



Mngiwa General Contractors Limited v Coast Institute of Technology & 2 others (Commercial Arbitration Cause E001 of 2022) [2024] KEHC 15904 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL ARBITRATION CAUSE E001 OF 2022
JK NG'ARNG'AR, J
DECEMBER 18, 2024**

BETWEEN

MNGIWA GENERAL CONTRACTORS LIMITED PLAINTIFF

AND

COAST INSTITUTE OF TECHNOLOGY 1ST DEFENDANT

MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY 2ND DEFENDANT

THE NATIONAL TREASURY 3RD DEFENDANT

RULING

1. The Defendants filed a Notice of Motion application dated 13th June 2024 under Certificate of Urgency pursuant to Section 21 of the *Government Proceedings Act*, Section 3A, 1A and 1B of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 29 Rule 2(1), (2)(b), 3, and Order 51 Rule 1 of the *Civil Procedure Rule*.
2. The Defendants/Applicants seek that the execution proceedings commenced by the Plaintiff/ Respondent giving rise to the proclamation notice dated 6th May 2024, warrants of attachment dated 2nd May 2024, warrants of sale dated 2nd May 2024 and issued to Status Auctioneers be recalled and set aside. That execution proceedings to enforce decree dated 12th August 2022, subsequent proclamation notice dated 6th May 2024, warrants of attachment dated 2nd May 2024, warrants of sale dated 2nd May 2024 and issued to Status Auctioneers attaching the moveable property belonging to the 1st Applicant herein be hereby declared a nullity. That the proclamation notice dated 6th May 2024, warrants of attachment dated 2nd May 2024 and warrants of sale dated 2nd May 2024 seeking to realise Kshs 10,632,742.47 be lifted and/or set aside and quashed. That pending the hearing and determination of this application, stay of execution be issued and this court adjourns the public auction, and that that the Respondents bear costs of this application.



3. The application is premised on grounds set therein and the annexed affidavit of Stephen Gofwa that there is imminent risk that the 1st Applicant's property, a public institution of higher learning will be subject to an illegal sale by public auction. That execution proceedings against the Applicants which give rise to the attachment orders and decree dated 12th August 2022 are a nullity ab initio. That the proclamation and warrants of attachment dated 2nd May 2024 to realise Kshs 10,632,742.47 are a nullity.
4. The Applicants further stated that they are a public institution established under the Technical and Vocational Education Training Act under the control of the Ministry of Education, State Department and Higher Learning. That the institution is still under complete and direct control of the ministry of education and does not have organizational or corporate autonomy and hence execution can only be effected through the Ministry of Education. That pursuant to the directives of the Ministry, the applicant was directed to be the mentor institution to the soon to be established Mwatate Technical Vocation College. That all actions undertaken by the Applicants including contractual obligations entered into for construction of the Mwatate Technical Vocation College were done under the supervision and control of the Ministry of Education.
5. The Applicants averred that on the basis of the aforementioned lack of autonomy, the Ministry of Education is mandated to fulfil the arbitral award and execution must be done in accordance with the laws of execution against government. That it is trite law that the remedy available to the Respondent would be to institute judicial review proceedings and seek an order of mandamus compelling Applicants to honour the arbitral awards. That the proclamation notice dated 6th May 2024 and warrants of attachment dated 2nd May 2024 are an abuse of the court process and a nullity in law and that the same be declared as such.
6. The Plaintiff/Respondent filed a Preliminary Objection dated 25th June 2024 that this court lacks jurisdiction to entertain the application dated 13th June 2024 for reasons that this court is functus officio pursuant to the clear provisions of the *Arbitration Act*. That the matter having been heard and determined on merit, the jurisdiction of this court was limited to the recognition of the award pursuant to provisions of Section 36 and 37 of the *Arbitration Act*. That Rule 6 of the Arbitration Rules, 1997 does recognize that if no application to set aside an arbitral award has been made in accordance with Section 35 of the Act, the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.
7. The Respondent stated that in the absence of an application to set aside the award in consonance with the provisions of the *Arbitration Act*, the jurisdiction of this court cannot be invoked to reopen issues which were or ought to have been the subject of adjudication before the Arbitral Tribunal whose decision then becomes final unless challenged within the ambits of the *Arbitration Act*. That in all proceedings before the Arbitral Tribunal as well as the enforcement proceedings before this court, the Respondents were duly represented by the Attorney General who filed respective documents and pleadings prior to the determination thereof. That the application herein is fatally and incurably defective and should be dismissed with costs.
8. The Defendants/Applicants and the Plaintiff/Respondent filed written submissions to their respective Notice of Motion application and Preliminary Objection. The Defendants/Applicants filed submissions dated 11th August 2024 and argued that the purpose of the application herein is not to overturn the decision of the arbitrator but to direct the Respondent to perform execution against the Applicants in a manner in conformity with the *Government Proceedings Act*. That Section 21 of the *Government Proceedings Act* provides for the procedure for execution against the government. That the correct procedure involves securing a certificate of costs and a certificate of order against the



government, followed by a writ of mandamus to compel payment. That central to this Act principle is that government property cannot be subject to execution process in civil cases. That this ensures that the operations of government entities, which often involve public functions and services are not disrupted.

