



**County Government of Baringo v Rotunda Contractors Limited (Miscellaneous Application E079 & E095 of 2023 (Consolidated)) [2025] KEHC 3752 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
MISCELLANEOUS APPLICATION E079 & E095 OF 2023 (CONSOLIDATED)  
RC RUTTO, J  
MARCH 25, 2025**

**BETWEEN  
THE COUNTY GOVERNMENT OF BARINGO ..... APPLICANT  
AND  
ROTUNDA CONTRACTORS LIMITED ..... RESPONDENT**

**RULING**

1. By orders dated 19<sup>th</sup> June 2024, this matter was consolidated with Miscellaneous Application No. E095 of 2023 with this Miscellaneous Application E079 of 2023 being the lead file. Thus, there are two applications before me for determination. In Miscellaneous Application No. E079 of 2023, the applicant, the County Government of Baringo, filed its Notice of Motion dated 23<sup>rd</sup> October 2023 seeking orders:
  - a. That the Honorable Court be pleased to set aside the arbitral award dated 16<sup>th</sup> December 2022 and delivered on 26<sup>th</sup> July 2023 by Eng. Joseph Ng'ang'a, Chartered Arbitrator, in the arbitration involving the parties herein;
  - b. That this Honorable Court does make such further orders as it may deem fit;
  - c. That the costs of the application be provided for.
2. In Miscellaneous Application No. E095 of 2023, the Notice of Motion is dated 27<sup>th</sup> November 2023 Rotunda Contractors limited, he prays for the following reliefs:
  - a. That this Honorable Court be pleased to recognize and adopt the final award delivered by Eng. Joseph Ng'ang'a of the Chartered Institute of Arbitrators dated 16<sup>th</sup> December 2022 and dispatched to parties on 26<sup>th</sup> July 2023;
  - b. That this Honorable Court be pleased to grant leave to the applicant to enforce the said arbitral final award as a decree of this Honorable Court;



- c. That costs of the application be provided for.
3. I find it prudent to determine Miscellaneous Application No. E079 of 2023 first because if allowed, it will have the effect of determining the application in Miscellaneous Application No. E095 of 2023 without any further recourse to the later's merits. I shall refer to the parties as applicant when addressing and analyzing each of their respective applications accordingly.
  4. The Notice of Motion dated 23<sup>rd</sup> October 2023 was based on the grounds on its face and the supporting affidavit of Julius Tarus, the applicant's County Attorney. The facts as established by the applicant are that, it is mandated to inter alia deliver services efficiently and effectively to the residents of Baringo County. That it contracted the respondent on 7<sup>th</sup> August 2013 to renovate and refurbish the office of its Governor. A dispute arose as to the contractual sum of Kshs.7,167,762.32. The matter was referred to arbitration on the strength of the arbitration clause wherein Eng. Joseph Ng'ang'a was appointed as the sole arbitrator.
  5. In the arbitral proceedings, the respondent filed its statement of claim and written submissions together with other pleadings. The respondent claimed that it was entitled to the contractual sum together with special damages. On its part, the applicant filed a statement of response, a counterclaim and written submissions. The applicant opined that the issues for determination were: whether a valid contract existed between the parties, whether the respondent performed its obligations in line with the contract, and whether the respondent was in breach.
  6. That on 15<sup>th</sup> September 2022, the applicant addressed the arbitrator vide a letter, seeking to adjourn the matter as there was a new county government official. They justified that on account of the presence of the new official, tracing the witness proved an exercise in futility. In response, the arbitrator requested the respondent to make a response to that request but he failed to do so. Subsequently, on 22<sup>nd</sup> September 2022, the arbitrator issued procedural order no. 17 directing parties to proceed with earlier directions.
  7. The award was delivered on 16<sup>th</sup> December 2022 and dispatched to the parties on 26<sup>th</sup> July 2023. In it, the applicant was directed to pay the respondent the outstanding principal amount of Kshs.7,167,762.00, interest in the sum of Kshs.6,305,441.00, exemplary and aggravated damages of Kshs.2,000,000.00, costs of Kshs.2,917,987.00 and reimburse the respondent the arbitral fees in the sum of Kshs.1,118,055.00. The applicant lamented that the awards were exorbitant and failed to uphold Articles 10 and 201 (1) (d) of *the Constitution*.
  8. The applicant contended that: the arbitrator acted against public policy in the manner and conduct of the proceedings upto the final award; refused to uphold the rules of natural justice insofar as the *Evidence Act* and the burden of proof was concerned; the directions issued amounted to open bias and partiality as the final award was entered in the respondent's favor; totally ignored the applicant's counterclaim and as a consequence, did not afford the applicant a fair hearing contrary to Article 48 of *the Constitution*.
  9. The applicant argued that the arbitrator, in his award, failed to take into account the fact that the respondent revised the contract and increased the contractual price illegally to Kshs.40,420,198.64. He further failed to appreciate the lengthy procurement process and delays in disbursements of funds from the National Treasury. That the arbitrator failed to acknowledge that the arbitration fees had not been budgeted for in the 2021 financial year. It therefore urged this Court to allow its application.
  10. The respondent filed its replying affidavit sworn by Kiplagat Chelelgo, its managing director, on 27<sup>th</sup> November 2023. The respondent summarized the facts as captured by the applicant save to add that



