



**County Government of Narok v Associated Construction Company Limited  
(Commercial Miscellaneous Application E002 of 2024 & Miscellaneous Application  
E013 of 2024 (Consolidated)) [2025] KEHC 11784 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11784 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
COMMERCIAL MISCELLANEOUS APPLICATION E002 OF 2024 &  
MISCELLANEOUS APPLICATION E013 OF 2024 (CONSOLIDATED)**

**CM KARIUKI, J**

**JULY 31, 2025**

**BETWEEN**

**COUNTY GOVERNMENT OF NAROK ..... APPLICANT**

**AND**

**ASSOCIATED CONSTRUCTION COMPANY LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicant vide chamber summons dated 30/05/2024, sought orders.
  - i. That the honourable Court be pleased to set aside the arbitral Award made and published on 29 March 2024 by the sole Arbitrator, Eng. Joseph Njogu Ng'ang'a, FCI Arb, in a contractual dispute involving Associated Construction Company Ltd and the County Government of Narok.
  - ii. That the honourable Court be pleased to remit the dispute between the parties for hearing before another arbitral tribunal under section 39(2)(b) of the *Arbitration Act*, Chapter 49, Laws of Kenya.
  - iii. The cost of the Application should be provided.
2. The Application is based on Sections 12, 15, 16, 19, 29(4), 35(1)(2)(a)(i) & (iii), and 39 of the *Arbitration Act* 1995; Rule 4(2), 7, and 11 of the Arbitration Rules 1997; Articles 48 and 50 of *the Constitution* of Kenya 2010; and Sections 1A, 1B, 3, 3A, and 59 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya.



3. The Application is based on the grounds set out on the face of the Application and the supporting affidavit sworn by JOHN MAYIANI TUYA on 30/05/2024.
4. The Respondent vide chamber summons dated 01/07/2024, sought orders.
  - i. That the Arbitral Tribunal's Award dated 29 March 2024 be recognized as binding and enforced as a decree of this Honourable Court.
  - ii. That the Court make such further orders as it deems appropriate in the circumstances.
  - iii. The Respondent bears the costs of this Application.
5. The Application is based on Section 36(1) of the *Arbitration Act* 1996, Rule 4(3), and Rule 9 of the Arbitration Rules of 1997. The Application is based on the grounds set out on the face of the Application and the supporting affidavit sworn by Nanak Singh Bansal on 01/07/2024.

**The background.**

6. On 03/09/2014, the Applicant executed a contract with the Respondent for upgrading Junction B3-Nairegie Enkare Road (E445) to the Bitumen standard for the negotiated tender sum of Kshs. 389,901,288/=.
7. In January 2018, a dispute arose between the parties. By mutual consent and by the contract's provisions, the parties participated in and consented to the nomination and appointment of one Engineer. P.T. Gichuhi is the sole Arbitrator to determine the dispute.
8. The operative clause in the underlying contract regarding the appointment of an arbitrator was contained in clause 15.2.
9. Following the appointment of Eng. P.T. Gichuhi, the parties consented to the jurisdiction of the arbitral Tribunal and submitted the relevant documentation.
10. Later, the Applicant was informed of arbitral proceedings that were taking place before another arbitrator, namely Eng. Joseph Njogu Ng'ang'a FCI Arb.
11. The Applicant contends that, through an external law firm, it wrote to the said Arbitrator on 6 March 2024, asking for an opportunity to participate in the arbitral proceedings. However, the Respondent, through a letter dated 08/03/2024, stated that it could only allow the participation of the Applicant in the proceedings if the Applicant provided security for costs in the form of a bank guarantee to cover half of the arbitration award (Kshs. 194 million). The Respondent also requested that the Applicant pay Kshs 250,000 as the Arbitrator's costs.
12. On 20 March 2024, the Applicant, through its lawyers, indicated its willingness to pay the costs (Kshs. 250,000) and further requested an extension of time by 21 days from 29 March 2024, a request to which the Respondent consented. However, the Arbitrator declined and proceeded to publish the Award on 29 March 2024.
13. The Award requires the Applicant to pay the Respondent KShs. 389,901,288/= within 45 days.
14. In the Application herein, the Applicant seeks to challenge the substitution of Eng. Joseph Njogu Ng'ang'a FCI Arb, as the sole Arbitrator, further irregularities were found, including the substitution of Eng. P.T. Gichuhi with Eng. Joseph Njogu Ng'ang'a FCI Arb, after receiving a letter directly from the Respondent, despite the Respondent having counsel on record – Messers Ameyo, Guto, Etole & Co. advocates. The Applicant contends that the unilateral appointment and substitution of the sole Arbitrator excluded the Respondent from the decision-making process; that there was no proper notice



or explanation regarding when and how the original Arbitrator, Eng. P.T. Gichuhi was replaced; the appointment of Eng. Joseph Njogu Ng'ang'a FCIArb was done in a manner that deliberately excluded the Applicant, yet the Arbitration is based on the doctrine of consent and Agreement of the parties.

