



# Dispute Resolution

3 March 2026

KENYA

- No second bite at the cherry: Court of Appeal bars judicial review of arbitral awards after failed section 35 challenge



For more insight into our expertise and services

## No second bite at the cherry: Court of Appeal bars judicial review of arbitral awards after failed section 35 challenge

On 30 January 2026, the Court of Appeal (COA) delivered a decision in *County Government of Kitui v Hon. Justice E. Torgbor and Power Pump Technical Company Limited* (Civil Appeal 176 of 2020) reinforcing the principle that arbitral awards cannot be collaterally attacked through judicial review after a failed attempt to set them aside under the Arbitration Act, Cap. 49 (Arbitration Act).

The County Government of Kitui (County Government) entered into a construction contract with Power Pump Technical Company Limited. Following a dispute, the matter was referred to arbitration, and the sole arbitrator rendered a final award in favour of the contractor. Dissatisfied with the outcome, the County Government first moved the High Court (Commercial Division) seeking to set aside the award, which application was struck out.

The County Government then initiated fresh proceedings, by way of an application, before the High Court (Judicial Review Division), seeking leave to commence judicial review proceedings to quash the award on grounds that the arbitrator had acted arbitrarily, irrationally, capriciously and in excess of jurisdiction.

The High Court rejected that approach, striking out the judicial review application as an abuse of the court process. The County Government consequently proceeded to appeal the decision to the COA.



# Dispute Resolution

KENYA

## The central issue before the COA

The core question before the COA was whether a party that has unsuccessfully challenged an arbitral award under the Arbitration Act may subsequently invoke judicial review to attack the same award.

In essence, the court was required to determine whether judicial review could operate as a fallback mechanism where the statutory route under section 35 had already been pursued and failed.

## Arbitration as a self-contained statutory regime

In dismissing the appeal, the COA delivered a firm restatement of Kenya's pro-arbitration jurisprudence. The court accepted that while the High Court retains limited supervisory jurisdiction in exceptional circumstances, the Arbitration Act establishes a distinct and self-contained statutory regime governing arbitral proceedings and the challenge of awards.

Where a party has invoked that regime, particularly section 35, which sets out the exclusive grounds for setting aside, and failed, it cannot repackage the same grievance under the rubric of judicial review. Allowing such an approach would undermine the carefully structured statutory framework governing arbitral finality.

## Abuse of process

The court observed that permitting judicial review in these circumstances would have the practical effect of reopening an arbitral award whose challenge had already been declined by a court of concurrent jurisdiction. Such an approach amounts to a collateral attack and constitutes an abuse of process.

The doctrine of finality, which underpins both arbitration law and the broader judicial system, would be compromised if litigants were permitted successive attempts in different divisions of the High Court seeking to achieve the same objective. The COA was clear that the internal administrative structure of the High Court cannot be used as a vehicle for forum shopping.

## Finality, estoppel and public policy

The appellant argued that its earlier application had been struck out on procedural grounds and not determined on the merits and therefore could not ground doctrines such as *res judicata* or estoppel. The court was, however, unpersuaded. It held that the decisive question was whether the subsequent proceedings were, in substance, an attempt to relitigate or reopen the same dispute. The court was of the view that the doctrine of *res judicata* is based on the principle of finality, which is a matter of public policy, and the doctrine prevents multiplicity of suits and ensures that litigation comes to an end. Therefore, a party is not entitled to a "second bite at the cherry" simply by reformulating its cause of action.



# Dispute Resolution

KENYA

The court further noted that abuse of process had been properly raised and, in any event, the High Court retains inherent jurisdiction under section 3A of the Civil Procedure Act, Cap. 21 to prevent misuse of its processes.

## Practical implications

The decision reinforces the strict nature of the timelines and grounds prescribed under section 35 of the Arbitration Act. Failure to comply, whether substantive or procedural, may be determinative. Courts will not permit judicial review to function as a corrective mechanism for missed statutory opportunities.

The decision also sends a clear signal that strategic re-litigation across different judicial divisions will not be tolerated. This underscores the importance of early, precise case assessment when considering whether to challenge an arbitral award.

