REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. E1312 OF 2025

SANLAM GENERAL INSURANCE COMPANY LIMITED.....APPELLANT/APPLICANT

VERSUS

DANIEL KAMAU NDUNGU..... .....RESPONDENT

RULING

1. There are two related applications before the court for determination. The **first application was filed in this file, E1091/2025** by **Daniel Kamau Ndung'u against Sanlam General Insurance Co. Ltd dated 15/07/2025**. The Applicant seeks orders of enforcement of the Final Arbitral Award dated 4/10/2025 of Kshs. 5,125,000/= plus interest at 12% pa from 20/11/2023.

2. The second motion is filed in **Miscl. Appl.No.E1312/2025** and **dated 10/09/2025**. **It is filed by Sanlam General Insurance Ltd against Daniel Kamau Ndung'u** wherein the Applicant seeks an order to set aside the Arbitral award dated 4/10/2024, as well as stay of proceedings in E1091/2025.

3. Directions were taken that the two applications being related be determined simultaneously but separately.

4. However, upon the court considering orders sought by the respective parties in both applications, the court finds that the Motion dated 10/09/2025 filed in E1312/2025 ought to

be determined first, as if successful, the motion dated 215/07/2025 in E1091/2025 would become moot.

Notice of motion dated 10/09/2025 in E1312/2025

5. The Applicant, Sanlam General Insurance Company Ltd seeks an order to set aside the arbitral award delivered on 4/10/2024 by the sole Arbitrator Geoffrey Imende upon grounds found on its face and supporting affidavit sworn by its legal officer Mercy Kaima and based upon **Section 35(3) of the Arbitration Act 1995 Rule 7 of the Rules and Order 50 Rule 6 of the Civil Procedure Rules (CPR).**

6. The Defendant posits that the sole arbitrator in the award directed the Applicant to pay the Respondent Kshs. 5,125,000/= with interest at 12%pa and costs he assessed at Kshs. 388,191.70 – Exhibit "MK-1" and "MK-2" respectively.

7. The gist of the motion as evinced in the affidavit material is alleged that the Arbitrator failed to appreciate that the loss subject of the arbitration proceedings occurred outside the territorial scope of the contract, to wit; Uganda, and provided an investigation report "MK – 4" to prove the same as expressly stated in the policy contract.

8. That despite the Arbitrator acknowledging that the territorial jurisdiction question had not been properly pleaded in the Respondents' pleadings and going beyond the issues submitted for adjudication that the issue of territorial jurisdiction ought to have been determined first as a preliminary issue.

9. In opposition to the application the Respondent Daniel Kamau Ndung'u raised grounds of opposition dated 25/09/2025 premised under provisions of Section 35(3) as summarized here below:-

a) *THAT the Application is incompetent and time-barred as it offends provisions under Section 35(3) of the Arbitration Act, 1995 which expressly provides that an arbitral award shall not be made after three (3) months*

b) *THAT the Final Award was rendered on 4th October, 2024 and served on 24th December, 2024 and the Award on Costs rendered on 15th May, 2025 served and demand made.*

c) *THAT without leave of court the Application is fatally defective as it offends the timelines under Section 35(3) of the Arbitration Act, which are mandatory.*

d) *That the Respondent has already moved this Honourable court through an application for recognition and enforcement of the Final Award and Award on costs pursuant to Section 36 and 37 of the Arbitration Act, which is properly before court under Misc. App. E1091 of 2025 and ought to proceed to conclusion.*

e) *That the allegation that the arbitrator lacked territorial jurisdiction is misconceived devoid of merit and an afterthought, the arbitral proceedings having been conducted pursuant to a valid arbitration clause in the insurance policy, governed by Kenya Law and wish seat of arbitration in Kenya.*

f) *That the Applicant fully participated in the arbitral proceedings, did not raise jurisdictional issues in*

pleadings and is estopped from challenging the jurisdiction of the Arbitrator at the enforcement stage.

g) *That the application dated 10th September 2025 amounts to disguised appeal on the merits of the arbitral award, contrary to the limited and exclusive grounds permitted under the Arbitration Act and therefore offends Section 10 of the Arbitration Act thereof which limit court intervention strictly to the grounds set out in the Act.*

The Respondent by the above objections urged the court to dismiss the application dated 10/09/2025.

10. Directions were taken that parties file submissions on the twin motions. Only the Applicant complied.

Applicant's Submissions.