15. The Applicant contends that the claimant's demand for security for costs in the form of bank guarantee to cover half of the arbitration award (Kshs. 194 million) as a precondition for granting the Respondent the opportunity to be heard in the arbitration proceedings impedes the constitutional doctrine of access to justice protected by article 48 and the principle of fair trial in article 50(1) of [the Constitution](#).

#### **The response.**

16. The Respondent opposed the Application vide replying affidavit sworn by Nanak Singh Bansal on 10/06/2024.
17. Upon the issuance of the Award and the execution of the Agreement, the Respondent commenced the works upon arriving and taking over the site and in turn raised various interim certificates for payment which certificates upon being certified by the Applicant's Resident Engineer, were either delayed to be paid, underpaid or the Applicant failed to pay the same in totality.
18. Following the breach of the terms of the Agreement by the Applicant on the failure to pay the raised interim certificates in full or the underpayments made by the Applicant to the same, the Respondent issued a Notice of Termination of the Agreement dated 17 January 2018 under Clause 69.1 of the Conditions of Contract which termination letter was sent to the Applicant vide registered post.
19. Following the issuance of the Notice of Termination of the Agreement, the Respondent submitted a Request for the Engineer's decision to the Engineer dated 24 April 2018 under Clause 67.1 of the Conditions of Contract.
20. Clause 67.1 of the Conditions of Contract provided that the Engineer was contractually expected to deliver a decision within 84 days of which the Engineer failed to do so, which prompted the Respondent to issue the Notice to Commence Arbitration dated 20 July 2018 which notice was issued after the lapse of the 84 days contracted prescribed for the issuance of the Engineer's decision which notice was duly received by the Applicant.
21. See a letter dated 15 August 2018, in which the Respondent's Advocates wrote to the Chartered Institute of Arbitrators, Kenya (CIArb Kenya), seeking the appointment of an Arbitrator to preside over the dispute between the parties herein. The Applicant and CIArb Kenya duly received this letter.
22. The CIArb Kenya appointed Engineer P. T. Gichuhi as the sole Arbitrator to preside over the Arbitral Tribunal between the parties herein, with all communication by the appointed Arbitrator copied to the parties. The same was sent via email and courier to both parties. As such, the mode of communication between the Applicant herein and the Respondent has been via email and hard copies delivered to the registered offices of the said parties.
23. The arbitration proceedings commenced, and eventually, the Arbitrator, Engineer P. T. Gichuhi, issued his directions on 15 July 2022. The Respondent herein felt aggrieved by the lack of progress in the arbitration proceedings since the issuance of the Arbitrator's directions on 15 July 2022.
24. It came to the Respondent's knowledge on or about 14 September 2023 that the appointed Arbitrator, Engineer P. T. Gichuhi, had passed away on 18 December 2022, which prompted the Respondent to write to CIArb Kenya to reappoint another Arbitrator to preside over the Arbitral dispute; this letter was copied to the Applicant.



25. Section 16(1) of the *Arbitration Act* provides that a substitute arbitrator may be appointed by the procedure applicable to the appointment of the original Arbitrator which is also reiterated by the contract between the two parties in the Appendix to form of BID which states that the appointer of an arbitrator by clause 67.3 is the Chartered Institute of Arbitrators Kenya CIArb Kenya.
26. The Respondent contends that no provision in law bars the Respondent as a party to arbitration proceedings from contacting the CIArb Kenya to seek any information and/or request the appointment of an Arbitrator despite having an Advocate represent them.
27. The Respondent was at will to engage the professional legal services of any counsel whom they deem fit to see to the proper justice of the matter. As such, on 13 September 2022, the Respondent herein terminated the services of the firm of Ameyo Ogutu and Company Advocates.
28. Following the CIArb Kenya's lack of response to the Respondent's letter dated 14 September 2023, the Respondent further wrote to CIArb Kenya on 31 October 2023, requesting a response to the letter dated 14 September 2023. A copy of the said letter was also served upon the Applicant.
29. On 17 November 2023, the CIArb Kenya wrote to one Engineer Joseph Njogu Ng'ang'a of its intention to nominate him as the sole Arbitrator in the dispute that arose between Applicant and the Respondent, which letter was duly copied and received by the parties herein.
30. On 22 November 2023, the CIArb Kenya wrote to both the Applicant and the Respondent notifying them of the appointment of Engineer Joseph Njogu Ng'ang'a as the sole Arbitrator for the said dispute.
31. On 30 November 2023, the appointed Arbitrator, Engineer Joseph Njogu Ng'anga, wrote to the Applicant and the Respondent and informed them of his acceptance of appointment as the sole Arbitrator in the dispute between the parties herein.
32. Section 14(2) of the *Arbitration Act* prescribes that any party that wishes to challenge the appointment of an Arbitrator shall within 15 days from the date he becomes aware of the composition of the arbitral Tribunal, send a statement of reasons for the challenge to the Arbitral Tribunal and that unless the Arbitrator challenged withdraws from his office or the other party agrees to the challenge, the Tribunal should decide on the challenge.
33. The Applicant herein was expected to challenge the appointment of Engineer Joseph Njogu Ng'anga on or before 16 December 2023. However, it failed to do so, and therefore the instant Summons, as premised on Section 12, seeking to challenge the appointment of Engineer Joseph Njogu Ng'anga is statute-barred by dint of Section 5 of the *Arbitration Act* as the Applicant is deemed to have waived its right to object to the appointment of Engineer Joseph Njogu Ng'anga.
34. The instant Summons has been filed over five (5) months after the period for the challenge of the appointment of Engineer Joseph Njogu Ng'anga as the sole Arbitrator in the dispute between the parties herein.
35. On 7 December 2023, Arbitrator Engineer Joseph Njogu Ng'anga issued Procedural Order No. 1, which outlined the order of proceedings for the Tribunal. Which procedural order was sent via email and courier, copied to the Respondent herein via their official email address and to their official government offices.
36. Furthermore, on 18 December 2023, the Arbitrator issued Procedural Order No. 2, which outlined the terms of his appointment of the Tribunal and informed both the Applicant and the Respondent herein via a letter delivered to the official government offices and via email.



