REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMARB NO. E100 OF 2024

ASTER AZURE LIMITED …….....1ST APPLICANT

COLIN THUMBI MUNDIA …….…….... 2ND APPLICANT

ELIZABETH NYAGUTHII MAINA……...3RD APPLICANT

-VERSUS-

BROADWAY BAKERY LIMITED …….……. RESPONDENT

RULING

1. The respondent herein filed a Notice of Preliminary Objection dated 16th April 2025, seeking to have the *"application"* dated 20th December 2024, struck out on grounds that-

    1) The applicants have moved Court vide a letter dated 20th December 2024 raising six grounds of Appeal against interim Award No.1 made and published on 22nd November 2024 by Hon. Collins Namachanja, Sole Arbitrator. The letter does not an affidavit (sic) containing grounds for setting aside. The mode of constituting the application is unknown as it is neither provided for in the Civil Procedure Act, Civil Procedure Rules or the Arbitration Act or the Rules made thereunder. Indeed, Rule 7 of the Arbitration Rules provides-

        "7. *An application under section 35 of the Act* ***shall be supported by an affidavit specifying the grounds on which the party seeking to settle aside the arbitral award*** *and both* ***the application***

and affidavit *shall be served on the other party and the arbitrator*."

2) Under the Civil Procedure Act, a "letter" is not mentioned anywhere as a mode of instituting a suit in Kenya. **Section 2 of the Civil Procedure Act** defines **"pleadings"** as to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of defendant. A letter is not among the modes of instituting a suit;
3) Under **Section 35(1) of the Arbitration Act,** a party dissatisfied with a decision of an Arbitral Tribunal has to file an application at the High Court seeking to set aside the award made and published by the Arbitral Tribunal. The pleading before the Court does not conform to the nature of an application to which the Court can grant any orders as it is an appeal disguised as an application for setting aside. **In Kikenni Properties Limited & another v Vipingo Ridge Limited** [2021] eKLR, the Court held *inter-alia*:

"An application for setting aside an Arbitral Award is envisaged by Section 35 of the Arbitration Act and it is not an appeal from the Arbitral award. On considering an application for setting aside an Arbitral Award, the Court exercises original jurisdiction as opposed to appellate jurisdiction.

In **Cape Holdings Ltd v Synergy Industrial Credits Ltd** [2016] eKLR the Court held that:

> ***"The Court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this Court is not sitting on an Appeal from the decision of the Arbitrator when considering whether or not to set aside the award."***

4) Suffice to add, the letter does not clearly state the grounds for setting aside an arbitral award as provided for under Section 35(2) of the Arbitration Act. The grounds stated in the irregular pleading are grounds for appeal and not grounds for setting aside as provided for under Section **35(2) of the Arbitration Act**. In **Godson Sixty One School Limited v Symbion Kenya Limited** (Civil Appeal 158, 159 & 160 of 2020 (consolidated) [2023] KECA 900 (KLR) (24 July 2023) (Judgment), the Court of Appeal held *inter-alia* as follows:

> *28. In terms of the above provision, an award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act. The parties before us had not agreed otherwise, so, the appellant could not benefit from the above exception. The import of the above provision is that the award could only be set aside in the manner provided under the Act.* ***The grounds for setting aside an award are provided under Section 35 of the Act, which is the exclusive recourse to a Court against an arbitral award. Accordingly, purporting to review the decision and seeking to substitute the award with an order setting aside the award in a manner not contemplated by Section 35 is an illegality****. This is because the procedure adopted and the prayers sought offended the clear provisions of Sections 10, 32A and 35 of the Act […]*
>
> *45. Undeniably, for a long time, the issue whether a right of appeal accrues automatically from decisions of the High Court under Section 35 of the Act remained contentious and unsettled by our Courts. Section 35 provides that recourse to the High Court against an arbitral award in through an application for setting aside the award. Upon such an application, the High*

Court may set aside the award if any of the grounds listed in Section 35(2)(a) of the Act are proved. The grounds are:

(a) a party to the arbitration agreement was under some incapacity

(b) the arbitration agreement is not valid under the law to which the parties have subjected it or the laws of Kenya

(c) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings.

(d) arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration.

