Kenya Elctricity Generating Company Plc v Yashinoya Trading & Construction Company Limited (Miscellaneous Application E470 of 2025) [2026] KEHC 2835 (KLR) (Commercial and Tax) (26 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E470 OF 2025

F GIKONYO, J

FEBRUARY 26, 2026

BETWEEN

KENYA ELCTRICITY GENERATING COMPANY PLC ..... APPLICANT

AND

YASHINOYA TRADING & CONSTRUCTION COMPANY LIMITED ..... RESPONDENT

RULING

Two applications: s35 & 36 of Arbitration Act

1. Before me are two Applications; under s35 & 36 of *Arbitration Act* for setting aside and recognition of the award, respectively. These applications are the two sides of the same coin and should be determined together but starting with the one for setting aside and proceeding to the next. I will set out each application in order of the date of filing, and the arguments proffered in support or opposition of the applications in the first part.

Avoiding muddle-up

2. The 'hereafter' names of the parties shall be used, except the terms 'applicant' and 'respondent' has been or shall be used only where appropriate or is part of the text under consideration, to avoid muddling up the parties.

Recognition of award

3. The Application was made by Yashinoya Trading & Construction Co. Limited (hereafter Yasinoya) through the Chamber Summons dated 7th May 2025 expressed to be brought under Order 46 Rule 18

of the Civil Procedure Rules, Section 36(1) of the *Arbitration Act* and Rules 6 and 9 of the Arbitration Rules seeking to adopt and enforce the Final Award delivered by Dr Francis Kariuki Arbitrator on the 4th April 2025 as a Judgment and decree of the Court.

4. The application is based on the grounds laid out in the body of the application, the supporting affidavit sworn by the applicant's director, Sammy Ngángá George, on 7th May 2025. It also filed written submissions dated 9th June 2025.

5. The respondent in the application opposed the application through the Replying Affidavit sworn by its legal manager on 19th May 2025 and written submissions dated 16th June 2025.

Setting aside application

6. The Application was made by Kenya Electricity Generating Company Plc (hereafter Kengen) in a Notice of Motion by the Respondent dated 13th May 2025 brought under Section 35 (2)(a)(iv) and Section 35 (2)(b)(ii) of the *Arbitration Act* and Rules 7 and 11 of the Arbitration Rules seeking to set aside the Arbitral Award published on 4th April 2025.

7. This application is based on the grounds laid out in the body of the application, the supporting affidavit sworn by the applicant's director, George Ominde, on 13th May 2025. This Application was opposed by the respondent in the application vide the Replying Affidavit sworn on 27th May 2025.

Arguments and grounds by YASHINOYA

8. It was the YASHINOYA'A case that Sections 32A and 36 of the *Arbitration Act* establish that awards are final and binding, and must be recognized and enforced by the High Court unless limited statutory exceptions apply, thereby preventing endless challenges once parties have chosen arbitration as their dispute resolution mechanism.

9. They contended that it has fully complied with the procedural requirements under Section 36 by furnishing the arbitration agreement entered by the parties on 8th April 2019, the final arbitral award dated 4th April 2025, and proof of service upon the KENGEN. Consequently, the legal burden shifts to KENGEN. to demonstrate valid grounds for refusal of enforcement under Section 37, which sets out narrow and exhaustive exceptions such as invalidity of the agreement, lack of notice, jurisdictional excess, or public policy concerns.

10. It was further submitted that KENGEN has failed to establish any of these statutory grounds, as mere dissatisfaction with the award is insufficient. In line with the principle of minimal judicial intervention in arbitral matters, the court was urged to recognize and enforce the award, and to dismiss the KENGEN'S pending application to set it aside for lack of legal merit.