37. Further, following the Arbitral Tribunal's directives in procedural order number 2, the Respondent herein proceeded to file its witness statement, statement of claim, and contract document to the Tribunal, with copies of the filed documents sent to the Applicant herein both via hardcopy to their official government offices and via email.
38. Subsequently, the Arbitrator issued procedural order number 3 on 31 January 2024, which was sent to the registered address of the Applicant via both email and courier.
39. On 3 February 2024, the Arbitrator issued Procedural Order No. 4, which outlined the procedures for the arbitration hearing. This procedural order was sent to both the Applicant and Respondent herein, but elicited no response from the Applicant.
40. The Applicant herein, through the firm of Musyoka Shikumo and Company Advocates, on 6 March 2024, wrote to the Arbitrator and the Respondent herein with their Notice of Appointment and a formal request for additional time to put in their Statement of Defence and submissions to protect the interests of their client, who is the Applicant.
41. By the letter to the Arbitrator dated 6 March 2024 by Musyoka Shikumo and Company Advocates, it is clear that all communication regarding the arbitration proceedings was being received, and the Applicant herein voluntarily opted not to participate in the arbitration proceedings. The fact that the Applicant had appointed Musyoka Shikumo and Company Advocates is proof enough that the Applicant was fully aware of the proceedings.
42. The Respondent herein was amenable to the Applicant's participation in the Arbitration and wrote to the Tribunal and copied the Applicant herein as to what, in all fairness, would be fair about the justice of the matter, seeing that the matter had been pending since 2018 and the Respondent therein had already incurred expenses.
43. Following the mutual Agreement between the Applicant and the Respondent regarding the request to participate in the proceedings, the sole appointed Arbitrator proceeded to issue procedural order number 5, which laid down the terms of participation for the Applicant herein. The same was sent via email and courier to both the Applicant and Respondent.
44. Section 26(e) of the *Arbitration Act* allows the Tribunal to make peremptory orders for compliance. Noncompliance with these orders invokes Section 26(f) of the *Arbitration Act*, which allows for the dismissal of the Applicant's request due to their noncompliance with the orders issued therein.
45. Subsequently, on 29 March 2024, following the non-response and noncompliance with the issued procedural order number 5 by the Applicant herein, the Arbitrator Engineer Joseph Njogu Ng'anga issued the Award.
46. The Applicant had ample time at their disposal to file a Statement of Defence and participate in the Tribunal's proceedings. The Applicant's right to a fair hearing was always available at all material times during the pendency of the Arbitration.
47. Further by section 5 of the *Arbitration Act*, a delay in objecting is a bar to remedies that were earlier available to the party, the same being prescribed by Article 32 of UNCITRAL (United Nations Commission on International Trade Law (Arbitration Rules, 2021) which "provides that failure by any party to object promptly to any noncompliance shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that its failure to object was justified".
48. There is no provision in the *Arbitration Act* for the extension of time to lodge a challenge to the appointment of an Arbitrator. Therefore, the Applicant herein is estopped from raising such an



objection at this stage, having failed to challenge the appointment within fifteen (15) days upon being aware of the appointment of the Arbitrator.