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

5) The letter is inviting the Court to exercise appellate jurisdiction over the Arbitral Tribunal in clear violation of Section 35 of the Arbitration Act. In **Mahan Limited v Villa Care ML** [2019] eKLR, Court was emphatic that under Section 35, the Court does not exercise appellate jurisdiction. Further, as held in **DB Shapaya and Co. Ltd v Bish International BV** (2) [2003] 2 EA 403, errors of facts or law cannot be a ground for setting aside an award and relies on (sic);
6) Court lack jurisdiction (sic) to issue any substantive orders based on a pleading unknown in law and that is not compliant with the Arbitration Act and the Rule made thereunder; and
7) The respondent thus prays that the entire “pleading’ be struck out with costs to the respondent.

2. The Notice of Preliminary Objection proceeded for hearing by way of written submissions. The respondent's submissions dated 1st October 2025, were filed by the firm of Wamae & Allen LLP Advocates. Mr. Kigata, learned Counsel for the respondent cited the provisions of Section 35 of the Arbitration Act and submitted 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). He stated that the mode adopted by the applicants for setting aside the Arbitral Award is unknown as it is neither provided for in the Civil Procedure Act, the Civil Procedure Rules, 2010, or the Arbitration Act or the Rules made thereunder.
3. He made reference to Rule 7 of the Arbitration Rules which provides that an application under Section 35 of the Act shall be supported by an affidavit specifying the grounds upon which the party seeking to set aside the Arbitral Award, and that both the application and affidavit shall be served on the other party and the arbitrator.
4. Mr. Kigata submitted that under the Civil Procedure Act, a letter is not mentioned anywhere as a mode of instituting a suit in Kenya. He termed that the mode of instituting the application herein is irregular and stated that failure to adhere to the mode of instituting it is not a mere technicality which can be cured by Article 159(2)(d) of the Constitution, which is not a panacea to all procedural irregularities. Counsel relied on the case of **Julieta Marigu Njagi v Virginia Njoki Mwangi & another** [2022] KEELC 407 (KLR), where the Court held that Article 159(2)(d) of the Constitution cannot be invoked to cure failure to adhere to provisions of the law.
5. Mr. Kigata contended that the "*pleading*" before the Court does not conform to the nature of an application to which the Court may grant any orders as it is an appeal disguised as an application for setting aside. He

cited the case of **Kikenni Properties Limited & another v Vipingo Ridge Limited** (supra), to support his argument.

6. In addition, Counsel pointed out that the letter does not state the grounds for setting aside an arbitral award as provided for under Section 35(2) of the Arbitration Act. He referenced the case of **Godson Sixty One School Limited v Symbion Kenya Limited** (supra), which states that no recourse is available against the award otherwise than in the manner provided by the Act.
7. Mr. Kigata stated that the letter is inviting the Court to exercise appellate jurisdiction over the Arbitral Tribunal in clear violation of Section 35 of the Arbitration Act. He cited the case of **Mahan Limited v Villa Care ML** (supra), where the Court was emphatic that under Section 35 of the Arbitration Act, the Court does not exercise appellate jurisdiction. He also cited the case of **DB Shapaya & Co. Ltd v Bish International BV (2)** (supra), where the Court stated that errors of facts or law cannot be a ground for setting aside an Arbitral Award.
8. Counsel stated that this Court lacks jurisdiction to issue any substantive Order based on a pleading unknown in law. He prayed for the entire *"pleadings"* to be struck out with costs to the respondent.
9. The applicants' submissions dated 21st July 2025 were filed by the law firm of Benedict Odhiambo Oloo & Co. Advocates. In justifying the mode used to move the Court for the setting aside the impugned Arbitral Award, Mr. Oloo, learned Counsel for the applicants stated that on 23rd December 2024, the applicants logged into the High Court Commercial Judicial Portal which the Court summarized for a party to file the setting aside of Arbitration Awards, which requirements are an application or letter, an affidavit, certified copy of an Arbitration Award and decree or order.

