

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMARB E032/2025 & MISC. APP.NO. E643/2025

JOSHUA MUSYOKI KITHUKU.....APPLICANT

VERSUS

CAROLINE MUTHEU MWAKODI.....RESPONDENT

RULING

Introduction

1. There are two applications for determination: the first one is dated 27th April 2025, filed by the Applicant (*Joshua Musyoki Kithuku*) in **HCCOMARB E032/2025**, whereby he sought the recognition and enforcement of the arbitral award issued on 7th March 2024.
2. The second application is a Notice of Motion application dated 14th May 2025 filed by the Respondent (*Caroline Mutheu Mwakodi*) in **MISC. APP.NO. E643/2025**, seeking to set aside the aforementioned arbitral award.
3. The Court proposes to first analyze and determine the second application (Notice of Motion Application dated 14th May 20225), as it seeks to set aside the arbitral award.

Notice of Motion Application dated 14th May 2025

4. The application is filed by the Respondent under *inter alia* under section 35 of the Arbitration Act, rule 7 of the Arbitration Rules, Articles 47, 48, 50 AND 159 (2) (d) of the Constitution of Kenya 2010, seeking to “set aside the arbitral award allegedly rendered on or about 7th March, 2024 IN THE MATTER OF AN ARBITRATION BEFORE IMRAN DHANJI (SOLE ARBITRATOR) Nairobi, made in favour of the Respondent.”
5. The Respondent also vide the same application seeks to have the arbitral proceedings leading to the said award declared fundamentally flawed, unconstitutional, and devoid of procedural fairness, thereby infringing the Applicant's rights.
6. The Respondent contended that she was never served with any notice of hearing or any document initiating or continuing the arbitration and was therefore denied an opportunity to participate in the proceedings. She averred that she was unaware of any arbitration clause or agreement with the Respondent, maintained that she had not entered into any contract containing an arbitral clause, and stated that their relationship was merely a joint venture with no reference to arbitration. She denied participating in any arbitral process, appointing an arbitrator, or attending any tribunal.
7. Ms. Mutheu stated that she only became aware of the existence of the arbitral award upon being served with an application seeking its adoption as a judgment of the court. She asserted that the Applicant had wrongly assumed that she had notice of and participated in the arbitration and that the proceedings were conducted without her knowledge, in secrecy, and in breach of the rules of

natural justice, the *audi alteram partem* principle, and her constitutional rights to a fair hearing and fair administrative action.

8. She maintained that she was neither served with the award nor given any opportunity to present her case or challenge the Applicant's claims, rendering the process procedurally unfair and the award invalid, *void ab initio*, and incapable of enforcement.
9. Ms. Mutheu further contended that the Applicant's conduct amounted to bad faith and a procedural ambush and that the proceedings offended the mandatory provisions of the Arbitration Act requiring equal treatment of parties and a full opportunity to be heard.
10. She averred that she moved the court promptly upon learning of the award and that, unless the court intervened, she stood to suffer irreparable harm, whereas the Applicant would suffer no prejudice if the orders sought were granted. She therefore urged the court, in the interest of justice, fairness, and equity, to halt enforcement and grant the reliefs sought.

Applicant's replying affidavit.

11. The Applicant swore the Replying Affidavit in opposition to the motion, contending that the application was an afterthought filed only after he had instituted proceedings in HCCOMMARB/E032/2025 seeking recognition and enforcement of the same final arbitral award.
12. He deponed that pursuant to a written loan agreement, he advanced the Applicant **Kshs. 4,000,000**, and the agreement contained an arbitration clause. Upon the Respondent's default, he commenced arbitral proceedings through the Chartered Institute of Arbitrators (Kenya Branch).