49. Sections 26(b) and (c) as read together with Section 19A of the *Arbitration Act* prescribe that the Arbitral Tribunal may continue the proceedings and make the Award on the evidence before it which in the arbitration proceedings between the parties herein, the Arbitrator Engineer Joseph Njogu Ng'anga did proceed with the hearing following the noncompliance by the Applicant.
50. In item V of procedural order number 1 dated 7 December 2023, the Tribunal gave notice to the Respondent that it intended to proceed with the Arbitral proceedings notwithstanding its refusal to participate.
51. Following the issuance of procedural order number 5 by Arbitrator Engineer Joseph Njogu Ng'anga in the said matter, laying down the requisite steps to be undertaken by the Applicant herein to participate in the said proceedings following the repeated default of the Applicant's obligations in the arbitration proceedings.
52. To ensure that the continued noncompliance by the Applicant was not repeated during the additional 21 days and to ensure equal treatment of the parties as provided in Section 19 of the *Arbitration Act*, the Tribunal directed that the Applicant shall bear the full costs of the Arbitral process after 29 March 2024.
53. As prescribed by Section 18(1)(b) of the *Arbitration Act*, the Applicant was directed to provide security for costs, which the Respondent therein would otherwise pay, in the event of default by the Applicant and in turn the Tribunal ordered that the Applicant was to make a deposit of Kshs 250,000 in respect of fees and expenses and further to provide security for costs in the amount of Kshs 3,000,000 which security was valid for 3 months.
54. The Applicant's failure to comply with the Tribunal's peremptory orders in procedural order number 5 is not in doubt, as it is consistent with all other peremptory orders issued by the Tribunal.
55. The Applicant herein has deliberately misled the Court that they were requested to deposit Kshs 194,000,000.00, being the security, an amount which is unknown to the Respondent and the Tribunal, noting that the directions issued in procedural order number 5 stated that the security deposit required for the matter was Kshs 3,000,000/=, which the Applicant declined to comply with.
56. The allegation that the Applicant herein was requested to deposit Kshs. The claim of \$ 194,000,000.00 to participate in the said Tribunal's proceedings is false and not supported by any evidence, and is made in bad faith to portray the arbitration process as unfair and oppressive to the Applicant.
57. Upon being served with procedure order number 5, the Applicant herein willingly declined to comply with the same and thereafter did not communicate with the Tribunal until the said chamber summons was served to the Respondent herein.
58. The Respondent contends that the Applicant is attempting to frustrate the Respondent's enforcement of the Award made in its favour, which the Respondent has declined to comply with.

#### **Directions of the Court.**

59. This file was consolidated with Narok HCCCMISC. E013 OF 2024. This file was made into the lead file.
60. The Application was canvassed through written submissions.
61. The Applicant's submissions.



62. The Applicant submitted that the procedure followed when appointing the sole Arbitrator, namely by mutual consent, should also be followed when appointing a substitute arbitrator. The Applicant contends that the appointment of Eng. Joseph Njogu Ng'ang'a FCIArb was not conducted in accordance with the procedure contemplated by the law and the contract. Further, the Respondent, having appointed counsel Messrs. Ameyo, Guto, Etole & Co. advocates, was expressly barred by law from sending out correspondence in the matter in their capacity. The Applicant relied on Order 9 Rule 5 of the Civil Procedure Rules, 2010.
63. The Applicant submitted that the proceedings conducted by the substitute Arbitrator in total disregard of the challenges to its appointment and jurisdiction are null and void, and the subsequent Award published is equally null and void ab initio. The issue of jurisdiction is a fundamental consideration that must be addressed before proceeding further in the case. Jurisdiction is everything, and without it, the Tribunal had to put its tools down. The Applicant relied on the Court of Appeal in Nakuru Civil Appeal No. 119 of 2017, Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others, consolidated with Civil Appeal No. 139 of 2017, and County Government of Embu & Another vs. Eric Cheruiyot & 15 Others.
64. The Applicant submitted that parties should be allowed to present their cases before a mutually appointed arbitrator as specified in the Agreement. The Applicant contends that the parties herein concluded an Arbitration agreement because they did not wish to litigate disputes between them in the courts. The Applicant relied on Section 39(1) and (2) of the *Arbitration Act*. The Court of Appeal at Nairobi in Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] eKLR referred to the decision in Geogas S. A v Trammo Gas Ltd (The "Balears").
65. The Respondent's submissions.
66. The Respondent submitted that an agreement between the parties herein must have been reached permitting any of the parties to file an appeal. An Agreement between the parties herein must confer such a right. With no written and executed Agreement between the parties herein conferring this Court the requisite appellate jurisdiction, the Applicant herein cannot invoke Section 39 of the Act. The instant arbitral Award that is the subject of the instant Summons was published on 29 March 2024, while the instant Summons is dated 30 May 2024. Therefore, the same was hopelessly filed beyond the thirty (30) day period prescribed by Section 79G of the *Civil Procedure Act*. The appeal (if the right to appeal was present) should have been filed on or before 6 May 2024, the Award having been received by the Applicant on 4 April 2024. The instant Summons, therefore, has been filed out of time to fall within the purview of Section 39 of the Act. The Respondent relied on Edith Wairimu Njoroge v Brooks Holdings Co. Limited & another [2018] eKLR, Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] e KLR, Ali Abdi Mohamed v Kenya Shell & Company Limited [2017] eKLR, William Muthee Muthami v Bank of Baroda [2014] eKLR, Talewa Road Contractors Limited v Kenya National Highways Authority (Civil Appeal 246 of 2019) [2021] KECA 276 (KLR), Mashin Construction Limited v Villa Care Limited [2022] eKLR, Section 107 of the *Evidence Act*, Section 79G of the *Civil Procedure Act*, and Order 42 Rule 1, 2, 13(4) of the Civil Procedure Rules.
67. The Respondent submitted that there is no evidence proffered by the Applicant to show that the Applicant herein was under any incapacity to execute the Agreement dated 3 September 2014. The Respondent relied on Section 35(2)(a)(i) of the *Arbitration Act*.
68. The Respondent submitted that the Applicant, having been served by courier, its intentional default in compliance with the directions of the Arbitral Tribunal cannot be grounds for setting aside a published arbitral award. The Applicant has always been aware of the arbitration proceedings before Arbitrator Engineer Joseph Njogu Ng'ang'a, but intentionally declined to participate in them and



