

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
MISCELLANEOUS APPLICATION NO. E025 OF 2024

VARIZONE LIMITEDAPPLICANT

VERSUS

WILD LIVING COMPANY LIMITEDRESPONDENT

RULING

1. By an Application dated 18.3.24, the Applicant seeks stay and the setting aside of the arbitral award delivered on 18.12.23. The Applicant prays that in the alternative, the Court gives further orders or directions as it deems fit in respect of all or part or the said arbitral award.

2. In a supporting affidavit sworn on even date, Christopher Denis Wilson, a director of the Applicant averred that the arbitral award was made pursuant to a statement of claim by the Respondent dated 27.1.23 in response to which it filed a statement of defence and counterclaim filed on 7.3.23. The Applicant’s case is that at the hearing, the Respondent admitted that it had breached the provisions of Clause 13 of the lease governing the tenancy relationship by subletting the premises to third parties without the Applicant’s consent; that the Respondent alleged that there were negotiations legitimizing the breach, which was denied.

3. The Applicant faults the Arbitrator for holding in Clause 18 subclause 1 of the arbitral award, that the breach was cured *vide* a meeting held on 15.3.19, despite there being no concessions and in effect unilaterally altered the contractual provisions of the lease. The Applicant averred that the Arbitrator overstepped his mandate by finding that the Applicant was not entitled to enforce contractual terms of the lease despite finding that there was a breach and thereafter contradicting himself that there was no breach. The Applicant faults the Arbitrator for upholding the subleasing despite the same being premised on a breach of the lease.

4. The Respondent opposed the Application vide a notice of preliminary objection dated 3.4.24. The objections are first, that the dispute between the parties was heard and determined on 18.12.23 in accordance with the will of the parties contained in the lease agreement dated 1.7.17. Second, that no objection was raised at the arbitral tribunal as to the competency or lack of jurisdiction and that the Applicant had a counterclaim. Third, that the dispute is no *res judicata*. Lastly, that this Court lacks jurisdiction to entertain the Application as filed under

the provisions of Clause 17 of the lease executed by the parties, now that the arbitral tribunal has rendered its award.

5. The Respondent also filed a replying affidavit sworn on 7.5.24 by Anthony Maina Niru, its Executive Director. He averred that the arbitral tribunal to which the dispute between the parties was referred, as well as its jurisdiction, were agreed and accepted by both parties; that the Applicant in fact proceeded to file a counterclaim; that in the award, the tribunal allowed the Respondent's statement of claim and dismissed the Applicant's counterclaim; that the Applicant did not write to the arbitral tribunal for clarification of any ambiguity which it thought appeared in the award as provided under Section 32 of the Arbitration Act; that no proof that the award offended any of the elements provided in Section 35(2) of the Act has been provided to warrant the setting aside of the arbitral award; that the Respondent had sought to determine if the breach complained of had been resolved by the meeting of 15.3.19; that making the determination, the Arbitrator did not exceed his mandate. The Respondent urged that the Application be dismissed with costs.
6. I have considered the pleadings before Court and the submissions on record. The main issue for determination is whether the applicant has met the threshold for setting aside the arbitral award. It is not disputed that a dispute arose between the parties following the subleasing of the premises in question by the Respondent, in breach of Clause 13 of the lease dated 1.7.17. It is also not disputed that the lease between the parties contained an arbitration clause, namely Clause 17. It is pursuant to Clause 17 of the lease that the said dispute was referred to the Arbitrator.
7. Section 35(2) of the Act sets out the grounds upon which an award may be set aside as follows:

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.

8. The grounds upon which the Applicant seeks the setting aside of the arbitral award are that the Arbitrator exceeded his mandate by making a finding on alleged concessions on the breach of the provisions of the lease by subletting of the premises in question without being supplied with any minutes or evidence of what was discussed at the meeting. The Applicant submitted that the award infringes on the Applicant's freedom to contract and enforce contractual obligations in the event of a breach, which is against public policy. It was submitted that this effectively denied the Applicant the right to vacant possession and the right to set off repair costs from outstanding rent as counterclaimed by the Applicant. Further, that the award, if allowed to stand will set a precedent to completely disregard sanctity of contracts.
9. In its submissions, the Respondent asserted that the Arbitrator did not grant any relief that was not sought in the statement of claim. Further that the Applicant did not invoke the provisions of Section 32 of the Act to seek clarification of any ambiguity in the award and finally, that the elements set out in Section 35(2) of the Act were not demonstrated to warrant the setting aside of the award.
10. The Applicant claims that the Arbitrator overstepped his mandate by finding that the Applicant was not entitled to enforce contractual terms of lease despite finding that there was breach and thereafter contradicting himself that there was no breach.

11. Section 35(2)(iv) empowers this Court to set aside an arbitral award if the same 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.
12. Clause 13 of the lease between the parties provides that the lessee may not underlet, part with or share possession or occupation of the premises in part or whole without prior written consent of the lessor for the duration of the lease and that such consent shall not be unreasonably withheld. Clause 17 of the lease provides that ***“in the event of any dispute or disagreement to any part of this lease both parties have agreed to arbitration and accept the verdict of the arbitrator shall be full and final.”*** The issue before the Arbitrator was the subleasing of the premises by the Respondent without the written consent of the Applicant. A plain reading of the cited clauses leads to the inescapable conclusion that the award dealt with a dispute falling within the scope of the reference to arbitration.
13. The Applicant contended that the award offends public policy. The Applicant’s case is that despite holding that the Respondent had breached Clause 13 of the lease, the Arbitrator then deviated and rubberstamped the said breach, yet there was no evidence that the terms of the lease were amended or varied in any way. The Applicant asserted that by making a finding that the subletting was consented to, the Arbitrator overstepped his mandate and acted against public policy.
14. In **Christ for All Nations vs. Apollo Insurance Co. Ltd [2002] 2 E.A 366**, the Court of Appeal stated as follows regarding public policy:

Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, (c) contrary to justice and morality.
15. In **Dinesh Construction Ltd & Another v Aircon Electronic Services (Nairobi) Ltd (2021) eKLR**, the court stated:

Although framed broadly, public policy as a ground for setting aside an arbitral award must be narrow in scope and the assertion that an award is contrary to the

public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and must then show which part of the award conflicts with that policy.

16. Flowing from the cited authorities, the ground of public policy for setting aside an arbitral award is only applicable when there is clear evidence that the award contradicts the Constitution or any written law. The Applicant was required to identify the public policy breached by the award and the part of the award conflicts with that policy. Additionally, the Applicant was under an obligation to demonstrate that the award is detrimental to the national interest of Kenya, or is contrary to justice and morality.
17. The Applicant's contention is that the award is against public policy as it infringes on its freedom to contract and enforce contractual obligations in the event of a breach. It was submitted that this effectively denied the Applicant the right to vacant possession and the right to set off repair costs from outstanding rent as counterclaimed by the Applicant. Further, that the award, if allowed to stand will set a precedent to completely disregard sanctity of contracts.
18. The Applicant has not identified the public policy breached by the award. No evidence was placed before the Court showing that the award contradicts the Constitution or any written law. Additionally, there is no demonstration that the award is detrimental to the national interest of Kenya, or is contrary to justice and morality.
19. From the grounds relied on, it is evident that the Applicant is contesting the correctness of the arbitral award. It is trite that the Court cannot review the merits of an arbitral award. Section 35 of the Act limits the Court's role to setting aside awards only on narrow procedural grounds, such as incapacity, invalidity, or public policy violations. Accordingly, this ground must fail.
20. It is noted that the arbitration clause in the lease in question bound the parties to arbitration in the event of any dispute and to accept the verdict of the arbitrator shall be full and final. This accords with Section 32A of the Act, provides as follows:

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.
21. Having voluntarily elected arbitration as a dispute resolution mechanism, the Applicant must accept the outcome thereof which is binding on the parties.

22. On this point, I am guided by the holding in **Bomas of Kenya Limited v Standard Investment Bank Limited [2023] KECA 544 (KLR)** where the Court of Appeal stated:

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 grounds of review, 'common law' or otherwise. Section 35 (1) of the Act provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsection (2).

23. Our courts have stated time and again that when dealing with an application under Section 35, as in the instant case, the Court does not have an appellate jurisdiction and cannot review the decision of the arbitrator by substituting its own view or conclusions. This remains the position even when the Court might have reached a different conclusion.
24. The Applicant supplied the Court with a copy of the judgment delivered on 18.9.25 in Kilifi CMCC No. E063 of 2020 where the Applicant stated that the court found that the relationship between the Respondent and a 3rd party in a sublease was unlawful. With respect, this Court cannot consider a judgment of 18.9.25 in an application to set aside an arbitral award delivered 2 years earlier on 18.12.23. The Court finds that by supplying the said judgment, the Applicant is in effect inviting the Court to consider the same and to delve into the merits of the award which this Court, by dint of Section 35 of the Act, has no jurisdiction to do.
25. In the end, I find that the Applicant has not met the threshold for setting aside the arbitral award. Accordingly, the Application dated 18.3.24 lacks merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED in MALINDI this 8th day of May 2026

M. THANDE
JUDGE