



REPUBLIC OF KENYA



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**Placid View Properties Limited v Etihad Cap Africa (Miscellaneous Application E027 of 2024)
[2025] KEHC 1207 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E027 OF 2024**

RC RUTTO, J

FEBRUARY 28, 2025

BETWEEN

PLACID VIEW PROPERTIES LIMITED APPELLANT

AND

ETIHAD CAP AFRICA RESPONDENT

JUDGMENT

1. The Appellant (Applicant) moved the court by way of an Originating Summon dated 8th May 2024 seeking the following orders: -
 - a. That the Arbitral Award dated 8th March 2024 issued by the appointed Arbitrator, Hon. James Ngotho Kariuki FCI Arb be set aside
 - b. That the costs of the Application and the arbitration be provided for.
2. The Originating Summon is premised upon Section 39 of the *Arbitration Act*, and Rule 3 (1) of the Arbitration Rules and is supported by the Affidavit of J. B. Singh sworn on 8th May 2024. It is further based on the following summarised grounds, that: - the arbiter erred in law; when he went outside the applicable principles of contract law; pursuant to Section 39 of the *Arbitration Act* and Clause 21 of the Principal Contract, the parties agreed to pursue litigation of disputes as civil matters in the Civil Courts subsequent to an arbitral reference of any dispute under the contract; the Arbitrator erred in law by failing to interpret the contract in terms of Section 3 (5) of the Contract Act that expressly obliges the tribunal to strictly interpret contracts in accordance with the terms; he re-wrote a binding contract; failed to uphold the contra- proferentem rule; holding that the Respondent acted outside of the scope of the consultancy agreement; wrongly applying the doctrine of estoppel; misdirecting himself by holding that the Claimant had proved his case against the Respondent on a balance of probabilities.



3. The Respondent opposed the Application by filing a Replying Affidavit, sworn on 18th July 2024 by its Director, Walid Khalid Abdulkarim. It urged the court to dismiss the application on grounds that it is misconceived, an abuse of the court process and lacks merit, for reasons that; an appeal against an arbitral award to the High Court on point of law is not as of right, parties herein did not agree to an appeal by either of them on any question of law arising out of the award; there is no agreement between the parties under clause 21; and that the application is incurably defective in view of the provisions of section 39 of the *Arbitration Act*.
4. Also filed was a Notice of Preliminary Objection dated 17th July 2024 based on grounds that: -An Appeal against an Arbitral Award to the High Court on a point of law is not as of right. In the absence of an agreement to appeal the award on question of law, the originating summons Application is incompetent, bad in law and therefore an abuse of the court process. The Application is incurably defective in view of the provisions of Section 39 of the *Arbitration Act* No. 4 of 1995.
5. The application was canvassed by way of written submissions

Appellant's submissions

6. The Appellant relied on its submissions dated 1st October 2024 wherein they set out the facts of the case and distilled two issues for determination namely; a) whether this Honourable court has jurisdiction under Section 39 of the *Arbitration Act* to entertain the appeal and b) whether the Honourable Arbitrator erred in law by applying the wrong principles of interpretation of contracts leading to the impugned decision.
7. On the first issue, the Appellant submitted that Clause 21 of the Consultancy Agreement established a three-tier dispute resolution mechanism. First, the parties agreed to attempt an amicable resolution of any disputes arising from the contract. Second, if an amicable resolution failed, the parties were to commence arbitration proceedings. Finally, if arbitration did not resolve the dispute, the parties could pursue litigation in the ordinary civil courts. The Appellant argues that Clause 21 is clear and unambiguous in this regard thus the appeal filed in this court challenging the arbitral award qualifies as the civil matter and this court being an ordinary civil court as contemplated under clause 21 of the agreement.
8. The Appellant submitted that the correct approach to the interpretation of Clause 21, was to base it on its natural and ordinary meaning. The Appellant urged the court to find that Clause 21(b) of the Consultancy Agreement did not stipulate that the Arbitral Award would be final and binding. Instead, it allowed the parties to pursue litigation in the ordinary civil courts upon conclusion of the arbitral proceedings. To buttress this point reference was made to the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (Ruling, 21 September 2021),
9. On the second issue, the Applicant referred to paragraphs 154 and 155 of the Award and submitted that the Arbitrator found an ambiguity in the interpretation of Clause 8(d) of the Consultancy Agreement concerning the Expression of Interest. It was contended that there was no ambiguity regarding the interpretation of Clause 8(d), as it expressly required the Respondent to submit a Letter of Offer, since an Expression of Interest did not qualify as such. In this regard, the Applicant argued that the Arbitrator failed to adequately consider the purpose of the contract, which was essential for proper interpretation, and also neglected the established principle of the *contra proferentem* rule. The Applicant cited the case of *Brian Martin Francis & 5 Others v Samuel Thenya Maina & Martin Munyu (Arbitrator)* [2021] eKLR to urge that courts should interpret the contract in cases of ambiguity in



a way that ensures the validity of the contract rather than rendering contract ineffective and to also support his submissions on the contra proferentem rule.

