Rohil Builders Limited v Orsoline Sisters of the Immaculate Virgin Mary (Miscellaneous Application E019 of 2025) [2026] KEHC 2965 (KLR) (Commercial and Tax) (26 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2965 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E019 OF 2025

MA OTIENO, J

FEBRUARY 26, 2026

BETWEEN

ROHIL BUILDERS LIMITED ..... APPLICANT

AND

ORSOLINE SISTERS OF THE IMMACULATE VIRGIN MARY .. RESPONDENT

JUDGMENT

1. The Applicant moved the court by chamber summons dated 10/3/2025 under Section 35 (2)(a) (iii) and Section 35 (2)(b)(ii) of the *Arbitration Act* and Article 50(1) of *the Constitution* seeking to set aside specified portions of a final arbitral award dated 20/12/2024 rendered by the sole arbitrator, Mr. Tom Onyango Oketch, in a dispute arising from a construction agreement dated 22/10/2019 for the development of a convent multipurpose hall and chapel. The dispute had been referred to arbitration pursuant to clause 45 of the agreement following disagreements on performance and final accounts.

2. The Applicant challenged awards relating to liability, damages of Kshs. 1,216,800.91, interest, and costs, and sought that the Respondent bear the costs of the application. It contended that the arbitrator acted in excess of jurisdiction, contrary to law and public policy, and in breach of the right to a fair hearing.

3. The Applicant argued that although the arbitrator acknowledged that the project quantity surveyor and project architect were the Respondent's agents and that the final certificate was contractually conclusive, he nonetheless disregarded the final certificate and revised the sums due without legal basis, thereby effectively re-writing the contract and acting ultra vires.

4. It was further alleged that the arbitrator improperly shifted the burden of proof to the Applicant, ignored settled jurisprudence and local authorities, reviewed and reduced the sums certified as due, and failed to award the full amount claimed under the final accounts.

5. The Applicant maintained that the award of damages lacked any evidential or legal foundation and departed from established principles on proof of special damages. It also asserted that the arbitrator considered extraneous matters, omitted claims for additional works, relied on payment certificates rather than actual payments, and relied on unverified financial records produced after the close of the hearing.

6. The Applicant additionally contended that the arbitrator demonstrated bias against its witness, issued post-hearing directions and admitted further evidence after becoming functus officio, and denied the Applicant an opportunity to cross-examine such evidence, thereby breaching procedural fairness. It further challenged the award of costs to the Respondent despite partial success of the Applicant and failure of the counterclaim, and the refusal to award interest.

7. On those grounds, the Applicant sought that the impugned portions of the final award be set aside and asserted that the application had been filed within the statutory timelines and in the interests of justice.

8. The Respondent, through a replying affidavit sworn on 11/7/2025 by Sr. Agnes Wanjiru Muhuga, a trustee of the Respondent opposed the Applicant's chamber summons seeking to set aside portions of the arbitral award dated 20/12/2024.

9. She stated that the dispute arose under the construction agreement and was properly referred to arbitration pursuant to clause 45 of the contract. Both parties submitted to the process, raised no objection to the appointment of Mr. Tom Onyango Oketch as sole arbitrator, and confirmed that he had no conflict of interest.

10. It was stated that the arbitrator afforded both parties a full opportunity to present evidence and subsequently published the final award on 20/12/2024, which was later circulated to the parties after settlement of his fees.

11. It was further contended that the Applicant failed to adduce any evidence to support its allegations that the award exceeded jurisdiction, violated public policy, contravened Kenyan law, was self-contradictory, or demonstrated bias. She maintained that the tribunal correctly applied the contract and the law, including the provisions relating to the final certificate, the roles of the project quantity surveyor and project architect, and the assessment of the final account.

12. She denied that the Tribunal rewrote the contract, shifted the burden of proof, or acted ultra vires, and asserted that the tribunal thoroughly reviewed the evidence and explained its reasoning in detail when revising the sums due and assessing damages at KShs. 1,216,800.91.

13. It was further deponed that the Tribunal did not consider extraneous matters, omit any legitimate claims, or rely on unverified documents, but instead considered all payment certificates, statements and records produced by the parties.

14. She denied any bias, stating that the tribunal's observations on the Applicant's witness were based on its assessment of the testimony during the hearing. She also asserted that the tribunal treated both parties fairly and that no complaints were raised during the proceedings.

15. On procedure, she stated that the tribunal was empowered under the contract, the *Arbitration Act* and the applicable rules to issue Order for Directions No. 6 and to seek clarifications post-hearing, and that no new evidence was improperly admitted. On interest, she explained that the parties had

mutually cancelled the contractual clause providing for interest on delayed payments, and thus the tribunal correctly found that no interest was payable, save for applying the prevailing Central Bank rate where appropriate. On costs, she maintained that the tribunal considered the entire case, the parties' conduct and the outcome before awarding costs, and gave reasons for the same.

16. She further deponed that the Applicant's application was in substance an appeal against the merits of the award despite the agreement providing that the arbitrator's decision would be final and binding. She stated that the Respondent had already complied with the award and paid the Applicant KShs. 1,216,800.91, which the Applicant had received, and annexed proof of payment. She contended that the application was intended to delay and frustrate enforcement.

17. Accordingly, she urged the court to find that the award was lawful and within jurisdiction, dismiss the application, and grant leave to enforce the arbitral award as a decree of the court.

18. The Applicant, through a further affidavit sworn on 7/8/2025 by Jadva Hirani, a director of the Applicant, responded to the Respondent's replying affidavit and maintained its challenge to the arbitral award. He stated that the award ought to be set aside on grounds of illegality and breach of public policy within the meaning of section 35(2)(b)(ii) of the *Arbitration Act*.

