity in the Agreement from which the bone of contention arose, to look into the facts and determine if there was jurisdiction under Article 17 of the Arbitration Act. He relied on the case of **Nyutu Agrovet Limited v Airtel Networks Kenya Ltd**, to assert his argument.

24. Counsel submitted that one of the grounds for setting aside an Arbitral Award under Section 35 of the Arbitration Act is lack of an arbitration agreement, and

argued that the jurisdiction of the Arbitrator should not have been invoked since there was no arbitration agreement. He relied on the case of **Synergy Credit Limited v Cape Holdings Limited** NRB CA Civil Appeal No, 71 of 2016 [2020] eKLR, and the case of **Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited ML** HC Misc Application No. 129 of 2014 [2015] eKLR, on the importance of Arbitrators to confine themselves to the terms of arbitration agreements.

25. Mr. Gachau further submitted that the uncertainty and unwavering positions presented by the respondent ought to have called the mind of the Arbitrator to get the actual and not proceed in the face of the wavering positions which the respondent changed when it found it fit to do so. The changes in goal posts and the evidently different positions in terms of the operative agreement ought to have called for a preliminary look into the facts, and the Arbitrator would have noted that he lacked jurisdiction.

26. In making reference to Sections 35 and 27 of the Arbitration Act, Counsel stated that one of the grounds for review or setting aside of an Arbitral Award is lack of jurisdiction and another ground is if it is found that the prayers sought in the statement of claim were never substantiated and proved. He submitted that the prayers sought by the respondent were never proved to the standard required in law. Referring to the decision by the Arbitrator, Counsel indicated that the finding was that there was misrepresentation and undue influence on the part of the applicant and he based his decision on the allegation that the respondent's witness had only stated during the hearing that he had been threatened.

27. Counsel contended that the ingredients that constitute misrepresentation and undue influence were never met by the mere allegation by the respondent's witness. Furthermore, that a mere statement by a witness in the dock cannot be

taken as the gospel truth without evidence to corroborate or substantiate the same.

28. In winding up his submissions, Mr. Gachau submitted that on the allegation of undue influence, the applicant did not have an upper hand that would unconscionably be used to arm twist the respondent and that the ingredients of undue influence were never met. He asserted that the applicant was not the dominant party in the relationship between the parties, and it did not use its position to influence the Agreement. He stated that the transaction and consequent 2018 Agreement was never strange in the circumstances, and that the execution of the said Agreement could not have been strange. He prayed for review and the setting aside of the Arbitral Award.

29. Mr. Otieno, learned Counsel for the respondent relied on the Supreme Court case of **Synergy Industrial Credit Limited v Cape Holdings Limited** [2019] KESC 12 (KLR) and submitted that the Arbitral Tribunal is the primary forum for determining disputes submitted to arbitration, whereas the High Court's role under Section 35 of the Arbitration Act is limited to addressing specific errors of the law. He argued that the applicant never pleaded or raised any objection to the Arbitral Tribunal's jurisdiction during the proceedings. That the applicant did not file a Preliminary Objection or plead lack of an arbitration agreement in its statement of defence, but instead raised jurisdiction belatedly in its final submissions, which the Arbitrator noted with surprise at paragraph 36 of the Award.

30. Counsel cited the case of **PT Prima International Development v Kempinski Hotels SA and others- Appeal** [2012] SGCA 35 and the Court of Appeal case of **Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar** [2000] KECA 14 (KLR) and argued that issues not pleaded cannot be

raised later or on appeal without leave of the Court. Mr. Otieno stated that under Section 17(2) of the Arbitration Act, any objection to jurisdiction must be raised no later than the filing of the statement of defence. He referred to the case of **Assa Abloy (E.A.) Limited v Top Security Systems Limited** [2021] KEHC 194 (KLR) and further stated that since the applicant failed to comply with the provisions of Section 17(2) of the Arbitration Act, it was deemed to have waived its right to challenge the Tribunal's jurisdiction under Sections 5 & 17 of the Arbitration Act as correctly noted by the Arbitrator in his Final Award and that the applicant is estopped from challenging the Arbitral Award on jurisdictional grounds.