10. The Applicant further submitted that the Arbitrator erred in law by wrongly applying the doctrine of estoppel, which had neither been pleaded nor raised as an issue by the parties. As a result, the Arbitrator erroneously held that the Respondent's claim was founded on estoppel, thereby modifying the contract between the parties. Additionally, the Applicant argued that the Respondent did not plead reliance on any representation or misrepresentation by the Applicant, nor did it demonstrate that it had been induced to believe that the Applicant had accepted the Expression of Interest as the required Letter of Offer. They urged that the application be allowed.

Respondent's submissions

11. The Respondent relied upon its submissions dated 2nd October 2024. It submitted that the rules governing the filing of an appeal to the High Court are the Civil Procedure Rules. It submitted that the appeal ought to have been filed within 30 days from the date of publication of the award. It contended that the appeal before the court was filed outside the mandatory 30-day period. Additionally, it was submitted that time began to run from the date the arbitral award was published, which was 8th March 2024. Reference was made to the case of *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR, to urge that the Appellant ought to have filed the appeal by 8th April 2024, rather than on 9th May 2024, as indicated in the appeal documents.
12. The Respondent further submitted that based on Section 39 of the *Arbitration Act*, an appeal against an arbitral award is not an automatic right but must be expressly agreed upon by the parties in the Arbitration Agreement. In support of this argument, the Respondent relied on the cases of *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR and *Vishnu Builders & Developers Limited v Maow Holding Limited* [2021] eKLR. Therefore, it urged that Clause 21 of the Consultancy Agreement, as relied upon by the Appellant, does not contain any express provision allowing an appeal against the arbitral award. Instead, it merely provides for amicable resolution of disputes, and in the event that consultations fail, the matter is to be referred to arbitration.
13. The Respondent submitted that the court lacks jurisdiction to interfere with the arbitrator's interpretation of contract as the award is final. It urged the court to rely on the case of *Martin Kapoor v Christopher Kapoor & Barbara Agonga*, case of *Samow Edin Osman v Rashid Bukura Somo* [2016] eKLR and *Talewa Road Contractors Limited v Kenya National Highways Authority (Civil Appeal 246 OF 2019)* [2021] KECA 276 (KLR) (5 November 2021) (Judgment)
14. It was also submitted that the court does not have jurisdiction to entertain this application, which in any event is incompetent for being filed out of time. It urged the court to dismiss the application with costs.

Analysis and Determination

15. I have carefully considered the Application before me and the rival submissions made by the parties herein together with the authorities cited. The main issues for determination that arise are: -
 - a. Whether the Application is incurably defective and/ or competent in view of the provisions of section 39(1) of the *Arbitration Act*;
 - b. Whether the application was filed on time pursuant to Section 39 (4) of the *Arbitration Act*
 - c. Whether this court should set aside the Arbitral Award published on 8th March 2024.



- i. Whether the appeal is incurably defective and /or competent in view of the provisions of section 39 of the [Arbitration Act](#)
16. This issue is two-fold. First, the Respondent, in its preliminary objection questions the jurisdiction of the court to hear and determine this appeal pursuant to the provisions of Section 39 of the [Arbitration Act](#). Specifically, he asks whether there exists an arbitration agreement which the parties consented to allow any party to lodge an appeal on a point of law before the High Court in relation to a matter arising out of an arbitral award. The second limb is whether the appeal was filed on time pursuant to Section 39 (4) of the [Arbitration Act](#).
17. Section 39 of the [Arbitration Act](#) stipulates as follows: -

“39. Questions of law arising in domestic arbitration

1. Where in the case of a domestic arbitration, the parties have agreed that—
 - a. an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
 - b. an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.
2. On an application or appeal being made to it under subsection (1) the High Court shall—
 - a. determine the question of law arising;
 - b. confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.
3. Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—
 - a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
 - b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).
4. An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.
5. When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.”