9. The Defendants/Applicants contended that the test for what can be termed as a government institution is elaborated in the case of *Kisya Investments Ltd v Attorney General & another* (2005) eKLR. That the court adopted the reasoning in the case of *Association of Retirement Benefits Scheme v Attorney General & 3 others* (2017) eKLR which cited with authority the Indian Supreme Court case of *Shetty v Airport Authority of India & others* (1979) 1SCR 1042. That the court in *Five Star Agencies Limited & another v National Land Commission & 2 others* (Civil Appeal E290 & 328 of 2023 (Consolidated)) (2024) KECA 439 (KLR) (12 April 2024) held that the existence of separate corporate personality does not deny the status of a government institution for purposes of the *Government Proceedings Act*.
10. The Plaintiff/Respondent in their submissions dated 8th December 2024 cited Section 10 and 35 (3) of the *Arbitration Act* and contended that looking at the application dated 13th June 2024 and the arbitral award dated 25th January 2022, the Applicants' application is time barred having been filed more than 2 years after the arbitral award. The Plaintiff/Respondent relied on the holding in the cases of *Nyutu Agrovet Limited v Airtel Networks Limited*, Civil Appeal (Application) 61 of 2012 (2015) KECA 1012 (KLR) and *Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators – Kenya Branch* (Petition 12 of 2016) (2019) KESC 11 (KLR) (6 December 2019) (Judgment). That the matter having been heard and determined on merit, the jurisdiction of this court was limited to the recognition of the award pursuant to the provision of Section 36 as read with Section 37 of the *Arbitration Act*.
11. The Plaintiff/Respondent submitted that Rule 6 of the Arbitration Rules, 1997 does recognize that if no application to set aside an arbitral award has been made in accordance with Section 35 of the Act, the party filing the award may apply ex parte by summons for leave to enforce the award as a decree. That in the absence of an application to set aside the award in consonance with provisions of the *Arbitration Act*, the jurisdiction of this court cannot be invoked to reopen issues which were or ought to have been the subject of adjudication before the Arbitral Tribunal whose decision then becomes final unless challenged within the ambits of the *Arbitration Act*. That this court is therefore functus officio as far as determination of this matter is concerned.
12. I have considered the Notice of Motion application dated 13th June 2024, the Preliminary Objection dated 25th June 2024 and submissions by the parties. The issues for determination are: -
 - a. Whether the court is functus officio and therefore lacks jurisdiction to hear and determine the application dated 13th June 2024.
 - b. Whether the 1st Applicant is a government institution and the *Government Proceedings Act* ought to apply in execution
 - c. Who should bear costs.
13. The Defendants/Applicants herein filed the application seeking stay of execution on the basis that the warrants of attachment and sale by the Plaintiff/Respondent to realise Kshs 10,632,742.47 was illegal as the 1st Applicant was a government under control of the ministry of education and that execution ought to have been done in accordance with the laws of execution against government. The Plaintiff/Respondent filed a Preliminary Objection that no application to set aside an arbitral award has been made, the party filing the award may apply ex parte by summons for leave to enforce the award as a



decree and the jurisdiction of this court was limited to the recognition of the award. That the court is therefore functus officio pursuant to Section 36 and 37 of the *Arbitration Act*.

14. The court in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 set out what constitutes preliminary objection as follows: -

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

15. Sir Charles Newbold P. in the same case held: -

“A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. The Preliminary Objection raised by the Plaintiff/Respondent herein goes to the jurisdiction of this court and in the case of *Owners of the Motor Vessel “Lillian S”* (1989) KLR 1 it was held that: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. It is not in dispute that the matter herein arose from an arbitration case where an arbitral award was pronounced and the said award was never challenged. According to the Defendants/Applicants, the arbitral award amounting to a sum of Kshs 6,571,470.91 was made in favour of the Plaintiff/Respondent and that the 1st Defendant/Applicant has already made a payment to the tune of Kshs 5,000,000. The Plaintiff/Respondent then approached this court for enforcement of the award which the Defendants/Applicants failed to comply with necessitating the execution process being set in motion.

18. According to this court, the Defendants/Applicants’ application is challenging the manner of execution which ought to have been done in accordance with the *Government Proceedings Act* and does not amount to reopening issues which ought to have been the subject of adjudication before the Arbitral Tribunal. I therefore find that this court has jurisdiction to hear and determine the Defendants/Applicants’ application. The Plaintiff/Respondent’s Preliminary Objection has no merit and is therefore disallowed.

19. On the second issue of whether the 1st Applicant is a government institution and the *Government Proceedings Act* ought to apply in execution, the Defendants/Applicants stated that they are a public institution established under the Technical and Vocational Education Training Act. That the institution is still under complete and direct control of the ministry of education and that all actions undertaken including contractual obligations entered into for construction of the Mwatate Technical Vocation College were done under the supervision and control of the Ministry of Education.



20. Section 21 (4) of the *Government Proceedings Act* provides: -

Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

21. This court finds that the 1st Defendant/Applicant having been a government institution, the Plaintiff/Respondent ought to have complied with Section 21 of the *Government Proceedings Act*. The Plaintiff/Respondent's actions of instituting execution against the 1st Defendant/Respondent was therefore unlawful and unprocedural.

22. In the upshot, the Defendants/Respondents' Notice of Motion application dated 13th June 2024 is allowed in terms of prayers 2, 3 and 4. Costs to follow the event.

DATED AND DELIVERED VIA TEAMS CTS TO PARTIES WITH PRIOR NOTICE THIS 18TH DAY OF DECEMBER 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