in its letter dated 15<sup>th</sup> April 2020, following the declaration of a dispute, the respondent applied for the appointment of an arbitrator in the Chartered Institute of Arbitrators. That Hon. Sylvia Mueni Kasanga was appointed the sole arbitrator vide letters dated 19<sup>th</sup> May 2020 and 28<sup>th</sup> May 2020.

11. That the said arbitrator accepted the appointment and, in her letter, dated 10<sup>th</sup> June 2020, disclosed to the parties her terms of reference and fees. The respondent accepted the terms of service by execution on 15<sup>th</sup> July 2020. It paid the requested deposit sum on 16<sup>th</sup> July 2020. That the applicant neither paid for the deposit nor executed the terms of reference.
12. Vide an order for directions No. 1 of 22<sup>nd</sup> June 2020, the arbitrator invited parties to a preliminary meeting on 1<sup>st</sup> July 2020. The same was held virtually through the zoom link platform at 1015hours. Both parties were in attendance. In the meeting, parties agreed on a timetable of activities that was drafted in order for directions No. 2 on that day.
13. Following those directions, the respondent filed its statement of claim on 8<sup>th</sup> July 2020, the applicant filed its statement of defence on 17<sup>th</sup> July 2020. The respondent filed its reply to defence on 3<sup>rd</sup> August 2020. A pre-hearing was scheduled to take place on 20<sup>th</sup> August 2020. However, the applicant requested that it takes place on a later date; the arbitrator directed that the same be held on 16<sup>th</sup> September 2020. Before it could take place, the applicant requested for another date scheduling that meeting to 22<sup>nd</sup> September 2020. The same was captured in order for directions no. 3.
14. On 24<sup>th</sup> September 2020, the applicant's counsel wrote an email notifying the respondent and the arbitrator of its intention to formally apply for the arbitrator's recusal from the matter since she was a sitting senator. That application was filed through an originating summons dated 29<sup>th</sup> September 2020. The respondent filed its replying affidavit sworn on 8<sup>th</sup> October 2020. The arbitrator recused herself in her ruling dated 5<sup>th</sup> November 2020 directing the applicant to meet the arbitral costs of the respondent.
15. Following those directions, the respondent demanded for its costs in the sum of Kshs. 355,262.00 in its letter dated 8<sup>th</sup> March 2021. Those costs were objected to by the applicant through its letter dated 23<sup>rd</sup> March 2021.
16. In the meantime, vide a letter dated 5<sup>th</sup> February 2021 the respondent requested the Chartered Institute of Arbitrators to appoint another arbitrator. This led to the appointment of Eng. Joseph Ng'ang'a. The arbitrator accepted the appointment and wrote to the parties in his letter dated 29<sup>th</sup> March 2021, his terms of reference. The respondent executed the terms of reference on 9<sup>th</sup> April 2021 and paid a deposit sum of Kshs. 150,000.00 on 16<sup>th</sup> April 2021. The applicant executed the terms on 15<sup>th</sup> July 2021 but did not pay for the deposit.
17. Under procedural order No. 1 dated 12<sup>th</sup> April 2021, parties were invited for a preliminary hearing. The same took place virtually on 27<sup>th</sup> April 2021. Counsel for both parties were in attendance. The timetable of activities and the issues agreed upon were captured in procedural order No. 2 dated 29<sup>th</sup> April 2021 and revised on 12<sup>th</sup> May 2021.
18. In the meantime, the applicant in its letter dated 19<sup>th</sup> April 2021, sought from the arbitrator, to settle the initial deposit arbitrator fees at Kshs.70,000.00 and the balance to be paid at a later date. The arbitrator reluctantly acceded in his letter dated 19<sup>th</sup> April 2021, on condition that the balance be settled within 15 days from the date of the letter. A reminder was sent to the applicant to settle the balance on 2<sup>nd</sup> June 2021 by the arbitrator.



