THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

HCCOMM ARB. No. E001 OF 2023

(Consolidated with HCCC. Misc. No. E 102 of 2023)

PAUL NJOROGE BEN……RESPONDENT /APPLICANT

Versus

WYCLIFFE WANDABWA……1ST APPLICANT /RESPONDENT

SAMUEL MBIRIRI (ABITRATOR)……2ND RESPONDENT

JUDGMENT

1. Before the court for determination are three related applications. The applications emanate principally from the final arbitral award (hereafter the award) rendered on 5th September 2023 by the sole arbitrator **Samuel Mbiriri Nderitu** (hereafter the arbitrator), against **Paul Njoroge Ben** and in favour of **Wycliffe Wandabwa.**
2. The first application is the motion filed under **HCCC Misc. No. E102 of 2023** was by **Paul Njoroge Ben** and is dated 16.10.2023 (hereafter the first application). It named **Wycliffe Wandabwa** as the 1st Respondent and the arbitrator as the 2nd Respondent. By the motion, which is expressed to be brought under Section 35 (2) (a) iv & vi and (b) ii of the Arbitration Act and Rule 7 of the Arbitration Rules inter alia,

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the applicant was seeking to set aside the award on grounds of illegality, fraud, bias, and violation of public policy and the agreement of the parties.

3. The second application dated 24th October 2023 (hereafter the second application) is the chamber summons brought by **Wycliffe Wandabwa** in **HC Comm. Arb. No. E001 of 2023** pursuant to Section 36 of the Arbitration Act and seeking primarily the adoption of the arbitral award as a judgment of the court. The record shows that on 13.12.2023, the court (**Mutuku J**) directed that the two causes above be consolidated, with **HC Comm. Arb. No. E001 of 2023** being appointed as the lead file.

4. Further, the court directed that the first and second applications be heard together by way of written submissions. The matter was scheduled for compliance mention on 6.03.2024, but there followed a lull and by the time the matter next came up again before this court **(Meoli J)** on 29.05.2025, a third application by way of a chamber summons had been filed by **Wycliffe Wandabwa.**

5. The third application, also premised on Section 36 of the Arbitration Act is dated 19th May 2025 (hereafter the third application)**.** The live prayers therein seek the adoption of the sole arbitrator's final award on costs dated 4.12.2023 as a judgment of the court and the issuance of a

decree in terms of the two final awards. Pursuant to directions issued by this court on 29.05.2025 and 22.07.2025, the third application was simultaneously canvassed by way of written submissions with the two earlier applications.

6. The foregoing should lay to rest the objections made by **Paul Njoroge Ben** based on his asserted proper sequence by which the three applications ought to be heard, namely that the second and third applications ought to be held in abeyance pending the hearing and determination of the first application. The court was perfectly entitled, upon being satisfied that the three related applications could be conveniently handled together, and in furtherance of the overriding objective in facilitating the just, expeditious, proportionate and affordable resolution of disputes, to give appropriate directions. Given the nature of the prayers in the three applications, it is obvious that the determination of the first application must take priority.

7. The court notes that the arbitrator despite being named in the first application did not participate in the proceedings, and while the court cannot ascertain on the material before it whether he was duly served, it appears that as the matter progressed, **Paul Njoroge Ben** all but abandoned the allegations of fraud against the said arbitrator. Advisedly, in the court's view, as it is settled that ***'"fraud must be***

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specifically pleaded …. fraudulent conduct must be distinctly alleged and distinctly proved , and it is not allowable to leave fraud to be inferred from the facts" as held in **Vijay Morjaria vs Nansingh Darbar & Anor. (2000) eKLR**. The Supreme Court in **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** held that "***fraud must be proved on evidence whose strength is higher than the ordinary civil balance of probabilities, but not as high as beyond reasonable doubt."***

8. That said, each of the parties herein having filed their respective application(s) are necessarily both applicant and respondent depending on the specific application. For purposes of clarity, the court will, relying on the order of the parties in the lead file, namely, **HComm. Arb. No. E001 of 2023** hereafter refer to **Wycliffe Wandabwa** as the Applicant, and **Paul Njoroge Ben** as the Respondent.

9. As gleaned from the parties' multiple affidavits on record, the uncontested background leading to the present matter can be briefly stated as follows. On 11th August 2016, the Applicant and the Respondent entered into an agreement for the sale (hereafter the sale agreement) of the Respondent's land parcel **No**. **LR.**

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Kajiado/Kaputiei-North/22269 (hereafter the suit property) to the Applicant at the price of Kshs. 19,750,000/-. The sale agreement contained an arbitration clause. Pursuant to the sale agreement, the Applicant paid a deposit of Ksh. 8,120,000/- out of which the sum of Kshs. 6,120,000/-, was applied to settle an outstanding facility at Family Bank, secured by a charge created by the Respondent over the suit property.