10. He further stated that when the applicants uploaded the letter on the Court Portal, an invoice from the CTS was generated, leading them to pay Kshs.10,000/=, and a receipt No. A-0406353 dated 23rd December 2025 was issued. He further stated that the applicants were given tracking No. Z89B2024 and that is the reason why the matter is in Court today. Counsel indicated that the letter dated 20th December 2024 to the Deputy Registrar for setting aside the arbitral award is supported by an affidavit dated 23rd May 2025.
11. Mr. Oloo submitted that while ordinarily an application to set aside an Arbitral Award is made via Notice of Motion, the Judiciary Portal itself allowed filing via *"application or letter"*. He asserted that the filing substantially complied with Court directions and platform protocols.
12. He stated that Article 159(2)(d) of the Constitution protects the applicants from being punished for the procedural form where substance and good faith exist. He contended that the method adopted by applicants can be cured by the filing of an affidavit. He submitted that Courts have repeatedly held that defects can be cured by proper supporting evidence, especially where no prejudice is caused.
13. Counsel contended that Section 35 of the Arbitration Act does not mandate the format of application or a letter. He relied on Section 3A of the Civil Procedure Act which empowers Courts to exercise inherent power to prevent abuse of process to achieve ends of justice. He also relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] E.A. 696, on what constitutes a Preliminary Objection.
14. Mr. Oloo submitted that the Court in this instance would have to engage in factual analysis by looking at the portal guidelines which makes the instant Notice of Preliminary Objection fail. He prayed for it to be dismissed with costs.

ANALYSIS AND DETERMINATION.

15. I have considered the Notice of Preliminary Objection filed by the respondent and the written submissions filed by the Parties' Advocates. The issue for determination is if the letter filed by the applicants herein seeking to set aside the Arbitral Award constitutes a valid application.

16. A Preliminary Objection was defined by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited** [1969] EA 696, as follows-

> ***So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of Court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

In the said case, Sir Charles Newbold P., stated thus -

> ***… the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.***
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> ***It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop."***

17. The Supreme Court of Kenya weighed in on the issue of Preliminary Objections in the case of **Aviation and Allied Workers Union Kenya v Kenya Airways Limited & 3 others** [2015] KESC 23 (KLR), and stated as follows-

> ***… thus, a Preliminary Objection may only be raised on a " pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts***.

18. In this instance, Mr. Oloo's contention is that the Preliminary Objection raised by the respondent herein is not valid as this Court has to look at what is provided on the High Court CTS portal in regard to the modes available to litigants who may wish to set aside Arbitral Awards.

19. I however do not agree with Mr. Oloo because even if the Judiciary CTS provides that the filing of a letter is one of the modes that can be resorted to in institution of setting aside of an Arbitral Award, such directions on the Judiciary CTS portal cannot supersede or replace the provisions of Section 35 of the Arbitration Act and Rule 7 of the Arbitration Rules. Any litigant, or Advocates representing litigants must be guided by the law.

20. Section 35 of the Arbitration Act provides the manner in which such an application can be brought to Court. It states as follows –

> ***(1) Recourse to the High Court against an Arbitration Award may be made <u>only by an application for setting aside under subsections (2) and (3)</u>.***
>
> ***(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;***

(ii) that the Arbitration Agreement is not valid under the law 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 the arbitrator or the arbitral proceedings or was otherwise unable to present his case; or

(iv) ……

(v) ……

(vi) ……

(Emphasis added).

21. Rule 7 of the Arbitration Rules provides for the mode by which applicants can make applications for setting aside arbitral. It states that –

> ***An application under Section 35 of the Act shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and arbitrator.*** (Emphasis added).

22. Bearing in mind the above provisions of the law, it is not legally sound for the applicants to urge this Court to find that the letter they filed with the intention of initiating the process of setting aside the Arbitral Award is properly on record.

23. If the legislature intended to have such applications commenced by way of letters, it could have expressly included the said requirement in Rule 7 of the Arbitration Rules. In my considered view, by providing that applications and affidavits should be filed in setting aside Arbitral Awards, the legislature intended to have a uniform and standardized procedure. It was not intended that Courts would be moved by way of letters, so as to make the orders that the applicant herein seeks.

24. Having considered the applicable provisions of the law, it is my finding that the applicant's letter dated 20th December 2024 to the Deputy Registrar, cannot be termed as an application to set aside the Arbitral Award.
25. That being the case, I hold that the respondent's Notice of Preliminary Objection is merited. Having so found, I cannot delve into the merits of whether or not the contents of the said letter can be equated to a memorandum of appeal as proposed by the respondent's Advocate.
26. In the result, the Preliminary Objection is hereby sustained, with the effect that the applicants' letter dated 20th December 2024 is hereby struck out. Costs are awarded to the respondent.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** on this **20th** day of **February 2026. Ruling delivered through Microsoft Teams Online Platform.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kigata for the respondent/applicant (In the Preliminary Objection)

Mr. Kongere Tom h/b for Mr. Oloo for the applicants/respondents

Ms B. Wokabi – Court Assistant.