19. Under procedural order No. 3 dated 7<sup>th</sup> June 2021, the applicant was given up to 18<sup>th</sup> June 2021 to settle its share of arbitral fees and submit a copy of the executed terms of reference. On 16<sup>th</sup> June 2021, the applicant requested for more time to settle the deposit sum. That request was granted in procedural order No. 4 and another extension granted.
20. The respondent filed its statement of claim and witness statements on 10<sup>th</sup> May 2021. The applicant filed its response on 27<sup>th</sup> May 2021 but did not file its witness statement. Parties were notified of a pre-hearing meeting for 1<sup>st</sup> July 2021 in procedural order No. 5 dated 25<sup>th</sup> June 2021. The same took place in Fairview Hotel – Bishop Road, Nairobi. The applicant therein sought and was granted an extension of time to file its witness statements from 31<sup>st</sup> May 2021 to 16<sup>th</sup> July 2021. This was captured in procedural order No. 6 dated 2<sup>nd</sup> July 2021.
21. On 14<sup>th</sup> July 2021, the applicant requested for more time to prepare and record the witness statements to a later date in light of the COVID-19 pandemic. That application was vehemently opposed by the respondent in its letter dated 15<sup>th</sup> July 2021. Nonetheless, the arbitrator granted the extension to 23<sup>rd</sup> July 2021 through procedural order No. 8 dated 15<sup>th</sup> July 2021. In his letter dated 17<sup>th</sup> July 2021, the arbitrator explained that each party had the right to obtain ample time to present its case. The witness statement was filed on 22<sup>nd</sup> July 2021.
22. On 24<sup>th</sup> July 2021, under procedural order No. 9, the arbitrator issued a preemptory order on security for costs. Consequently, the respondent applied for security for costs vide an Originating Summons dated 26<sup>th</sup> July 2021. Leave to seek interim relief from the High Court for security for costs was granted in procedural order No. 12 dated 3<sup>rd</sup> August 2021.
23. On 2<sup>nd</sup> July 2021, the arbitrator issued his interim fee note amounting to Kshs.1,270,166.00. The respondent paid its share on 16<sup>th</sup> July 2021. The applicant protested that fee note in its letters dated 29<sup>th</sup> July 2021 and 30<sup>th</sup> July 2021 as well as an email dated 29<sup>th</sup> July 2021. It sought an explanation and re-adjustment of the fee note threatening that if those demands were not met, it would apply to have the arbitrator recuse himself.
24. The arbitrator justified how he arrived at the figure in his fee note vide its letters dated 30<sup>th</sup> July 2021. In its email dated 31<sup>st</sup> July 2021, the respondent requested for time to respond to that issue reserving its date of response to 2<sup>nd</sup> August 2021. On 2<sup>nd</sup> August 2021, the applicant wrote a letter seeking the recusal of the arbitrator if he did not accept to charge reasonable fees. On 2<sup>nd</sup> August 2021, the respondent accused the applicant of employing delaying tactics to avoid settling the arbitrator's fees. It then responded to the letter seeking recusal on 4<sup>th</sup> August 2021 citing mala fides.
25. Through procedural order No. 10 dated 31<sup>st</sup> July 2021 and a letter dated 2<sup>nd</sup> August 2021, the arbitrator provided avenues for termination of the mandate and recusal of the arbitrator respectively. In its Notice of Motion dated 5<sup>th</sup> August 2021, the applicant filed an application seeking recusal of the arbitrator. The respondent filed its replying affidavit on the same dated 16<sup>th</sup> August 2021. An interim award was published on 17<sup>th</sup> August 2021 dismissing the application.
26. Vide a Notice of Motion dated 30<sup>th</sup> August 2021, the applicant sought to set aside that award at the High Court sitting at Nairobi in Miscellaneous Application NO. E638 of 2021. It also sought to terminate the mandate of the arbitrator seeking the appointment of a new arbitrator de novo. A response was filed by the respondent on 27<sup>th</sup> September 2021. Subsequently, on 19<sup>th</sup> August 2022 this court found that the application lacked merit and proceeded to dismissed it with costs.