10. Upon the facility being retired, the bank delivered the original document of title in respect of the suit property and the discharge of charge to the Applicant, with the consent of the Respondent. It appears that the sale agreement was not performed as anticipated. While the parties accuse each other of breaching the terms of the agreement, it is admitted that the balance of the purchase price was not paid in the period stipulated in the agreement, and on 15th November 2016, the Respondent moved first, by serving the Applicant with a completion notice, to which the Applicant responded by rescinded the agreement , citing inability to complete payment.

11. In rescinding the sale agreement, the Respondent conceded the forfeiture of 10% of the purchase price as liquidated damages and sought a refund of the balance of his deposit, which the Respondent

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failed to refund, while demanding the return of the title document and discharge of charge, ostensibly to enable him obtain a loan from the bank in order to pay back the deposit. On his part, the Applicant asserting a lien continued to withhold the documents.

12. Eventually, the Applicant instituted a suit, namely, **Kajiado CMCC 107 of 2019**, against the Respondent seeking recovery of the deposit. However, following a preliminary objection raised by the Respondent citing the arbitration clause in the sale agreement, the matter was referred to arbitration. But first the matter was submitted to mediation which was unsuccessful and thereafter, the arbitrator was appointed on 20.09.2022 at the request of the Applicant. Following which the Applicant filed his statement of claim dated 22nd February 2023 seeking payment of the deposit with interest, to which the Respondent filed a response dated 17.03.2023. Upon the conclusion of the arbitration proceedings the arbitrator rendered his final award (save as to costs) dated 5th September 2023 which is the subject of the first and second applications, and subsequently the award on costs dated 4.12.2023, the primary subject of the third application.

13. In order to contextualize the present dispute, the court finds it apposite to highlight the issues framed and determined by the arbitrator

in the award dated 5th September 2023.The arbitrator framed two issues for determination at paragraph 16 of the award as follows:

> **'"The following <u>were agreed as the issues for determination and set out in the Order for Directions No. 2 issued after the pre-hearing review meeting</u>:**
>
> **a. whether the Claimant was to return documents before refund or was to get a refund followed by return of completion documents.**
>
> **b. Is the claimant entitled to the reliefs sought?".**

16. Having considered the material before him, the arbitrator held that the Respondent was obligated under clause 20.4 of the sale agreement, following the rescission of the agreement, to refund all monies owed to the claimant , before demanding the return of any or all of the completion documents, in this case, the original document of title and discharge of charge, which the arbitrator had found to fall within the definition of completion documents under clause 8.1.14 of the sale agreement.

17. Further, having found that clause 20.3 of the agreement invoked by the Applicant in seeking interest at 2% p.m. did not apply

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to the facts of this case, and further that clause 20.4 which provided for recission did not provide for payment of interest, the arbitrator proceeded to invoke Section 32C of the Arbitration Act. And justified on the facts of the case and general principles regarding the award of costs, his consequent award of simple interest at the rate of 15% p.a from 8th July 2021 to the date of the award (Kes. 1,995,020.95), with a rest of 60 days to enable the Respondent to settle the award sums, and in default the amounts awarded would continue to accrue interest at the rate of 14% pa from 6th November 2023 until full payment.

The Parties' Depositions

18. The above determinations prompted the three applications now before this court. By his initial affidavit material in support of the first application, the Respondent relied on grounds of fraud, bias, and violation of public policy, and terms of the parties' agreement. Therein, he canvassed multiple factual and legal matters determined by the arbitrator, including the question of the party who was in breach, all which have no place in an application under Section 35 of the Arbitration Act. He especially took issue with the arbitrator's interpretation of clause 8.1 and 20.4 of the sale agreement,

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asserting that the arbitrator wrongly categorized the original title and discharge documents as completion documents liable for return only upon a refund of the deposit. The Respondent asserted that prior to the rescission, the Respondent failed to honour his obligation to return the documents to facilitate the change of user and after rescission, to facilitate the refund of deposit. He asserted that the arbitrator's contrary finding amounted to rewriting the parties' contract.

