

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. E005 OF 2024

**CAPE SUPPLIERS
LIMITED.....APPLICANT**

VERSUS

**VILLA CARE LIMITED.....
RESPONDENT**

RULING

1. This Ruling arises out of the Application by the Applicant by way of a Notice of Motion dated 30.04.2025. It seeks a Review of the previous Orders issued by my **Brother Benjamin Mwikya Musyoki J.**

Background Facts

2. The Applicant filed the Notice of Motion dated 30th April 2025 seeking the following orders;
 - a) *The court to review the ruling and orders issued by Honourable Justice Benjamin Mwikya Musyoki vide a ruling delivered on 8th April 2025 as relates to the question of whether the award failed to consider an issue submitted for determination by the parties, i.e.*

whether the service agreements executed between the parties were perpetual in nature.

- b) The court to review the ruling and orders issued by Honourable Justice Benjamin Mwikya Musyoki vide a ruling delivered on 8th April 2025 as relates to the upholding of the Arbitration award published by the sole Arbitrator Kevin Tom Mogeni, with respect to compensation on the Kindaruma property, which property (as established in the certificate of title) comprises 1 parcel measuring 1.145 acres and NOT 2 plots measuring 1 acre and 1.13 acres respectively.*
- c) The court to review the ruling and orders issued by Honourable Justice Benjamin Mwikya Musyoki vide a ruling delivered on 8th April 2025 to the extent that the award on compensation on the Kindaruma property, be assessed at a value of Kshs. 400,000,000/= and not Kes. 850,000,000/=, as evidenced in the valuation report dated 16th March 2018 and produced in the Arbitration proceedings and which was unopposed by the Respondent herein.*
- d) The Court to issue any other order that it may deem fit for ends of justice to be met.*
- e) Costs of this Application be provided for.*
- In support of the Application, there is the Supporting Affidavit of **Kinaro Kibanya**, sworn on 30th April 2025. He stated that the **Honourable Mr. Justice Benjamin**

Mwikya Musyoki, in a Ruling delivered on 8th April 2025, dismissed the Applicant's Motion dated 18th January 2024. The application sought to set aside the arbitral award published by the sole arbitrator, **Kevin Tom Mogeni**. The Court instead allowed the Respondent's Motion dated 12th March 2024 in Arbitration Cause No. E014 of 2024. The net result thereof was recognizing and enforcing the arbitral award, albeit with a revision on the award of costs as prayed in the Applicant's setting-aside application.

3. Being dissatisfied with the said Ruling, the Applicant now seeks its review on the grounds of errors apparent on the face of the record. It is submitted that if left uncorrected, the errors will occasion substantial prejudice. This including exposure to the loss of a colossal sum of money and the resultant unjust enrichment of the Respondent.
4. In reply, the Respondent filed Grounds of Opposition dated 16th May 2025 on the following grounds;
 - a) *The Application is fatally defective and an outright abuse of the process of the Court and should be struck out for reasons that:-*

- b) *The Arbitration Act does not provide for review of a decision made pursuant to Section 35 and therefore under Section 10 of the Act, the Court lacks jurisdiction to intervene and confer upon itself the powers to review its decision to adopt the Arbitral Award as a Decree.*
- c) *The Application for Review is brought under the provisions of the Civil Procedure Act and the Rules thereunder, which do not apply to Arbitral proceedings as Section 10 of the Arbitration Act makes the Arbitration Act a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which stipulates that: “Except as provided in this Act no Court shall intervene in matters governed by this Act”.*
- d) *The Application for Review further offends the mandatory provisions of Section 32A of the Arbitration Act which stipulates that: - “Except as otherwise agreed by the parties, an Arbitral Award is final and binding upon the parties to it, and no recourse is available against the Award otherwise than in the manner provided by this Act.”*
- e) *The grounds in support of the Application for Review are issues dealt with conclusively in the Ruling sought to be reviewed and are res judicata, and to the extent that the Judgment Debtor/Applicant purports to impugn the Court’s substantial findings in a decision made*

pursuant to Section 35 of the Arbitration Act betrays the Application and reveals it to be an appeal disguised as a review.

- f) The Court lacks jurisdiction to entertain the prayer for a stay of execution as there exists no competent Appeal capable of sustaining the application for stay of execution as the Application for Review does not meet the legal threshold established by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited & The Chartered Institute of Arbitrators -Kenya Branch (Interested Party) [2019] eKLR and is a nullity in law.*
- g) The Application offends the principle of functus officio, which is grounded on public policy and favors the finality of Arbitration proceedings and bars the reopening of a matter where an Award has been adopted as a Decree of the Court.*
5. The Respondent also filed a Replying Affidavit sworn on 16th May 2025 based on the same grounds raised in the above-mentioned Grounds of Opposition.

Issues for determination

6. The Court has carefully considered the Application, the responses, the written submissions and the oral highlights by

Counsel for the parties. The Court frames a single issue for determination as follows;

a) Whether the Court has the jurisdiction to review the Ruling dated 8th April 2025.