27. The hearing of the dispute thus took place on 15<sup>th</sup> September 2022 at the CIArb boardroom in Nairobi. The respondent stated that it did not have any letter by the applicant purporting to request for an adjournment on that day. It was however revealed in the final award that the arbitrator received an email transmitting a letter requesting for the rescheduling of the hearing when the hearing session was already over. It contended that the applicant ought to have communicated earlier of its intention to adjourn the hearing since it was well aware of the hearing date.
28. On 2<sup>nd</sup> December 2022, the arbitrator notified parties that the final award would be ready for dispatch on 16<sup>th</sup> December 2022 subject to payment of the balance of his fees owed by the applicant in the sum of Kshs. 1,799,932.00 and Kshs. 482,972.00 owed by the respondent. The arbitrator also sent a final account fee note highlighting the table of activities and hours each activity took.
29. Though the respondent settled the sums due, the applicant did not, thereby withholding the release of the final award. A letter dated 18<sup>th</sup> July 2023 was authored by the respondent disclosing its intentions to settle the applicant's balance on fees and then later claims the same with interest. On 22<sup>nd</sup> July 2023 the respondent settled the sums. Thereafter, the final award was dispatched on 26<sup>th</sup> July 2023.
30. The respondent observed that the applicant applied for recusal of the two arbitrators before the scheduled hearings yet it had initially participated in all proceedings prior to the applications. Further that the applicant's actions were deliberate and calculated to frustrate the respondent and force it to abandon the proceedings. The respondent averred that the applicant only intent was to delay the matter and assert dominance through intimidation and threat tactics violating the principle of arbitration on resolving disputes expeditiously and in a cost-effective manner.
31. That from the email dated 29<sup>th</sup> July 2021, the applicant had the financial muscle but still intended to draining the respondent's resources by avoiding financial liability including the settling of the arbitration costs. It further deposed that no allegations of bias could stand since on several occasions, the arbitrator granted orders in favor of the Applicants notwithstanding the respondent's protests.
32. The respondent prayed that the application be dismissed with costs as it lacked merit for the following reasons; the applicant had approached the court with unclean hands; the continued litigation caused unfortunate financial loss, loss of business activities, wastage of resources and emotional anguish; no grounds for bias had been established since the respondent did not know of the arbitrators prior to their appointments; the arbitrator considered all the evidence that was placed before him; the arbitrator did not delay in any of its responses; and the applicant was only forum shopping as the application did not advance and good reasons warranting an order for setting aside.
33. The applicant filed a supplementary affidavit sworn by Julius Tarus on 20<sup>th</sup> March 2024. It reiterated the contents of its application and attached copies of the final award dated 16<sup>th</sup> December 2022, the respondent's statement of claim, the applicant's response, the applicant's reply to its response, list of witnesses, list of documents, witness statements, parties' written submissions, procedural orders No. 1 – 17, letter and email dated 15<sup>th</sup> September 2023 as well as the application seeking recusal.
34. The application was canvassed by way of written submissions. The applicant filed its written submissions and list of authorities dated 15<sup>th</sup> March 2023. It submitted that in light of section 35 (2) (b) (ii) of the *Arbitration Act* and the decisions of the court in *Christ for All Nations vs. Apollo Insurance Company* [2002] EA 366, Misc. App No. 792 of 2004; *Mahigan Investments Limited vs. Giovanni Gaida & 79 others*, HCCC No. 836 of 2003; *Rwama Farmers' Cooperative Society Limited vs. Thika Coffee Mills Limited* and *Tanzania National Roads Agency vs. Kundan Singh Construction Limited* [2013] eKLR, the arbitral award was contrary to public policy having violated the applicant's



- constitutional right to fair hearing, demonstrated open impartiality, did not furnish equal treatment of the parties and was a breach of the rules of evidence intended to unjustly enrich the respondent.
36. They also submitted that the applicant was not afforded a hearing on 15<sup>th</sup> September 2022 despite informing the arbitrator that it was seeking an adjournment. That the arbitrator did not consider the letter dated 18<sup>th</sup> April 2014 advising the respondent to stop work. Finally, the applicant submitted that since a new county government official had come into office, it was difficult for them to trace their witness. As such, the continued hearing of the dispute violated the applicant's rights as enshrined in Article 50 (1) of *the Constitution* and section 19 of the Oaths and Statutory Declaration Act.
  37. The respondent adopted its written submissions and list of authorities both dated 13<sup>th</sup> March 2024. They submitted that the award dated 16<sup>th</sup> December 2022 was not against public policy within the spectrum of section 35 (2) (b) (ii) of the Act and the decisions Teejay Estate Limited vs. Vihar Construction Limited (Misc. App. No. E184 of 2021) [2022] KEHC 121 (KLR), Godfrey Mwapembwa vs. Nation Media Group Limited [2021] eKLR, Dinesh Construction Limited & another vs. Aircon Electra Services (Nairobi) Limited [2021] eKLR and Das Group Limited vs. Mayfair Limited t/a Peche Foods [2021] eKLR.
  38. According to the respondent, the applicant's bone of contention was on the fees charged by the arbitrator. It submitted that the issue was substantively decided upon in County Government of Baringo vs. Rotunda Contractors Limited [2022] KEHC 12080 (KLR). In any event, the arbitrator analytically explained the justification for his fees and furthermore, the applicant executed the terms of reference with zero complaints.
  39. On whether the arbitrator was biased, the respondent relied on its definition under Blacks Law Dictionary and the decision of the court in County Government of Baringo vs. Rotunda Contractors Limited (Supra) to argue that bias was not established and the issue was res judicata. On whether the arbitrator failed to uphold the rules of natural justice, the respondent submitted that those allegations were not proved. Finally, the respondent while relying on several decisions, submitted that the application to set aside the award was time barred. It prayed that the application be dismissed.
  39. I have considered the application, the affidavits in support and the response in opposition thereto, examined the respective parties written submissions and the annexures to the affidavits and analyzed the law. Before delving into the merits or demerits of the application, I wish to address one preliminary issue raised by the respondent that is whether the Notice of Motion dated 23<sup>rd</sup> October 2023 is time barred by dint of the provision of section 35 (3) of the *Arbitration Act*.
  40. Section 35 (3) of the *Arbitration Act* provides that an application for setting aside an 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 (seeking correction and interpretation of the award) from the date on which that request had been disposed of by the arbitral award. Thus, the issue is whether the Applicant's application dated 15<sup>th</sup> June 2023 is time barred by dint of the provisions of Section 35(3) of the *Arbitration Act*.
  41. In the instant case, a perusal of the record reveals that on 2<sup>nd</sup> December 2022, the Tribunal notified the parties that the final award would be ready for dispatch on 16<sup>th</sup> December 2022 subject to the applicants settling the balance of his fees. A final account fee note highlighting the table of activities and hours each activity took was also shared. The applicant did not settle the sums due, thereby withholding the release of the final award. A letter dated 18<sup>th</sup> July 2023 was authored by the respondent disclosing its intentions to settle the applicant's balance on fees and then claim the same with interest on a later date.