18. Section 39(1) provides for two circumstances where a party may approach the court. First, it contemplates where arbitration proceedings are on-going and secondly, where an award has been made. In all instances, parties ought to have consented either at the time of making the agreement or any other time during or after the arbitral proceedings. Notably, in all the circumstances the issues to be determined are issues of law. See the case of *Okeno & Sons Building Contractors v Bukura Agricultural College* [2018] eKLR where the court held that: “It is clear from Section 39 of the Act that an appeal to the High Court is allowed on questions arising from the award and only if the parties have agreed that such an appeal could be made.”
19. The Appellant submits that the agreement by the parties is contained in Clause 21 of the Consultancy Agreement dated 1st December 2020, which according to him outlines the dispute resolution mechanism, by providing a three-tier process as follows; first, the parties to resolve the disputes amicably. In the event that amicable resolution fails, the dispute is to be referred to arbitration and lastly, if arbitration is unsuccessful, the parties proceed to litigate in the ordinary civil courts.
20. The Respondent contends that the parties did not consent to an appeal by either of them to the High Court on any question of law arising from the arbitral award. He asserted that there is no arbitration agreement under the strict provisions of Section 39 of the *Arbitration Act*. Further, that in the absence of the agreement, the Originating Summons is incompetent, bad in law and an abuse of the court process.
21. Clause 21 of the agreement provides as follows;

“21. Disputes

Any dispute arising under this Agreement shall prior to any litigation in the ordinary civil courts as a civil matter be resolved in the manner stipulated herein below: -

 - a. In case of any dispute or disagreement arising out of or in connection with this Agreement (including as to interpretation validity or enforceability of this Agreement) between the parties, the parties shall use all reasonable efforts by consultation to resolve the Dispute on an amicable basis. Such consultation shall begin immediately one party has delivered to the other party a written request for such consultation. If such dispute cannot be settled within thirty (30) days after a request for such consultation is made, any party may refer the dispute to arbitration in accordance with the provisions of Clause 21 (b) below.
 - b. Any dispute or difference arising between the parties hereto regarding the meaning or interpretation of anything herein contained or otherwise arising out of or in connection with this Agreement shall be referred for decision to an arbitrator in accordance with the provisions of the *Arbitration Act* (No. 4 of 1995). Such arbitrator shall be appointed by mutual agreement of the parties hereto. In the event of the parties being unable to agree upon the appointment of a particular arbitrator, the Chairman shall appoint an arbitrator for the time being of the Chartered Institute of Arbitrators (Kenya chapter). The Arbitrator shall not be the same person as the mediator.”
22. A reading of Clause 21 is clear to me that before any litigation of a dispute in the ordinary civil courts, the parties are required to attempt resolve of their disputes through consultation which is time bound and limited to 30 days. If, after 30 days, the dispute remains unresolved a party is at liberty to refer the dispute to Arbitration in accordance with the provisions of the *Arbitration Act* No. 4 of 1995.
23. The clause further provides for the procedure of appointing an arbiter. The parties have been accorded an opportunity to agree on one, if they fail to agree then the Chairman of the Chartered Institute of



- Arbitrators (Kenya chapter) appoints an arbiter on behalf of the parties. The clause excludes a person who has acted in the mediation to be appointed as an arbiter.
24. This court understands this clause to prohibit the parties when in dispute from venturing into litigation in the ordinary civil courts as a civil matter before first having their dispute resolved through consultation and later arbitration. The clause is also explicit on the governing laws in the arbitration process, it refers to the Arbitration Act No 4 of 1995 which then means that when taking up arbitration the parties subjected themselves to the provisions of the Arbitration Act.
25. This court takes note that the arbitration process is a self-executing process that is defined by the parties and guided by the Arbitration Act. I draw attention to several provisions of the Arbitration Act and note that under the Act a party aggrieved by the decision of the Arbiter can move to the High Court to challenge the decision under sections 35, 37, and 39. Arbitration proceedings in the first instance give liberty to the parties under the agreement with a limited extent of the Court intervention reserved under the Act. In this instance, the applicant has moved the court by invoking the provisions of Section 39 which is reserved for parties that have consented and is limited to the determination of legal question(s) as already noted above.
26. Thus, the parties must demonstrate that they have agreed to apply to the High Court for determination on a question of law. Further, this section, being a non-mandatory provision of the Act respects the autonomy of parties in the arbitration process. It begins with “where parties have agreed”. On this alone, clause 21 does not show that the parties agreed to invoke section 39 of the Arbitration Act.
27. The applicant position is that clause 21 allows either party to pursue legal action beyond arbitration. This court notes that clause 21 refers to “any dispute arising under this agreement shall prior to any litigation in the ordinary civil suit as a civil matter be resolved in the manner....”. Typically, a civil suit is initiated through a plaint that outlines the nature of the claim or breach. In this case if it were the intended process, the applicant would not have sought relief under the Arbitration Act.
28. I do not agree with Applicant’s interpretation. Section 39 of the Act applies when parties have agreed to refer a legal question to court. In the absence of clear and unequivocal consent or agreement between the parties and while acknowledging their autonomy in the arbitration process, I find that clause 21 clearly cannot be interpreted as consent to seek the court’s intervention under section 39 of the Arbitration Act as argued by the applicant. This is exemplified by the fact that the respondent, a party to the same agreement is of a contrary position over the same provision of the agreement.
29. The upshot is that in the absence of such agreement by the parties to meet a jurisdictional prerequisite, this Application is incompetent and should be struck out for want of jurisdiction of the Court.
- ii. Whether the application was filed on time pursuant to Section 39 (4) of the Arbitration Act,
30. Section 39 (4) of the Arbitration Act provides that:

“An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.”

This section stipulates that an appeal must be filed within the timelines prescribed by the Court of Appeal or the High Court, as applicable. The rules applicable in filing an appeal before the High Court are governed by Section 79G of the Civil Procedure Act provides that an appeal must be filed within thirty (30) days of the decision being appealed against.



31. The order being appealed is the arbitral award, which was published on 8th March 2024 and issued on 9th April 2024. While the Applicant has not addressed this issue, the Respondent argues that the appeal before this Court should have been filed within thirty (30) days from the date of the award's publication. The Respondent contends that the appeal was due by 8th April 2024, not 9th May 2024, making the appeal incompetent.
32. When then does time to appeal start running? Is it from the date the arbitral award was published or when it was issued. As per Section 79G, it is from the date of the order. However, in the present matter, two dates have been discussed and it is important to clarify the exact date to be considered herein.
33. The Respondent has annexed a copy of the letter dated 23rd February 2024 addressed to the parties advocates herein informing them that the award was ready for collection on 8th March 2024 subject to payment of the full Arbitrator's fees. The Respondent has also annexed email correspondences between the arbitrator and parties from 5th April 2024 to 8th April 2024 wherein the Arbitrator confirms receipt of payment of fees and thereafter dispatch the award to the parties on 8th April 2024.
34. In my view, based on the arbitrator's communication, the award was ready for collection on 8th March 2024. From that date, any party could collect the award once they settled the arbitrator's fees. The conditional release of the award did not affect its availability. To draw a comparison, a court judgment is considered delivered when pronounced by the court, not when it is collected. The collection of a copy of the judgment may be contingent on the payment of required court fees. What remains unexplained by the Applicant is why there was delay in collecting the award on 8th March 2024.
35. I wish to draw reference in the Court of Appeal's decision in the case of *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR where the court discussed this issue at length when it held:-

“...the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.

Should it be any different because the arbitral tribunal has withheld the delivery of the award because of non payment of fees and expenses (Section 32B (3)? Counsel Ngatia argues that it would be a legal absurdity to deem that the award has been delivered when in fact it has been withheld. With respect I am unable to agree. Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed received because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.”

36. Guided by the above and as per Section 79G of the *Civil Procedure Act*, the timeline for filing an appeal in the High Court is 30 days from the date of the order. Given that the award was dated 8th March



2024, it is clear that the 30day period within which the application should have been filed expired by 9th April 2024. The application in question, having been filed on 8th May 2024, was therefore improper, as it was filed well beyond the prescribed timeframe. The Applicant has not provided any explanation for the delay in filing the application.

37. It is therefore evident that the application before me is time-barred, as it was filed outside the prescribed period. I therefore have no jurisdiction to entertain the matter on its merit and in particular whether to set the arbitral award aside. See Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1. At any rate, I have already found that the appeal is incompetent having been filed without the agreement of the parties under section 39(1) of the *Arbitration Act*.
38. I must therefore down the judicial tools in this matter at this stage and find that the Originating Summons dated 9th May 2024 is incompetent. Accordingly, the same is struck out with costs to the respondent, costs following the event.

Orders accordingly.

RHODA RUTTO

JUDGE

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

For Appellant:

For Respondent:

Court Assistant:

