

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
COMMERCIAL & TAX ARBITRATION CAUSE NO. E024 OF
2025**

MILTON BEN ESILIA ALUKONYA

..... **APPLICANT**

VERSUS

PETER KIIRU KAMAU

RESPONDENT

RULING

Introduction

1. Before the Court for determination is the Applicant's Notice of Motion dated 24th March 2025, brought under Section 35 of the Arbitration Act, 1995, seeking the setting aside of the arbitral award delivered by James K. Mwangi, a Sole Arbitrator appointed in the dispute between the parties herein.

2. The application is supported by the affidavit of the Applicant, sworn on the same date, and written submissions dated 2nd February 2026.

3. The Respondent opposed the motion through a **Replying Affidavit sworn on 15th April 2025**. However, as at the time of writing this Ruling, no submissions were on record on behalf of the Respondent.
4. The Court has carefully considered the Notice of Motion Application, the replying affidavit, and the submissions filed by the Applicant.
5. The background of the matter is that the parties entered into a **Partnership Deed dated 1st March 2022** for the establishment and operation of a business known as **Bustani Bar**. Clause 13 of the Partnership Deed provided for arbitration in the event of a dispute.
6. A dispute subsequently arose relating to the management of the partnership, retirement by the Respondent from the partnership, and the valuation of the Respondent's share.
7. The dispute was referred to arbitration by consent, culminating in an arbitral award in which the Arbitrator found in favour of the Respondent and awarded him **Kshs. 872,675**, being the value of his capital contribution.
8. Aggrieved by the award, the Applicant moved this Court seeking to set it aside.

9. The Applicant contends that the Arbitrator exceeded his jurisdiction by determining matters not pleaded and awarded a sum which was not supported by the Partnership Deed. It was further the Applicant's contention that the award conflicts with public policy of Kenya insofar as it imposed liabilities not contractually agreed.
10. Further, the Applicant asserted that he was denied a fair opportunity to fully present his case.
11. On this basis, the Applicant urges this Court to invoke **Section 35(2)** of the Arbitration Act and set aside the award.
12. The Respondent, on the other hand, maintained that the arbitration was conducted strictly in accordance with the Partnership Deed and the Arbitration Act. The Applicant fully participated in the arbitral proceedings and suffered no procedural prejudice.
13. It was therefore the Respondent's case that no ground recognised under Section 35(2) for setting aside an arbitral award has been met, and that the application is a disguised appeal on the merits, which this Court lacks jurisdiction to entertain.

14. The Respondent therefore urged this Court to dismiss the application, relying heavily on the principle of finality of arbitral awards.

Analysis and Determination

15. From the pleadings and submissions, the sole issue for determination is whether the Applicant has satisfied the statutory grounds for setting aside an arbitral award under Section 35 of the Arbitration Act.

16. The limited parameters within which an arbitral award may be set aside are circumscribed under Section 35 of the Arbitration Act as follows:

“(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.”

17. Section 35(2) of the Arbitration Act exhaustively sets out the grounds upon which an arbitral award may be set aside. The Court’s jurisdiction is therefore strictly limited.

18. In **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** the Court of Appeal was emphatic that the Arbitration Act is a complete code, and courts must resist the temptation to intervene outside its express provisions. This position was endorsed by the Supreme Court in **Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd [2019] eKLR** where the Court underscored the finality of arbitral awards, save for narrow exceptions under Section 35.

19. Similarly, in **Reliable Concrete Works v Ngewanji Company Limited [2022] eKLR**, the court held that Section 35(2) strictly circumscribes the jurisdiction of the High Court in setting aside arbitral awards, and an applicant must bring himself squarely within those statutory bounds. The Court stated that: -

“Courts have taken the position that the grounds for setting aside of an arbitral award as set out under the

above section of the Act are strict and spell out the jurisdiction of the court in setting aside an Arbitral Award. This is the position that was taken in *Midco Holdings Limited v Summit Textiles (EA) Limited* [2014] e KLR, where it was held:

“... Section 35 (2) of the Arbitration Act circumscribes the grounds upon which an arbitral award can be set aside, and an applicant seeking to set aside an arbitral award must bring himself strictly within the legal bounds of that Section. See the case of *TRANSWORD SAFARIS LTD V EAGLE AVIATION LTD & 3 OTHERS* NBI MISC APPLICATION NO. 238 OF 2003, Nyamu J. (as he then was).”

20. From the above provisions of the statute and jurisprudence, it is clear that Section 35 of the Act sets out the exclusive grounds upon which a party may apply to set aside an arbitral award. These include incapacity, invalidity of the arbitration agreement, lack of proper notice, excess of jurisdiction, improper composition of the tribunal, or conflict with public policy.

21. In the present case, the Applicant argued that the Arbitrator exceeded his jurisdiction. From the record, the Court notes that the Partnership Deed expressly empowered the Arbitrator to determine disputes touching

on the valuation of a partner's share, division of assets upon retirement, and accounts of the partnership.

22. The Court has carefully considered the award and noted that the same confined itself to these very issues in the Partnership Deed as identified in the preceding paragraph. A disagreement with the arbitrator's conclusions does not amount to an excess of jurisdiction.
23. On the allegations by the Applicant that due process was not followed and his right to be heard curtailed, the Court notes from the record that the Applicant participated in the arbitral proceedings, filed pleadings, adduced evidence, and made submissions.
24. No material has therefore been placed before this Court to demonstrate that the Applicant was **unable to present his case** within the meaning of Section 35(2)(a) (iii). Mere dissatisfaction with the outcome cannot be equated to denial of a fair hearing.
25. The Court associates itself with the holding of in Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others [2005] KEHC 1267 (KLR), where Ransely J (as he then was) stated as follows:

“A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.”

26. Regarding the Applicant’s argument that the award was against the public policy of Kenya, it is trite that the public policy ground must be construed narrowly and cautiously.
27. The Court in **Christ for All Nations v Apollo Insurance Co. Ltd [2002] EA 366** held that an award will be contrary to public policy if it is inconsistent with the Constitution or other laws of Kenya; inimical to the national interest of Kenya; or contrary to justice or morality.
28. In **Kenya Shell Ltd v Kobil Petroleum Ltd [2006] eKLR**, the Court of Appeal cautioned that courts must resist the temptation to interfere with arbitral awards merely because they would have reached a different conclusion.
29. Having gone through the award, and taking into account Clause 13 of the Partnership Deed, which

provided for arbitration in the event of a dispute, as well as the provisions of the Partnership Deed as a whole, I find nothing in the award that is contrary to public policy of Kenya. On the contrary, the award gives effect to the parties' contractual arrangements.

30. The Applicant's submissions repeatedly attacked the correctness of the Arbitrator's findings. This Court reiterates that it **does not sit on appeal** over arbitral awards. Errors of fact or law, if any, are immaterial unless they fall within Section 35.

31. The upshot of the foregoing is that the Applicant has failed to establish any of the grounds set out under Section 35(2) of the Arbitration Act.

32. Accordingly, I make the following orders:

- i. The Notice of Motion dated 24th March 2025 is dismissed.
- ii. The Applicant is at liberty to file an application for recognition of the arbitral award under Sections 36 and 37 of the Arbitration Act.
- iii. Costs of the application are hereby awarded to the Respondent.

33. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 23RD DAY OF APRIL 2026**



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A - Moses

.....for the Applicant

.....for the Respondent