



REPUBLIC OF KENYA



**KENYA LAW**

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**Direct Pay Limited v Tum (Miscellaneous Application E351 of 2021)  
[2023] KEHC 2906 (KLR) (Civ) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION E351 OF 2021**

**JK SERGON, J**

**MARCH 28, 2023**

**BETWEEN**

**DIRECT PAY LIMITED ..... APPLICANT**

**AND**

**SHARON TUM ..... RESPONDENT**

**RULING**

1. This ruling is premised on the Notice of Motion dated 24<sup>th</sup> August, 2021 taken out by the applicant and supported by the grounds laid out on its face and the facts stated in the affidavit of Agnes Mwathi, Group Head of Talent of the applicant. The applicant sought for an order for a stay of execution of the arbitral final award save as to the assessment of costs delivered on 21<sup>st</sup> April, 2021, pending the hearing and determination of the application seeking to set aside the arbitral award.
2. In retort to the said Motion, the respondent filed the Grounds of Opposition dated 9<sup>th</sup> November, 2021 featuring the following grounds:
  - a. This Honourable Court lacks the requisite jurisdiction and power to grant the reliefs sought in the Notice of Motion dated 24<sup>th</sup> August, 2021 on the basis that the *Arbitration Act* does not contain any provision, express or implied, that grants this Honourable Court jurisdiction or power over any proceedings before any Arbitral Tribunal.
  - b. The *Arbitration Act* is a complete code that governs and regulates matters pertaining to Arbitration as provided in Section 10 of the said Act, and as such the provisions of the *Civil Procedure Act* and Rules made thereunder are inapplicable to the present Notice of Motion dated 24<sup>th</sup> August, 2021. The applicant's Notice of Motion dated 24<sup>th</sup> August, 2021 is thus incompetent, bad in law, and amounts to an abuse of the process of this Honourable Court and as such ought to be dismissed.



3. The respondent also swore a replying affidavit on like date to reiterate the Grounds of Opposition, to which the applicant rejoined with the supplementary affidavit sworn by Agnes Mwathi.
4. At the interparties hearing of the Motion, this court directed the parties to put in written submissions.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed to in the affidavits supporting and opposing the Motion; the Grounds of Opposition and the rival submissions.
6. A brief background of the matter is that the applicant presented a claim against the respondent arising out of an alleged breach of contract, and which claim was heard by a sole arbitrator, Mwaniki Gachoka, who dismissed the applicant's claim by way of the award made on 21<sup>st</sup> April, 2021, with costs to the respondent. The applicant was also ordered to pay the arbitrator's costs amounting to the sum of Kshs.850,200/=.
7. Subsequent to the arbitral award, the applicant approached the High Court by way of the Chamber Summons dated 21<sup>st</sup> July, 2021 and sought for an order setting aside the final arbitral award save as to the assessment on costs.
8. Before the Chamber Summons could be heard, the applicant filed the instant Motion which is the subject of this ruling.
9. Before I consider the merits of the Motion, I note that the respondent has raised a preliminary issue in the Grounds of Opposition and the replying affidavit by contending that this court lacks jurisdiction to entertain the Motion in the absence of any express or implied provision in the *Arbitration Act*, Cap. 49 Laws of Kenya, granting the courts power to interfere with taxation proceedings arising out of arbitration.
10. In that respect, the respondent cites among others, the case of *Erad Suppliers & General Contracts Limited v National Cereals & Produce Board* [2013] eKLR where the court determined that:
 

“Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision. The jurisdiction of the court is statutory and cannot be increased or cut down. In our case this position is reinforced by the provision of Section 10 of the *Arbitration Act* which states that except as provided in the Act, no court shall intervene in matters governed by the Act. Again the arbitral awards are insulated by Section 32A of the *Arbitration Act* wherein it is provided that except as otherwise agreed by the parties to it, no recourse is available against otherwise than in the manner provided by this Act. It follows that what must be borne in mind is that there is no appeal, in the ordinary sense, from the award of an arbitrator. The parties have chosen their tribunal and they must, generally speaking, accept the result whether it is right or wrong. The circumstances in which the court will intervene are exceptions to the general rule...”
11. The respondent further cites the case of *Pesa Print Limited v Atticon Limited & another; Symphony Technologies Ltd & 2 others (Interested Parties); Barons Estates Limited(Intended Respondent)* [2019] eKLR in which the court went further on to state that:
 

“From the above excerpts, it emerges that the parties the Applicant and Respondents chose their forum and process of dispute resolution as outlined in the Arbitration Clause/Agreement housed in the 2 Loan Agreements. They attended and participated in Arbitration proceedings. They did not raise any issue of joinder of parties to arbitration



proceedings. The same cannot successfully be raised at this stage. This Court's mandate is limited to application of Sections 35, 36 and/or 37 Arbitration Act."