19. Additionally, the Respondent challenged the arbitrator's award of Kshs. 1,995,020.95 to the Applicant being interest at a rate of 15% per annum, arguing that this rate was not agreed upon and contravenes clause 20.3 of the sale agreement, which capped interest at 2% per annum. He asserted that the arbitrator introduced terms not contemplated by the parties, thereby breaching natural justice and public policy.

20. However, by his supplementary affidavit dated 1st December 2025 and admitted following the consent of the parties recorded on 19.12.2025 allowing his motion dated 1.12.2025, the Respondent deposed as follows. That contrary to averments contained in the replying affidavit of the Applicant dated 8.11.2023, the first

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application did not constitute an appeal on facts, but was a challenge to the legality of the award of interest by the arbitrator, based on grounds of jurisdictional excess and public policy, and was premised on Section 35 (2) (a) iv and (b) ii of the Arbitration Act. Further, asserting that upon rescission of the agreement by the Applicant, his sole obligation under clause 20.4 of the sale agreement was to refund the Applicant's deposit without interest . He viewed the arbitrator's award of what he termed as unconscionable interest, itself an issue not submitted to arbitration, as tantamount to re-writing the parties' contract and offensive to public policy.

21. The Respondent's responses to the second and third motion are similar. He takes the position that both are premature, and ought to await the outcome of the first motion.

22. For his part, the Applicant by his affidavit dated 8.11.2023 dismissed the first application as defective for failing to specify statutory grounds for the prayer seeking to set aside the arbitral award, for improperly joining the arbitrator as a party, and for disregarding the binding arbitration agreement. He contended that the application is frivolous and an abuse of court process.

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23. Rehashing the history of the matter, the Applicant accused the Respondent of attempting, under the guise of a public policy challenge, to re-litigate factual issues already determined by the arbitrator. In his view, the first application is a disguised appeal on facts, which is impermissible under the Arbitration Act. He asserted that the allegations of bias and fraud are unsubstantiated, pointing out that the arbitrator's findings were based on evidence and legal reasoning. Moreover, he contended that the arbitral award is valid, enforceable, and free from ambiguity.

24. The Applicant equally rehashed the background to the dispute by his affidavit in support of the second application brought under Section 36(1) of the Arbitration Act, Rule 4(1), (2), (3), (4), (5), (6) and 11 of the Arbitration Rules, Order 46 of the Civil Procedure Rules, Section 3 and 59 of the Civil Procedure Act; as well as the third application under Section 36 of the Arbitration Act, Rule 9 of the Arbitration rules, Order 39 Rule 1 of the Civil Procedure Rules inter alia. The Applicant also filed a supplementary affidavit dated 5.03.2024, annexing complete and certified copies of the sale agreement and the arbitral award (marked as annexures **WWM-1**

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and WWM- 2), in compliance with Section 36(3) of the Arbitration Act.

16. Pursuant to the orders granted on 19.12.2025, the Applicant filed a further affidavit dated 22.01.2026 wherein he reiterated his previous depositions and added that the contested issue of interest was exhaustively considered by the arbitrator and that the challenge brought by the Respondent amounts to an invitation to the court to revisit the merits of the award, which is not contemplated in the grounds for setting aside an arbitral award under Section 35 (2) of the Arbitration Act.

The Parties' Submissions

17. Pursuant to the consent recorded on 19.12.2025 in respect of the Respondent's motion dated 1st December 2025, the Respondent's submissions dated 1st December 2025 were admitted.

18. Regarding the first application, the Respondent argued that the arbitrator exceeded his jurisdiction by determining matters that were not contemplated by the parties in the arbitration agreement and by issuing an award that is contrary to the public policy of Kenya. The case of **Kenya Tea Development Authority Agency Ltd. & 7 Others vs Savings Tea Brokers Limited (2015)e KLR** was cited in support of

the proposition that the jurisdiction of the arbitrator was ''*tethered by the arbitration agreement, reference and the law"*.

19. Restating the terms of the sale agreement, the Respondent asserted that the agreement clearly set out the consequences of failure to complete the transaction, including forfeiture of part of the purchase price and the return of the deposit sums without interest. Which provisions he asserts to have been ignored by the arbitrator in imposing an interest rate of 15% per annum on the deposit refund, a matter not provided for in the agreement. And contended that in doing so, the arbitrator effectively rewrote the contract between the parties and exceeded his jurisdiction.

