



Narok County Government v Equity Bank Limited (Commercial Miscellaneous Application E004 of 2024) [2025] KEHC 11873 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
COMMERCIAL MISCELLANEOUS APPLICATION E004 OF 2024**

**CM KARIUKI, J
JULY 31, 2025**

BETWEEN

NAROK COUNTY GOVERNMENT APPLICANT

AND

EQUITY BANK LIMITED RESPONDENT

RULING

1. There are three applications before this Court for determination. (1) one of the applications is by the applicant seeking to set aside award-wide a notice of motion dated 25/06/2024, praying for the orders.
 - I. Spent.
 - II. Spent.
 - III. That this Honourable Court be pleased to set aside in its entirety, the Final Award of Rajinder Billing (Sole Arbitrator) published on March 26, 2024, and delivered on June 24, 2024, awarding the Respondent the principal sum of Kes. 611,469,155.23/= and incurred costs of Kes. 110,895,329.96/= and simple interest on the amount of Kes. 611,469,155.23/= at the rate of 12% per annum.
 - IV. That the Final Award of Rajinder Billing (Sole Arbitrator) published on March 26, 2024, and delivered on June 24, 2024, be and is hereby declared null and void.
 - V. That this honourable court order the commencement of the arbitration proceedings anew under a new Arbitrator.
 - VI. The costs of this Application should be provided for.



2. The Application is premised on Article 25 (c), 48, 50 (1), 159 (2) (d) of *the Constitution*, Section 35 of the *Arbitration Act*; Sections 1A, 1B & 3A of the *Civil Procedure Act*, and Rule 7 of the Arbitration Rules.
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 25/06/2024.
- 4.(2) The respondent herein also filed an application for the recognition and enforcement of the award on 08/07/2024 at Mililani Law Courts (Mililani Commercial Misc. Application E040 of 2024 Equity Bank Limited Vs. Narok County Government), which was transferred to Narok Law Courts to be heard together with the Application seeking to set aside the Arbitral Award.
5. The Respondent herein sought the following order:
6. The Final Arbitral Award published on March 26 by a sole Arbitrator, Rajinder Billing, shall be adopted and enforced as a decree of this Court.
7. (3) The applicant filed another application dated 19/11/2024, seeking the orders. -seeking leave to file the applicant's pleadings; Praying.
 - I. That the Honourable Court grant the Applicant leave to file the Applicant's pleadings and documents before this Honourable Court, which were filed at the arbitral proceedings before Rajinder Billing (Sole Arbitrator).
 - II. That the Applicant's pleadings and documents attached to this Application be deemed to be duly filed before the Honourable Court for the just determination of the matter.
 - III. Those costs of the Application to be in the cause.
 - IV. That the Court be pleased to grant any such other order(s) as the Court may deem fit.
8. The Application is premised on Article 50(1), 159(2)(d) and (e) of *the Constitution*, Section 35 of the *Arbitration Act*, Order 50 Rule 6 & Order 51 Rule of the Civil Procedure Rules, 2010.
9. 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 19/11/2024.

The background.

10. A dispute arose between the parties after the Applicant terminated an agreement it had entered into with the Respondent, dated April 19, 2011, for the provision of a smart card system for the Maasai Mara National Reserve.
11. The dispute was before the Arbitrator from August 2013 and after an extensive process that include parties filing pleadings together with supporting evidence and making submissions the sole arbitrator Rajinder billing published his Award inter alia holding that the Applicant had unlawfully terminated the Agreement it had entered with the Respondent dated 19/04/2011 for provision of a smart card system for the Maasai Mara National Reserve.
12. On June 24, 2024, the Hon. Arbitrator wrote to the parties and informed them to collect the Final Award from his Chambers upon receipt of the full fees in the sum of Kes. 18,364,830.00/=. The Applicant collected the Final Award from the Honourable Arbitrator Chambers on June 24, 2024.
13. The Hon. Arbitrator awarded the Claimant (Respondent herein) the principal sum of Kes. 611,469,155.23/= and incurred costs of Kes. 110,895,329.96/= and interest on the amount of Kes.



611,469,155.23/= at the rate of 12% per annum at simple interest. To be paid by the Respondent within 180 days after the date of publication of the Final Award.