11. The Applicant **Sanlam General Insurance Co. Ltd** by its Advocates G. G. & Co. Advocates filed submissions dated 12/01/2026 and authorities. It proposed three main issues for court's determinations:-

a) *Whether the Application to set aside the arbitral award is time barred under Section 35(3)*

b) *Whether the Arbitrator exercised excess jurisdiction above his statutory mandate*

c) *Whether a party participating in arbitral proceedings without raising a formal jurisdictional objection can later invoke Section 35.*

Whether the application is time barred

12. It is submitted that **Section 35(3) of the Arbitration Act** provides; *that an application for setting aside an arbitral award*

may not be made after three months have lapsed from the date on which the party making that application had received the arbitral award, that no evidence of service of the arbitral award was provided, as the operative trigger is receipt, adding that the arbitral tribunal, under Section 32(5) obligates it to deliver a signed copy of the award to each party, and only after such would it attain vitality against a party until it is properly brought to its notice, that the final arbitral award and the award on costs were received on 13/06/2025 being the time from which computation in respect of Section 35(3).

13. The case of **Anne Mumbi Hinga v. Victoria Njoki Gathaara [2009] eKLR** was called to aid for the proposition that the application is not time barred.

On the matter of jurisdiction and excess of mandate

14. While citing **Section 35(2) (a) (iv) of the Act** that empowers the court to set aside an arbitral award where it deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, the Applicant submitted that the jurisdiction of a tribunal arises from a contract between the parties, is embedded within, and bounded by the substantive terms of the contract; being a creative of consent; to the extent that the policy was governed by Kenyan Law, defining the geographical scope which the risk covered, to wit, the territorial limitation determines the risk exposure, premium computation, and regulatory compliance.

15. It is further submitted that the alleged theft of the subject motor vehicle occurred in Uganda under the Yellow card scheme, whereof the Respondent ought to have reported the

theft within the jurisdiction with the applicable cross border procedures, adding that if the loss occurred outside the territorial scope insured, then the dispute to the extent that it sought to impose indemnity beyond that scope, fell outside the contractual mandate, reiterating that the tribunals authority extended only to disputes arising within the four corners of the policy, the Republic of Kenya.

16. Citing the case of **Nyutu Agrovet Ltd v. Airtel Network Kenya Limited [2015] eKLR**, it was submitted that the court of appeal recognizes that although juridical intervention in arbitral matters is circumscribed, it is nonetheless permissible where an arbitrator exceeds his mandate; adding that the Supreme Court, in affirming the limited yet real scope of intervention, made it plain that arbitral autonomy does not extend to an act done without jurisdiction.

17. Also called to aid is the case of **Christ for All Nations vs. Apollo Insurance CO. Ltd [2003]2EA 366** where in the High Court held that an award will offend public policy where it is inconsistent with the law or amical to the fundamental principles of justice in Kenya, being sanctity of contract; that to impose an insurer to indemnify a risk beyond the agreed territorial limits is to impose liability where none was contemplated by the parties.

18. Further, on the principle of estoppel and participation, the Applicant submitted that participation by a party to arbitrate proceedings without raising jurisdictional objection does not amount to waiver, stating that jurisdiction flows from contract and statute, and acquiescence could not confer

jurisdiction to the arbitrator nor could it clothe it with authority if that authority was never conferred by the contract.

19. Finally, the Applicant submitted that should the challenge under **Section 35** succeed, then recognition of the award under **Section 36 and 27** of the Act as sought as sought by the Respondent in the motion dated 15/7/2025 must collapse and urging the court to find as such with costs to the Applicant.

Analysis and Determination

20. Upon interrogation of the arbitral proceedings and the final awards, as well as submissions tendered by the Applicant that the court postulates what concerns for determination are issues :

a) *Whether the application to set aside the arbitral award is time barred*

b) *Whether the arbitrator exercised excess jurisdiction above the statutory mandates*

c) *Who shall bear costs of the application.*

Whether the application to set aside the arbitral award is time barred.

21. **Section 35(3)** provides that:

> *An application for setting aside the arbitral award may not be made after 3 months have lapsed 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.*

22. The question that arises here is when the two-arbitral awards were received by the Applicant. Whereas the Respondent in his grounds of opposition states that the final award dated 4/10/2024 and the award on costs dated 15/05/2025 were received by the Applicant, he fell short of providing evidence when the awards were received as to meet the requirement at **Section 35(3) of the Act**.

23. I agree with the Applicant that it is not enough to simply state that the Application is time barred without substantiation as it offends provisions under the Act. Whereas no dispute arises as to when the arbitral awards were made, the Respondent ought to have provided evidence as to when they were served and received by the Applicant in the manner provided under the law.

24. **Section 32 (5)** obligates the Arbitrator to deliver a signed copy of the award (in this case the final award and the award on costs) and only upon receipt would duly acknowledged, would time start to run.

25. Whereas in superior court decisions, notably **Nyutu Agrovet Limited (supra), University of Nairobi v. Multiscope Consultancy Engineers Limited [2020]eKLR and Lanctech (Africa) Limited v. Geotharmol Development Company [2020] eKLR,** the issue of "received/receipt" of an arbitral award by the parties and or their clients has been discussed in length, and while holding that actual receipt of a signed copy of the arbitral award is not, or may not be necessary and that notification to the parties to the arbitral proceedings by the arbitrator that the award is ready for collection, the

Respondent failed to offer any cogent evidence of such notification or service by the arbitrator or any evidence of receipt or its readiness for collection. **Section 107-109 of the evidence Act** is applicable in this regard. The burden of proof lies with whoever alleges that the awards were indeed received by the Applicant or its Advocates within three months of delivery.

26. The Applicant submitted that both the final award and the award on costs was received on 13/06/2025 and thus computation of time started to run for which then the application under review dated 10/09/2025 was filed within the statutory period, and therefore not time barred. See also **Anne Mumbi Hinga(supra).**

Jurisdictional excess of Mandate by the Arbitrator

27. The jurisdiction of the tribunal arose from the contract executed between the parties in which it is embedded within and bound by the substantive terms of the contract, which terms were by consent of the parties.

28. **Section 35 (2) (a)(iv) of the Act** empowers the court to set aside an arbitral award when the arbitrator entertains a dispute not contemplated or not falling within the terms of the reference.

29. The jurisdiction of a tribunal arises from the contract executed between the parties, such jurisdiction is embedded within and bounded by the substantive terms of the contract, which is a creature of consent; and the policy terms as agreed. The contract between the parties is embedded in the policy no. 17/070/1/000096/2019/11 and exhibited in the investigation

report prepared by Party Loss Assessors dated 5/03/2020 – ext No. "MK4" upon statements from eye witnesses at the scene of the accident wherein the investigators conclusively made findings that the theft of the vehicle took place in a foreign court, to wit; Uganda where the initial accident report was made to the police.

30. The investigators also found that the authorized driver of the subject vehicle never made a report of the theft to any Kenyan police station.

31. These material facts are uncontroverted.

32. An Arbitral Tribunal is mandated to confine itself to issues as framed and referenced for determination, to wit, the policy document expressly limited the cover to incidents occurring within the Republic of Kenya, and within the territorial scope of the contract.

33. It is not in dispute that the arbitrator, despite finding that the theft of the vehicle occurred in Uganda, outside the territorial scope of the policy cover, failed to determine that very crucial aspect of the referenced issues to him, only mentioning it in passing.

34. I have considered the terms of reference issued to the Arbitrator by consent of both parties. Pertinent here as evinced at par. 21 of the Final award was that in reference to the preliminary meeting between the parties advocates the parties agreed that they did not have jurisdictional challenge among other terms stated thereto.

35. At par. 40 of the final award, one of the issues crafted for determination was **(a) whether the claimant (Respondent) was in breach of the insurance policy.**

36. Upon interrogation, the Arbitrator made a finding at par. 63 that the claimant was not in breach of the terms of the Insurance policy and further that the Defendant (Applicant) was liable to compensate the plaintiff being the insured value of the vehicle together with costs of the suit and interest at court rates.

37. On the factual and evidential aspects of the claim, the Arbitrator's findings cannot be faulted. Despite all parties agreeing on the terms of reference of the arbitral proceedings, they forgot, that the territorial question on jurisdiction of the policy was forgotten or not seriously taken into account, noting that the Respondent in his grounds of objection stated that the allegation on territorial jurisdiction is misconceived devoid of merit, an afterthought having been conducted pursuant to a valid arbitration clause in the insurance policy governed by Kenyan Law, with the seat of arbitration in Kenya.