20. Additionally, the Respondent argued that an arbitrator's jurisdiction is limited to the terms of the arbitration agreement and the contract between the parties. Moreover, that as creatures of the contract, arbitrators cannot determine issues outside the agreement or impose obligations that were not contemplated by the parties. An Indian case, **Associated Engineering Co. Vs Government of Andhra Pradesh** (whose full citation was not supplied) was cited in this regard. Therefore, the Respondent contended that the arbitrator's decision

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regarding interest was beyond the contractual terms and was unlawful and outside the scope of the arbitration reference.

21. Finally, the Respondent described the 15% interest awarded by the arbitrator as illegal, unfair and unconscionable hence violating public policy of Kenya as defined in **Christ for All Nations vs Apollo Insurance** (supra). For these reasons, the Applicant urged the court to find that the arbitral award was *ultra vires* and should therefore be set aside.

22. In compliance with earlier directions issued by the court, the Applicant had filed his submissions in respect of the three applications. By his submissions 5.03.2025, the Applicant after setting out the historical background to the dispute submitted on the first application as follows. A challenge to an arbitral award based on alleged erroneous factual findings, is legally untenable.

23. Further describing the arbitration as a process recognized and entrenched as a dispute resolution mechanism under Article 159(2)(c) of the Constitution of Kenya, counsel submitted that the intervention of the court in arbitration matters was limited by virtue of Section 10 of the Arbitration Act. Highlighting the fact that the parties herein had expressly agreed under clause 21.6 of the sale agreement that the

arbitral award would be final and binding, counsel asserted that the resultant award cannot be challenged on the basis of the arbitrator's factual findings therein and on that basis, the first application must fail.

24. In addition, the Applicant stated that there is nothing peculiar about the specific finding that completion documents should be returned upon the refund of deposit and that the first application has not been brought within the grounds of public policy as contemplated in Section 35(2)(b) ii of the Arbitration Act. Counsel argued that the Respondent's allegations of fraud and public policy violations are vague, unsubstantiated, and legally deficient.

25. Specifically, concerning the Respondent's contention that the arbitrator's finding that the title deed and discharge of charge formed part of the completion documents was erroneous and indicative of fraud, the Applicant asserted that the impugned finding was a reasonable interpretation of clauses 8.1.14 and 8.1.15 of the sale agreement. Which referred to *"any other documents necessary to effect registration of the transfer of the property"* and *"any other documents necessary to support the mixed commercial/residential user."*

26. Citing the Supreme Court decision in **Fanikiwa Limited & 3 Others vs Sirikwa Squatters Group & 17 Others (2023) KESC 105**

(KLR) quoting inter alia the case of **Vivo Energy Kenya Limited v. Maloba Petrol Station Limited & 3 Others, [2015] eKLR** on the legal requirement that fraud must be specifically pleaded and proved, counsel stated that the Respondent's allegations of fraud in this case must fail for want of particulars and proof.

27. On the asserted grounds of public policy, the Applicant submitted that the Respondent merely contended that the finding that the title document and change of user comprised completion documents and the consequent award of 15% interest p.a went against public policy but failed to demonstrate how. Citing inter alia **Rwama Farmers' Co-operative Society Ltd vs Thika Coffee Mills Ltd (2012)eKLR, Glencore Grain Ltd. Vs TSS Grain Millers Ltd. (2002)eKLR** and **Christ for All Nations vs Apollo Insurance Co. Ltd. (2002) eKLR** for the proposition that for an arbitral award to be said to be contrary to public policy, there must be some fundamental departure from the law and legal norms.

28. And in asserting the absence of demonstration of illegality and potential injury to public good by the Respondent, the Applicant cited the case of **Federica Martina Ferro v Gabriella Zouras Ferro [2020] eKLR**.

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29. In defence of the arbitrator's award of interest at the rate 15% per annum, the Applicant stated that it was a standard annual rate which was reasonable and lower than the 2% per month (24% per annum) stipulated in clause 20.3 of the agreement; that interest is ordinarily awarded to facilitate prompt payment of decretal sums; and moreover in this instance, the interest was applied not from the date of default in 2016 but from 8th July 2021. The Applicant further contending that if the Respondent had concerns about the interest rate, he should have availed himself of the provisions of section 34 of the Arbitration Act to seek correction. The Applicant concluded by asserting that the Respondent has failed to meet the legal threshold for setting aside an arbitral award on grounds of fraud or public policy, there being no demonstration of fraud, or injury to the public, whereas the challenge is a disguised appeal against the arbitrator's factual findings.