14. The Applicant contends that the Arbitrator exhibited bias against the Applicant by not considering its evidence and submissions as made. Applicant adds that the Applicant complains that the Award contains decisions on matters not pleaded by the Claimant/Respondent. Furthermore, the arbitral Award addressed a dispute not covered by the terms of the reference to arbitration and included decisions on matters outside the scope of the arbitration agreement. Further, the Arbitrator went against public policy, as the decision did not consider the various legal and financial obligations of the Applicant.
15. Aggrieved by the Tribunal's Award, the Applicant has filed the instant Application seeking to set aside the same.
16. The Applicant referred to Pages 16 and 17 of the Arbitral Award in its submissions. A perusal of pages 16 and 17 of the Final Arbitral Award indicates a List of the Applicant's Pleadings and Documents, being paragraphs 31.1 to 31.15 of the Award. To assist the Honourable Court in referring to the documents alluded to therein, the Applicant wishes to provide the following specific documents to the Honourable Court: i. Applicant's Point of Défense & Counterclaim dated December 4, 2014; ii. Applicant's List and Bundle of Documents dated January 4, 2015; iii. Applicant's 1st Supplementary List & Bundle of Documents dated February 20, 2018; iv. Applicant's 2nd Supplementary List & Bundle of Documents dated February 20, 2018; v. Applicant's 3rd Supplementary List & Bundle of Documents dated February 20, 2018; vi. Applicant's Written Submissions dated June 26, 2023, and the List of Authorities dated June 26, 2023
17. The Applicant contends that the Applicant's pleadings and documents set out herein above would be of value to the Honourable Court in making a just determination on the Application.
18. The Applicant argued that the Applicant's pleadings and documents set out herein above were subject to the arbitration proceedings and are not any new or unfamiliar documents to the Respondent herein.

The response.

19. The Respondent opposed the Application vide replying affidavit sworn by John Njenga on 08/07/2024.
20. The Respondent contends that the Applicant has not specified what evidence or submissions were not considered, what matters in the Award were not pleaded, any dispute within the reference to arbitration, or matters beyond the scope of the reference in the Award.
21. The Respondent contends that public policy does not come into the matter at all, further that they are not aware of the legal and financial obligations of the Applicant, which the Award allegedly offends.
22. The Respondent contends that the seat of arbitration was Nairobi, and that would be the appropriate location for the hearing of the Application. The Respondent has already applied to enforce the Award before the High Court in Nairobi, as the arbitral proceedings were in Nairobi, and litigation prior to the arbitration over the same matter was also in Nairobi.
23. The Respondent also opposed the Application vide grounds of opposition dated 08/07/2024 on the following grounds: The Application was filed out of time. The parties having been notified that the Award was ready for collection on March 26, 2024, the last day for filing an application challenging the Award was June 26, 2024.



24. The Applicant has concealed material information, as the parties were notified that the Award was ready for collection on March 26, 2024. There is no jurisdiction to declare an award null and void.
25. Except for section 35 of the [Arbitration Act](#) and rule 7 of the arbitration rules, none of the other provisions cited by the Applicant confer any jurisdiction to make the orders sought. The Applicant was obliged to object under section 17(3) of the [Arbitration Act](#) as soon as they became aware that the Arbitrator was delving into matters outside the scope of the reference.
26. The Applicant has not met the threshold set out in section 35(2) of the [Arbitration Act](#), Cap 49, Laws of Kenya (the [Arbitration Act](#)), for setting aside an award.
27. The Applicant has not demonstrated that the Arbitrator had any interest, association, conduct, or extraneous knowledge that would support the allegation of bias against the Applicant. Heineken East Africa Import Company Limited & Another V Maxam Limited [2024] KECA 625(KLR) is cited.
28. The allegation that the Arbitrator determined a dispute outside the terms and scope of the reference or dealt with issues not pleaded was not raised before the Arbitrator. The Applicant is deemed to have waived the right to raise these objections in these proceedings as per section 5 of the [Arbitration Act](#). Easy Properties Limited & another v Express Connections Limited & Another [2021] KEHC 19(KLR).
29. This Court's Jurisdiction to set aside awards is limited to the circumstances set out in section 35(2) of the [Arbitration Act](#). This Court lacks Jurisdiction to set aside an award based on the Arbitrator's alleged bias or failure to consider the Applicant's legal and financial obligations. Godson Sixty-One School Limited V Symbion Kenya Limited [2023] KECA 900 (KLR).
30. Section 41 of the [Arbitration Act](#) provides that the Act is binding on the government, which includes the Application as a county government. The arbitral Award cannot be set aside based on claims that the Arbitrator ignored legal and financial obligations which are peculiar to the Applicant as a county government.
31. The Applicant has not demonstrated that the Award violated Kenya's public policy as interpreted in Christ for All Nations V Apollo Insurance Co. Ltd [2002] 2 EA 366. The Claim that the arbitral Award violates public policy is therefore without merit. No factual or legal basis has been laid for the grant of the orders sought. The Application is without merit and is an abuse of the court process. Other grounds and reasons are set out in the affidavit of John Njenga.
32. In response to the chamber summons Application dated 08/07/2024, the Applicant herein filed a Replying Affidavit sworn by John Mayiani Tuya on 24/10/ 2024 in opposition to the said Application.
33. In response to the notice of motion dated 19/11/2024, the Respondent filed an affidavit sworn by Samuel Wamaitha on 13/01/2025.
34. The Respondent contends that this Court lacks Jurisdiction to evaluate the merits of the Award when considering an application to set aside an award, and no useful purpose will be served by allowing the Applicant to file its papers from arbitration. Further, the papers the Applicant seeks to file were available at the time of applying, setting aside. No explanation has been given for the failure to file the pleadings together with the Application for setting aside. The supporting affidavit to the Application to set aside does not refer to the said papers.
35. The Respondent contends that both parties have submitted their responses to the Application. Therefore, the Respondent will be prejudiced if the Application is allowed, as they will be required to



file further responses and submissions in opposition to the Application for setting aside. It will also delay the expeditious resolution of the matter.