11. The YASHINOYA relied on: -

    a. Jambo Biscuits (K) Limited & 3 others versus Jambo East Africa Limited & 3 others [2021] eKLR

    b. Josef versus Golden Century Limited (Miscellaneous Application E581 of 2022 & E068 of 2023 (Consolidated)) [2024] eKLR

    c. Geo Chem Middle East Ltd versus Kenya Bureau of Standards [2020] eKLR

    d. Acorn Properties Limited versus Isaac Gathungu Wanjohi & 2 others [2019] Eklr

Arguments and grounds by KENGEN

12. KENGEN argued that the Tribunal exceeded its mandate by effectively rewriting the parties' contract. In particular, the Tribunal held that minutes of a meeting held on 30th January 2024 formed part of and were binding under the contract dated 8th April 2019, despite the contract expressly defining what constituted its terms and not including such minutes.

13. It argued further that by incorporating post-completion meeting deliberations into the contract and treating them as binding, the Tribunal altered the agreed terms, contrary to the principle that an arbitrator must interpret, not modify, the parties' agreement.

14. It further argued that the Tribunal improperly awarded additional costs and interest at 17% without any contractual or legal basis, even though the contract and procurement framework did not contemplate such payments, especially for delays attributed to the Respondent.

15. KENGEN maintained that this decision ignored statutory provisions, including procurement regulations prohibiting financial implications arising from contract extensions due to contractor delays, as well as constitutional principles on prudent use of public funds. Consequently, the award is said to misapply the law and contravene public procurement and finance regulations applicable to public entities.

16. Additionally, KENGEN faulted the Tribunal for acting beyond the scope of reference by failing to determine and apportion arbitration costs as required under the *Arbitration Act*, instead directing the filing of a Bill of Costs for assessment, which led to inflated and revised claims.

17. KENGEN asserted that these actions amount to an excess of jurisdiction, produce an award inconsistent with the contract, statute, and public policy, and therefore justify setting aside the award under Section 35.

18. KENGEN relied on: -

    a. Foxtrot Charlie Inc. v Afrika Aviation Handlers Limited & Another [2012] KEHC 4191 KLR

    b. Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A

    c. Kenya Post Office Savings Bank & another v The Advertising Company Limited & another [2017] KEHC 9959 (KLR)

    d. Evangelical Mission for Africa & another v Kimani Gachuhi & another [2015] KEHC 4518 (KLR)

    e. Jambo Biscuits(K) Limited & 3 others v Jambo East Africa Limited & 3 others [2021] KEHC 3209 (KLR)

    f. Associated Engineering Co v Government of Andhra Pradesh and Another 1992 AIR 232

    g. Airtel Networks Kenya Limited v Nyutu Agrovet Limited [2011] KEHC 778 (KLR)

    h. Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others [2014] eKLR.

Analysis and determination

19. Having analyzed the applications, respective responses, and the submissions as filed by the parties, the issues for determination are: -

a. Whether the arbitral award published on 4th April 2025 should be set aside or

b. Whether the Arbitral award published on 4th April 2025 should be recognized as binding and enforceable as a judgment of the court.

Setting aside award

20. Has KENGEN met the threshold for setting aside the arbitral award?

21. Section 35 sets out the grounds for setting aside an award as follows: -

> " 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."

22. KENGEN argued that the Arbitral Tribunal erred in holding that the *Public Procurement and Asset Disposal Act* was inapplicable to the contract dated 3rd April 2019, despite the contract having been awarded pursuant to Section 135(1) and (2) of the Act and its 2020 Regulations. It is further contended that the Tribunal disregarded key constitutional and statutory provisions governing prudent use of public funds, including Articles 201(d), 227(1), and 159(2)(c) and (3) of *the Constitution*, as well

as Section 30 of the *Public Finance Management Act*, which require that arbitration be conducted consistently with *the Constitution* and written law. As a result, KENGEN maintains that the award is inconsistent with *the Constitution* and applicable legislation, and therefore offends Kenya's public policy under Section 35(2)(b)(ii) of the *Arbitration Act*.

23. As the ground of public policy has been pleaded, I am content to cite Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A 366, that: -

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either
>
> (a) inconsistent with *the Constitution* or any other law of Kenya whether written or unwritten, or
>
> (b) inimical to the national interest of Kenya,
>
> (c) contrary to justice and morality".