30. Finally, the Applicant urged the court to adopt the award as a judgment, noting that the statutory requirements under Section 36 of the Arbitration Act have been met. The submissions were supported by the holding in **Pavanputra Enterprises Limited v Keroche Breweries Limited [2021] eKLR**, that **"*The only conditions for adopting the award are contained in Section 36 of the***

Arbitration Act which are: (1) That the party must apply in writing; (2) Avail an original or certified copy of the award; (3) Avail an original or certified copy of the arbitration agreement."

31. The Applicant concluded by stating that the award ought to be adopted and enforced as a decree of the court, and that costs be awarded in his favor due to the Respondent's failure to comply with the award and instead engaging in relentless and unnecessary litigation.

32. In addition, by his supplementary submissions dated 20th January, 2026 and filed pursuant to the court's order of 19.12.2025, the Applicant reiterated his earlier submissions. Specifically addressing the first application, the Applicant cited the Respondent's assertion that the tribunal exceeded its mandate by awarding interest and considering completion documents not contemplated in the contract, counsel highlighted the provisions of clause 21.3 and 21.6 on the scope of the mediation agreement and binding nature of the arbitrator's final award.

33. The Applicant further reiterated that an application under Section 35 of the Arbitration Act is not an appeal, and the court cannot re-evaluate the merits of the arbitral award. As held in **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** and reaffirmed in **Akoth v**

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Harvit Credit Limited (Misc Civil Application E1118 of 2024) [2025] KEHC 13673 (KLR), citing the Supreme Court decisions in **Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd [2019] eKLR and Synergy Industrial Credit Ltd v Cape Holdings Ltd [2019] eKLR.**

34. As regards the award of 15% interest, the Applicant contended that it was within the discretion of the arbitrator upon his rejection of the Applicant's claim for 2% monthly interest, as compensation for deprivation of his monies .The Applicant submitted that the award falls within the arbitrator's discretion under Section 32C of the Arbitration Act, which empowers arbitral tribunals to award interest unless expressly excluded by contract.

35. Moreover, the Applicant asserted that the question of what constituted completion documents as provided in the sale agreement was comprehensively addressed by the tribunal Here calling to aid the case of **Associated Motors Limited v Sekura International Limited [2023] KEHC 3125 (KLR)**, to the effect that the arbitrator is the master of facts and was clothed with the authority under the arbitration clause to interpret the parties' agreement and the law.

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36. In conclusion the Applicant submitted that the first application fails the strict statutory threshold prescribed in Section 35 of the Arbitration Act. Further that the arbitrator acted with jurisdiction and that allegations of fraud and public policy violations being unsubstantiated, the first application ought to be dismissed to pave the way for the enforcement of the award.

Analysis and Determination

37. The court having considered the uncontested background and the material canvassed in respect of the three applications has framed two issues for determination, namely, whether the Respondent has brought his application within the circumscribed grounds of Section 35 (2) (a) iv and b(ii) of the Arbitration Act; and whether the arbitrator's final awards and award on costs ought to be adopted as a judgment of this court.

38. Regarding the first issue, despite the first application having invoked Section 35 (2) (a) iv & vi and (b) ii of the Arbitration Act, by his further affidavit and submissions, the Respondent appeared to have abandoned references to subsection 2 (a) vi and the related assertions of fraud against the arbitrator. Thus, the court will consider his application as one grounded on Section 35 2(a) iv & b(ii) of the Arbitration Act.

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39. Arbitration as an alternative dispute resolution mechanism between contracting parties is entrenched under Article 159(2) (c) of the Constitution. Section 10 of the Arbitration Act, and indeed the entire Act pays homage to the autonomy of contracting parties to enter into arbitration agreements, by limiting the involvement or intervention of courts in commercial arbitration matters. This is premised on the principle that, provided that it is lawful, contracting parties are autonomous and have the right to agree on their preferred means of resolving commercial disputes without recourse to the courts.

40. The Court of Appeal in **Kenya Oil Company Limited & Anor. vs Kenya Pipeline Company (2014) KECA 851 (KLR)** stated as follows:

> **"The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). <u>In addition to improving, simplifying and harmonizing practices in international commercial arbitration, the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration. The principle of</u>**

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party autonomy underpinning arbitration is premised on the platform that provided it does not offend strictures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had."

41. Thus, Section 35 of the Arbitration Act, provides limited grounds for setting aside an arbitral award, as follows:

"(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,

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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

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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)……

(4)……..”

42. The guiding principles where a court is called upon to determine an application for setting aside an arbitral award under the above provisions have been restated in many cases including the case of **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** where the Court of Appeal held inter alia that:.

