



**Njuca Consolidated Company v Athi Water Works Development Agency;  
Equity Bank Limited (Interested Party) (Civil Suit E859 of 2021)  
[2024] KEHC 7849 (KLR) (Commercial and Tax) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E859 OF 2021  
JWW MONG'ARE, J  
JUNE 24, 2024**

**BETWEEN**

**NJUCA CONSOLIDATED COMPANY ..... PLAINTIFF**

**AND**

**ATHI WATER WORKS DEVELOPMENT AGENCY ..... RESPONDENT**

**AND**

**EQUITY BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. The 1<sup>st</sup> Respondent *vide* its application dated 13<sup>th</sup> October, 2021 moved this Court to seek interim measures for the preservation of the subject matter of an arbitration, pending the arbitration proceedings. The 1<sup>st</sup> Respondent also sought to restrain the Applicant from appointing another contractor pending the determination of the dispute by an arbitrator. Subsequently, the Court through its ruling delivered on 2<sup>nd</sup> December, 2022 granted the 1<sup>st</sup> Respondent's prayers pending the determination of the dispute before the arbitrator and further directed the appointment of an arbitrator within 21 days of the judgement.
2. Following the above mentioned Ruling, the Defendant has now filed the Notice of Motion dated 14<sup>th</sup> April 2023 asking the court to Review and set aside the Ruling dated 2<sup>nd</sup> December, 2022 in respect of paragraph 47 of the Ruling granting prayer (a) of the Plaintiffs application dated 13<sup>th</sup> October 2021 and in particular the Order restraining the Defendant from ejecting and/or in any other manner removing the Plaintiff/Applicant from possession of site, appointing another contractor to proceed with the construction works.



3. In the alternative to prayer 3 above, the Applicant asked the court to Order that the Applicant is at liberty to contract for the completion of works with respect to the contract for the construction of Changamwe Repooling Sewer Network - Contract No. Awsb/afdb/ktswssp/w/09/2018 pending the hearing and determination of Arbitration proceedings already commenced.
4. The Application was supported by the sworn Affidavit of Eng. Michael M. Thuita who stated that, the court, in its Ruling dated 2<sup>nd</sup> December, 2022 determined that the Applicant herein be precluded from appointing another contractor to proceed with the construction works pending the outcome of the Arbitration proceedings.
5. It was the Applicant's further averment that the funding of the contract for the construction of Changamwe Repooling Sewer Network - Contract No. Awsb/afdb/ktswssp/w/09/2018 was due to lapse in December, 2023 which means that the project will not be completed in the event that the Court does not review the prayer to have another contractor execute the remainder of the pending works.
6. In response the 1<sup>st</sup> Respondent filed an undated Replying Affidavit sworn by Muthoni Njoroge who stated that that the Applicant's application falls below the established threshold warranting review of the said ruling. The Application did not introduce new evidence that was not available to the applicant during trial nor did it seek to correct any error apparent on the face of the ruling. Therefore, the application was an appeal disguised as an application for review.
7. The 1<sup>st</sup> Respondent also filed a Preliminary Objection dated 16<sup>th</sup> June 2023 on the six grounds one of which is that the court lacks jurisdiction to hear and determine the Application.
8. The parties filed submissions which the court has carefully considered alongside the Application, Notice of Preliminary Objection as well as the response filed therewith. The court frames two issues for determination, to wit: whether the court has jurisdiction to determine the Application? and Whether the Application meets the threshold for a review of the Ruling dated 2<sup>nd</sup> December 2022?
9. Before delving into the issue regarding review, the court will address the Preliminary Objection which raises the question– does the court have jurisdiction in the matter before it and/or is the court functus officio?
10. An objection to the jurisdiction of the court has been cited as one of the grounds in the Preliminary Objection and that the same consists a point of law. Indeed, the locus classicus case on the question of jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" vs Caltex Kenya Limited*. [1989] KLR 1 where the court held that jurisdiction is everything and without it, a Court has no power to make one more step and must down its tools once it finds it has no jurisdiction in a matter.
11. It was the Plaintiff/1<sup>st</sup> Respondent's case that since the arbitration proceedings are already in motion, the present application should have been lodged with the arbitral tribunal. Therefore, the court lacks jurisdiction and should decline the invitation to review the impugned ruling. The Respondent added that the court is functus officio.
12. It is trite law that Section 10 of the *Arbitration Act* limits court intervention in arbitration and in any event, court intervention should only be limited to the instances contemplated by the *Act*.
13. Further, Section 7 of the *Arbitration Act* dealing with the Interim measures by court provides as follows:-
  - (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.



- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.
14. In contrast to the above provision, Section 18(1)(a) of the *Arbitration Act* states:-
- (1) Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party—
- (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure;
15. It is therefore the court's understanding that the import of Section 18 of the *Act* is that the arbitral tribunal has power to grant such an interim measure of protection as it may consider necessary and the tribunal may seek assistance of the High Court in exercise of any power conferred under the said Section 18(1). Equally, a party to the proceedings can seek assistance of the High Court with the approval of the arbitral tribunal.
16. Looking at the instant case, it is not in dispute that the arbitration proceedings are already in motion. In light of the above provision of Section 18(1) of the *Act*, any interim application as this one should have been brought before the tribunal and the matter may be brought to this court with the approval of the court unless the parties otherwise agreed which is not the case herein.
17. Indeed, the tribunal has the requisite jurisdiction to deal with the instant Application and parties herein should bear in mind that the role of the court under the *Arbitration Act* is merely complementary.
18. Accordingly, the upshot of this court's ruling is that the Respondent's Preliminary Objection is merited and the same is hereby upheld. It therefore follows that the Applicant's Application fails and is hereby dismissed as the court, having found it lacked jurisdiction to entertain it, cannot take any further step.
19. Each party shall bear its costs of this application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>th</sup> DAY OF JUNE, 2024.**

**J.W.W. MONG'ARE**

**JUDGE**