36. The Respondent also opposed the Application dated 19/11/2024, vide grounds of opposition dated 13/01/2025, as follows.

There is no jurisdiction to make the orders sought.

37. The *Arbitration Act* is a comprehensive code, and its provisions supersede those of *the Constitution*, the *Civil Procedure Act*, and the rules. See *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR and *Godson Sixty-One School Limited v Symbion Kenya Limited* [2023] KECA 900(KLR).
38. Section 35 of the *Arbitration Act* does not confer Jurisdiction to make the orders sought. The Applicant is guilty of delay. The papers filed by the claimant in the arbitration were available for filing at the time the Application to set aside was filed. No explanation has been provided for the Applicant's failure to file the papers at that time.
39. The Applicant is effectively seeking to introduce additional evidence to address the gaps in its case. The Respondent has already filed its responses and submissions on the Application to set aside the Award published by Rajinder Billing on March 26, 2024(the Award) and will be prejudiced if the Application is allowed.
40. The Court does not review the merits of the Award in an application seeking to set aside an award. It does not sit on appeal against an arbitral award. The papers will not assist the Court in determining the Application to set aside. The papers that the Applicant seeks to produce are not relevant to the setting aside Application, and no useful purpose will be served by allowing the Applicant to file them.
41. No reference to the papers has been made in the setting aside Application, and the Application has failed to establish any valid basis for filing the papers. The Application is intended to delay the timely determination of the setting aside Application. The Application is without merit and is an abuse of the court process—other grounds and reasons set out in the affidavit of SAMUEL WAMAITHA.

Directions of the Court.

42. The applications were argued via written submissions, which were highlighted.

The Applicant's submissions.

43. The Applicant submitted that this Court has original and unlimited Jurisdiction to determine the Application herein as per Article 165 of *the Constitution*, 2010, as read together with Section 35 of the *Arbitration Act*. The High Court has original and unlimited Jurisdiction to set aside and declare an Arbitral Award null and void. The Applicant relied on section 41 of the *Arbitration Act*.
44. The Applicant submitted that the Application was filed within the time specified in Section 35(2) of the *Arbitration Act*. The documents were lodged and paid for before midnight on June 26, 2024. However, due to delays encountered by the e-filing system and the Judiciary pay bill via KCB, the payment confirmation message was received six (6) minutes later (12:06 a.m.).
45. The Applicant submitted that there is no concealment of a material fact by the Applicant, as it is clear from the annexed Award that the Arbitrator notified the parties that the Award was ready on March 26, 2024, when it was published. However, it was not released to the parties until June 24, 2024, at 5:30 p.m.



46. The Applicant submitted that they had met the threshold for setting aside an Award under section 35(2) of the *Arbitration Act*. Therefore, the Application has merit before this Honourable Court, and the grounds of opposition dated July 8, 2024, ought to be dismissed with costs.
47. The Applicant submitted that the Final Award of Hon. Rajinder Billing (Sole Arbitrator), published on March 26, 2024, and delivered on June 24, 2024, ought to be set aside in its entirety. Firstly, the Arbitrator exhibited bias by failing to consider the Applicant's evidence and written submissions. Despite the Applicant adducing sufficient evidence, the Hon. Arbitrator still determined that the Applicant, on a balance of probability, has not proved failure of the smart card system and that there was no material breach on the part of the Respondent. The Applicant relied on Section 35 of the *Arbitration Act* 1995.
48. The Applicant submitted that the Award contains decisions on matters not pleaded by the Respondent. The investment costs were not part of the tender terms. This particular matter should be resolved in other forums based on the relevant procurement laws. The Applicant relied on *National Bank of Kenya Limited v Moeish Consult Limited* [2020] eKLR; the Court cited the case of *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR.
49. The Applicant submitted that the Hon. Arbitrator went against public policy as the decision did not consider the various legal and financial obligations on the Applicant. The Applicant is a public institution established under Article 176 of *the Constitution* of Kenya, 2010, and derives its revenue from public funds; therefore, the Hon. Arbitrator was bound to treat the Applicant accordingly. The Award granted was excessive and unjustifiably high, given the colossal public funds involved.
50. The Award will therefore cause the Respondent to be unjustly and unfairly enriched from the loss of the Applicant. The Arbitrator awarded the Respondent colossal sums of money despite the same not being provided for in the Agreement between the parties or proved as owed before the arbitral tribunal, the only reason that led to the Award of the colossal sums was the anticipation of the same in the Agreement which the Applicant terminated for breach on the part of the Respondent, which leads to unjust enrichment on the part of the Respondent.
51. Thus, challenge the Award of Kes. 611,469,155.23/= on the basis that the Hon. Arbitrator awarded the amounts as anticipated commissions for 10 years, whereas the Respondent had only performed the contract for 2 years. Because the Applicant, probably after the termination of the contract, procured the services of another service provider to undertake the exact role of revenue collection. Does it mean that taxpayers' money would be used twice for payment of the same services over the same period?
52. This is contrary to public policy and is likely to result in unjust enrichment. The Applicant relied on *Attorney General (On Behalf of the Republic of Kenya & the National Youth Service) v N. K. Brothers Limited* (Arbitration Cause E047 of 2021 & E039 of 2022 (Consolidated)) [2023] KEHC 22503 (KLR) (Commercial and Tax) (September 26, 2023) (Ruling); *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR and *Capture Solutions Limited v Nairobi City Water and Sewerage Company Limited* [2020] eKLR
53. The Applicant submitted that the additional Award of interest is punitive and amounts to unjust enrichment to the extent that, if enforced, it would injure public finances. The Award of the additional 12% interest contravenes Kenya's public policy. Surprisingly, the same was not awarded on the alleged payment of incurred expenses in the sum of Kes. 110,895,329.96/=.
54. The Applicant submitted that they are entitled to the prayers sought, having met the threshold provided under Section 35 of the *Arbitration Act*.