“Courts do not re-examine the merits of the award; <u>intervention is confined to statutory grounds, interpreted restrictively to uphold the finality principle</u>

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in Section 10 of the Act which prohibits court intervention except as provided."

See also **Akoth v Harvit Credit Limited (Misc Civil Application E1118 of 2024) [2025] KEHC 13673 (KLR), Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd [2019] eKLR** and **Synergy Industrial Credit Ltd v Cape Holdings Ltd [2019] eKLR:**

43. In **Kenya Oil Company Limited & Anor** (supra) the Court of Appeal considered as useful guidance the principles discussed in the case of **Geogas S. A v Trammo Gas Ltd (The "Baleares") (1993) 1 Lloyd's LR 215 and stated:**

"In that case, as is the case here, the question arose as to whether it was permissible to review as an error of law or a finding of fact by arbitrators, which is challenged on the ground that there was no evidence to support it. The court in that case was dealing with an appeal under Section 1 of the English Arbitration Act, 1979. It is necessary to quote at length the words of Lord Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:

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"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

44. The Court of Appeal concluded by stating that :

The principle captured by Lord Justice Steyn in that passage in relation to Section 1 of the English

Arbitration Act is in our view applicable under Section 39 of our Arbitration Act. In effect, having agreed to submit their disputes to arbitration, the parties to this appeal must accept and honour the result of the arbitrator's findings of fact.

Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged."

45. More recently in in **Synergy Industrial Credit Limited v Cape Holdings Limited [2020] KECA 208 (KLR),** the Court of Appeal quoted **Justice Ripple**, speaking for the United States Court of Appeal for the 7th Circuit in **Generica Ltd Pharmaceutical Basics, 125 F. 3d 1123 (7th Cir. 1997)** to reiterate the principle that :

"As the court noted on the first opinion, arbitration is simply a matter of contract between the parties. When the parties agree to have their dispute settled by an arbitrator, they also agree to accept the arbitrator's view of the facts and of the meaning of the contract.

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Courts thus do not sit to hear the claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts". (Emphasis added).

46. The court concluded as follows:

"Here at home, the High Court took the same approach in Apa Insurance Co. Ltd v. Chrysanthus Barnabas Okemo [2005] eKLR, while considering an application to set aside an arbitral award under Section 35 of the Act. Ochieng, J. rendered himself thus:

"In looking at this issue, I must remind myself that it is not for me to re-evaluate the evidence, as if it were an appeal. This is certainly not an appeal from the decision by the arbitrator. My role is to ascertain if the applicant had made out a case to warrant the setting aside of the arbitral award."

47. Similarly in this case, the court is not sitting on appeal on the merits of the merits of the award made by the arbitrator, the parties having pursuant to clause 21.3 and 21.6 of the sale agreement agreed that the determination of any dispute referred to him was final and binding.

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Thus, a plethora of the depositions found in the Respondent's initial affidavit in support of the first motion which resemble grounds of appeal have no place in an application brought pursuant to Section 35(2) of the Arbitration Act. However, upon being challenged through the replying affidavit of the Applicant, the Respondent by his further affidavit and submissions appeared to concede by restricting himself to two grounds, namely, excess of jurisdiction and public policy.

48. This court found useful guidance in the Court of Appeal decision in **Synergy Industrial Credit Limited (supra),** where the court while considering Section 35 (2) of the Arbitration Act and expressed itself as follows:

> **"(S)ection 35(2) (iv) of the Act, as indeed the entire Act, is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 (the Model Law). Section 35(2) (iv) is borrowed word for word from Article 34(2) (a) (iii) of the Model Law. On the other hand, Article 34(2) (a) (iii) of the Model Law is itself borrowed almost word for word from Article V(1) (c) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which sets out**

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the grounds upon which recognition and enforcement of an arbitral award may be refused. As the Explanatory Note by the UNCITRAL Secretariat on the Model Law as amended in 2006 makes abundantly clear, that legislative approach was found desirable for the sake of harmony. We are therefore satisfied that commentaries on the two provisions of the Model Law and the New York Convention are relevant in unpacking Section 35(2) (iv) and in guiding us in the determination of this appeal.

49. The Court of Appeal proceeded to state that:

The UNCITRAL Guide to the New York Convention, 2016 notes that the equivalent language to that in our section 35 (2) ('may be set aside') is permissive and discretionary, rather than obligatory or mandatory, meaning that the court is not obligated to set aside an arbitral award, although it is free to do so if the circumstances of the case justify it. Secondly, from the use of the phrase "only if" in section 35, the list of grounds provided therein on the basis of which an arbitral award may be set aside constitute an exhaustive and closed list. No new or additional grounds may be

introduced to impeach an arbitral award. It is for that reason that the High Court reiterated in Transworld Safaris Ltd v. Eagle Aviation Ltd & 3 Others, HC Misc App. No 238 of 2003 that an applicant under Section 35 of the Act must strictly bring himself within the terms of the provision."'