24. The above position was buttressed in Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR.

25. It is clear from the foregoing that, public policy is a fluid and most imprecise term. Thus, ordinarily interpreted restrictively.

26. The ground of public policy will only succeed in setting aside an arbitral award only where there is clear evidence that the award contradicts *the constitution* or any law-written or unwritten, is detrimental to the national interest of Kenya, or is in direct opposition to principles of justice or morality, or is manifestly arbitrary and unfair. An applicant relying on this ground must specify the public policy relied on and the parts of and the manner the award is contrary to that public policy.

27. KENGEN pointed out Regulation 132(3) of the *Public Procurement and Asset Disposal Act* which provides;

> " The extension of contract period under section 139(2)(a) of the Act where delivery is delayed shall not have a financial implication."

28. In essence, the said Regulation stipulates that no financial implication is to arise from an extension of the contract period in cases of delay caused by the Contractor, thereby preserving the public interest and ensuring accountability in the use of public funds.

29. Notably, however, in the award, the Arbitrator at paragraph 16(e), having evaluated the evidence before him, found KENGEN liable for breach of contract. The Arbitrator found –

> " This is a clear admission of liability from the Respondent for the delays in the completion of the works. I therefore find and hold that the Respondent was in breach of Contract necessitating extension of time and is thus liable".

30. The Arbitral Tribunal, after assessment of evidence, found KENGEN and not YASHINOYA, to be in breach of contract, and therefore liable. The determination of the issue before the tribunal cannot, therefore, be said to be against public policy.

31. The 2nd issue that KENGEN pressed was that the Arbitral Tribunal has acted outside its mandate by rewriting a new contract on behalf of the parties and establishing in its Award Published on 4th April

2025, that the Minutes of the meeting of 30th January 2024 formed part of the Contract entered by the parties.

32. Conversely, YASHINOYA argued that the Tribunal did not exceed its mandate or re-write the contract. It interpreted the agreement in accordance with its express terms, considered the evidence properly before it, and issued its Award based on mechanisms already embedded in the contract.

33. YASHINOYA argued that the respondent should not be allowed to make a thinly veiled appeal against the Tribunal's findings on fact and contractual interpretation, an avenue not permitted under Section 35. According to them, this ground for setting aside the Award must fail.

34. On this issue, I do note that the Arbitrator explained in detail at paragraph 15.1 of the Award that;

> I have considered the rival submissions and pleadings by the parties on this issue. Clause 2 of the Contract between the Parties recognized one such meetings' minutes as essential in interpreting the Contract. Indeed, the minutes of the meeting held on 13th March 2019, predates the Contract between the Parties which was entered into on 8th April 2019. Additionally, sub-clause 21 of the General Conditions of Contract envisaged that such meetings would be necessary in resolving disputes.....
>
> evidently, from the foregoing, the Contract between the Parties did provide for meetings between the Parties, and those meetings were an essential tool for resolving disputes between the Parties out of the Contract including interpretation of the Contract. It is for this reason that one such meeting, the minutes of the meeting held on 13th March 2019, was included in clause 2 as an interpretative guide to the Contract, only second to the Contract itself in order of priority. Additionally, such meetings would play pivotal roles in addressing contract implementation issues, if any. It is in this light that one needs to appreciate that the minutes of the meeting held on 30th January 2024 were part of the Contract. It was also an essential meeting where Parties were in line with sub-clause 21 seeking amicable resolution to some of the issues that were plaguing the Contract implementation. According to the said minutes, the object was to explore amicable settlement for the Claimant's claim for additional costs submitted as a result of the extension of the term of the Contract. Moreover, a look at those minutes, shows that they are signed by eight (8) representatives from the Respondent and three (3) from the Claimant indicating that they intended to be bound by the deliberations. Consequently, I am inclined to disagree with the view taken by the Respondent's that the minutes of the meeting held on 30th January 2024 were not part of the Contract, not binding and were overtaken by events. I therefore find and hold that the minutes of the meeting held on 30th January 2024 were part of the Contract and are binding on the Parties.