55. The Applicant submitted that the Respondent has not satisfied the conditions as set out in section 36 of the Arbitration Act. The Respondent annexed exhibits "JN 1" and "JN 2", which do not satisfy the provisions to warrant the enforcement and recognition of the final Award. The Applicant contends that it has filed an application seeking to set aside the Arbitral award, which is pending determination before this Honourable Court. The Application seeking to set aside the final Arbitral award raises serious grounds for setting aside the Award; therefore, the recognition and enforcement of the Award cannot be granted. The Applicant relied on sections 36, 37 of the Arbitration Act, *Samura Engineering Limited vs Don-Wood Co Ltd* [2014] eKLR cited in *Machiri Limited v Kenya Airport Authority* (Commercial Arbitration Cause E057 & E053 of 2023 (Consolidated)) [2024] KEHC 3303 (KLR) (Commercial and Tax) (March 21, 2024) (Ruling).
56. The Applicant submitted that the Sole Arbitrator dealt with matters beyond the scope of the reference. The Applicant contends that the investment costs were challenged before the Arbitrator, and the Applicant's position is that the same were not part of the contracted terms. The costs as set out were without any basis for failure to follow procurement processes, which entail requisition, tendering, and final selection of the supplier. Therefore, the said investment costs would have been resolved in other forums based on the relevant procurement laws. The Applicant relied on the case of *Mahican Investments Limited & 3 Others v Giovanni Gaida & 80 Others* [2005] eKLR.
57. The Applicant submitted that the decision on whether to allow additional evidence is discretionary and should be exercised judiciously. The Applicant contends that the documents it seeks to adduce are not new to the Respondent, and the Respondent will not be prejudiced, as they may be granted an opportunity to file further responses. The Applicant contends that they relied on Section 35 of the Arbitration Act, Article 50(1) and 159(2) of the Constitution of Kenya, and *Kikenni Properties Limited vs. Vipingo Ridge Limited* (2021) eKLR.

The Respondent's submissions.

58. The Respondent submitted that the Applicant's Application has not met the parameters set out in *Heineken's case supra*. Further, the Applicant has not specified the pleadings or evidence that were allegedly not considered. The Respondent relied on *Heineken East Africa Import Company Limited & Another v Maxam Limited* [2024] KECA 625 (KLR).
59. The Respondent submitted that by not challenging the Arbitrator's alleged consideration of unpleaded issues or his alleged handling of matters beyond the scope of the reference during the arbitral proceedings, the Applicant waived the right to raise these objections in these proceedings.
60. The Respondent contends that the costs incurred by the Respondent to implement the SCC that the applicant claims were beyond the scope of reference were pleaded in the Respondent's statement of Claim before the Arbitrator, as shown in the Award. No objection was ever raised on the basis that the Claim was outside the scope of what could be referred to the Arbitrator. The Respondent relied on *Easy Properties Limited & Another V Express Connections Limited & Another* [2021] KEHC39(KLR), and section 5 of the Arbitration Act.
61. The Respondent submitted that the Applicant, in alleging that the Award offends public policy, has not cited a single statute or constitutional provision. The Respondent relied on *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 EA 366, cited with approval in *Kenya Shell Limited V Kobil Petroleum Limited* [2006] eKLR.



62. The Respondent submitted that the download from CTS on filings shows that the Application was filed on June 27, 2024, and not June 26, 2024, as alleged by the Applicant. The Respondent relied on Section 35(3) of the *Arbitration Act*.
63. The Respondent submitted that the Applicant cannot rely on sections 1A, 1B, and 3A of the Civil Procedure Rules or articles 25©, 50(1), 159(2)(d) of *the Constitution* for the orders sought. The Respondent relied on *Godson Sixty-One School Limited v Symbion Kenya Limited* [2023] KECA 900(KLR), and section 35(2) of the *Arbitration Act*.
64. The Respondent urged this Court to dismiss the Application with costs and, consequently, to allow the Application that has been filed separately for recognition and enforcement of the Award.
65. The Respondent submitted that none of the provisions cited by the Applicant in the Application for additional documents aid the Applicant. Allowing the Application would contravene section 10 of the *Arbitration Act*. The Application lacks a basis in the *Arbitration Act*, and the provisions of law cited by the Applicant do not confer Jurisdiction to make the sought orders. Litigation must also come to an end. Further, the Applicant is guilty of inordinate and unexplained delay. The papers will serve no useful purpose in these proceedings. The Respondent relied on *Anne Mumbi Hinga V Victoria Njoki Gathara* [2009] KECA 466(KLR), *Godson Sixty-One School Limited V Symbion Kenya Limited* [2023] KECA 900(KLR), *Jadesa Tuke Dabelo V Independent Electoral & Boundaries Commission & Another* [2015] KECA 1005(KLR), *Nicholas Kiptoo Arap Korir Salat V Independent Electoral And Boundaries Commission, Wilfred Rotich Lesan, Robert Siolei, Returning Officer, Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo* [2013] KECA 113(KLR), Rule 11 of the Arbitration Rules, *Kenya Commercial Bank V David Gachuiga & 2 Others* [2007] KEHC 2443(KLR), *Kimathi & Another V Muriuki & 12 Others* [2023] KECA 666(KLR), *Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & Another* [2014] KECA 642(KLR), and *Samuel Kamau Muhindi V Blue Shield Insurance Company Ltd* [2010] KEHC 1041(KLR).

Analysis And Determination.

66. This Court considered the applications, the respective supporting affidavits, the respective replying affidavits, the respective grounds of opposition, and the respective parties' submissions.

Issues

67. Three applications are before this Court for determination. The main issues for determination are:
 - I. Whether the Application to set aside the arbitral Award was filed out of time.
 - II. Whether leave should be granted to the Applicant to file additional documents.
 - III. Whether this Court should set aside in its entirety the Final Award.
 - IV. Whether the Award should be adopted and enforced.

Whether the Application was filed out of time.

68. The Respondent contends that the Application was filed out of time. The parties having been notified that the Award was ready for collection on March 26, 2024, the last day for filing an application challenging the Award was June 26, 2024. Furthermore, the Applicant has concealed material information, as the parties were notified that the Award was ready for collection on March 26, 2024.



69. The Respondent submitted that the download from CTS on filings shows that the Application was filed on June 27, 2024, and not June 26, 2024, as alleged by the Applicant.
70. According to the Applicant, the Application was filed within the time limit. The documents were lodged and paid for before midnight on 26/06/2024. However, due to delays encountered by the e-filing system and the Judiciary pay bill via KCB, the payment confirmation message was received six (6) minutes later (12:06 a.m.).
71. The Applicant submitted that there is no concealment of a material fact by the Applicant, as it is clear from the annexed Award that the Arbitrator notified the parties that the Award was ready on March 26, 2024, when it was published. However, it was not released to the parties until June 24, 2024, at 5:30 p.m.
72. The time limit within which to apply to set aside an arbitral award is governed by Section 35(3) of the *Arbitration Act*, which provides. Sect 35(3). An application for setting aside the arbitral Award may not be made after 3 months have elapsed from the date on which the party making that Application had received the arbitral Award, or if a request had been made under section 34, from the date on which the arbitral Award had disposed of that request.
73. In *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366, the Court held that the 3-month time frame is strict and cannot be extended, not even by the Court under the Civil Procedure Rules.
74. This Court notes that the Applicant's advocate filed documents on June 26, 2024, at 23:58:59. However, the system indicates that no documents were successfully uploaded until June 27, 2024, at 00:03:44, when the upload was completed. In the circumstances, this Court grants the Applicant the benefit of doubt and considers the Application as having been filed within the prescribed time.

Whether leave should be granted to the Applicant to file additional documents.

75. The Applicant referred to Pages 16 and 17 of the Arbitral Award in its submissions. A perusal of pages 16 and 17 of the Final Arbitral Award indicates a List of the Applicant's Pleadings and Documents, being paragraphs 31.1 to 31.15 of the Award. To assist the Court in referring to the documents alluded to therein, the Applicant wishes to provide the following specific documents to the Court: i. Applicant's Point of Défense & Counterclaim dated December 4, 2014; ii. Applicant's List and Bundle of Documents dated January 4, 2015; iii. Applicant's 1st Supplementary List & Bundle of Documents dated February 20, 2018; iv. Applicant's 2nd Supplementary List & Bundle of Documents dated February 20, 2018; v. Applicant's 3rd Supplementary List & Bundle of Documents dated February 20, 2018; vi. Applicant's Written Submissions dated June 26, 2023, and the List of Authorities dated June 26, 2023
76. The Applicant contends that the Applicant's pleadings and documents set out herein above would be of value to the Court in making a just determination on the Application.
77. The Applicant argued that the Applicant's pleadings and documents set out herein above were subject to the arbitration proceedings and are not any new or unfamiliar documents to the Respondent herein.
78. The Applicant submitted that the decision on whether to allow additional evidence is discretionary and should be exercised judiciously. The Applicant contends that the documents it seeks to adduce are not new to the Respondent, and the Respondent will not be prejudiced, as they may be granted an opportunity to file further responses.
79. The Respondent submitted that the Applicant cannot rely on sections 1A, 1B, and 3A of the Civil Procedure Rules or articles 25©, 50(1), 159(2)(d) of *the Constitution* for the orders sought.



80. The Respondent submits that none of the provisions cited by the Applicant in support of the Application for leave to file additional documents—namely Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Articles 25(c), 50(1), and 159(2)(d) of *the Constitution* legal basis for the orders sought. Allowing the Application would contravene section 10 of the *Arbitration Act*. The Application lacks a basis in the *Arbitration Act*, and the provisions of law cited by the Applicant do not confer Jurisdiction to make the sought orders. Litigation must also come to an end. Further, the Applicant is guilty of inordinate and unexplained delay. The papers will serve no useful purpose in these proceedings.
81. The Court does not review the merits of the Award in an application seeking to set aside an award. It does not sit on appeal against an arbitral award. The papers will not assist the Court in determining the setting aside Application. The papers that the Applicant seeks to produce are not relevant to the setting aside Application, and no useful purpose will be served by allowing the Applicant to file. No reference to the papers has been made in the setting aside Application, and the Application has failed to establish any valid basis for filing the papers.
82. It is not in dispute that the documents the Applicant seeks to introduce were part of the arbitral record. However, the *Arbitration Act* does not provide for the filing of additional documents outside the original Application to set aside the Award. Section 10 of the Act provides that no court shall intervene in matters governed by the Act except where so provided. This statutory limitation binds the Court and cannot be supplemented by other sources of Jurisdiction to enlarge its scope of intervention.
83. Furthermore, the Supreme Court in *Nyutu Agrovat Ltd v Airtel Networks Kenya Ltd & Another* [2019] eKLR reiterated that the *Arbitration Act* must be interpreted strictly, and judicial intervention is only permissible where the Act expressly permits it. Consequently, this Court finds that it lacks Jurisdiction to grant the orders sought.

ii. Whether this Court should set aside the Award

84. The Applicant has sought to have the Award set aside under section 35 of the *Arbitration Act*.

Bias on the Part of the Arbitrator

85. The Applicant contends that the Arbitrator exhibited bias by failing to consider its evidence and written submissions. The Applicant's position is that this conduct constitutes a violation of the principles of natural justice, rendering the arbitral proceedings unfair.
86. In response, the Respondent argues that the Application fails to meet the threshold set out in the *Heineken* case supra. The Respondent further submits that the Applicant has not explicitly identified the pleadings, evidence, or submissions that the Arbitrator allegedly disregarded.
87. This Court notes that its Jurisdiction to set aside an arbitral award is strictly confined to the grounds stipulated under Section 35(2) of the *Arbitration Act*. Allegations of bias, unless they fall within the limited grounds provided under that section—such as failure to accord with a party the opportunity to be heard or breach of public policy—do not, on their own, confer Jurisdiction on this Court to set aside an award.
88. However, A perusal of pages 16 and 17 of the Final Arbitral Award indicates a List of the Applicant's Pleadings and Documents, being paragraphs 31.1 to 31.15 of the Award. The Applicant sought to introduce specific documents to assist the Court in referring to the documents alluded to therein. The Applicant wished to provide the following documents to the Court: i. Applicant's Point of Défense & Counterclaim dated December 4, 2014; ii. Applicant's List and Bundle of Documents dated January



- 4, 2015; iii. Applicant's 1st Supplementary List & Bundle of Documents dated February 20, 2018; iv. Applicant's 2nd Supplementary List & Bundle of Documents dated February 20, 2018; v. Applicant's 3rd Supplementary List & Bundle of Documents dated February 20, 2018; vi. Applicants' Written Submissions dated June 26, 2023, and the List of Authorities dated June 26, 2023
89. The above documents were on record; however, the Hon. Arbitrator still determined that, on a balance of probability, the Applicant had not proved the failure of the smart card system and that there was no material breach on the part of the Respondent. (Pages 16 and 17 of the Award). This lapse on the side of the Arbitrator can only be explained by an inference of bias against the Applicant.
90. Article 50 of the Kenyan Constitution guarantees the right to a fair trial for every person. This right encompasses various aspects, including the right of every person 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. Section 19 of the *Arbitration Act* provides for the equal treatment of parties in arbitral proceedings and guarantees each party a full opportunity to present its case.

Determination of Matters Not Pleaded

91. The Applicant further contends that the arbitral Award contains determinations on matters that the Respondent did not plead. Specifically, the Applicant argues that the issue of investment costs was not contemplated in the tender terms and therefore fell outside the scope of the reference to arbitration. The Applicant's position is that such matters should be addressed through other appropriate forums established under the relevant procurement laws.
92. In response, the Respondent submits that the Applicant failed to raise any objection during the arbitral proceedings regarding the alleged consideration of unpleaded issues. The Respondent argues that, by participating in the proceedings without protest, the Applicant waived the right to challenge the Award on this ground at this stage.
93. This Court notes that, under Section 35(2)(a)(iv) of the *Arbitration Act*, an arbitral award may be set aside if it contains decisions on matters not contemplated by or not falling within the terms of reference to arbitration. The investment costs were not part of the tender terms. This particular matter ought to have been resolved in other forums based on the relevant procurement laws. (Refer to paragraphs 100-106 of the Award). In *National Bank of Kenya Limited v Moeish Consult Limited* [2020] eKLR, the Court cited the case of *Synergy Credit Limited CA Civil Appeal No. 71 of 2016* [2020] eKLR where the Court of Appeal observed as follows: - "In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its Award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or Agreement is critical. Other relevant considerations, without in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Défense of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the Award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings. "
94. Along with that, there is the Award containing matters beyond the Scope of Reference.
95. The Applicant contends that the arbitral Award addressed a dispute that did not fall within the terms of reference to arbitration and contains determinations on matters beyond the scope of the reference.



96. According to the Applicant, the Sole Arbitrator determined issues relating to investment costs, which were not part of the contractual terms. The Applicant maintains that these costs were not subject to proper procurement procedures—including requisition, tendering, and supplier selection—and thus should have been resolved through forums established under the relevant procurement laws. The Applicant’s position is that such issues fall outside the Arbitrator’s mandate.
97. In response, the Respondent submits that the Applicant did not raise any objection during the arbitral proceedings regarding the Arbitrator’s consideration of matters allegedly outside the scope of reference. The Respondent contends that by remaining silent and participating without protest, the Applicant waived the right to raise these objections at the stage of setting aside.
98. The Respondent further contends that the investment costs now being disputed were expressly pleaded in its statement of Claim before the Arbitrator, as is reflected in the arbitral Award. The Applicant did not at any point object to the inclusion of that Claim on the ground that it fell outside the scope of the reference.
99. Additionally, the Respondent argues that under Section 17(3) of the *Arbitration Act*, the Applicant was required to raise any jurisdictional objection as soon as it became aware that the Arbitrator was dealing with matters alleged to be beyond the scope of the reference. No such objection was made during the proceedings.
100. This Court finds that the allegation that the Arbitrator determined a dispute beyond the scope of the reference or outside the pleadings was not raised during the arbitral proceedings. Under Section 5 of the *Arbitration Act*, a party who proceeds without objection despite being aware of a ground for challenge is deemed to have waived the right to rely on that ground at a later stage. As held in *Kenya Oil Company Ltd & Another v Kenya Pipeline Company Ltd* [2014] eKLR, parties are bound by their conduct in arbitration, and failure to raise timely objections operates as a waiver.
101. However, if the matter is unpleaded, one cannot raise the same until the same features are in the final Arbitral award. Otherwise, it would be illogical to expect a party to read the mind of the Arbitral tribunal in anticipation of the matter outside the scope of the referral.
102. Section 35(2)(a)(iv) of the *Arbitration Act* permits a court to set aside an award if it deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration. However, this ground cannot be invoked where the party seeking to rely on it failed to raise a timely objection during the arbitral proceedings, particularly where the matters in issue were expressly pleaded and addressed without protest.

Award Contrary to Public Policy

103. To succeed on the ground that the Award violates public policy, the Applicant must demonstrate that the Award, in substance or effect, contravenes Kenya’s legal system, constitutional values, or fundamental notions of justice and morality. Specifically, it must be demonstrated that the Arbitrator, in arriving at the Award, disregarded material legal and financial obligations of the Applicant in a manner that contravenes the public sense of fairness and justice and undermines Kenya’s public interest. Section 35(2)(b)(ii) of the *Arbitration Act* provides that:
- “ An arbitral award may be set aside by the High Court only if the High Court finds that...
the award conflicts with the public policy of Kenya.”
104. The Applicant argues that the Arbitrator disregarded its legal and financial obligations as a public body. It asserts that the Award, which granted the Respondent a sum of Ksh. 611,469,155.23/=



- = is excessive and unjustified, given that the sums were neither provided for in the Agreement nor proved before the arbitral tribunal. The Applicant, being a public institution established under Article 176 of *the Constitution* and funded by public revenue, maintains that the Award unjustly enriches the Respondent, particularly as the Respondent only performed the contract for two years, yet was awarded anticipated commissions for ten years. It is contended that if enforced, the Award would amount to paying twice for the same services—once to the Respondent and again to a subsequent service provider—thus violating principles of public finance accountability.
105. The Applicant further submits that the Award of interest at 12% per annum on the principal amount is punitive, disproportionately high, and constitutes unjust enrichment. It contrasts this with the fact that no interest was awarded on the incurred expenses of KES. 110,895,329.96/=, suggesting inconsistency and arbitrariness in the Award that renders it oppressive and injurious to public financial interests.
 106. In reply, the Respondent submits that the Applicant's Claim that the Award violates public policy is unsubstantiated. It argues that the Applicant has failed to cite any specific statutory or constitutional provision that the Award allegedly contravenes, nor has it demonstrated how the Award offends Kenya's legal conscience or public morality.
 107. This Court reiterates that its Jurisdiction to set aside an arbitral award is strictly limited to the grounds enumerated in Section 35 of the *Arbitration Act*. This Court, after reviewing the Award, notes that the Arbitrator's decision did not take into account the various legal and financial obligations of the Applicant. The Applicant is a public institution established under Article 176 of *the Constitution* of Kenya, 2010, and derives its revenue from public funds; therefore, the Hon. Arbitrator was bound to treat the Applicant accordingly. The Award granted was excessive and unjustifiably high, given the colossal public funds involved. The Award will therefore cause the Respondent to be unjustly and unfairly enriched from the loss of the Applicant.
 108. In the English case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32, the observation of Lord Wright was that “Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment.”
 109. Moreover, indeed, as a remedy against wrong, unjust enrichment was well known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and Briggs, J A, in the case of *Saleh bin Ghaleb v Hussein al Qu'aiti*, [1957] EA 55, at p 73, where one finds this passage, vis, “so far as the allowances are concerned, this was a clear case of unjust enrichment” leading to a suffering of wrongful loss of which equity would provide a remedy.
 110. Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice:
 111. In Kenya, it would also be contrary to the spirit of section 3(c) of the *Judicature Act*, where it would be unjust to allow a party to retain the benefits of an unjust enrichment.
 112. The Arbitrator awarded the Respondent colossal sums of money, despite these not being provided for in the Agreement between the parties or proven as owed before the arbitral tribunal. The only reason for the Award of the colossal sums was the anticipation of the same in the Agreement, which the



- Applicant terminated due to a breach on the part of the Respondent, resulting in unjust enrichment on the part of the Respondent.
113. Thus, the challenge of the Award on the basis that the Hon. Arbitrator awarded the amounts as anticipated commissions for 10 years, while in contrast, the Respondent had only performed the contract for 2 years, is unjustified. Considering the Applicant likely procured services from another provider after contract termination to collect revenue, this would imply that taxpayers' money would be used twice for the same services during the same period. This is against public policy and is likely to result in unjust enrichment.
114. This has been demonstrated, in substance or effect, to contravene Kenya's legal system, constitutional values, or fundamental notions of justice and morality. In substance, any law, action, or practice in Kenya that undermines the principles of *the Constitution*, particularly those related to human rights, equality, and the rule of law, would be considered a contravention. This includes actions by state organs or individuals that violate constitutional values, fundamental rights, and principles of justice and morality.
115. In the case of Attorney General (On Behalf of the Republic of Kenya & the National Youth Service) v N. K. Brothers Limited (Arbitration Cause E047 of 2021 & E039 of 2022 (Consolidated)) [20231 KEHC 22503 (KLR) (Commercial and Tax) (September 26, 2023) (Ruling)]; the Court held that,
- “It is for the above reasons that I find that the Award in this respect is inordinately high, does not constitute compensation but is punitive and amounts to unjust enrichment to the extent that if it is enforced, it would injure public finances. I will accordingly set aside the interest of 12% applied to the awarded sum of 278,517,127.00 and the interest of 16% further awarded on the certificate of 16.03.2006, as these awards violate the public policy of Kenya.”
116. In the case of Malt Developers Limited v Postal Corporation of Kenya, ML Misc. No. 26 of 2013 [2014] eKLR, the Court underlined the principle of public policy where it was observed that:
- “Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein, as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this Court how the decision by the Arbitrator would negatively affect, impact, or infringe the rights of third parties and thus offend public policy” [Emphasis mine]
117. Also, a case in England is Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil). In this case, the Court reasoned that in order for an English court to set aside the Award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the Award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.
118. The Arbitrator awarded the Respondent herein interests on the Claim on the sum of Kes. 611,469, 155.23/ = at the rate of 12% per annum at simple interest payable after the expiry of 180 days from the date of publication of the final Award. This is an addition to the Award already granted.
119. In awarding the interest, the Arbitrator relied on section 32C of the *Arbitration Act*, citing his discretion. That the additional Award on interest is punitive and amounts to unjust enrichment to the extent that, if it is enforced, it will injure public finances. The Award of the additional 12% interest



violates Kenya's public policy. Surprisingly, the same was not rewarded for the alleged payment of expenses incurred in the sum of Kes. 110,895,329.96/=.

120. The Court makes a finding that the Applicant has demonstrated that the final Award would occasion a gross injustice to the Applicant and thus contravenes Kenya's legal system, constitutional values, or fundamental notions of justice and morality.

121. Thus, the Application for setting aside the Award is meritorious. This is so because the Final Award of Hon. Rajinder Billing (Sole Arbitrator), published on March 26, 2024, exhibited bias and went against public policy. As such, this Court makes the orders that.

- I. The Application for leave to file additional documents is declined.
- II. The Final Award of Hon. Rajinder Billing (Sole Arbitrator), published on March 26, 2024, is hereby set aside in its entirety.
- III. The Application for the enforcement of the Award of the Arbitrator published on March 26, 2024, and delivered on June 24, 2024, is unsuccessful given order (ii) above.
- IV. The matter is hereby referred back before a new Arbitrator for hearing and determination.
- V. Parties to bear their own costs
- VI. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
31st DAY OF JULY 2025**

CHARLES KARIUKI

JUDGE