- therefore cannot claim refuge under Section 35(2)(iii) of the *Arbitration Act*. The Respondent relied on Section 35(2)(iii) of the *Arbitration Act*, and *Virmint Company Limited v Effie Ogenda t/a Western Safe Energy Solutions (Arbitration Cause E025 of 2022) [2023] KEHC 4109 (KLR)*.
69. The Respondent submitted that the Applicant herein has not cited any grounds on the face of the Application or the supporting affidavit to show how the arbitral Award offends public policy. It is not disputed that the Applicant and the Respondent entered into a contract, and a dispute subsequently arose, which ultimately led to the commencement of arbitration proceedings. The Applicant has failed to plead and prove to the required standard how the arbitration proceedings between the parties and the eventual Award are subject to the national interest of the Republic of Kenya and how the enforcement of the arbitral Award would have a profound impact on the citizenry of this Country. The Applicant herein has not shown either by the instant Summons or its written submissions that the published arbitral Award is inconsistent with the provisions of *the Constitution* of Kenya or any other written law, or it is contrary to justice and morality, or that its enforcement is subject to the national interest of this Republic. *Machiri Limited v Kenya Airport Authority (Commercial Arbitration Cause E057 & E053 of 2023 (Consolidated)) [2024] KEHC 3303 (KLR)*, in which the Honorable Court cited with approval the holdings in the cases of *Christ for All Nations v. Apollo Insurance Company Limited [2002] EA 366* and *Mall Developers Limited vs. Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR*, and *Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR*.
70. The Respondent submitted that the Applicant herein, despite being fully aware of the appointment of Arbitrator Eng. Joseph Njogu Ng'ang'a, FCIArb, on 6 March 2024, failed to challenge his appointment. No challenge on the appointment of the Tribunal was made within the 15 days following Procedural Order No. 2, or indeed at any other time right up to the publishing of the Award on 29 March 2024.
71. Rule 3(1) of the Arbitration Rules of 1997 prescribes that applications under Sections 12 and 15 of the *Arbitration Act* must be by way of Originating Summons. Suppose the Applicant seeks to terminate the mandate of the Arbitrator. In that case, the Applicant should have filed an Originating Summons with the Arbitrator being enjoined as a party to the Summons to answer all questions related to his appointment. In the instant proceedings, the Applicant herein has filed a Chamber Summons contrary to procedure, and accordingly, this ground for setting aside the published Award should fail.
72. The Respondent contends that should this Honorable Court determine that the instant Summons was brought under Sections 12 and 15 of the *Arbitration Act* are proper, then the Applicant, having failed to challenge the appointment of the Arbitrator, should be denied. The Applicant herein submitted itself to the arbitration proceedings and is therefore estopped from raising the issue of how the Arbitrator was appointed.
73. The Respondent relied on *Ogake v Transmara Sugar Co. Ltd (Miscellaneous Application 29 of 2022) [2023] KEHC 20993 (KLR)*, *Donwoods Company Limited V Samura Engineering Limited [2010] eKLR*, Article 32 of UNCITRAL (United Nations Commission on International Trade Law (Arbitration Rules, 2021), 748 *Air Services Limited v Theuri Munyi [2017] eKLR*, *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR*, sections 5 and 14 of the *Arbitration Act*.
74. The Respondent submitted that the Applicant herein in the instant Summons does not seek to terminate the mandate of the Arbitrator Engineer Joseph Njogu Ng'ang'a. The Applicant has sought no prayers or orders to have the mandate of the Arbitrator terminated on the grounds as prescribed by Sections 14 and 15 of the *Arbitration Act*. The Applicant having failed to apply to this Honourable Court for the termination of the Arbitrator's mandate, this Honourable Court has no power to grant the same.