The respondent settled those sums on 22<sup>nd</sup> July 2023. Thereafter, the final award was dispatched on 26<sup>th</sup> July 2023.

42. In the case *Njau v Safaricon Investment Cooperative Society Limited* (2024) KEHC 12789 (KLR) and also in *Lantech (Africa) Limited v Geothermal Development Company* ML HC Misc. Appl. No. E776 of 2020 [2020] eKLR, the court when discussing whether the application was filed within the requisite time as stated under section 35(3) of the *Arbitration Act* held that:

“(33) [D]elivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties.”

43. The court also noted that;

“...the date of receipt is the date the parties are notified of the award. The arbitral Tribunal discharges its obligation of delivery once it avails the signed copy of award to the parties and the failure by the parties to collect it does not delay or postpone the delivery. Indeed, once the parties are notified of the award, it is within their power to collect it”.

44. Based on the above, the application to set aside ought to have been made within three (3) months from the date the award was received, the date of receipt being the date the parties were notified of the award, being 16<sup>th</sup> December 2022. Thus, on this premise alone, this application is incompetent for being filed out of time and is for dismissal.

45. Be that as it may, and in the event, I was to consider the application on merit, the applicant seeks to set aside the arbitral award dated 16<sup>th</sup> December 2022 and published on 26<sup>th</sup> July 2023. Section 35 (2) (a) of the *Arbitration Act* empowers this court to set aside an arbitral award where 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.
46. Under section 35 (2) (b), the High Court may also set aside an arbitral award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya or that the award is in conflict with the public policy of Kenya. I am alive to the pronouncements of our Apex Court protecting the sanctity of the arbitral proceedings and would strictly confine myself to the wordings of section 35 of the *Arbitration Act*. In *Nyutu Agroviet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch* [2019] KESC 11 (KLR), the Supreme Court held as follows:
- “Section 35 of the *Arbitration Act* should be interpreted in a way that promoted its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. It allowed an aggrieved party to apply for the setting aside of an arbitral award on certain grounds. The court had the opportunity to correct specific errors of law that could taint the process of arbitration. There was need to shield arbitral proceedings from unnecessary court intervention...”
47. In *Synergy Industrial Credit Ltd vs. Cape Holdings Ltd* [2020] eKLR, the Court of Appeal stated that:
- “One of the significant features of the *Arbitration Act* (the Act) is the principle of party autonomy, which entitles parties to have their disputes resolved by the forum and in the manner of their choice. For that very reason, the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act”.
48. The parties have enumerated the facts giving rise to this application. More particularly, I find that the respondent chronologically set out the background in detail and those facts are not rebutted. I will therefore not rehash those facts but will only make reference to what is necessary. In this case, the applicant has contended that the award was contrary to public policy for the several reasons it has enumerated. The 10<sup>th</sup> edition of Black’s Law Dictionary Tenth Edition defines public policy as follows:
- “The collective rules, principles or approaches to problems that affect the commonwealth or (esp.) promote the general good; ... principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the state and the whole of society.”
49. Public policy has been the subject of litigation in our jurisdiction. In *Christ for All Nations vs. Apollo Insurance Co. Ltd* [2002] 2 E.A 366, the court held thus:
- “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, or (c) contrary to justice and morality”.
50. This Court in *Misc. Application No. E1301 of 2020; Dinesh Construction Limited & Another vs. Airon Electronic Services (Nairobi) Limited* [2021] eKLR, held that:
- “30. Although framed broadly, public policy as a ground for setting aside an arbitral award must be narrow in scope and 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 then must show which part of the award conflicts with that policy.”

51. Having established the import and tenor of public policy, I now proceed to analyze each and every reason set out by the applicant in the foregoing paragraphs as hereunder.
52. The first complaint was that the arbitrator demonstrated open bias in his directions regarding the applicant’s request for an adjournment and partiality as the award was entered in the respondent’s favor. The directions in question are those to be found under procedural order No. 16 of 15<sup>th</sup> September 2022. The applicant on that day, wrote to the arbitrator, seeking to adjourn the hearing to a later date. To properly analyze and make a determination on this, it is important to give a chronology of events on what transpired leading up to the authoring of the letter dated 15<sup>th</sup> September 2022.
53. Following the dismissal of the applicant’s Notice of Motion dated 30<sup>th</sup> August 2021 in Nairobi High Court Miscellaneous Application No. 638 of 2021 on 19<sup>th</sup> August 2022, the arbitrator, one Eng. Joseph Ng’ang’a proceeded to circulate to the parties procedural order No. 14 dated 24<sup>th</sup> August 2022. Parties were advised that the hearing of the dispute would take place on 8-9 September 2022, 13-14 September 2022 and 15-16 September 2022. Under procedural order No. 15 dated 30<sup>th</sup> August 2022, further directions for hearing were issued.
54. Notably, no request for adjournment was sought until on 15<sup>th</sup> September 2022 the date of the hearing. The adjournment was sought through a letter that was forwarded by an email sent at 1:08 p.m. Under procedural order No. 17, the hearing commenced at 9:00 a.m. and lasted till 1:30 p.m.
55. Following the request, the arbitrator invited the respondent to share its comments on the request. The respondent did not do so leading to the issuance of Procedural order No. 17 dated 22<sup>nd</sup> September 2022. The arbitrator acknowledged that the applicant’s request seeking to adjourn the hearing from 15<sup>th</sup> September 2022 to 22<sup>nd</sup> September 2022 was received via email after the hearing took place. The arbitrator stated “in the absence of any agreement to the contrary by the parties, the arbitral tribunal in item VI procedural order no. 16 dated 15<sup>th</sup> September 2022 shall stand.”
56. Procedural order No. 16 dated 15<sup>th</sup> September 2022 recorded that the respondent’s witness testified between 9:00 a.m. and 1:30 pm. It also reminded parties on item V on procedural order No. 15 dated 30<sup>th</sup> August 2022 which provided that in the event of a party failing to attend a hearing, the tribunal “will not take failure of the respondent to attend the hearing as an admission of the claimant’s allegations as the burden of proof rests with the party that alleges any matter.” The arbitral tribunal informed parties that it had adopted the parties’ witness statements to ensure equality and parties were given time to file their written submissions.
57. I have carefully perused the procedural orders. Nothing therein advances any act by the arbitrator was biased or perceived to be biased. In the same vein, I also do not agree with the applicant submission that its rights under Article 48 of *the Constitution* were violated. The arbitrator informed parties that though, the applicant was absent, it would still consider the evidence of the applicant. I find that the arbitrator accommodated the applicant by considering their evidence as contained in the witness statement. If strict rules of evidence were to apply then the applicant’s evidence would not have been considered since they did not appear for the hearing.
58. Clearly, by seeking to adjourn the matter after it had proceeded demonstrates lack of good faith on the part of the applicant. The applicant actions demonstrate a party that lacks diligence and enthusiasm



in having the matter determined. This amounts to crafty machinations that cannot be condoned or entertained by this court. Contrary to the applicant's submission that the acts of the arbitrator were against public policy, it is the applicant's behaviour and conduct in the proceedings before the tribunal that were contrary to public policy. Public policy frowns upon a party which, despite having been duly served and has notice, fails to show up at trial and then moves, after fact with mala fide, to set aside the decision of the tribunal.

59. The reasons advanced for the adjournment were that there was a new county government official and therefore, tracing their witness became futile. I am not persuaded by that argument since county governments are entities with perpetual successions and well defined structure, and if that was the case the applicant ought to have notified the parties in advance since the new government did not come in overnight but all along the applicant knew of the hearing. To allow this argument from the applicant will infact wreak havoc to public policy that is perpetual succession and existence of county government despite the regular democratic elections. This Court will not entertain any thought that a succeeding government can arbitrarily seek to ran away from liabilities and obligations already entered into before they assumed office. That is what will be contrary to public policy.
60. The tribunal in paragraphs 62 – 87 set out the applicant's case. The arbitrator carefully considered the evidence of both parties in its analysis running from paragraph 91- 178. The tribunal cited the evidence of both parties irrespective of the fact that the applicant did not participate in the proceedings at the hearing. I therefore find that contrary to the applicant's allegations, the tribunal upheld the rules of natural justice and considered all the issues that were placed before it.
61. In the manner and conduct of proceedings, I find that the arbitrator accommodated the applicant on several occasions even in instances it ought not to have. For instance, the applicant was granted leave to pay the initial deposit fees in installments. Even after that leave was granted, the applicant did not settled that sum. Thereafter, the applicant, on filing its response on 27<sup>th</sup> May 2021, failed to file its witness statement. It was however indulged and during the pre-hearing meeting for 1<sup>st</sup> July 2021, the applicant was granted an extension of time to file its witness statements from 31<sup>st</sup> May 2021 to 16<sup>th</sup> July 2021.
62. On 14<sup>th</sup> July 2021, the applicant requested for more time to prepare and record the witness statements to a later date in light of the COVID-19 pandemic. That application was vehemently opposed by the respondent in its letter dated 15<sup>th</sup> July 2021. Nonetheless, the arbitrator granted the extension to 23<sup>rd</sup> July 2021 through procedural order No. 8 dated 15<sup>th</sup> July 2021. In his letter dated 17<sup>th</sup> July 2021, the arbitrator explained that each party had the right to obtain ample time to present its case. The witness statement was filed on 22<sup>nd</sup> July 2021. If anything, it is the applicant who benefited from the arbitrator's leniency.
63. The applicant also states that the arbitrator failed to take into account the fact that the respondent revised the contract and illegally increased the contractual price to Kshs.40,420,198.64. Further, that he failed to appreciate the lengthy procurement process and delays in the disbursements of funds from the national treasury. That the arbitrator failed to acknowledge that the arbitration fees had not been budgeted for in the 2021 financial year.
64. Looking at the tribunal's award, I find that the arbitrator considered the evidence with a lot of scrutiny and granted the reliefs complained of. I find that the arbitrator properly, skillfully and meticulously looked at the evidence on record. Nothing in his analysis points to a breach of public policy insofar as the reliefs are concerned. Consequently, I find that there was no violation of Articles 10 and 201 (1) (d) of *the Constitution*.



65. During the entire process, the applicant was seen as a litigant with a tendency of disregarding the orders of the tribunal and seeking extension of time to do that which was required of it. A lot of those breaches have been laid out here in and further seen under procedural order No. 9, of 24<sup>th</sup> July 2021 when the arbitrator issued a preemptory order on security for costs.
66. Similarly, on 2<sup>nd</sup> July 2021, the arbitrator issued his interim fee note amounting to Kshs.1,270,166.00. The respondent paid its share on 16<sup>th</sup> July 2021. The applicant protested that fee note in its letters dated 29<sup>th</sup> July 2021 and 30<sup>th</sup> July 2021 as well as an email dated 29<sup>th</sup> July 2021. It sought an explanation and readjustment of the fee note threatening that if those demands were not met, it would apply to have the arbitrator recuse himself. The arbitrator justified how he arrived at the figure in his fee note vide its letters dated 30<sup>th</sup> July 2021. I further note that the issue was substantively determined by this Court in County Government of Baringo vs. Rotunda Contractors Limited (*supra*) and raising this issue in this case amounts to *res judicata*.
67. In its email dated 31<sup>st</sup> July 2021, the respondent requested for time to respond to that issue reserving its date of response to 2<sup>nd</sup> August 2021. On 2<sup>nd</sup> August 2021, the applicant wrote a letter seeking the recusal of the arbitrator if he did not accept to charge reasonable fees. On 2<sup>nd</sup> August 2021, the respondent accused the applicant of employing delaying tactics to avoid settling the arbitrator's fees. It then responded to the letter seeking recusal on 4<sup>th</sup> August 2021 citing *mala fides*.
68. Through procedural order No. 10 dated 31<sup>st</sup> July 2021 and a letter dated 2<sup>nd</sup> August 2021, the arbitrator provided avenues for termination of the mandate and recusal of the arbitrator respectively. In its Notice of Motion dated 5<sup>th</sup> August 2021, the applicant filed an application seeking recusal of the arbitrator. Ultimately, as earlier indicated, that application was dismissed and this court cannot address itself to it.
69. Though the respondent settled the sums due, the applicant did not, thereby withholding the release of the final award. A letter dated 18<sup>th</sup> July 2023 was authored by the respondent disclosing its intentions to settle the applicant's balance on fees and then claim the same with interest on a later date. The respondent settled those sums on 22<sup>nd</sup> July 2023. Thereafter, the final award was dispatched on 26<sup>th</sup> July 2023. I do not think that the applicant being a county government was unable to settle the debts owed to the respondent. Instead, it was seeking for all avenues to escape liability. An act which, again, I find is contrary to public policy given that the applicant ought to be accountable to the public by being seen as one which will honour its financial obligations timeously.
70. I am persuaded by the respondent's argument to the extent that the applicant's conduct was duly intent on draining the respondent's resources, avoiding financial liability and defeating the respondent's claim. The applicant did not even pay for the arbitral fees alleging that the procurement process was lengthy and delays in disbursements of funds from the national treasury were apparent. If this argument was anything to go by, the applicant would have attached evidence so as to show that it had commenced the process with a view to settling outstanding debts. Further, this Court takes judicial notice that a county does not just depend on disbursements of funds from the national treasury but also have their own source revenue.
71. In the end, I find that the applicant is undeserving of the orders sought. No reasons have been advanced for this Court to exercise its limited discretion set out in section 35 of the *Arbitration Act*. It has not been demonstrated how the arbitral award is inconsistent with *the Constitution* or any other law of



Kenya, or is contrary to justice and morality. The Court of Appeal in Civil Application No. 57 of 2006; Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR held thus:

“The matter before us has of course nothing to do with Section 35(2) (b) (ii) (Supra). .... We think as a matter of Public Policy, it is in the public interest that there should be an end to litigation and the Arbitration Act, under which the proceedings in this matter were conducted underscores that policy.” (underline mine).

72. I agree with that holding to the extent that the Arbitration Act envisions an end to litigation and this Court must uphold and give meaning and breath life to that policy. The upshot of my above analysis is that’s the applicant’s Notice of Motion dated 23<sup>rd</sup> October 2023 lacks merit and must fail.
73. Turning to Miscellaneous Application No. E095 of 2023, the application was supported by the grounds on the face of the Motion and the supporting affidavit of Kiplagat Chehelgo, the applicant’s managing director. In it, the applicant seeks to enforce the arbitral award dated 16<sup>th</sup> December 2022 but dispatched on 23<sup>rd</sup> July 2023.
74. Section 36 (1) of the Arbitration Act provides that 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 which provides the grounds for refusal of enforcement of the award. Under section 36 (3), the party relying on an arbitral award or applying for its enforcement must furnish the original arbitral award or a duly certified copy of it together with the original arbitration agreement or a duly certified copy of it.
75. The grounds for refusal for enforcement of an arbitral award are enumerated as follows in section 37:
  - a. a party to the arbitration agreement was under some incapacity; or
  - b. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made; or
  - c. the party against whom the arbitral award is invoked 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
  - d. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or
  - e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
  - f. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
  - g. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.
76. This Court may decline to enforce the award if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya or if its enforcement is contrary to public policy. In



the present case, none of the above conditions set out in section 37 disqualify the enforcement of this award dated 16<sup>th</sup> December 2022 and published on 23<sup>rd</sup> July 2023. On the face of it is no impediment to the enforcements of the award.

77. However, in light of section 36 (3) of the Act, I find that while the applicant annexed the final award, it failed to adduce the arbitration agreement in its application. What is the effect of that failure? It is trite that the provisions of section 36(3) are stated in mandatory terms and they must be complied with. In *Mubia v Mimos Consortium Ltd (Miscellaneous Civil Application E057 of 2023)* [2024] KEHC 9376 (KLR) (25 July 2024) (Ruling), it was held:

“19. Section 36 of the *Arbitration Act* sets out the legal parameters governing enforcement and adoption of an arbitral award. It provides:-

20. In *Samura Engineering Limited vs Don Wood Co. Ltd* [2014] eKLR the court held that:-

Of course, Section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to *the Constitution*. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed....

20. The applicant has provided a certified copy of the arbitral award by one Florence Ndinda Kyule who has not described the office she holds. The arbitrator is named in the award as one Mr. Mohammed S. Balala whose address or location is not known. The applicant has neither provided the original agreement containing the arbitration clause nor has he provided a properly certified copy of the award as required by the law. It is noted that the sale agreement and the final award are not in dispute and the only issues raised by the respondent is non-compliance with the law and procedure. In my view, the non-compliance does not affect the validity of the award.

21. Consequently, I find that the applicant has failed to establish a case for recognition and enforcement of the final award as set out in Section 36(3) of the Act. Accordingly, it is my considered view that the application dated 30<sup>th</sup> November 2023 is incompetent and misconceived.”

78. In view of the foregoing, I find that the application dated 27<sup>th</sup> November 2023 is incompetent for failure to comply with the mandatory requirements of section 36(3) of the Act.

79. Accordingly, the following are my final orders:

1. The Notice of Motion dated 23<sup>rd</sup> October 2023 is incompetent and lacks merit and it is hereby dismissed. with costs to the respondent therein.
2. The Notice of Motion dated 27<sup>th</sup> November 2023 is incompetent and is struck out with no order as to costs.

80. It is so ordered.

**DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**



**RHODA RUTTO**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of;

Wanyoike Court Assistant

.....Applicant

.....Respondent

