



**Karlson v Were (As the legal representative and administrator of the Estate of Peter Ouma Onyango - Deceased) (Commercial Arbitration Cause E015 of 2023) [2025] KEHC 1410 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1410 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E015 OF 2023  
PM MULWA, J  
FEBRUARY 27, 2025**

**BETWEEN**

**MATS KARLSON ..... APPLICANT**

**AND**

**ROSE NYALWENGE WERE (AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF PETER OUMA ONYANGO - DECEASED) ..... RESPONDENT**

**RULING**

1. There are two applications for determination; the first one is the applicant's application dated 16<sup>th</sup> January 2023 and it seeks the enforcement of an arbitral award dated 20<sup>th</sup> November 2021 as a decree and order of this court while the second one is the respondent's application and it seeks an order to set aside the aforementioned award.
2. The first application was a Notice of Motion application filed under Section 36 of the *Arbitration Act* 1995 and rules 6, 9 and 11 of the Arbitration Rules 1997.
3. The application is based on the ground that one Peter Ouma Onyango (deceased) passed away on 24<sup>th</sup> October 2021 and letters of administration to the deceased estate ad litem were granted on 5<sup>th</sup> August 2022 and that the deceased and the applicant had entered into a joint venture agreement whereby it was agreed that any dispute arising thereto would be referred to an arbitrator.
4. The applicant averred that a dispute arose between the parties under the agreement which was referred to arbitration whereby a final award was issued on 20<sup>th</sup> November 2021 in favour of the applicant and it is therefore in the interest of justice that the award be enforced as decree of the court.



5. In opposition to the application, the respondent filed two preliminary objections dated 14<sup>th</sup> June 2023 and 27<sup>th</sup> July 2023. The respondent also filed a replying affidavit sworn on 11<sup>th</sup> April 2023 by herself.
6. In the POs the respondent contended that the application is incompetent as it was made contrary to the mandatory requirements of rule 9 of the arbitration rules and further the applicant failed to furnish the court with the original or certified copies of the arbitration agreement or a duly certified copy of it.
7. The court will first consider the merits of the POs before proceeding with the other pleadings.
8. Section 36(1) and (3) of the Arbitration Act states:
  - “(1) A domestic arbitral award shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
  - (2) ...
  - (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—
    - (a) the original arbitral award or a duly certified copy of it; and
    - (b) the original arbitration agreement or a duly certified copy of it.”
9. Rule 9 of the Arbitration Rules states:

“ An application under section 36 of the Act shall be made by summons in chambers.”
10. From the provisions above, an applicant may apply to have an award recognized and enforced by the court through an application in the form of a chamber summons.
11. In this case, the application for enforcement was filed in the form of a notice of motion application contrary to the mandatory provisions of the arbitration rules.
12. In my view, the wording of rule 9 of the Arbitration Rules is couched in mandatory terms and therefore all applications under section 36 of the Arbitration Act must be filed through a chamber summons. If not the application is defective and must suffer the fate of being struck out. On this ground alone, the application is struck out.
13. The court will now consider the second application seeking to set aside the award. It was filed inter alia under Section 35(1), (2) (a) (i) (v), (b) (ii) and (3) of the Arbitration Act 1995 and Rules 4(2), 7 and 11 of the Arbitration Rules 1997.
14. The basis of the application was that the deceased was incapacitated during the entire arbitral proceedings as he was suffering from terminal illness which led to his untimely death and that the composition of the arbitral tribunal was defective as the procedure for appointment under the arbitration agreement was not followed nor did the deceased consent to the deviation of the said procedure.
15. Further that the award is in conflict with the public policy of Kenya; that the application was made within 3 months after receipt of the award and that it was not possible to collect the award upon its publication on 20<sup>th</sup> November 2021 due to exceptional circumstances following the demise of the deceased four weeks prior to the publication. The respondent contended that she was notified of the award on 9<sup>th</sup> March 2023.



16. The applicant submitted that the respondent ought to have made an application to set aside the arbitral award three months after it was made in the year 2021.
17. The setting aside of arbitral awards is provided for under Section 35 of the *Arbitration Act*. Subsection 3 thereto states:

“An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.”
18. In this case, the deceased passed away on 24<sup>th</sup> October 2021 and the respondent herein obtained letters of administration ad litem on 5<sup>th</sup> August 2022. The arbitral award was issued on 20<sup>th</sup> November 2021 and the respondent’s advocate was notified of the same on 6<sup>th</sup> December 2021 as evidenced by the correspondence of even date, marked as ‘MK 3(a)’ in the applicant’s supporting affidavit of 16<sup>th</sup> January 2023. I note further that the respondent filed a replying affidavit sworn on 11<sup>th</sup> April 2023 in opposition to the application to recognize the award.
19. This meant that the respondent was aware of the arbitral award earlier and once letters of administration were issued to her on 5<sup>th</sup> August 2022, she had the obligation to file the application to set aside the award within 3 months. Although the respondent contended that she was notified of the award on 9<sup>th</sup> March 2023, she did not avail any evidence to prove this.
20. I find that the application to set aside the award was filed out of the mandatory 3-month timeframe and inordinately late in violation of section 35 of the *Arbitration Act*. I therefore dismiss it with costs.
21. In the end the final orders are that:
  - i. The applicant’s application dated 16<sup>th</sup> January 2023 which seeks the enforcement of the arbitral award dated 20<sup>th</sup> November 2021 as a decree and order of this court is struck out.
  - ii. The respondent’s application dated 6<sup>th</sup> June 2023 seeking to set aside the aforementioned award is dismissed.
  - iii. Each party to bear their own costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI**

**THIS 27TH DAY OF FEBRUARY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Odongo h/b for Mr. Makau for Applicant

Mr. Kimata for Respondent

Court Assistant: Carlos

