



**Elite Westlands Limited & another v Kiama (Civil Application  
E666 of 2024) [2025] KECA 1026 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KECA 1026 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E666 OF 2024  
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA  
MAY 30, 2025**

**BETWEEN**

**ELITE WESTLANDS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**VAAL REAL ESTATE LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WILLIAM KANYA KIAMA ..... RESPONDENT**

*(Being an application for the stay of execution against the ruling and order of the Environment and Land Court at Nairobi (L.N. Mbugua, J.) dated 30th October 2024 in ELC Misc. Appl. No. E115 Of 2024)*

**RULING**

1. The brief background of this dispute is that, on 27<sup>th</sup> August 2021 the applicants, Elite Westlands Limited and Vaal Real Estate Limited, and the respondent, William Kanya Kiama, entered into an agreement for the sale and purchase of a one- bedroom apartment, type D, on 15<sup>th</sup> floor, located on LR No. 209/2144/1 in Nairobi. The applicants rescinded this agreement due to breach of its contractual terms by the respondent. Aggrieved by the applicants' decision to rescind and resell the apartment, the respondent initiated arbitration proceedings. In the statement of claim dated 24<sup>th</sup> May 2023, the respondent sought, *inter alia*:
  - a. a finding that the applicants were in breach of the agreement for sale dated 27<sup>th</sup> August 2021;
  - b. general and exemplary damages;
  - c. refund of the remainder of Kshs.3,921,579/=;
  - d. interest on the refund; and
  - e. costs of the suit with interest and any other relief.



2. The sole arbitrator, Mr. William Edward Kosar, conducted the arbitral proceedings and subsequently published an arbitral award in favour of the respondent as follows:-
  - a. return of Kshs.1,821,476/=;
  - b. the difference between the actual purchase price and the sale price of the unit;
  - c. interest at 16% from 21<sup>st</sup> June 2022 until the date of payment;
  - d. post judgment interest at the rate of 16%;
  - e. costs in favour of the respondent; and
  - f. the respondent had already paid the arbitration's fees of Kshs.255,000/=.
3. Being aggrieved by the arbitral award, the applicants sought an order to stay of execution and an order to set aside the award. In a ruling delivered on 30<sup>th</sup> October 2024, the learned Judge (L.N. Mbugua, J.) dismissed the applicants' motion to set aside the arbitral award. The learned Judge equally allowed the respondent's application for the enforcement of the award.

Aggrieved by the two rulings, the applicants filed notices of appeal, dated 4<sup>th</sup> November 2024 and 7<sup>th</sup> November 2024.
4. By way of motion dated 22<sup>nd</sup> November 2024 pursuant to Articles 47, 48, 50 and 159 of the [Constitution](#), section 7 of the [Fair Administrative Action Act](#) and Rule 4 of the [Court of Appeal Rules, 2010](#), the applicants sought the following orders before this Court: -
  1. that the applicants be granted leave to file an appeal against the enforcement of an arbitral award and its subsequent enforcement before this Honourable Court;
  2. that the applicants' notice of appeal dated 7<sup>th</sup> November 2024 and filed on the even date be admitted into the records of this Honourable Court;
  3. that leave so granted do act as stay of the ruling by the ELC at Milimani (L.N. Mbugua, J.);
  4. that the respondent be restrained from taking any enforcement measures in regard to recognition award as per the orders of the ruling dated 30<sup>th</sup> October 2024 and the subsequent extracted decree dated 21<sup>st</sup> November 2024 pending the hearing and determination of this application;
  5. the recognition award granted in the impugned ruling be stayed pending the application and the appeal; and
  6. that costs of this application be provided for.
5. The complaint by the applicants was contained in the grounds and the supporting affidavit sworn on their behalf by Joseph Wangondu. The case was that the learned Judge had not considered all the documents contained in the pleadings more so the LSK Conditions of Sale and the Agreement of Sale; that the arbitral award was against public policy and containing glaring irregularities that were against the very aims of the parties who had sought arbitration as a way of resolving their dispute; that the trial court ignored evidence and the submissions presented by both parties which had led to a miscarriage of justice; that the trial court failed to recognize that what was being challenged were not the facts or the law on which the arbitral award was based, but that the award was against the very public policy in Kenya "which was the governing law of the agreement between the parties according to Clause 19 of the Agreement of Sale"; that the arbitrator veered beyond the scope of the arbitrable issues in the award;



