Merdin & 2 others v Mbaya & 2 others (Civil Application E638 of 2025) [2026] KECA 207 (KLR) (6 February 2026) (Ruling)

Neutral citation: [2026] KECA 207 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E638 OF 2025

DK MUSINGA, F TUIYOTT & AO MUCHELULE, JJA

FEBRUARY 6, 2026

BETWEEN

ADNAN MERDIN ..... 1ST APPLICANT

CENK TERZIOGLU ..... 2ND APPLICANT

ELIF TERZIOGLU MERDIN ..... 3RD APPLICANT

AND

ANDREW KIKUYU MBAYA ..... 1ST RESPONDENT

NEHEMIAH ROTICH ..... 2ND RESPONDENT

MEKAN EAST AFRICA LIMITED ..... 3RD RESPONDENT

(Being an application for leave to appeal to the Court of Appeal against the Ruling of the High Court of Kenya (J. W. W. Mongare, J.) dated 28th October 2025 and stay of execution and or enforcement of the award recognized as a decree of the Court in HCCOMMARB NO. E005 OF 2022)

RULING

1. The notice of motion dated 3rd November 2025 is for leave of this Court to the applicants to lodge an appeal to this Court against the rulings and orders made on 28th October 2025 in HCCOMMArb/ E005/2022, Adnan Merdin & 3 Others vs Andrew Kikuyu Mbaya & 2 Others, one dismissing the applicants' notice of motion brought under section 35 of the *Arbitration Act* (the Act) and the other allowing the respondents' chamber summons under section 36 of the Act for recognition and enforcement of an award. Tucked in there is a third prayer for stay of execution of the impugned orders pending the hearing and determination of the intended appeal.

2. Germane to the motion before us is the following abridged background.

3. Parties herein were engaged in arbitration proceedings before an Arbitral Tribunal constituted of Mr. Anthony Milimu Lubulellah who, upon conclusion of the proceedings, advised counsel for the parties, in a letter dated 27th February 2018, that the award was ready for collection upon payment of arbitration fees of Kshs.4,640,000/- less the deposit of Kshs.600,000/- already paid. Prior to the commencement of the arbitral proceedings, parties agreed that they would share fees and expenses of the Arbitral Tribunal on a 50:50 basis.

4. For reasons, not relevant for now, it was not until about 3 years 9 months later, on 12th December 2021, that the respondents paid their share of the fees and the award was collected by the parties on 14th and 15th December 2021.

5. Aggrieved by certain findings in the award, the applicants moved the High Court through an application filed on 14th January 2022 seeking to set aside the award. The application, predicated upon the provisions of section 35 of the Act, was met with a notice of preliminary objection on grounds that it was filed out of time contrary to section 35(3) of the Act.

6. In upholding the objection Monga're, J, in a ruling dated 28th October 2025, observed:

> "I therefore find and hold that "received" for purposes of the Act means notification by the Arbitrator that the award is ready for collection. Consequently, once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged 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 Act begins to run. Whereas the applicants have blamed the respondents for not paying their portion of the arbitrator's fees as the reason for the delay in physically receiving the award, I agree with the respondents that since the parties are responsible for paying the arbitrator, they cannot rely on the delay 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). 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. In the present case, the Arbitrator notified the parties on 27th February 2018 that the Award was ready for collection. This act of notification is the operative event that triggered the three-month period under section 35(3).
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> While the applicants' argument that a party should not benefit from their own wrong has moral force, the statutory limitation period is a strict procedural requirement. The applicants had the legal right to pay the entirety of the fees themselves to lift the lien and then seek reimbursement from the respondents, thus safeguarding their right to apply to set aside the award within the statutory timeframe. Their failure to do so, for over three years, cannot serve to postpone the mandatory limitation period and the existence of an arbitrator's lien under section 32B (3) does not also operate to suspend the said period."

7. Contemporaneously with upholding the objection, the High Court allowed the respondents' application dated 21st January 2022 seeking recognition and enforcement of the Arbitral Award. This was an application under section 36 of the Act.

8. It is this state of affairs that triggered the filing of the current motion before us.

9. We are urged that the motion meets the constricted criteria set out by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators- Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR) for grant of permission to appeal as the trial judge erred

in law in considering that the respondents foundation for seeking to benefit from their own wrong has only a 'moral force"; in not appreciating that the respondents tactical strategy was to pay the fees only when assured that the award was in their favour; in deeming an award which is withheld by an arbitrator under a statutory lien under section 32B(3) is also 'received' by a litigant, a contradiction in terms; in failing to find that the respondents' acts were calculated to defeat the applicants' fundamental rights of access to justice as set out in Article 48 of *the Constitution*; in not appreciating sufficiently or at all that the determination will mean that the applicants' legitimate legal grievances will therefore never be considered by the Court; whereas section 35(3) specifies that a motion "may not" be made after the expiry of 3 months from the date the party "had received the arbitral award", the trial judge erred in construing it as a statutory limitation notwithstanding authorities brought to her attention; and in allowing the application for recognition and enforcement not because it was in accordance with the legal requirements but because of the striking out of the applicants' motion.