35. The Arbitrator carefully reviewed all the terms of the contract and concluded that minutes of meetings provided for were a vital part of the contract and based on the evidence before him and his interpretation, he concluded that there were other meetings provided for under the contract which formed part of the terms of the contract and as such the meeting of 30th January 2024 was within the scope of the contractual terms. I see reason to interfere with this finding.

36. On the issue of costs, it was KENGEN'S position that the Tribunal went beyond the Reference and failed to conclusively determine the costs within the scope of the initial pleadings and agreed mandate, which was confirmed by the Arbitrator's own Order for Directions No.1 at paragraph 13. To them, this constitutes an excess of jurisdiction under Section 35(2)(a)(iv).

37. In the Final Arbitral Award, the Tribunal directed that KENGEN was to bear the Respondent's costs of the reference. Specifically, the Tribunal stated: -

> " The parties are at liberty to agree on the quantum of these costs. In the event the parties do not agree, the Claimant shall file a Bill of Costs before me for assessment. The Respondent shall file submissions in response to the Claimant's Bill of Costs within 7 days of receipt. The Tribunal shall thereafter prepare and publish an award on quantum of costs." (See paragraph 20(2), page 32 of the Arbitral Award.

38. Section 32B of the *Arbitration Act* provides as follows: -

> " Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5)."

39. This provision gives the Arbitrator the mandate to determine and apportion costs and expenses of the arbitration 'in its award under this section, or any additional award under section 34(5).'

40. Any dispute on costs should be resolved specifically under section 32B of the *Arbitration Act* once the Arbitrator publishes the award on quantum of costs. The tribunal did not act ultra vires its jurisdiction.

41. This ground is not potent to cause setting aside of the award under section 35 of the *Arbitration Act*.

42. Upon reviewing the arguments presented by KENGEN with regard to public policy, it is evident that they are merely contesting the correctness of the arbitral award. I should point out here that, when parties voluntarily choose arbitration as the method of dispute resolution, they must be prepared to accept and be bound by the outcome of that arbitration.

43. Under section 7 of the Transitional Provisions of the Sixth Schedule of *the Constitution*, all existing law continue to be in force except that they be construed in a manner that brings them into conformity with *the Constitution*. The *Arbitration Act* is existing law.

44. Within the framing of article 159(2)(c) of *the Constitution*, the jurisdiction of the Court under section 35 is not appellate in nature as to carry out a de novo review of the merits of an award or substitute the tribunal's judgment or opinion with its own. The structure of section 35 of the *Arbitration Act* only gives the court power to review an award on the limited grounds provided in the section which are quite in line with article 159(3) of *the Constitution*. The section also promotes and upholds the doctrine of party autonomy and finality of arbitral awards.

45. The application for setting aside the award, therefore, fails.

Of recognition and enforcement

46. Subsequently; whether the arbitral award should be recognized and enforced.

47. Section 36 provides for power of the High Court to recognize and enforce domestic arbitral award and requirements thereto as follows: -

> " 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

(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."

48. I find that the Applicant has complied with the above requirements.

49. There is also nothing under section 37 of the *Arbitration Act* that prevents recognition and enforcement of the award by the court.

Disposal

50. In conclusion, I make the following orders: -

1. The application dated 13th May 2025 is dismissed with costs to the respondent in the said application.

2. The application dated 7th May 2025 is allowed.

3. The award published on 4th April 2025 is hereby adopted as a judgment of this court and shall be enforced as such upon a decree of this court.

4. The respondent in the application dated 7th May 2025 shall bear the costs thereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF FEBRUARY, 2026

F. GIKONYO M

JUDGE

In the presence of: -

Ouma for Applicant in 470/2025

Ms Mburu for Respondent in 470/2025

Ouma for Respondent in 441/2025

Ms Mburu for Applicant in 441/2025

CA – Ivan/Aggrey