75. Further, the Application for the termination of the mandate of the Arbitrator to this honourable Court can only be made before the publication of an award. The Respondent relied on *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR, Sections 12, 15, and 16 of the *Arbitration Act*, *Villa Care Limited v Waiyaki Way Developers Limited* (Miscellaneous Application E180 of 2021) [2023] KEHC 2158 (KLR), *Magnate Ventures Limited v Kenya Railways Golf Club; Backlite Limited (Interested Party)* [2019] eKLR.
76. The Respondent submitted that the Applicant herein, having stated that there were constitutional breaches, the Applicant should have enjoined the Arbitrator in the proceedings to respond to the alleged breaches of *the Constitution*, as the Arbitrator was the arbiter in the dispute between the parties herein. Further, constitutional breaches must be specific and precise to enable the Court to interrogate and determine. Constitutional violations cannot be raised in an application for setting aside a published award.
77. While the Applicant is at liberty to pursue the alleged constitutional breaches by way of a petition before this honourable Court, the instant proceedings are limited only to the grounds under Sections 35 and 39 of the *Arbitration Act*. Any other issues can be addressed in the appropriate forum. The Respondent relied on *Bernard Murage v Fineserve Africa Limited & 3 others* [2015] eKLR, *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; and *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR.
78. The Respondent submitted that the Arbitral Tribunal did not make any interim award within the meaning of Section 3 of the *Arbitration Act* that ordered that the Applicant herein must present an irrevocable bank guarantee as a precondition for its participation in the proceedings. The Respondent brought no application under Section 18 of the *Arbitration Act*, as such an application would require a substantive response from the other party, and thereafter, the Arbitrator is expected to decide.
79. The Respondent's letter dated 8 March 2024 does not amount to an application under Section 18 of the *Arbitration Act*, and the Arbitrator rendered no Ruling that the Applicant has annexed to the instant Summons. Even if we are to grant that the Arbitrator made a Ruling on an application which was by way of a letter dated 8 March 2024 and that the same is made under Section 18 of the *Arbitration Act*, this honourable Court lacks the jurisdiction to hear any application seeking to challenge the Ruling under Section 18 of the *Arbitration Act*. The Respondent relied on *National Agricultural Export Development Board v Cargill Kenya Limited* [2014] eKLR and Section 32A of the *Arbitration Act*.

### **Analysis And Determination.**

80. This Court considered the applications, the respective supporting affidavits, the Respondent's replying affidavit, and the respective parties' submissions.

### **Issues**

81. The main issues for determination are:
- i. Should the Award be made and published on 29/03/2024 be set aside?
  - ii. Should the dispute between the parties be remitted for hearing before another arbitral tribunal?
  - iii. Whether the Award dated 29/03/2024 should be recognized as binding and enforced as a decree of this honourable Court.
82. Should the Award made and published on 29/03/2024 be set aside?



83. A dispute arose between the claimant and the Respondent relating to the upgrade to the Bitumen Standard of Junction B3 - Nairegie Enkare Road E445 for the negotiated tender sum of Kshs 389,901,288/=. The parties agreed to have the dispute referred to Arbitration by the terms of the contract, as specified in Clause 15.2. The sole Arbitrator gave a final award in the Applicant's favor on 29 March 2024.
84. One of the significant features of the Arbitration Act is the principle of party autonomy, which entitles parties to have their dispute 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.
85. Section 32A of the Act prescribes that, except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the Award otherwise than in the manner provided by this Act. The gravamen of the instant Summons is that the Applicant herein was never involved in the appointment of Eng—Joseph Njogu Ng'anga FCI Arb, who was the replacement arbitrator in the arbitral proceedings between the parties herein.
86. The Applicant has approached this Court seeking to set aside the arbitral Award on the premises of Sections 35 and 39 of the Arbitration Act. This Court will therefore proceed to analyze the Application in light of the said provisions. The conditions for setting aside an arbitral award under Sections 35 and 39 of the Arbitration Act differ and have distinct thresholds that must be satisfied.
87. The Applicant herein has cited section 35(1)(2)(a)(i) and (iii) of the Arbitration Act.
88. Section 35 of the Arbitration Act CAP 49 provides for the Application for setting aside an arbitral Award.
- (1) 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 the arbitral proceedings or was otherwise unable to present its 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 by the Agreement of the parties, unless that Agreement conflicted with a provision of this Act from which the parties cannot derogate; or failing such Agreement, was not by 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 conflicts with the public policy of Kenya.

### **Incapacity**

- 89. Section 35(2)(a)(i) of the Act prescribes that an arbitral award may be set aside by this Honorable Court if the party making the Application furnishes proof that the party to the arbitration agreement was under some incapacity.
- 90. The Applicant is a County Government within the meaning of Article 176 of *the Constitution* of Kenya, which means that agents of the parties herein executed the Agreement.
- 91. The Applicant herein bears the burden of furnishing proof of the alleged incapacity at the time of agreeing. See sections 107, 108, and 109 of the *Evidence Act*.
- 92. The Applicant has not adduced any evidence to show that the Applicant herein was under any incapacity to execute the Agreement dated 03/09/ 2014. The Applicant has also not shown that the persons who executed the Agreement dated 03/09/ 2014 were incapacitated within the meaning of Section 35(2)(a)(i) of the Act to warrant the setting aside of the arbitral Award.
- 93. Proper notice of the substitution of the Arbitrator
- 94. Section 35(2)(a)(iii) of the *Arbitration Act* (Kenya) provides a procedural ground for setting aside an arbitral award when a party's right to be heard or participate in the proceedings was compromised. The Applicant contends that the substitution of the Arbitrator was not done by mutual consent, as in the initial appointment of the Arbitrator.
- 95. According to the Applicant, the unilateral appointment and substitution of the sole Arbitrator excluded the Applicant from the decision-making process. There was no proper notice or explanation regarding when and how the original Arbitrator, Eng. P.T. Gichuhi was replaced. This move made it impossible for the Applicant to participate in the proceedings and adduce evidence in support of its case. This was a blatant breach of the Applicant's right to a fair hearing enshrined in Article 50(1) of *the Constitution*.
- 96. In Arbitration, the mutual consent of the parties is typically required for both the initial appointment and any substitution or replacement of an arbitrator, especially when the arbitration agreement stipulates it.
- 97. Clause 15.2 of the Agreement between the parties herein provides that: Any dispute not resolved under 15.1 shall be referred to a single Arbitrator nominated by the parties and appointed under the provisions of the *Arbitration Act* of Kenya or any statutory Modification thereof.
- 98. The Applicant herein has expressly admitted that it became aware of the appointment of Arbitrator Eng: Joseph Njogu Ng'ang'a, FCI Arb on 6 March 2024. The appointment of Engineer Joseph Njogu Ng'ang'a was made following the death of the initial Arbitrator, Engineer P.T. Gichuhi. On 17 November 2023, the CI Arb Kenya wrote to one Engineer Joseph Njogu Ng'ang'a of its intention to