10. The motion was opposed through a replying affidavit sworn on 10th November 2025 by Nehemiah K. Rotich, the 2nd respondent. Shorn of what may not be strictly relevant to the narrow matter at hand, the response is as follows. It is contended that: the motion before us is fatally defective for failing to attach the final award which is the subject matter of the intended appeal; since the ruling dated 28th October 2025 was delivered on merit of the preliminary objection, the arbitral process should end at the High Court, the parties having bound themselves to the process; it is scandalous and false to allege that it was the respondents' strategy to pay the arbitrators fees only when the award was in their favour; any party could collect the award from the Arbitrator and more so when the applicants had a successful counterclaim of Kshs.63,310,631 which was reduced by consent to Kshs.57,316,637 to recover part of fees paid to the arbitrator; the applicants are merely buying time hoping that the Court of Appeal will, in Civil Appeal No. 129 of 2020-University of Nairobi v Multiscope Consulting Engineers, make a decision to their advantage; the applicants are silent on the issue of security or any willingness to offer security knowing well that the respondents' decretal amount as at the end of the October 2025 amounted to Kshs.241,065,184; the applicant has failed to show that the High Court stepped outside the grounds set out under section 35 of the Act, a minimum test enunciated in Nyutu; the holding of the High Court that the application was time barred was correct; the three month limitation period under section 35(3) of the Act is strict and jurisdictional and once the statutory time lapses, the court is divested of jurisdiction; the principle that time limits under section 35(3) of the Act are mandatory has been affirmed in several authorities and the Court of Appeal has nothing more to add in that respect; and the applicant's attempt to obtain leave to appeal is a thinly veiled effort to evade the doctrine of finality in arbitration and to frustrate enforcement of a valid award, which undermines the very purpose of the statute, to ensure efficiency, certainty and minimal judicial interference.

11. At plenary hearing of the motion, learned senior counsel, Mr. Ngatia, appeared for the applicant while learned counsel, Mr Mereka, represented the respondents. Counsel made useful highlights of submissions they had filed on behalf of their clients. The submissions substantially follow the arguments and contentions we have already set out.

12. We have two sets of applications before us; two for permission to appeal and one for stay pending the hearing and determination of the intended appeal. As a matter of logical sequence, the former should be considered and determined first.

13. The window to appeal from the decision of the High Court determining a setting aside application under the provisions of section 35 is narrow and grantable only in exceptional circumstances. The

straitjacket was imposed in Nyutu Argovet Limited (supra) in the following passage, which will be referred to in years to come;

> "In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."

14. By parity of rational, similar principles, no doubt, extend to when permission can be granted to appeal from the decision of the High Court and courts of similar status to this Court in a determination made under section 36 of the Act for recognition and enforcement of an award.

15. Yet, before determining the substance of the applications for leave, we are called upon to resolve two preliminary issues: whether we have jurisdiction to hear the motion in the first place when the Award which is the subject of the appeal has not been attached to the application and; whether the applicants can urge and press the application when it partly succeeded in the arbitral proceedings from which the impugned Award emanates.

16. It is true that the Arbitral Award has not been attached to the motion before us, but that has to be inconsequential in the circumstances of the controversy at hand. What matters is whether, on the basis of the material before us, we can make an informed decision to grant or refuse leave. The ruling from which leave to appeal is sought did not deal with the substantive issues raised by the applicants as grounds to impeach the Award. It was on a preliminary objection as to whether or not the motion before the High Court was time barred in view of the provisions of section 35(3) of the Act. The ruling itself is attached to the affidavit in support of the motion and is therefore before us. In so far as the ruling does not touch on the merits of the motion seeking to set aside the award, the ruling alone is sufficient for us to make an enlightened decision as to whether or not to grant permission to appeal.

17. The next objection is based on estoppel. It is common ground that before the Arbitral Tribunal, the applicants succeeded in their counter claim of Kshs.57,674,568.00 which was to be deducted from the sums due to the respondents. It is argued by the respondents that in so far as the application says nothing of this partial success, then to insist on the current motion is to approbate and reprobate. Not much can turn on this objection. The applicants had sought to set aside the Award on, amongst other grounds, that the Award in favour of the respondents violated well established principles of company law and against public policy. It has not been demonstrated to us that merely because part of the Award was in favour of the applicants then they cannot maintain the argument that the Award, indeed the substantial part, is contrary to public policy.

18. Turning now to the merit of the application, at the heart of the matter before the High Court was the interpretation and application of section 35(3) of the Act:

> "(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."

19. No doubt there are a host of High Court decisions, amongst them University of Nairobi v Multiscope Consultancy Engineers Limited [2020] KEHC 9696 (KLR), Lantech (Africa) Limited v Geothermal Development Company [2020] KEHC 10419 (KLR), Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited [2021] KEHC 6762 (KLR) and Will Developers And Construction Limited v Government of the Republic of Kenya Permanent Secretary, Vocational Training, Ministry of Education, Science and Technology & another [2021] KEHC 6842 (KLR) which have held that "received" for purposes of section 35 of the Act simply means notification by the Arbitrator to the parties that the award is ready for collection.