31. Mr. Otieno submitted that the Agreement dated 1st November 2014 contained an arbitration agreement under Clause 22 and the repayment plan agreement of 28th March 2018 was an addendum to it, expressly preserving all terms of the 2014 contract, including arbitration. He further submitted that the respondent's claim was rooted in fraud, misrepresentation and undue influence surrounding the 2018 repayment plan, which was tied to the 2014 Agreement. He stated that since the arbitration clause broadly covered breaches of contract including those arising from fraud and misrepresentation, this Court should find that there was a valid arbitration agreement between the parties herein. Counsel cited the case of **Ramji Karman Holdings Limited v D. Manji Construction Limited** [2024] KEHC 8986 (KLR) and asserted that the applicant has not shown that the Arbitrator ventured beyond his mandate to warrant being granted the orders being sought herein.

ANALYSIS AND DETERMINATION.

32. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit

filed by the respondent, the further affidavit by the applicant and the written submissions by Counsel for the parties herein. The issue that arises for determination is whether the Arbitral Award made on 19th September 2024 should be set aside.

33. The High Court's jurisdiction in arbitration matters is limited, as the Arbitrator's findings of fact and interpretation of the contract between the parties are final. Consequently, the Court cannot entertain allegations of factual or legal error by the Arbitrator or interfere with such findings. This position is anchored on the provisions of Section 32A of the Arbitration Act, which provides 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.***

34. To this end, I am bound by the Supreme Court's position in the case of **Geo Chem Middle East v Kenya Bureau of Standards** [2020] KESC 1 (KLR), wherein it cited with approval the holding of the late Ochieng J., in a case between the same parties at the High Court, as follows -

> ***It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award … if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, <u>it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal.</u>*** (Emphasis added).

35. Section 17(2) of the Arbitration Act provides that an objection to the Arbitral Tribunal's jurisdiction must be raised no later than the filing of the statement of defence. From the pleadings and the Arbitral proceedings, the applicant did not challenge the Arbitral Tribunal's jurisdiction over the dispute between the parties herein before or at the time of filing its response to the respondent's claim. It instead brought it up belatedly in its submissions towards the tail end of the arbitral proceedings. The above notwithstanding, the Tribunal considered this issue in its Final Award from paragraphs 36 to 48 and held that the applicant had waived its right to challenge jurisdiction by failing to raise it at the appropriate stage. The applicant is therefore estopped and precluded from raising the objection at this late stage, particularly, having already filed pleadings, presented evidence, and made submissions with the full knowledge of its right to contest jurisdiction

36. This Court is cognizant of the provisions of Section 5 of the Arbitration Act which provides that in the event that a party is aware of a breach of the Arbitration Act or the arbitration agreement but continues with the proceedings without promptly objecting, or objecting within the set time limit, they are deemed to have waived their right to raise that objection later. As such, guided by the provisions of Section 5 of the Arbitration Act as read with Section 17(2) of the said Act, I am inclined to agree with the Tribunal's finding on the applicant's challenge to its jurisdiction.

37. This Court's jurisdiction to set aside an Arbitral Award is derived from Section 35 of the Arbitration Act. Section 35(2) of the said Act outlines the grounds upon which an Arbitral Award may be set aside. It states that –

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.

38. In the case of **Bomas of Kenya Limited v Standard Investment Bank Limited** [2023] KECA 544 (KLR), the Court of Appeal in addressing the import of Section 35 of the Arbitration Act, held as follows-

> ***By agreeing to arbitration, the parties limit interference by courts to the grounds set out in Section 35 of the Act. By necessary implication they waive the right to rely on any further grounds of review, 'common law' or otherwise. Section 35 (1) of the Act provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsection (2).***

39. In the instant application, the applicant's case is that the Arbitral Award made on 19th September 2024 should be set aside since the dispute giving rise to the Award did not arise from any arbitration agreement between the parties. I am persuaded that this ground falls squarely within the provisions of Section 35(2)(a)(iv) of the Arbitration Act, reproduced above herein. In the circumstances, it is my finding that this Court's jurisdiction to set aside the impugned Arbitral Award has been properly invoked.