nominate him as the sole Arbitrator in the dispute that arose between Applicant and the Respondent, which letter was duly copied and received by the parties herein.

99. On 22 November 2023, the CIArb Kenya wrote to both the Applicant and the Respondent notifying them of the appointment of Engineer Joseph Njogu Ng'ang'a as the sole Arbitrator for the said dispute. On 30 November 2023, the appointed Arbitrator, Engineer Joseph Njogu Ng'anga, wrote to the Applicant and the Respondent and informed them of his acceptance of appointment as the sole Arbitrator in the dispute between the parties herein.
100. The appointed Arbitrator informed the parties herein of his acceptance of the nomination. The communication was sent to the parties herein via email dated 1 December 2023, and further, a hard copy was sent to the Applicant via G4S courier. All further communication from the appointed Arbitrator, Engineer Joseph Njogu Ng'ang'a, was sent to the parties via email and hard copies via courier to the Applicant. The Applicant herein was always aware of the impending and eventual appointment of Engineer Joseph Njogu Ng'ang'a as the Arbitrator.
101. The Applicant herein had no issue with the appointment of the Arbitrator, as that is evident from its Advocates' letter dated 27 February 2024. The supposed issue as to his appointment only arose after the publication of the Award. The period provided within which a party can object to the appointment of an Arbitrator is fifteen (15) days. Section 14(2) of the Act provides that.

“Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13 (3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”
102. The Applicant did not raise any objection to his appointment until after the Award was published. If the Applicant wished to challenge the appointment of the Arbitrator, it should have raised the requisite objection as prescribed by Section 14(2) of the Act on or before 22 March 2024. That was not done.
103. As prescribed by Section 14(2) of the Act, once the party becomes aware of the appointment of an arbitrator, a challenge must be presented to the appointed Arbitrator. The appointed Arbitrator is expected to make a finding on the challenge.
104. Section 14(3) of the Act, in turn, prescribes the timelines to be adhered to upon the decision being rendered by the Arbitrator in response to the challenge. Upon notification of the decision of challenge, the aggrieved party is to apply to this Honorable Court within thirty (30) days of being notified of the decision on the challenge on appeal.
105. The Applicant herein, despite being fully aware of the appointment of Arbitrator Eng. Joseph Njogu Ng'ang'a, FCIArb, on 6 March 2024, failed to challenge his appointment. No challenge on the appointment of the Tribunal was made within the 15 days following Procedural Order No. 2, or indeed at any other time right up to the publishing of the Award on 29 March 2024.
106. Any challenge must be made within 15 days of the party becoming aware of the appointment and composition of the Arbitral Tribunal. In this regard, the composition of the Arbitral Tribunal was specified in Item III (3) of Procedural Order No. 2 dated 18 December 2023. This Procedural Order and others following it were sent by email and courier to the Respondent. Having failed to challenge



the Arbitrator's appointment, the Applicant is estopped from raising the issue of the appointment of the Arbitrator. Further, Section 5 of the Act prescribes 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 noncompliance without undue delay or, if a time limit is prescribed, within such period, is deemed to have waived the right to object.”

107. The Court's take is that Section 16(1) of the *Arbitration Act* stipulates that a substitute arbitrator should be appointed using the same procedure as the original Arbitrator, and this method is often reiterated within the contract itself. This ensures consistency and fairness in the appointment process, regardless of whether the original Arbitrator is replaced due to resignation, inability to act, or other reasons. This section generally outlines the process for appointing a substitute arbitrator. It emphasizes that the procedure for appointing the replacement should mirror the one used for the initial Arbitrator. Many arbitration agreements explicitly state that if an arbitrator needs to be replaced, the same procedures apply.
108. This principle ensures a transparent and predictable process for arbitrator replacement. It prevents parties from unilaterally altering the appointment procedure when a replacement is needed. If both parties chose the original Arbitrator through a mutual agreement, then a substitute arbitrator would also need to be agreed upon by both parties. If an institution made the original appointment, it would typically be involved in appointing the substitute.
109. This approach helps maintain the integrity and impartiality of the arbitration process, ensuring that the replacement arbitrator is selected fairly and by the Agreement of the parties involved. The substitution of the Arbitrator was not done by mutual consent, as in the initial appointment of the Arbitrator. According to the Applicant, the unilateral appointment and substitution of the sole Arbitrator excluded the Applicant from the decision-making process.
110. There was no proper notice or explanation regarding when and how the original Arbitrator, Eng. P.T. Gichuhi was replaced. This move made it impossible for the Applicant to participate in the proceedings and adduce evidence in support of its case. This was a blatant breach of the Applicant's right to a fair hearing enshrined in Article 50(1) of *the Constitution*. This Article stipulates that (1) Every person has the right to have any dispute that the Application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
111. The right to a fair trial in Kenya applies to both criminal and civil matters. Article 50 of *the Constitution* of Kenya guarantees this right, ensuring that all individuals have access to a fair and public hearing before a court or other independent and impartial Tribunal when resolving legal disputes. This right is fundamental to the administration of justice and the protection of human rights, ensuring that both criminal and civil proceedings are conducted fairly and impartially. This right is further reinforced by Article 25, which explicitly states that certain fundamental rights, including the right to a fair trial, cannot be limited or abridged.
112. In Arbitration, mutual consent of the parties is usually required both in the initial appointment and any substitution or replacement of an arbitrator, especially where the arbitration agreement prescribes it. Clause 15.2 of the Agreement between the parties herein provides that: Any dispute not resolved under 15.1 shall be referred to a single Arbitrator nominated by the parties and appointed under the provisions of the *Arbitration Act* of Kenya or any statutory Modification thereof.



113. This Court finds that the Applicant could not waive its right to object to the appointment of the Arbitrator because it was not invited to consent in appointment of the arbitrators as stipulated by the statutes and reiterated in the contract, when as it had already been excluded from the decision-making process and in fact in the entire hearing process of the dispute. It does not matter that it may have been aware of the alleged appointment; however, the entire process became invalid due to that exclusion and breach of statute and the Agreement.
114. The Respondent, having appointed counsel Messrs. Ameyo, Guto, Etole & Co. advocates, was expressly barred by law from sending out correspondence in the matter in their capacity. This argument was raised in respect of the letter written by the Respondent in their capacity, seeking the appointment of the Arbitrator, without even inviting the Applicant to consent to the appointment of an arbitrator. *Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited (Interested Party) (Petition E001 of 2021) [2022] KEHC 48 (KLR)* Held that "...the Arbitration Act proceeds from the position that the arbitration process is consensual, and court intervention is only necessary to assist the parties carry out their stated intention crystallized in the arbitration agreement. Hence, section 12 of the Arbitration Act dealing with appointments of arbitrators does not supplant the parties' right to appoint or prescribe the mode of appointment of the Arbitrator but only sets out a default procedure for the Court to intervene should the parties either fail to comply with the contractual provisions for appointment of an arbitrator".
115. The Chartered Institute of Arbitrators' substitution of Eng. P.T. Gichohi with Eng. Joseph Njogu Ng'ang'a FCI Arb, after receiving a letter directly from the Respondent, despite the Respondent having counsel on record, Messrs Ameyo, Guto, Etole & Co. Advocates, based on a direct letter from the Respondent without involving applicant counsel, raises serious legal and ethical questions. The communication should have gone through the Respondent's legal representatives and sought consensus on the appointment of the Arbitrator. The Respondent herein never filed a Notice of Change of Advocate or Notice of Intention to Act in person. Therefore, the Applicant had a legitimate expectation that any communication from the Respondent regarding the matter before the Tribunal would be made through their counsel on record.
116. Contrary to law and procedure, the respondents proceeded to issue correspondence in their capacity, thereby breaching protocol, causing confusion, and undermining the integrity of the proceedings.
117. In the circumstances, this Court notes that it cannot be said that the Applicant was given an equal opportunity to respond through proper channels. Therefore, this Court finds that there was a violation of natural justice and procedural fairness.

### **Public policy**

118. It is apparent that the Arbitral Tribunal improperly and wrongly relied on section 26(b) of the Arbitration Act, 1995, to progress the proceedings despite the Applicant's valid objection to the Tribunal's appointment and jurisdiction. Section 26 (b) provides that.
119. Unless otherwise agreed by the parties, if, without showing sufficient cause, (b) the Respondent fails to communicate his statement of defense by section 24(1), the arbitral Tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.
120. The decision of the Arbitral Tribunal to progress the arbitral proceedings and issue an award without correctly determining the Applicant's objection to its appointment or allowing the Applicant to be heard gravely violates the right to a fair hearing protected by Article 50 (1) of the Constitution and undoubtedly contravenes the public policy of the determination of disputes.



121. Thus, the Court finds that the impugned arbitral Award cannot stand and accordingly makes the following orders.

- i. The Court sets aside the Arbitral Award made and published on 29 March 2024 by the Sole Arbitrator, Eng. Joseph Njogu Ng'ang'a, FCI Arb, and the dispute is remitted back for Arbitration between the parties to be heard and determined before another arbitral tribunal.
- ii. The recognition and enforcement of the Award published on 29 March 2024 has been declined.
- iii. Parties to bear their costs.
- iv. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
31<sup>ST</sup> DAY OF JULY 2025**

**CHARLES KARIUKI**

**JUDGE**