19. He deponed that the replying affidavit consisted largely of denials and failed to meaningfully address or dispute the alleged public policy breaches. He denied that the application to set aside the award was an afterthought or an attempt to evade enforcement, and stated that the Applicant had, prior to filing the application, engaged counsel to articulate serious and material objections touching on breaches of Kenyan law and public policy.

20. He further asserted that the Respondent had purported to make payments under the award before registering and enforcing it through the court, despite being aware that the award was allegedly founded on errors of law and fact, and characterised this as an attempt at unjust enrichment. He maintained that the sums actually paid to the Applicant materially differed from the amounts reflected in the certificates and final accounts, which discrepancies the arbitrator allegedly ignored, thereby depriving the Applicant of its rightful dues and violating its right to property. He annexed bank advices to demonstrate the payments made.

21. He deponed that payment of the awarded sum did not extinguish the Applicant's right to seek setting aside of the award. He contended that it would be unconstitutional and contrary to justice, morality and national interest to allow a party to benefit from an award said to be grossly incompetent and made in breach of *the Constitution*, the law and principles of fairness. He further stated that disregarding established precedent undermined public policy and the integrity of arbitration.

22. He denied that the application was a fishing expedition and maintained that it raised substantial and lawful grounds for setting aside the award. He therefore swore the further affidavit in continued support of the application to set aside the arbitral award.

Analysis and determination

23. The Applicant and Respondent filed written submissions dated 11/8/2025 and 14/10/2025, respectively. I have considered the same together with the evidence and pleadings filed by the parties.

24. The parties herein entered into a construction agreement dated 22/10/2019 for the development of a convent multipurpose hall and chapel. A dispute arose from the agreement which was referred to arbitration pursuant to clause 45 of the agreement following disagreements on performance and final accounts.

25. In the instant application, the Applicant sought to set aside the final award on the grounds that it was contrary to public policy, made in excess of jurisdiction, founded on extraneous matters, tainted by bias, and rendered in breach of the right to a fair hearing.

26. On public policy, the scope of intervention is narrow and has been consistently defined by the courts. In Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 EA 366, Ringera J. observed that an award may only be set aside on the grounds of public policy where it is:

> " inconsistent with *the Constitution* or other laws of Kenya... inimical to the national interest... or contrary to justice or morality."

27. In Glencore Grain Ltd v TSS Grain Millers Ltd [2002] 1 KLR 606, the court held that an award would offend public policy only if it is:

> " immoral or illegal or... would violate in a clear and unacceptable manner basic legal and/or moral principles or values in Kenyan society."

28. The same position was reiterated in Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd [2012] eKLR, where public policy was described as that which is:

> " Injurious to the public, offensive, an element of illegality... and that violate[s] the basic norms of society."

29. A reading of the award showed that the arbitrator identified the material placed before him, framed the issues for determination, and analyzed the evidence and submissions at length. The findings were anchored on the contract and the record.

30. In particular, the arbitrator considered clauses 34.21 and 34.22.3 of the agreement, which qualified the conclusiveness of the Final Certificate in instances of accidental inclusions, exclusions, or computational errors. On the evidence, errors in the Final Account were demonstrated and, in part, admitted. The arbitrator therefore adjusted the account and explained the computation leading to the sum awarded. The figure was neither arbitrary nor speculative.

31. The court finds no illegality, fraud, corruption, or violation of fundamental legal or moral standards. The complaint, in substance, challenges the merits of the decision. That is not a ground for setting aside recognized under section 35 of the Act.

32. The allegation that the award offended public policy has therefore not been established.

33. On jurisdiction and alleged extraneous matters, clause 45.0 of the contract referred to arbitration any dispute or matter arising out of or in connection with the contract, including issues of measurement, valuation, and the parties' rights and liabilities. The clause was deliberately broad, and the award was expressed to be final and binding.

34. The matters determined by the arbitrator concerned the valuation of the works and the Final Account. These issues plainly fell within the scope of the reference.

35. Although it was alleged that extraneous matters were considered, none have been specifically identified. The record further shows that the Applicant participated fully in the proceedings, filed pleadings, tendered evidence, and raised no jurisdictional objection at the time.

36. Order for Directions No. 6 related to procedural and evidentiary matters within the parties' knowledge and possession. It did not enlarge the dispute or exceed the tribunal's mandate.

37. In the circumstances, the court is not persuaded that the arbitrator acted outside his jurisdiction.

38. On the allegation of bias, the award indicates that the arbitrator heard both parties and made credibility findings after observing the witnesses. Such evaluative conclusions fall squarely within the arbitrator's mandate and cannot, without more, found an inference of partiality. Consequently, the allegation of bias is unsupported and therefore baseless.

39. On fair hearing, the record showed that both parties were afforded equal opportunity to present evidence and submissions. Each called witnesses, produced documents, and filed submissions, including further submissions after the impugned directions. No procedural prejudice was demonstrated. Further submissions were filed following the directions, and no procedural prejudice was demonstrated.

40. Taken as a whole, the application invited the court to re-evaluate the evidence and substitute its own view for that of the arbitrator. That would amount to an appeal on the merits, which is impermissible.

41. In light of the statutory policy of finality of arbitral awards and the parties' contractual agreement that the award would be final and binding, the Court finds that no ground for interference has been established.

42. The application is therefore dismissed with costs.

43. It is so ordered.

SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 26TH FEBRUARY 2026

ADO MOSES

JUDGE