- and that the sole arbitrator based his decision on an allegation of forgery of documents in perpetration of fraudulent transactions which was not a matter capable of settlement through arbitration.
6. The applicants' fear was that if the application is not granted, leave allowed and stay issued, the respondent will proceed to execute the decree which would prejudice their interests.
  7. Senior counsel Mr. Allen Gichuhi (appearing with learned Counsel Mr. Alibhai Hassan and learned counsel Ms. Karen Wanjau) prosecuted the application before us. On whether leave to file an appeal should be granted, senior counsel, relying on [\*Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators - Kenya Branch\*](#) (Petition 12 of 2016) [2019] KESC 11 (KLR) and [\*Synergy Industrial Credit Limited v Cape Holdings Limited\*](#) [2019] eKLR, submitted that the sole arbitrator, during the conduct of the arbitral proceedings and when issuing the final award, had acted in ignorance of public policy, including the stipulations laid in statute on the scope of arbitrable matters and the evidentiary burden of the parties in proving the matters claimed. It was submitted that the award was inconsistent with the [\*Constitution\*](#), the [\*Land Act\*](#), County By-Laws and the Agreement of Sale; the arbitrator had acted in ignorance of the rules of evidence, had not given deference to evidential burden placed on the respondent who had claimed fraud without proof, and that by making a finding of fraudulent transaction the arbitrator had veered off the scope of the matters that ought to have been determined by the arbitration. Basing his arguments on [\*Safaricom Limited v Abiero & Another\*](#) (Commercial Arbitration Cause E057 of 2024) [2024] KEHC 15743 (KCB), senior counsel submitted that a case had been made for leave to be granted.
  8. On whether the intended appeal was arguable, it was submitted that, where there was prima facie evidence that the proceedings were against public policy and the award was so grave and so manifestly clear that the doors of justice had been closed to the applicants, there had been shown an arguable appeal. Reference was made to [\*Equity Bank Limited & 2 Others v Lumasia\*](#) (Civil Appeal No. E178 of 2023 [2024 KEHC 11620] [\*KCB and County Government of Meru v Leopard Rock Mico Limited\*](#) (Civil Application No. E013 of 2023) [2023] KECA 1401 (KLR)).
  9. On whether stay should be granted, it was argued that the respondent was in the process of executing the decree following the award, and that the decretal sum and costs amounting to Kshs.8,978,864/= had been demanded through a letter dated 5<sup>th</sup> November 2024. It was submitted that if stay is not granted the decree would be executed and that would render the appeal nugatory.
  10. Learned counsel Mr. Peter Wanyama appeared for the respondent. Relying on the replying affidavit, the provisions of sections 35(2) and 39(3) of the [\*Arbitration Act\*](#), learned counsel submitted that it had not been shown that any cogent ground for leave to appeal existed, instead it was clear that the superior court had correctly applied itself in dismissing the application to set aside the arbitral award. It was argued that the appellants had failed to demonstrate how the superior court had erred in failing to set aside the award based on the incapacity of a party; invalidity of the arbitration agreement; lack of proper notice of the arbitrator's appointment; that the award had dealt with matters outside the scope of the arbitration; or that the award conflicted with public policy. Citing the decision in [\*Kenya Shell Limited v Kobil Petroleum Limited\*](#), Civil Appeal No. 57 of 2006 [2006] eKLR), learned counsel submitted that it was not enough that the applicants were dissatisfied with the arbitral award. That, they ought to have placed on record substantial grounds that would invite this Court to seek to intervene on appeal.
  11. On the question of the arbitral award being against public policy, learned counsel Mr. Peter Wanyama, while relying on [\*Nyutu Agrovet Limited\*](#) (*supra*), submitted that the ground had not been substantiated. This was because the arbitral process had been conducted in accordance with the law, and the award had been rendered by a qualified arbitrator. He asked that this Court interprets public



policy narrowly so that not to upset an arbitral award that was substantially supported by the evidence tendered, and was in accordance with the law.

12. We have considered the application, the response, the rival submissions and the principles of law applicable.
13. Under section 35(2) of the *Arbitration Act*, the court is allowed to set aside an arbitral award only in specific circumstances, such as incapacity of a party; invalidity of the arbitration agreement; lack of proper notice of the arbitrator's appointment; the award dealing with matters beyond the scope of the arbitration; or the award being in conflict with public policy.
14. The dispute between the parties arose from the contract dated 27<sup>th</sup> August 2021 which related to the purchase of an apartment. The purchase price was Ksh.12 million. The applicants were the vendor and the respondent was the purchaser. The respondent initiated arbitration proceedings after the applicants rescinded the contract and resold the apartment. The arbitration proceedings were conducted by Prof. William Edward Kosar who issued an award on 19<sup>th</sup> June 2024 in favour of the respondent.
15. When the applicants challenged the award before the superior court, the grounds were that: -
  - a. the arbitrator was not properly appointed because they (the applicants) were not given a proper notice of his appointment;
  - b. the award was against public policy for reasons that the arbitrator relied on a letter dated 13<sup>th</sup> December 2022 allegedly from the Nairobi City County produced by the respondent who was not the maker against the provisions of section 35 of the *Evidence Act*. Further that, the arbitrator awarded Kshs.2,000,000/= as compensatory damages on allegations of fraud which were not pleaded or proved, and that the arbitrator had concluded that the applicants had waived their right to rescind the contract by accepting part-payments;
  - c. the applicants were unable to present their case as the respondent withheld the proper letter addressed to their advocates dated 19<sup>th</sup> April 2023 which confirmed that an occupation certificate was issued on 26<sup>th</sup> August 2022; and
  - d. that the award contained decisions on matters beyond the scope of the reference to arbitration as the arbitrator based his decision on allegations of forgery.
16. In dismissing the applicants' request to set aside the arbitrator's award on the above grounds, the learned Judge found as follows:-