20. The result of this interpretation has substantial ramifications because, once a setting aside application is found to be time barred, then a party cannot access the setting aside remedy available under section 35. Arguments have been made by the applicants, which are not frivolous, that the consistent reading of this provision by the High Court is erroneous and needs to be tested before this Court, and we agree. While it is true that the guideline in Nyutu is that leave will be granted when the High Court "has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties", this test must be construed, without letting down the guard, to also mean that leave will be granted where the High Court has refused to set aside an arbitral award or declined to entertain a setting aside motion in a manner that is manifestly and plainly wrong, and in so doing, has closed the door of justice to the applicant.

21. At this stage we have to be measured not to comment on the merit of the intended appeal, yet we entertain no doubt that, given the ramifications of the interpretation on the access to justice, the issues raised in the intended appeal deserve to be exhaustively canvassed and considered at the appellate level. In reaching this decision, it is of comfort, somewhat, that permission was granted in similar circumstances in University of Nairobi v Multiscope Consulting Engineers [2020] KECA 376 (KLR) when this Court stated: -

> "(18) An issue has been raised by the applicant regarding the interpretation of section 35(3) and this is a jurisprudential issue that ought to be addressed. The striking out of the applicant's motion has also resulted in the applicant being shut out from the seat of justice, and there is an issue whether the learned Judge of the High Court properly directed himself in striking out the applicant's motion or whether the learned judge made a decision that is so manifestly wrong and which has completely closed the door of justice to the applicant. We find that these are exceptional circumstances and it is appropriate that leave to appeal to this Court be granted so that these pertinent issues are fully ventilated and addressed by the Court."

22. Just as it has done before, the High Court decided to hear the summons for setting aside together with that of recognition and enforcement. This approach saves on judicial time as the issues arising in those two sets of applications are invariably similar. In this matter, having determined the setting aside application on a preliminary objection, the learned judge proceeded to peremptorily allow the application for recognition and enforcement. In short thrift, the learned judge concludes:

> "Turning to the respondents' application for recognition and enforcement of the award, having struck out its application to set aside the same, it follows that nothing stops the Award from being recognized and enforced as an order of the court under section 36 of the Act."

23. It does not mean that merely because the setting aside application had suffered on jurisdictional misadventure then the recognition and enforcement award must automatically succeed. The High Court needed, still, to consider the grounds in opposition of recognition or enforcement raised by the applicants on merit. Only then could it be said that the application was determined within the purview of section 36 and section 37, which sets out grounds for refusal of recognition and enforcement. This serious and grave infraction means that the application for recognition and enforcement was allowed without a merit-based inquiry, thereby compromising the applicants' right to be heard on the grounds of refusal raised.

24. Having reached the decision that leave ought to be granted, we can now consider the application for stay. An order for stay of execution under the 5(2)(b) jurisdiction of this Court is granted where the applicant demonstrates that he/she has an arguable appeal and that failure to grant stay would render the intended appeal nugatory. An arguable appeal is one that, even though not assured of success, raises an argument that is not frivolous and therefore deserving of further interrogation at a hearing. On the second limb, nugatory must be interpreted not only to mean worthless, futile or invalid but also trifling and in addition, whether or not what is sought to be stayed, if allowed to happen, is reversible or damages will reasonably compensate the party aggrieved (see amongst others Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] KECA 378 (KLR)). The two conditions are conjunctive, one without the other counts for nothing.

25. In granting leave to appeal we must have necessarily reached the decision that the intended appeal is arguable and this first limb of stay need not detain us any further.

26. On the nugatory aspect, the dispute here involves a money decree which will only be stayed in the circumstances explained in Kenya Hotel Properties Limited v Willesden Investments Limited (Civil Application 322 of 2006) [2007] KECA 401 (KLR) as follows:

> " The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all. Hence the cases such as of Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd. – Civil Application No. Nai. 358 of 1999 (unreported) where it was held by this Court that if an applicant is compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable."

27. The applicants raise an apprehension that as the respondents have no known assets, restitution of any sums paid out to them will not be viable and the loss will not be compensable. Notwithstanding this direct averment, the respondents have not bothered to react, nay, to disprove it. We consequently find that the apprehension of the applicants that the intended appeal will be rendered nugatory if stay is not granted is well founded. In the circumstances, stay is deserved. Yet grant of stay need not prejudice the respondents more than is necessary. So that the current success of the respondents is also not put into jeopardy as the appeal is heard and determined, stay granted shall be conditional.

28. Ultimately, we allow the notice of motion dated 3rd November 2025 in terms of prayers 2 and 3. The intended appeal shall be filed and served within sixty (60) days of this order. We further grant stay of

execution and or enforcement of the Arbitral Award pending the hearing and determination of the intended appeal on condition that the applicants shall furnish a bank guarantee for the decretal sum within sixty (60) days hereof. Costs of the application shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2026.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR .