**Cale Infrastructure Construction Co Ltd v Synoniem Company Ltd (Miscellaneous Civil Application E554 of 2024) [2025] KEHC 1485 (KLR) (Civ) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1485 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E554 OF 2024**

**JN MULWA, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**CALE INFRASTRUCTURE CONSTRUCTION CO LTD ..... APPLICANT**

**AND**

**SYNONIEM COMPANY LTD ..... RESPONDENT**

**RULING**

1. Before the court for determination is the applicant's application dated June 6, 2024 (hereafter called the applicant) pursuant to section 35 of the *Arbitration Act* seeking inter alia:

    a. Spent

    b. Spent.

    c. That the arbitral award delivered by Eng. Howard AM'mayi the sole Arbitrator on May 20, 2024 be set aside

    d. Costs of the application and arbitral proceedings to be awarded to the applicant.

2. It is premised on grounds found at the supporting affidavit sworn by Rama Yahya and grounds on its face. The gist of the deposition is that Respondent filed arbitration proceedings against the Applicant seeking inter alia special damages to the tune of Kshs. 55,280/- general damages for breach of contract as well as interest and costs, in respect of alleged damages occasioned to a Cherry Picker Machine Z-60/34 leased to the Applicant by the Respondent pursuant to clause 14 of the lease contract.

3. Further the applicant deposes that despite the Arbitrator holding that there was no written contract on leasing, he proceeded to exercise non-existent jurisdiction by arbitrating the Respondent's claim and awarding general damages for breach of contract. In summation, he states that in the absence of

valid written contract for leasing with a valid arbitration clause, the Arbitrators award was void and liable for setting aside ex debito justiciae for want of the Arbitrators jurisdiction whereas the resultant awards on general damages, special damages and interest went again public policy.

4. The Respondent opposes the application by way of a replying affidavit deposed by Mary Kangangi. The nucleus of her deposition is that the arbitral award was premised on relevant filed documents, evidence, a determination and analysis of issues both on fact and law therefore the Applicant's motion does not meet the required threshold for setting aside an arbitral award as set out in Section 35 of the *Arbitration Act*, and therefore the applicant states that the application is not tenable, is an abuse of the Court process and intent on causing further delay as such ought to be dismissed with costs.

5. The application was canvassed by way of written submissions, which this Court has duly considered alongside the rival material.

6. Arbitration proceedings are specifically provided for by dint of Article 159(2)(c) of *the Constitution* and operationalized by the *Arbitration Act*. Consensus from decisions emanating from superior Courts is that, interference with such proceedings must be limited, as an encroachment would negate the purpose and intent of the Act towards expeditious yet fair dispute resolution. See Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch [2019] KESC 11 (KLR).

7. The scope with which the High Court can and ought to interfere with an arbitral award has been the subject of in-depth discussions and interpretation within our jurisdiction. However, the position appears to have been settled, as to the parameters and ambit within which a Court may interfere with an arbitral award by way of setting aside.

8. Section 35(1) & (2) of the *Arbitration Act* provide that: -

    1. Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

    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 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.

9. Ex facie review of the Applicant's motion, it appears to be premised on jurisdiction of the Arbitrator to entertain the proceedings by dint of Section 4 as read with Section 35(2)(a)(ii) of the Act and that the award was in conflict with the public policy on accord of Section 35(2)(b)(ii) of the Act. The impugned arbitral award was delivered on 20/05/2024 and the instant application was filed on 06/06/2024 being 16 days after the delivery.

10. In light of the issues that arise for determination are:-

a. Whether the Arbitrator was endowed with jurisdiction to arbitrate the claim?

b. Whether this Court ought to set aside the Arbitrators' decision rendered on 20/05/2024 on accord of public policy.

c. Who ought to bear the costs of the motion?

**Whether the Arbitrator was endowed with jurisdiction to arbitrate the claim?**

11. Vide its written submission, the Applicant cited Section 4 as read with Section 35(2)(a)(ii) of the Act and the decisions in Consolidated Bank Kenya Limited v Arch Kamau Njendu t/a Gitutho Associates [2015] eKLR; County Government of Nyeri v Eustace Gakui Gitonga [2019] eKLR and Dreamers Green House Limited v Agriculture and Food Authority Horticulture Crops Directorate & Another [2020] eKLR, which decisions agree that in the absence of a written arbitration agreement, an Arbitrator has no jurisdiction to arbitrate upon a dispute as the arbitrator did on 20/05/2024.

12. The Respondent in retort posited that the arbitration proceedings were conducted with the full participation of the parties herein and that none of the parties raised a jurisdictional question before and during the arbitration proceedings up to the conclusion thereof; That the challenge to the jurisdiction of the Arbitrator to conduct the arbitration proceedings ought to have been raised during the arbitration proceedings pursuant to Section 17(1) & (2) of the Act, and therefore to allow the challenge of the jurisdiction of the Arbitrator outside the arbitration proceedings by invoking Section 35 of the Act is to run afoul of the law and to seek to reinvention of the same.

13. It warrants reminder that where parties subject their dispute for resolution by way of arbitration, it involves consensus akin to contracting parties. The duty of this Court while adjudicating between contracting parties was succinctly settled in the decision of National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd for the proposition that contracting parties are always at liberty to delineate terms of their engagement, which may include contracting on an arbitration clause. As to the nature of such a clause, the Court of Appeal in Synergy Industrial Credit Limited v Cape Holdings Limited [2020] KECA 208 (KLR), while referencing in brief to Section 17 of the Act observed that: -

> As we stated earlier, the primary consideration in determining the scope of the reference is the arbitral clause or agreement. It is in the arbitral agreement that the parties have agreed to submit their dispute to arbitration and it is that agreement therefore which provides the basis of the arbitration. By dint of section 17 of the *Arbitration Act*, the arbitral agreement in

a contract is an independent agreement, separate and independent from the other terms of the contract and a finding that the contract is void does not invalidate the arbitral agreement.

14. Notwithstanding, the purport of Section 4 of the Act, as to the form which an arbitration agreement takes as juxtaposed against the finding of the Arbitrator at paragraphs 40, 41, 42 and 43 of his award, it is trite as observed by the Court of Appeal in the case of Engineers Boards of Kenya v Jesse Waweru Wahome & 5 others [2015] KECA 1 (KLR), that there is an intrinsic need of giving statute a holistic reading and interpretation in order to ascertain the true legislative intent. It is on the premise of the latter decision, that this Court must read Section 4 and Section 35(2)(a)(ii) of the Act alongside Section 17(1), (2) & (3) of the Act which provides that:

    1. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

        a. .....

        b. .....

    2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of an arbitrator.

    3. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

15. The purport of Section 17(2) & (3) of the Act would imply that a party who intends to challenge the jurisdiction of an Arbitrator ought to do so in limine not later that the submission of the statement of defence or at the earliest opportune time, in the course of arbitration proceedings.

16. A review of the Applicant's response to the statement of claims and or the arbitral award, ex facie does not seem that the Arbitrator's jurisdiction was challenged by the Applicant during the proceedings. Such failure would translate to acquiesce to the arbitration proceedings and waiver of right to object as provided for in Section 5 of the Act which states that; -

> A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

17. As to whether the objection on jurisdiction can be entertained at this stage, the Court of Appeal in the case of Kibuwa Leasing & Management Limited v Jadala Investments Limited & another [2023] KECA 895 (KLR) pithily observed that: -

> 46... Our examination of the arbitral proceedings, the arbitral award, the impugned judgment, and the rival submissions of the parties, does not reveal what might have led to the contention that the arbitrator acted in excess of jurisdiction, or that he failed to accord the appellant a fair hearing. If that were the case, the appellant was mandated to raise such a plea at the earliest opportunity during the arbitral proceedings. It did not....
>
> 48... As the High Court at Nairobi in Joma Investments Limited v N. K. Brothers Limited [2018] eKLR correctly observed when considering the effect of section 17(3) of the Act and the consequences of failure to raise an objection at the first instance: "Given the foregoing,

my take is that since the arbitrator did not deal with any substantive aspect of whatever dispute that was before him, instead of filing the instant summons, the applicant ought to have followed the procedure stipulated under section 17 of the *Arbitration Act* and challenged the arbitrator's jurisdiction to determine those claims it felt went beyond the scope of his authority once the arbitral proceedings began.....

> 49. In conclusion, we find that no jurisdictional issues or breach of the appellant's right to fair hearing were ever raised before the arbitrator pursuant to section 17(3) of the Act, raising such issues before the learned Judge pursuant to section 35(2) of the Act was an afterthought in vain and against the grain of clear statutory edicts from which the superior court cannot stray. Accordingly, that ground of appeal also fails." [Emphasis added]

18. The Respondent argued that to entertain the Applicant's jurisdictional objection at this stage would run afoul of the law and the settled position above. In addition having reviewed the decisions relied on by the Applicant, the court finds no relevance to the present cause as they are not binding upon this Court but only persuasive, and further that the decisions where rendered prior to settled position in Kibuwa Leasing case (supra).

19. For the foregoing, the court finds that the Applicant's jurisdictional challenge in respect of the arbitration proceedings herein is not well founded and cannot not be entertained at this juncture with the attendant result that the same must fail.

Whether this Court ought to set aside the Arbitrators' decision rendered on 20/05/2024 on accord of public policy?

20. On the second limb that the arbitral award was in conflict with public policy on account of Section 35(2)(b)(ii) of the Act, the definition of 'Public Policy' as captured in the above provision was succinctly addressed by the Court of Appeal in Kenya Shell Limited v Kobil Petroleum Limited [2006] KECA 389 (KLR) wherein it was stated that: -

> Public policy, which is a factor we may consider in the exercise of our discretion, is of course an indeterminate principle or doctrine. In years of yore, it was branded "an unruly horse, and when you get astride it, you never know where it will carry you"- Richardson v Mellish [1824] 2 Bing 229. Nevertheless, it clearly has reference to ideas which for the time being prevail in a country as to the conditions necessary to ensure its welfare. It is variable and must fluctuate with the circumstances of the time. Ringera J (as he then was) examined several authorities in Christ For All Nationals v Apollo Insurance Co. Ltd [2002] 2 EA 366 and formed the view that: -
>
> "although public policy is a most broad concept incapable of precise definition..... an award could be set aside under section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it was shown that either it was:
>
> i. inconsistent with *the constitution* or other laws of Kenya, whether written or unwritten or,
>
> ii. inimical to the national interest of Kenya or
>
> iii. contrary to justice and morality."

21. The Applicant challenges the arbitral award specifically on general damages as being contrary to public policy saying that the same went against the principle of restitution, judicial discretion and settled

position in law that general damages are not awardable on a claim for breach of contract. In urging the above counsel relied on the following cases: Christ for all Nations v Apollo Insurance Co. Ltd [2002] EA 366; Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR and Kenya Industrial Industries Ltd v Lee Enterprises Ltd [2000] KLR 135 as cited in Abdi Ali Dere v Firoz Husseing Tundal & 2 Others [2013] eKLR.

22. On the award of special damages to the tune of Kshs. 55,280/- it was argued that the same was not specifically pleaded and proved meanwhile on the award of compound interest at 15.88%p.a, the same was arbitrary as it was not pleaded whereas the Arbitrator did not give reasons for awarding the same.

23. In retort, while calling to aid the provisions of Section 32C of the Act and the decision in Kenya Tea Development Agency Limited & 7 Others v Savings Tea Brokers Limited [2015] eKLR, the Respondent assailed the Applicant's grounds on public policy as being an appeal on the merits of the arbitral award guised as a reference pursuant to Section 35 of the Act.

24. With the above in mind, before addressing the issue, this Court must remind itself of its role pursuant to Section 35 of the *Arbitration Act*. The Court of Appeal in Gachuhi & another v Evangelical Mission for Africa & another; Law Society of Kenya (Interested Party) [2023] KECA 51 (KLR), set out the role of this Court as follows; -

> " It is plainly obvious that the learned Judge expressed himself rather broadly and expansively in the above extract, and to some extent lost sight of the character of the application before him. It is trite that in an application to set aside an arbitral award under section 35 of the *Arbitration Act*, the court is not sitting on appeal from the merits of the decision of the Arbitral Tribunal. If that were so, arbitral awards would be impeached and set aside on all manner of grounds outside the confines of section 35 of the *Arbitration Act*. The decisions of the Supreme Court in Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Another [2019] eKLR and Synergy Industrial Credit Ltd v Cape Holdings Ltd [2019] eKLR reaffirm the closed nature of the grounds for setting aside an arbitral award under section 35."

25. While presiding over an application in the nature of the one presently before this court, it is vital that this Court does not sit on appeal over the arbitral award. The Arbitrator having found that there existed a contract between the parties proceeded to award damages both general and special in respect of the matter. At the heart of the dispute was the lifting equipment Cherry Picker Machine Z-60/34 that was damaged while under the Applicant's possession and or usage. It is on the premise of the ensuing damage that the Arbitrator found that the Applicant was in breach of its duty of care for causing damage to the Respondent's equipment, to which, he found that the former ought to bear the costs of the breach to the tune of Kshs. 3,500,000/-.

26. On special damages, the court finds that the Arbitrator reviewed the assessment reports, took due cognizance of storage of the equipment and its transportation thereof to award Kshs. 55, 280/-. Lastly, on interest rate of 15.88% p.a, there was no discussion on the same by the parties. However, the Arbitrator went ahead to summarily award interest at 15.88% p.a (CBR) from date of his decision until full settlement.

27. There being no justification on the Arbitrator's adoption of the interest rate applied, the court sets aside the rate and adopts the court rates of 14% p.a on the sum claimed of Kshs. 55,280/=.

28. On the general damages, it is undisputed that the matter that was being arbitrated was in respect of contracting parties and the resultant dispute in respect of purported breach or otherwise. As

rightly argued by the Applicant and as settled by the Court of Appeal in Kenya Tourist Development Corporation (supra), it was held that: -

> " As a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DharamshI v Karsan[1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication"

29. Further, it is settled that an injured party would however be entitled to special damages in respect of actual loss suffered as a result of the breach. In Anson's Law of Contract, 28th Edition at Pg. 589 - 590, it is stated:

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant, who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal.'

30. Based on the above learned pronouncements and this court's findings, the application dated 6/6/2024 succeeds partially

31. As to the awards on special damages and interest rate decreed by the Arbitrator, on the former, a review of the decision reveals that the Arbitrator considered the material before him and proceeded to conclusively pronounce himself on the award. Therefore, the award on special damages is sustained, as is. In any event, an attempt to interrogate the evidentiary aspects of the award, as implored by the Applicant, would be tantamount to sitting on appeal over the arbitral decision.

32. Section 32(3) of the Act as read with Section 32C obligated the Arbitrator to provide reasons for arriving at his decision. Reviewing the Arbitrators' decision in its entirety, no reasons appear to have been issued on the award, either if interest rate was agreed upon or otherwise. To the foregoing, the award on compound interest at the rate of 15.88% p.a is set aside for breach of public policy.

33. Consequently, without belaboring further on the application, the Court finds and determines that the application dated 6/6/2024 is merited, and succeeds partially as hereunder;

    a. The Arbitrator had the requisite jurisdiction to arbitrate on the dispute between the parties.

    b. That the award of general damages in the sum of Kshs. 3,500,000/= is set aside.

    c. That the award of Kshs. 55,280/= is upheld, but interest to be applied shall be at court rates of 14% p.a. from the date of the award, 20/05/2024.

    d. Each party shall bear its own costs on the application.

    Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025**

**.....**

**JANET MULWA.**

**JUDGE**