“ 16. ....A perusal of the documents filed by the applicant reveals that they filed a statement of the defence way back on 26<sup>th</sup> June 2023 as a response to the statement of the claim. Nowhere in the said pleading did the applicants question the validity of the arbitrator or the arbitration proceedings on the basis that they were not given proper notice or that the arbitrator was not competent. The issues relating to the notice of appointment of the arbitrator are factual ones which ought to have been raised in limine, before the arbitration body. As it were, the records indicate that the applicants wholly submitted themselves to the jurisdiction of the arbitral body and the validity of the arbitral proceedings were not made a subject of contest before that body.

17. ....



18. ....
19. As for the other grounds, again it is apparent that the applicant fully participated in the arbitral proceedings, called witnesses and even filed submissions. The issues framed by the applicant for determination before the arbitrator related to “breach of contract as well as damages for breach of contract”. The award given was confined to these issues. The claims now being raised by the applicant that it was unable to present its case, that the award is against public policy or that the arbitrator went beyond the scope of reference are issues in the realm of the appeal.”
17. When the parties were contracting, they agreed that:-
- “20. 1. Any dispute with regard to any matter in connection with the sale and purchase of the said property shall be referred to a single arbitrator to be appointed by the parties hereto.”
18. The Supreme Court in *Synergy Industrial Credit Limited* (*supra*) stated as follows:-
- “Generally, therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on specified grounds. And hence, the purpose of section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would lead to a miscarriage of justice ”
- In both this decision and in *Nyutu Agrovet Limited* (*supra*), the circumstances under which leave to appeal against an arbitral award include: where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process; where leave would be granted to prevent an injustice from occurring and to restore confidence in the process of the administration of justice; and where the subject matter is so important as a result of the arising economic value or the legal principle at issue.
19. According to the case of *Safaricom Limited v Abiero* (*supra*), the ground of public policy for setting aside an arbitral award is applicable where there is clear evidence that the award contradicts the *Constitution* or any written law, is detrimental to the national interests of Kenya, or is in direct opposition to the principles of justice, or is manifestly arbitrary and unfair.
20. In *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd*, Appeal (Civil) 7419 of 518, the Indian Supreme Court observes as follows on what would constitute public policy:-
- “Therefore, in our view, the phrase public policy of India, used in section 47 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for the public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice ”
21. When the applicants sought before the superior court that the arbitral award be set aside, they were complaining, among other things, that the arbitrator was not properly appointed as they were not given proper notice of his appointment, and therefore that the award was not valid. The superior court



found that the issue had not been taken up before the arbitrator, and there was no evidence that they had not given any evidence regarding the appointment or lack of notice. It has not been shown to us that the court was wrong on the evidence before it.

22. On the question that the arbitrator had veered off the scope of matters that were subject to the arbitration, the parties had agreed that any dispute in connection with the sale and purchase of the apartment would be committed to a arbitrator for resolution. It is clear from the award, and this is what the superior court found, that what was ordered in the resolution was in regard to the sale and purchase of the apartment, and matters connected to it. The award was about the refund, compensation for rescission, the interest and costs.
23. The applicants are complaining that they were denied an opportunity to present certain evidence and/or documents. However, the superior court perused the record and found that each side to the arbitration had filed pleadings, and had been allowed to testify, call witnesses and file submissions in support of its case. It was not demonstrated to us that this finding was without basis.
24. In the claim that the award was against public policy, we listened carefully to senior counsel in relation to the point. He did not indicate to us how his clients came to this conclusion. There is no specific provision of the *Constitution* or statute that was shown to have been infringed. This, to us, was a straight forward and simple arbitration whose resolution solely depended on the arbitrator dealing with the facts as presented before him, to decide whether or not, given the agreement the parties had signed, the applicants had validly or not validly rescinded the contract, and then deal with the consequences. We cannot find that, on the face of things, there are substantial, or any grounds on which the arbitral award can be impeached.
25. To be able to obtain leave to appeal, the applicants were required to show that there exists substantial error, a breach of justice, or some compelling ground that would justify the setting aside of the arbitral award. The fact only that the applicants did not agree with the findings of the arbitrator on the matters placed before him in relation to the agreement that they had signed would not be a sufficient basis to cause us to grant leave to appeal.
26. In conclusion, we find the application to be lacking in merits and hereby dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2025.**

**S. GATEMBU KAIRU FCIArb.**

.....  
**JUDGE OF APPEAL**

**F. A. OCHIENG**

.....  
**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed



**DEPUTY REGISTRAR.**