40. The record reveals that the parties herein entered into an Agreement dated 1st November 2014 for leather upper cutting and stitching of footwear components, which was to run for five years up to 31st October 2019. It is also not disputed that the parties herein entered into another Agreement dated 28th March 2018 to establish a repayment plan. The Agreement dated 1st November 2014 had an arbitration agreement under Clause 22 which states that –

> ***Any dispute or difference arising between the parties regarding the meaning, construction, interpretation, breach or fulfilment or non-***

> ***fulfilment of the terms and obligations of this Agreement or any clause or condition thereof which cannot be settled amicably shall be referred to a single arbitrator appointed by the chairman for the time being of the Kenya branch of the Institute of Arbitrators. The award of finding of any such arbitrator shall be final and binding on the parties and the arbitration shall take place in Nairobi.***

41. This Court notes that although the applicant averred that in 2015, the parties herein entered into a separate arrangement for the supply of complete/full uppers through local purchase orders, which caused it financial losses, neither party has furnished evidence of such an Agreement. The applicant contended that the Agreement was verbal. It is this Court's considered view that the applicant is not being candid, because the Agreement of 2014 was to run up to 31st October 2019.

42. The respondent exhibited the Agreement dated 28th March 2018 which established a repayment plan. The applicant however contends that the 2015 arrangement which formed the basis of the respondent's claim before the Tribunal, did not contain an arbitration clause. It asserted that the Arbitral Tribunal exceeded its jurisdiction by adjudicating disputes arising from a separate agreement without its consent, misapplied the law, granted reliefs not pleaded, wrongly made findings of misrepresentation and undue influence, and set aside an agreement that was not properly before it.

43. In making a determination in this case, this Court can only be guided by the documents relied on at the Tribunal, and not otherwise. I am therefore guided by the 2014 Agreement and the repayment plan Agreement of 2018. On perusal of the latter Agreement, it provides that -

> ***This repayment plan Agreement amends and modifies the Payment & Costing Schedule of the Agreement for the Leather Upper Cutting and Stitching of Footwear Components and Uppers dated 1st November, 2014.***

44. From the above clause, I hold that the Agreement to establish a repayment plan dated 28th March 2018 cannot be read in isolation but must be read with the Agreement dated 1st November 2014, as its scope was limited to the amendment and modification of the payment & costing schedule as provided for in the Agreement dated 1st November 2014. Further, the said Agreement expressly provides that -

> ***Yetu Leather Limited further acknowledges that all the terms of the Leather Upper Cutting and Stitching of Footwear Components and Uppers dated 1st November, 2014 remain enforceable except as amended herein.***

45. Given the said circumstances, I am inclined to agree with the respondent that the arbitration clause provided for in the agreement dated 1st November 2014, equally extended to any dispute or difference arising between the parties regarding the meaning, construction, interpretation, breach or fulfilment or non-fulfilment of the terms and obligations of the Agreement to establish a repayment plan dated 28th March 2018.

46. In **Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others** [2005] KEHC 1267 (KLR), the Court observed as follows:

> ***In order to succeed (in showing that the matters objected are outside the scope of the reference to arbitration) the application must show***

beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute.

47. It therefore follows that in addressing the dispute arising from the repayment plan, the Arbitral Tribunal did not exceed its jurisdiction. Consequently, the applicant's contention that the Tribunal acted beyond its jurisdiction by adjudicating disputes arising from a separate agreement without the applicant's consent, misapplied the law, granted reliefs not pleaded, wrongly found misrepresentation and undue influence, and set aside an agreement that was not before the tribunal, cannot be sustained.

48. The upshot is that the application dated 16th December 2024 is not merited. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** on this **13th** day of **February 2026. Ruling delivered through Microsoft Teams Online Platform.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the applicant

Mr. Otieno for the respondent

Mr. Kimutai – Court assistant.