Analysis

7. The Applicant brought the Application for review under **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1, 2 & 3 of the Civil Procedure Rules**. The Applicant submits that **Rule 11 of the Arbitration Rules** expressly provides that *“so far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules.”* This importation clause incorporates the Civil Procedure Rules into arbitration proceedings before the High Court, unless they are expressly inconsistent with the Arbitration Act.
8. The Respondent maintained that the Application for Review is brought under the provisions of the Civil Procedure Act and the Rules thereunder, which do not apply to Arbitral proceedings. That **Section 10 of the Arbitration Act**

makes the Arbitration Act a complete code. That **Rule 11 of the Arbitration Rules** cannot override **Section 10 of the Arbitration Act**.

9. **Section 10 of the Arbitration Act** limits the Court's intervention in matters governed by the Act, except as provided. It provides;

“Extent of court intervention

Except as provided in this Act, no court shall intervene in matters governed by this Act.”

10. The Court in the case of **Prof. Lawrence Gumbe & Another vs. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004**, held that:

“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented...”

11. Further in **Anne Mumbi Hinga vs . Victoria Njoki Gathara Civil Appeal No. 8 of 2009**, the Court held in part that: -

“The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decreed where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. In the court’s view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to the Court that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration...”

12. **Section 10** thereof thus cautions Courts to only interfere with matters arbitration as allowed by the Act. This Court is bereft of any jurisdiction to deal with the matter otherwise than allowed by law.

13. In addition, **Section 32A of the Arbitration Act** provides;

Effect of award

Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against

the award otherwise than in the manner provided by this Act.

14. With regard to the issue of review in arbitration matters, the Court of Appeal in **Godson Sixty One School Limited v Symbion Kenya Limited** **[2023] KECA 900 (KLR)** found;

“In terms of the above provision, an award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act. The parties before us had not agreed otherwise, so, the appellant could not benefit from the above exception. The import of the above provision is that the award could only be set aside in the manner provided under the Act. The grounds for setting aside an award are provided under section 35 of the Act, which is the exclusive recourse to a court against an arbitral award. Accordingly, purporting to review the decision and seeking to substitute the award with an order setting aside the award in a manner not contemplated by section 35 is an illegality. This is because the procedure adopted and the prayers sought offended the clear provisions of sections 10, 32A and 35 of the Act.”

15. The Court of Appeal went on further to state as follows;

“In terms of section 10 of the Act, no judicial authority would intervene in arbitral proceedings except where it is so provided. The legislative intent is clear that the arbitral proceedings are not to be impeded except as provided under the Act. Therefore, the invocation of the Civil Procedure Rules and the Civil Procedure Act was an impermissible way of circumventing clear statutory edicts under the Act limiting court intervention.

In any event, by agreeing to arbitration, parties to a dispute necessarily agree that the provisions of the Act and nothing else will determine the fairness of the hearing. Typically, they agree to waive the right of appeal or review, which in context means that they waive the right to have the merits of their dispute re-litigated or re-considered. By agreeing to arbitration, the parties limit interference by courts to the grounds set out in section 35 of the Act. By necessary implication, they waive the right to rely on any further ground of appeal, review and common law or otherwise. Accordingly, we entirely agree with the learned judge that the appellant improperly invoked the provisions of

the Civil Procedure Rules and the Civil Procedure Act by seeking to review the said decision.”

16. Guided by the above decisions, it is the Court’s finding that the Court lacks jurisdiction to consider an application for review of its Ruling rendered on an application made under **Section 35 of the Arbitration Act**. The Applicant is also reminded that under **Section 32(A) of the Act** an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act. It has not been submitted that this is an arbitration agreement where parties provided for intervention by the Court by way of appeal or review of the Arbitral Award.

17. The Orders issued by **Benjamin Mwikya Musyoki J** on 8th April, 2025 were to adopt the Arbitral Award as a Judgement of this Court. The Court also declined to set aside the Arbitral Award. The Learned Judge did not write or add anything to that Award by the Arbitrator. The application seems to challenge the Award itself and its merits as well as reasoning by the Arbitrator. It is not even about the process

of adoption of the award. This Court going by its previous pronouncements is bound to honour and respect party autonomy. Allowing the review will be inviting the Court to apply its mind and relook at the Arbitral Award. Parties had bound themselves to a process that carried finality with no recourse to appeal and with very limited Court interference.

18. The Court is not persuaded that the Application is merited. The Application is hereby dismissed.

19. As to costs, the same lie at the discretion of this Court. As a general rule, costs follow the event. The same are awarded to the Respondent.

Determination

20. The Applicant's Application by way of a Notice of Motion dated 30.04.2025 is HEREBY dismissed for lack of merits.

21. The costs of the Motion are awarded to the Respondent.

22. It is so ordered.

23. The file is marked as closed.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 07TH DAY OF MAY, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Miss Kiiru for the Applicant.

Mr. Kariuki for the Respondent.

Mr. John Paul - Court Assistant.