By refusing to entertain collateral challenges disguised as judicial review, the Court of Appeal has reinforced party autonomy, procedural certainty and the finality of arbitral awards.

For commercial actors, particularly in infrastructure and public procurement contexts, this predictability is essential. The integrity of arbitration depends on finality, and the court has once again affirmed that principle in unequivocal terms.

**Desmond Odhiambo and Billy Oloo**



## OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa, Kenya and Namibia, please contact:



### Rishaban Moodley

Practice Head & Director:  
Dispute Resolution  
Sector Head:  
Gambling & Regulatory Compliance  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com



### Tim Fletcher

Chairperson  
Director: Dispute Resolution  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



### Patrick Kauta

Managing Partner | Namibia  
T +264 833 730 100  
M +264 811 447 777  
E patrick.kauta@cdhlegal.com

### Imraan Abdullah

Director:  
Dispute Resolution  
T +27 (0)11 562 1177  
E imraan.abdullah@cdhlegal.com

### Timothy Baker

Director:  
Dispute Resolution  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

### Eugene Bester

Director:  
Dispute Resolution  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

### Neha Dhana

Director:  
Dispute Resolution  
T +27 (0)11 562 1267  
E neha.dhana@cdhlegal.com

### Denise Durand

Director:  
Dispute Resolution  
T +27 (0)11 562 1835  
E denise.durand@cdhlegal.com

### Claudette Dutilleux

Director:  
Dispute Resolution  
T +27 (0)11 562 1073  
E claudette.dutilleux@cdhlegal.com

### Jackwell Feris

Sector Head:  
Industrials, Manufacturing & Trade  
Director: Dispute Resolution  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

### Nastascha Harduth

Sector Head: Corporate Debt,  
Turnaround & Restructuring  
Director: Dispute Resolution  
T +27 (0)11 562 1453  
E n.harduth@cdhlegal.com

### Anja Hofmeyr

Director:  
Dispute Resolution  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

### Annemari Krugel

Director:  
Dispute Resolution  
T +27 (0)11 562 1709  
E annemari.krugel@cdhlegal.com

### Mercy Kuzeeko

Director:  
Dispute Resolution  
T +26 (4)83 373 0100  
E mercy.kuzeeko@cdhlegal.com

### Corné Lewis

Director:  
Dispute Resolution  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

### Nomlayo Mabhena-Mlilo

Director:  
Dispute Resolution  
T +27 (0)11 562 1743  
E nomlayo.mabhena@cdhlegal.com

### Sentebale Makara

Director:  
Dispute Resolution  
T +27 (0)11 562 1181  
E sentebale.makara@cdhlegal.com

### Vincent Manko

Director:  
Dispute Resolution  
T +27 (0)11 562 1660  
E vincent.manko@cdhlegal.com

### Khaya Mantengu

Director:  
Dispute Resolution  
T +27 (0)11 562 1312  
E khaya.mantengu@cdhlegal.com

### Richard Marcus

Director:  
Dispute Resolution  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

### Lebogang Makwela

Director:  
Dispute Resolution  
T +27 (0)11 562 1057  
E lebogang.makwela@cdhlegal.com

### Burton Meyer

Director:  
Dispute Resolution  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

### Desmond Odhiambo

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com

### Lucinde Rhodie

Director:  
Dispute Resolution  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

### Clive Rumsey

Sector Head: Construction & Engineering  
Director: Dispute Resolution  
T +27 (0)11 562 1924  
E clive.rumsey@cdhlegal.com

### Belinda Scriba

Director:  
Dispute Resolution  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

### Tim Smit

Sector Head:  
Consumer Goods, Services & Retail  
Director: Dispute Resolution  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

### Joe Whittle

Director:  
Dispute Resolution  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

### Roy Barendse

Executive Consultant:  
Dispute Resolution  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

### Rimo Benjamin

Counsel:  
Dispute Resolution  
T +27 (0)11 562 1716  
E rimo.benjamin@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.  
Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114  
E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**ONGWEDIVA**

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.  
T +264 (0) 81 287 8330 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

**WINDHOEK**

1<sup>st</sup> Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.  
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020  
T +264 833 730 100 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

©2026 15577/MAR

