Vittone v Echuka Country Estates Limited (Miscellaneous Application E061 of 2024) [2025] KEHC 11468 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11468 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION E061 OF 2024

PJO OTIENO, J

AUGUST 1, 2025

IN THE MATTER OF THE ARBITRATION ACT, 1995

BETWEEN

PAULINE NJOKI VITTONE ..... APPLICANT

AND

ECHUKA COUNTRY ESTATES LIMITED ..... RESPONDENT

(Consolidated with HCMisc Arb No E029 of 2024)

JUDGMENT

1. Pursuant to dated 13/9/2025, the parties agreed to have any dispute between then resolved through arbitration.There arose a dispute between the parties hence the arbitration clause was activated, an arbitration was appointed who issued his final award dated 15/2/2024.

2. In the award, the arbitrator found for and awarded to the claimant the sum of Kshs.4,959,946 with interest thereon at 2% per annum from 31/12/2011 till payment in full. The claimant was also awarded the costs of the arbitration.

3. That award has attributed two applications, each for either party. The first application was filed by the Respondent and sought the remedy of setting aside the award. The second application was by the claimant seeking the recognition and adoption of the arbitral award and for a judgment to be entered on the terms of the award.

4. Where, as here, the subject of discussion is whether to enforce or set aside an award, the two applications must be seen to fall on the flip side of each other. For that reason, if one fails, the other stands successful. With that understanding, the court shall consider the application for setting aside, being the first in time, then only if it fails shall the application for enforcement be available for consideration.

5. The application for setting aside was brought by way of Notice of Motion dated 15.05.2024, pursuant to section 35(2)b(ii)and supported by the Affidavit of Beatrice Sang sworn on the 15/5/2024. The grounds disclosed on the face of the application and the affidavit in support are that; by the arbitrator awarding to the claimant interest at 2% per month from the 31/12/2011 till payment in full, the arbitrator went out of her mandate and rewrote and recast the contractual terms between the parties. She is thus accused of having acted contrary to the public policy in Kenya.

6. That application was opposed by the claimant on the strength of the replying affidavit sworn by the claimant herself on the 26/11/2014.

7. The gist of the opposition, beyond terming the application for being an abuse of the court process and thus meritless, was simply that the determination by the arbitrator, at paragraphs 91 and 92, were the outcomes of interpretation by the arbitrator, of the contract between the parties. The claimant thus prayed that the application be dismissed for want of merit.

8. The second application by the claimant was by chamber summons pursuant to section 36(1) of the *Arbitration Act* as well as Rules 9 and 11 of the Rules made under the Act. The grounds disclosed to premise the application are that there is a final award whose certified copies had been filed with the court and which deserve enforcement to bring the contract between the parties to fruition. The application was supported by the affidavit of the claimant which reiterated the grounds on the face of the application.

9. Both applications were directed to be canvassed by way of written submissions. Both sides did comply with such directions and filed such submissions. The court has had the benefit of reading the two sides submissions and will only set out a summation in this decision.

10. For the respondent the position taken reiterates the ground that a purposive reading of the entire agreement does not reveal an intention that a defaulting party would pay to the interest calculated at 2% per month on the sums due hence it is inconceivable where the arbitrator invited that obligation from

11. The decision of the court of appeal in Kenya Bureau of standards – vs – Geochem Middle East [2018] eKLR was cited from the position of the law that section 35, of the *Arbitration Act* demands that party autonomy be revered with the court reminding itself that it has no business rewriting the agreement for the parties. The submissions thus urge that the application be allowed with the consequence that the award be set aside wit costs.

12. On his part the claimant also filed written submission in which it urges that the application for setting aside be dismissed for lack of merit because; no public policy was contravened, that the award for interest was valid and lawful as compensation for deprivation for funds as contemplated under clause 1.1 of the agreement which was properly interpreted and applied by the arbitrator in accordance with the contra proferentem doctrine.

13. The submissions then identify three issues for determination; whether the award contravenes the public policy in Kenya; whether there was jurisdiction to award interest and lastly, whether the award amounts to rewriting the contract between the parties.

14. On whether the award contravened any public policy in Kenya, the decision in Christ for All Nations – vs – Bulo Insurance was cited for the proposition of the law that public policy is contravened or affronted when an act is inconsistent with *the constitution* or any other law, written or unwritten, when it is eminical to the national interests of Kenya or when it is against or repugnant to justice and morality.

15. When applying that law to the facts and circumstances of this case, it is submitted that no demonstration of breach of Public Policy has been made and that at the very most, the complaint should be about interpretation of the clause on interests and no more.

16. The claimant then cites to court the decision in Mall Development Ltd – vs - Postal Corporation [2014] [KEHC 1464 [KLR] on the need to respect party autonomy and that the window for interference on basis of public policy violation under Section 35 (2) (b) (ii) is very narrow and demand a very high threshold of demonstration. It was added that mere unfairness, procedural errors or just the large value of the monetary claim is never sufficient to demonstrate breach of public policy. In that decision it was stressed that public policy exception cannot be used as a back door for appeal or review of an award. It was equally submitted that the doctrine of privity of contract ordain that parties be held to their bargain as an important way in reinforcement of party autonomy. To the Respondent no breach of public policy had been proved and therefore there is no basis to interfere with the award.

17. On jurisdiction or discretion to award interest, the Respondent cited to court section 32 c of the Act to permit award of interest, simple or compounded, calculated from such date and at such rate and rest as way be specified in the award only subject to an agreement of the parties and permission of the substantive rules of law applicable to the substance of the dispute. It is then reiterated that the agreement did not explicitly exclude interest payable to include interest payable to an innocennt party by a party in breach.

18. The decision in Kenya Airports parking Services Ltd – vs – Municipal Council of Mombasa (2013) eKLR, was cited for the position of the law that there is jurisdiction and mandate on an arbitrator to award interests on sums adjudged due unless the same is expressly excluded by the parties in the contract. In the absence of express exclusion, arbitrators are assumed to have full power to award interests.

19. The claimant equally cited to court the decision in Anne Mumbi Hinga – vs – Victoria N Gathara [2003] eKLR for the proposition that an award cannot be set aside merely because the arbitrator misconstrued the contract or erred in law or fact, because parties voluntarily chose arbitration and must live with its consequences.

20. When the principles of law so enunciated in the decision is capture to the facts of the case, the claimant contends that clause 1.1 of the contract permits application of compounded interest and did not provide any time cap as insinuated by the applicant.

21. On paragraph 91 of the award, it was submitted and contended that all the arbitrator said was that the unit of time for calculation of interest is a month. The award of interest in the award was supported as contractual and lawful hence beyond the statutory justifiable for interference under section 35 of the Act.

22. On whether the arbitrator rewrote the parties' contract for them, it is submitted that failure by the applicant to complete the agreement is not in dispute and that failure attracted consequences which the arbitrator defence to be a refund with interests, the argument that award for interests on money found due was not anticipated under the contract is fenced legally and factually flowed from failing to appreciate the commercial reality and legal justification for award of interests on money held from the owner.

23. It was then submitted and urged that the court should invite the application of the contra proferentem rule so that any ambiguity in the contract, regarding interest and to whom such interest is payable be interpreted against the party who proposed or drafted the clause. The decision in Kenya Commercial Bank Ltd – vs – Kenya planters Cooperative Union [2005] eKLR was thus cited, it being asserted

that the applicant drafted the agreement and inserted all the clauses. It was then added that in case of ambiguity in a contract the court should prefer an interpretation which upholds the validity and efficacy of the agreement and accords with commercial sense. For that proposition, the respondent cited to court the decision in Kenya Power and Lighting Co. Lts – vs – Nation Media Group Ltd [2019] eKLR. The claimant thus prays that the application be dismissed, the award Upheld, recognized and enforced by a judgment of the court.

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Issues, Analysis and Determination

26. The courts perusal and anxious reading of the Respondents Application reveals that the sole reason the award is challenged is the award for interest at 2% per month effective 31/12/2011 till payment in full. For that limb of the award, the applicant contends that a violation of public policy is evident. Whether or not the arbitrator rewrote the contract by awarding interest begs the question whether there was public policy breach. Accordingly, the sole issue for defamation is whether there was public policy violation by the arbitrator to invite the invocation by the court of the provisions of section 35 (2) (b) of the Act. That provision stipulates: -

> " (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 of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or 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 is in conflict with the public policy of Kenya."

27. Because arbitration as designed seeks to protect, respect and fosters party autonomy and choice of forum and how they wish to transact their contractual relations, it is a very strong thing for the court to pierce at the heart of the parties' bargain and undo what their chosen trier of facts and determiner of the right thereby created has reached. The court will only interfere in the limited instances provided under section 35 and 37 of the Act.

28. The instances of interference are where the result can be seen so be inimical to every norm of justice and fairness, outright violation of the law or when the award is so obviously contrary to the law and facts pleaded or agreed between the parties so that to let the award stands yields no justice but a travesty or perversion of the same.

29. It was the duty of the applicant being the duty bearer under section 107 and 108 of *Evidence Act*, to prove that the award contravened *the constitution*, a written or unwritten law, was inimical to and otherwise repugnant to justice and its sister morality.

30. In attempts to discharge that onus, the applicant has, with admirable brevity but concerningly lack of depth, concentrated on the fact that the contract did not provide for payment of interest beyond one month.

31. That to the court is never a demonstration of violation of public policy but a question of facts for determination by the arbitrator. It is the court, a challenge on the correctness of the interpretation of the agreement in whole, based on the facts pleaded and placed before the tribunal.

32. The court is guided that, by choice, the parties chose the forum for interpretation of both facts and law applicable to their dispute. In that choice the court was excluded and asked to remain excluded.

It would be a usurpation of the parties' choice and autonomy for the court to impose itself upon the parties against their wish.

33. The court thus finds that no breach of public policy of the Republic of Kenya has been demonstrated to have been violated by the arbitrator to invite its interference with the award.

34. The above should be sufficient to dispose of the matter but the court also appreciates that parties have taken time to submit on the issue whether interest on money due was anticipated by the parties.

35. In its review of the contract, the court noted that clause 1.1. provided for calculation of interest of 2% per month on sums found due. That is in line with the justification for an award for interest. The award of interest on any sum found due as envisaged by section 32 of the Arbitration is to compensate the person entitled for the loss he suffered while the money remained held by the person who was holding it back unfairly.

36. In this case for instance, by the terms of the agreement, the claimant reasonably expected that she would get the house she was investing in. When that expectation was disrupted by the acts of the seller on which the claimant had no control, the just and reasonable conduct expected of the applicant was to expeditiously offer and effect a refund. When it failed to do that or just place the money in an interest earning escrow account, it is inferred that he was in possession and control of the money, used it economically and earned a benefit which was undue to him, and which he must now pass over to the person entitled to the money.

37. The court finds that the arbitrator's finding on interest as payable, the rate thereof and the effective date of calculation of that interest was an apt capture and interpretation of the parties bargain captured in clause 1.1, of the agreement, and thus unchallengeable.

38. The consequence of the foregoing discussion and conclusion is that the application for setting aside lacks merit and is dismissed.

39. Having been so dismissed, the spirit of the *arbitration Act* and practice is that parties' autonomy expressing the arbitration award to be final must now be enforced.

40. The court is of the learning that the grounds upon which an award is set aside are the same grounds upon which enforcement would be refused. In the absence of a ground to set aside, there cannot be a ground to refuse recognition and enforcement. That position is reinforced by the fact that the applicant never opposed the application from resolution and enforcement. It thus becomes axiomatic that the application for recognition and enforcement is merited the award is hereby recognized from recognition and enforcement.

41. For the foregoing reasons and conclusions, judgment is hereby entered for the claimant against the applicant in terms of the award of the following terms;

    a. Kshs. 4,959,946.00 being the sum paid to the applicant by the claimant under the contract

    b. Costs of these proceedings to be agreed between the parties within 30 days or be taxed by the Deputy Registrar in the event the parties are not able to agree on a figure.

    c. Interest on the judgment from at 2% per month for the 31/12/2011 till payment in full.

    d. Interest on the costs at the court rates of 14% from till the date of full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF AUGUST, 2025.

PATRICK J O OTIENO

JUDGE