50. The Court of Appeal concluded by stating that :

"'The third aspect of the provision is that an erroneous decision in law or fact by the arbitral tribunal is not a ground upon which a court may set aside an arbitral award under Section 35. A court seized of an application to set aside an arbitral award under that Section has no jurisdiction to review the merits of the arbitral award. Thus for example, in Paperwork's v. Misco, Inc. 484 US 29 (1987) 108 S. Ct 364, the US Supreme Court expressed itself as follows (Justice White) while reversing a decision of the Court of Appeal for the Fifth Circuit which had refused to enforce an arbitral award (quotes and footnotes omitted):

"*Collective bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application*

of the agreement and require binding arbitration for unsettled grievances. In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or misrepresentation of the contract. The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As long as the arbitrator's award draws its essence from the collective bargaining agreement and is not merely his own brand of industrial justice, the award is legitimate. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on the face of it is governed by the contract. Whether the moving party is right or wrong is a question of the

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contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bar-gained for. The courts therefore have no business weighing the merits of the grievance considering whether there is equity in the particular claim, or determining whether there is particular language in the written instrument which supports the claim." (Emphasis added).

51. The party seeking to set aside an arbitral bears the burden to satisfy the court by providing justification for the strict statutory grounds invoked in his application. In this case, the Respondent severally faulted the arbitrator's interpretation of clause 81.1 and 20.4 of the sale agreement. Arguing that the arbitrator erroneously classified the title and discharge documents as "completion documents" to be returned only after the refund. Resulting in the award of interest to the Applicant at the rate of 15% p.a. He asserts that this interpretation effectively rewrote the contract between the parties as the issue of interest was outside the scope of the reference to the arbitrator.

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52. Further that the award of Kshs. 1,995,020.95 in interest at the rate of 15% p.a. was contrary to the provisions of clause 20.3 of the agreement, which capped interest at 2% per month. He claimed that the arbitrator's award introduced terms not contemplated by the parties, thereby violating the principle of party autonomy and justice, hence contrary to public policy. Which renders it unenforceable.

53. The court notes that the parties herein expressly agreed to arbitration as their dispute resolution mechanism. This agreement is found at clause 21 of the sale agreement which is entitled "Mediation/Arbitration." The relevant provision is clause 21.3, which states: "***Any dispute or difference arising out of or in connection with this Agreement shall be determined by the appointment of a single arbitrator to be agreed between the Parties, or failing agreement within seven (7) days, after either party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the Chairman for the time being of the Law Society of Kenya***." On a plain reading, this clause contemplates any *dispute* or *difference* arising out of or in connection with the sale agreement and contains no exceptions.

54. Upon the appointment of the arbitrator the Applicant filed his statement of claim which included a claim for refund of the deposit and interest thereon, to which the Respondent filed a response. The Respondent submitted to the jurisdiction of the arbitrator by participating in the arbitration process, and at no time did he raise any objection concerning matters referred to the arbitration, the process itself or the arbitrator at any point. Section 17 of the Arbitration Act empowers the arbitral tribunal to rule on its own jurisdiction including any objection as to the existence, validity and scope of the arbitral agreement.

55. Indeed, at the end of the process, at paragraph 16 of the final award, the arbitrator framed two issues for determination as follows:

'The following <u>were agreed as the issues for determination and set out in the Order for Directions No. 2 issued after the pre-hearing review meeting</u> :

a. whether the Claimant was to return documents before refund or was to get a refund followed by return of completion documents.

b. Is the claimant entitled to the reliefs sought?".