38. It is noting that the above issue was in the mind of the arbitrator, but as parties had raised no jurisdictional challenge, he proceeded to confer jurisdiction upon himself to hear and determine the dispute, contrary to the long trodden principle that once a court becomes aware that it may not possess the necessary jurisdiction, it ought to down its tools as anything that it does without jurisdiction amounts to naught, as held in the **Owner of Motor Vessel (Lillian S) supra.**

39. The insurance policy as stated earlier limits cover to incidents occurring within the republic of Kenya. To this, the Applicant submitted that despite the express provision and being aware of the same, he disregarded and failed to address himself to that crucial fact and proceeded to award indemnity; by rewriting the contract between the parties; despite also acknowledging that the issue had not been properly pleaded in the Respondents defence but emerged later in the proceedings.

40. The parties here are reminded that anything done by the court, and in this case, the tribunal, being a quasi-judicial agency, without jurisdiction is nothing as held in the celebrated case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil Kenya [1989] KECA 48 (KLR).** The court observed that if the jurisdiction of a court or tribunal (including arbitrator) is raised by a party or the court, it must be decided at the earliest opportunity; that jurisdiction is everything, and where the court had no jurisdiction, there would be no basis to continue the proceedings pending other evidence.

41. The court continued to render that a party who failed to question the jurisdiction of a court may not be heard to raise the issue after the matter was heard and determined. It is important to say here that the arbitrator raised that issue, but made light weather of the issue when he stated that the issue of territorial jurisdiction had not been properly pleaded by the Respondent but emerged later in the proceedings. It is at that stage of the proceedings that the arbitrator ought to have posed, and proceeded to deal with the issue of territorial

jurisdiction as held in the **owners of the motor Vessel "Lillian" case (supra).**

42. In the court's view, the issue of territorial jurisdiction is a legal issue that ought to have been determined before proceeding further as reiterated in the holding reiterated in many decisions among them **Rai & 3 Others v. Rai & 4 Others [2014] KERHC [3124] KLR** which matter arose from arbitration proceedings. The moment a court or tribunal notes that a question of jurisdiction has been raised or it finds such a question suo moto, it ought to stay the proceedings and proceed to hear and determine that legal issue. It does not matter at what stage of the proceedings the issue presents itself to the arbitrator or the court. Clearly, the arbitrator acted beyond and in excess of his mandate when upon the issue coming to his knowledge, he proceeded to hear the dispute without first addressing himself to the legal question of jurisdiction.

43. It is trite that jurisdiction of a tribunal is embedded in the contract between the parties, which then binds them to the letter. The Court's duty in respect is not to rewrite the contract but only to interprete. Persuaded to agree with the Applicant that the policy of Insurance over the vehicle subject of the arbitration proceedings was limited to an occurrence within the territory of Kenya.

44. The arbitrator having found that the occurrence occurred in a foreign country, a fact not disputed by any of the parties herein, then by making a finding that the Applicant herein was obligated to indemnify the policy holder exercised excess

jurisdiction above what the parties consented and also embedded in the policy cover.

45. In my view, it does not matter what finding the arbitrator made, for or against the parties. What matters and clearly elucidated in the learned decisions stated above and others, and to quote the holding in the **Motor Vessel "Lillian"** decision (supra) by Myarang JA; at par 7 of the judgment that:

> "*a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It was immaterial whether the evidence was scanty or limited. Scanty or limited facts constituted the evidence before the court. A party who failed to question the jurisdiction of a court may not be heard to raise the issue after the matter was heard and determined. There were no grounds as to why a question of jurisdiction could not be raised during the proceedings. As soon as that was done the court should hear and dispose of that issue without further ado".*

46. The above holding is all fours with the question before the court. The issue is a legal issue, and whether or not was raised by the parties during the arbitral proceedings, the arbitrator knew and had knowledge of the same, to which he ought to have taken the initiative to hear and determine it before proceeding to the substantive issues referenced. That failure in my considered view makes his decision and the awards both in the substantive final award dated 4/10/2024 and the award on costs dated 15/05/2025 *void ab initio,* as they amount to naught.

47. For the foregoing, the grounds of objection raised by the Respondent dated 25/9/2025 as against the Applicant's motion dated 10/9/2025 are devoid of merit and must be dismissed with costs to the Applicant.

Conversely, the Applicant's application dated 10/09/2025 is allowed, to the extent that the Final Award dated 4/10/2024 and the award on costs dated 15/05/2025 are hereby set aside.

48. By the above finding, It is evident that the Application in Misc. Appl. No. E 1091/2025 dated 15/7/2025 is now moot; the court will not belabor to determine the same.

Delivered Dated and Signed at Nairobi this 12th March 2026.

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JANET MULWA.

JUDGE