13. Mr. Kithuku averred that the Respondent's advocates were duly notified of the reference and copied in all correspondence, and the Institute appointed **Hon. Imran Dhanji** as sole arbitrator.
14. The Applicant asserted that the arbitrator accepted the appointment, convened a preliminary meeting, and the Respondent, through counsel, actively participated, attended the preliminary meeting, and filed a defence, witness statement, and supporting documents.
15. He averred that although the Respondent, through her Advocate, participated in setting the hearing schedule and even proposing the hearing date, she failed to attend the hearing held on 29th February 2024, prompting the Tribunal to proceed in her absence in accordance with its directions. The tribunal thereafter rendered a final arbitral award on 7th March 2024 and notified both parties by email that the signed award was ready for collection, which he maintained constituted sufficient notice and effective service.
16. The Applicant maintained that the proceedings were conducted fairly and transparently and that the Respondent's failure to attend the hearing or collect the award resulted from her own inaction. He relied on case law, asserting that notification of the availability of the award sufficed for service.
17. He further deponed that under section 32A of the Arbitration Act, the award was final and binding, and that the Applicant had not established any of the limited grounds under section 35 to set it aside, and that the present application was filed outside the statutory three-month period under section 35(3).
18. Mr. Kithuku also contended that the application offended section 10 of the Act by inviting impermissible judicial intervention and amounted to an appeal

disguised as a setting-aside application, with misplaced reliance on constitutional provisions.

19. He therefore urged the court to find the application incompetent, misconceived, and brought in bad faith, to dismiss it with costs, and denied all allegations not expressly admitted.

Respondent's supplementary affidavit.

20. The Respondent swore the supplementary affidavit in support of her application and in reply to the Respondent's affidavit.

21. She denied ever entering into or signing any loan agreement with the Respondent or receiving Kshs. 4,000,000, and maintained that no evidence of disbursement or acknowledgment had been produced. She stated that their relationship concerned a joint business venture and not a debtor-creditor arrangement, and described the alleged agreement as unsigned, unilateral, and fabricated.

22. The Respondent further denied consenting to any arbitration or executing any arbitration clause, and contended that in the absence of a valid arbitration agreement, the tribunal lacked jurisdiction. She averred that she was never served with any notices relating to the arbitration, did not participate in the proceedings, did not appoint or instruct any advocate to act for her, and only became aware of the award dated 7th March 2024 upon being served with enforcement proceedings, after which she moved the court without delay.

23. Ms. Mutheu asserted that the proceedings were conducted without notice and in breach of her right to a fair hearing, rendering the process procedurally unfair

and contrary to the Arbitration Act and public policy. She therefore urged the court to set aside the award, stating that she faced the risk of execution and injustice if enforcement proceeded, while the Respondent would suffer no prejudice if the award were vacated.

Applicant's further affidavit

24. The Respondent swore a further affidavit dated 22nd July 2025, supplemental to his earlier replying affidavit for the limited purpose of producing the complete version of the loan agreement dated 22nd November 2017. He deponed that due to an inadvertent scanning and uploading error by his advocate, the last page of the agreement had been omitted from the copy previously filed in court.

25. He annexed a complete copy of the agreement, including the final page bearing the signatures of both parties, and asserted that the document confirmed that the agreement had been duly executed by the Applicant and himself. He further stated that the Applicant personally handwrote her contact details in the agreement and was at liberty to challenge the authenticity of the signature if she so wished.

Analysis and determination (On Notion of Motion dated 14th May 2025)

26. Both parties filed written submissions; the Respondent's is dated 17th July 2025, while the Applicant's is dated 22nd July 2025. I have considered the same together with the application and the responses filed.

27. The main issue for determination is whether the application to set aside the final arbitral award dated 7th March 2024 is time-barred under Section 35(3) of the Arbitration Act.

28. It was the Applicant's submission that the Respondent's application dated 14th May 2025 is time-barred as the arbitral award was rendered and parties were notified of its availability on 7/3/2024, while the instant application was filed over eleven (11) months later.

29. **Section 35 of the Arbitration Act** provides the following: -

“(1) 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).

(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; 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.

(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.

30. In this case, the Arbitrator delivered the arbitral award on 7/3/2024 and notified the parties via email on the same date. The Arbitrator sent the email notification to the email address of the Respondent's Counsel, that is katmbuvy@yahoo.com, which I note from the record to belong to the Respondent's Advocate and is also the same email address through which previous correspondence regarding the arbitration proceedings was being sent and/or received. The said email was produced as 'JMK-7' in the Applicant's replying affidavit, sworn on 13/6/2025.

31. The question of when an arbitral award is deemed to have been received was discussed in **National Housing Corporation v Custom General Construction Limited [2021] eKLR**, where the court held: -

" I find and hold that consistent with the object of the Act, the only logical interpretation of section 35(5) of the Act is that an application to set aside must be made within 3 months from the date the award is received and for this purpose, the date of receipt is the date which the parties are notified of the award. 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 award. Failure of the parties to collect it does not delay or postpone the delivery."