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56. The Court of Appeal in **Synergy Industrial Credit Limited [supra**] observed that :-

> **'We will only add that decisions on the equivalent provisions of the New York Convention and the Model Law abound and are clear that an arbitral tribunal has discretion to award remedies where its powers are not specifically limited. Thus, for example in *Telenor Mobile Communications As v. Strom LLC., 524 F. Supp. 2d 332 (2007)*, one of the complaints in an application to vacate an arbitral award was that the arbitral tribunal had awarded a remedy that the parties had not asked for. Rejecting the argument, the *US District Court, Southern District of New York* stated (quotes and footnotes omitted):**
>
> ***"Arbitrators enjoy broad discretion to create remedies unless the parties ' agreement specifically limits this power. While an arbitrator's award must draw its essence from the parties 'agreement...the effectiveness of arbitration in resolving complicated commercial disputes would be severely undermined if arbitrators were limited to the mechanical application of contested contractual provisions.***

<u>If the arbitration clause does not include any limit on the arbitrators' powers to craft a remedy, a respondent must overcome a powerful presumption that the arbitral body acted within its powers. Accordingly, while an arbitrator may not award relief expressly forbidden by the agreement of the parties, an arbitrator may award relief not sought by either party, so long as the relief lies within the broad discretion conferred by the FAA (Federal Arbitration Act).</u>"

57. The arbitration agreement in this case did not expressly limit the jurisdiction of the arbitrator to craft an appropriate remedy, having found that the title and discharge documents comprised completion documents liable for return upon refund of deposit under clause 20.4 of the sale agreement, and further that the Respondent had failed to refund the deposit within the stipulated period.

58. In so doing, the arbitrator invoked the provisions of Section 32C of the Arbitration Act which provides as follows:

> **"Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest**

calculated from such date, at such rate and with such rests as may be specified in the award".

59. From the foregoing, it is evident that the arbitrator was clothed with jurisdiction to comprehensively deal with the dispute referred to him by interpreting the sale agreement and applying it to the facts presented and to arrive at a decision. And in the exercise of his discretion found the Applicant deserving of an award of interest on the deposit. Nothing therefore turns on the complaint that the arbitrator exceeded his jurisdiction in considering an award of interest.

60. The second related contestation concerning the award of interest appeared to target the rate of interest set at 15%, which the Respondent variously described as illegal, unfair and unconscionable, thus offensive to public policy. In the case of **Nyombi & Anor v National Social Security Fund Board of Trustees & 4 Others (2021) eKLR** which involved a challenge to an arbitral award on several grounds including public policy, the Court of Appeal emphasized that courts ought not to lightly interfere with arbitral awards. While stating that public policy grounds are narrowly construed, the Court in upholding the impugned award, emphasized that parties should respect

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arbitration outcomes unless an award is one manifesting clear grounds for setting aside under Section 35 of the Arbitration Act.

61. An award is said to be contrary to the public policy of Kenya if it is illegal, that is, inconsistent with the Constitution or laws of Kenya; is immoral; inimical to the national interest of Kenya; is contrary to justice and morality; or portends injury to the public good. See **Rwama Farmers' Co-operative Society Ltd vs Thika Coffee Mills Ltd (2012)eKLR, Glencore Grain Ltd. Vs TSS Grain Millers Ltd. (2002)eKLR** and **Christ for All Nations vs Apollo Insurance Co. Ltd. (2002) eKLR**

62. In **Federica Martina Ferro v Gabriella Zouras Ferro [2020] eKLR** the Court observed the following:.

> **"Be that as it may, it is upon the Respondent to show which public policy is being violated. A mere allegation will not suffice. In the case of Deutsche Schachtbau-und Tiefbohrgesellscraft mbH v Ras Al Khaimah National Oil Company (1987) Lloyd's Rep 246, the court held that, <u>where public policy considerations are invoked, it has to be shown that, there is some element of illegality or that the enforcement of the award would</u>**

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be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the powers of the state are exercised."

63. The Respondent's assertions in support of the averment that the award of interest at 15% p.a is contrary to public policy appear vague. The mere fact that the Respondent was aggrieved by the arbitrator's determinations and award of 15% p.a interest without more, does not render the award offensive to public policy. As earlier observed, the arbitrator was pursuant to the mediation agreement and Section 32C of the Arbitration Act empowered to deal with and determine the Applicant's claim for interest as submitted. Reviewing the award especially at paragraphs 59 to 77, the court noted that the arbitrator painstakingly justified his award of 15% interest p.a and his concurrent rejection of the Applicant's claim for interest at 2% p.m. In the circumstances the challenge brought under public policy grounds must fail. Accordingly, the first application is found to be without merit and is hereby dismissed with costs to the Applicant.

64. Consequent to the above finding, no legal impediment remains to the adoption of the final award and award on costs as sought in the

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Applicant's second and third applications brought under Section 36 of the Arbitration Act. The section provides inter alia that "***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.*** The second and third applications are hereby allowed with costs to the Applicant.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 19TH DAY OF MARCH 2026.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Eredi

For the Respondent: N/A

C/A: Lepatei

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