32. In this case, therefore, the Arbitrator's award was received by the parties when they were notified about it via the email dated 7/3/2024. This, in effect, means that the Respondent had three months from the said date to file an application to set it aside as stated under section 35(3) of the Arbitration Act.

33. However, the Respondent filed the present application seeking to set aside the application on 14/5/2025, 11 months after the award was delivered to the parties. This was in clear violation of section 35(5) of the Arbitration Act, which sets a strict timeline of 3 months from the date of receipt of the application.

34. It is my finding, therefore, that the application ought to be dismissed as it was filed in violation of the statutory timelines set out in the Arbitration Act.

35. The above finding notwithstanding, the Court will proceed to analyze whether the Respondent established the grounds required to set aside an award under section 35 of the Arbitration Act.

36. The Respondent anchored her application to set aside the arbitrator's application on the argument that she was not aware of and did not participate in the arbitral

proceedings. She contended that she only became aware of the arbitration when she was served with the application to enforce and recognize the award.

37. However, the material on record demonstrates that the Respondent's counsel entered an appearance on her behalf and participated in the proceedings.

38. By a letter dated 27/3/2019, Katunga Mbuvi & Co. Advocates responded to the Applicant's demand and expressly confirmed that they had instructions to act for the Respondent in relation to the dispute. Upon commencement of the arbitration, the said advocates continued to represent the Respondent and attended the preliminary meeting held on 20/9/ 2019. The said letter was produced as 'JMK-2' in the Applicant's replying affidavit.

39. Counsel for the Respondent thereafter filed the defence, witness statement, list of documents, and trial bundle dated 24/10/2019. Copies of pleadings were annexed to the Applicant's replying affidavit and marked 'JMK-5.'

40. Further, the Applicant produced as 'JMK-6' in his replying affidavit copies of email correspondence between counsel for the parties confirming the fixing of the hearing for 29/2/2024 on a date proposed by the Applicant's advocates, evidencing due notice of the hearing.

41. Based on the foregoing, the Court is of the view that the Respondent fully participated in the arbitral proceedings through her counsel on record. She cannot now claim not to have known whatsoever of the proceedings, having instructed an advocate to represent her during the proceedings.

42. The Respondent has therefore not demonstrated sufficient grounds to set aside the subject arbitral award as stipulated under section 35 of the Arbitration Act.

The 2nd Application – Notice of Motion Application dated 27th April 2025

43. This Application was filed in **HCCOMARB E032/2025** by the Applicant, seeking the recognition and enforcement of the subject application.

44. He asserted that the Respondent is indebted to him as per the award to the tune of Kshs.4,000,000.

45. The Respondent filed a Replying Affidavit opposing the application on the same grounds that she posed in support of her application seeking to set aside the award; she disputed the existence of a loan agreement and alleged that she was not aware of the arbitral proceedings.

46. Having found that the Respondent actively participated in the proceedings through her counsel and having analysed the loan agreement as produced as 'JMK-1' by the Applicant in his supporting affidavit, I am of the view that the Respondent has not established any sustainable grounds to oppose the enforcement of the award.

47. **Section 36(1) of the Arbitration Act**, which provides that:

" (1) A domestic arbitral award shall be recognized as binding and, upon application in writing to the High Court, shall be enforced in the same manner as if it were a judgment or order of the court.

...

(3) The party relying on an arbitral award or applying for its enforcement shall furnish (a) the original arbitral award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made; and (b) the original arbitration agreement or a duly certified copy thereof."

48. The Applicant produced a signed and certified copy of the final arbitral award and a copy of the loan agreement dated 22nd November 2027, which contained the arbitration clause. The same was produced as 'JMK-1' and 'JMK-2' in the Applicant's supporting affidavit.

49. The Applicant has therefore satisfied the threshold set out under section 36 of the Act.

50. In the upshot, I find no reason not to recognize and enforce the arbitral award as prayed for by the Applicant.

51. The application dated 27th April 2025 is granted as prayed, while the application dated 14th May 2025 is hereby dismissed entirely.

52. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

26TH FEBRUARY 2026

ADO MOSES

JUDGE