12. The respondent also states and argues that the proviso on a stay of execution set out under order 46, rule 6 of the Civil Procedure Rules cannot apply by virtue of Section 10 of the said Arbitration Act which limits the intervention by the courts in arbitral proceedings. To buttress her arguments, the respondent makes reference to the above-cited case of Erad Suppliers & General Contracts Limited v National Cereals & Produce Board (supra) in which the court made the following determination:

"This finality of the arbitral award is one of the hallmarks of arbitration comes. Its effect is to limit the applicability of the Civil Procedure Rules and intervention by the court in arbitral proceedings. In the circumstances, stay of execution of the decree issued by the court on 9th March 2012 under the Civil Procedure Rules could therefore not have arisen.

As Odunga J had rightly pointed out in his ruling of 8<sup>th</sup> February 2012, the Civil Procedure Rules are only applicable to arbitral proceedings as appropriate and certainly Order 42 of the Civil Procedure Rules is not of them.

I therefore wish to reiterate his views that this court does not have jurisdiction to entertain the application that has been filed by the Applicant herein. This is because the court can only intervene in arbitral proceedings as provided for under Sections 6, 7, 12, 14, 15, 16A, 17, 18, 28, 32B, 35, 36, 37, 38 and 39 of the Act."

13. The respondent also urges this court to consider the decision arrived at by the Court of Appeal when it rendered itself in the following manner in the case of Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR:

"A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states:

"Except as provided in this Act no court shall intervene in matters governed by this Act".

...The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decrees where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate."

14. For all the above reasons, the respondent urges that this court do dismiss the instant Motion with costs.
15. On its part, the applicant states and submits that contrary to the averments made by the respondent, Section 37 of the Arbitration Act provides for the suspension of an arbitral award by the court, including in taxation proceedings.
16. The applicant further states and submits that the provisions of Order 42 of the Civil Procedure Rules extend to applications seeking for a stay of execution of an arbitral award, and that the setting aside of an arbitral award is provided for under Section 35 of the Arbitration Act, citing the case of Oltukai Mara Limited v Conservation Corporation (Kenya) Limited [2006] eKLR in which the court held that:

"The respondent/applicant has however made an application to set aside the award. As already observed above the respondent/applicant was perfectly entitled to lodge the said application as the law permits the filing of such an application before the expiry of 3



months from the date on which the award was received. Before a determination of that application the court has in my view inherent jurisdiction to consider an application for stay of enforcement and execution of the award. In the premises I find and hold that the respondent/applicant was entitled to move the court as it has done. Having taken that view of the matter, I must now consider the principles applicable. I agree with counsel for the claimant that the grounds upon which an order of stay of enforcement or execution of the arbitral award may be made in this case should be analogous to the grounds set out in Order XLI Rule 4 (1) and (2) of the Civil Procedure Rules. I say so because the arbitral tribunal has already adjudicated upon the dispute between the claimant and the respondent/applicant and has made an award in favour of the claimant. That award has been filed and the court has granted leave to the claimant to enforce the same. The claimant is therefore the holder of a decree in its favour which it is entitled to execute.

For the respondent/applicant to succeed in this application, it had to show that there is sufficient cause to order stay of enforcement and execution of the arbitral award. It was also required to establish that it will suffer substantial loss if the order of stay is not granted and that the application had been made without unreasonable delay. Finally the respondent/applicant had to demonstrate that it can furnish such security as may ultimately be binding upon it.”

17. The applicant is therefore of the view that the provisions of the [Civil Procedure Rules](#) would become applicable in so far as is appropriate, pursuant to the proviso of Rule 11 of the Arbitration Rules.
18. Upon my consideration of the authorities cited by the parties and which are referenced hereinabove, it is apparent that the courts have taken different positions on the matter. In the case of [Oltukai Mara Limited v Conservation Corporation \(Kenya\) Limited](#) (supra) the High Court found that it had jurisdiction to entertain an application seeking an order for a stay of execution of an arbitral award, pending the hearing of an application seeking to set aside the arbitral award in question.
19. However, in the cases that followed, namely the case of [Erad Suppliers & General Contracts Limited v National Cereals & Produce Board](#) (supra) and the case of [Anne Mumbi Hinga v Victoria Njoki Gathara](#) (supra) both of which were relied upon by the respondent, the respective courts declined to grant an order for a stay of proceedings/execution arising out of arbitral proceedings on the premise that the [Arbitration Act](#) is a complete code except as regards the enforcement of the award/decrees where the Arbitration Rules make the provisions of the Civil Procedure Rules applicable where appropriate.
20. From my study of the record, it is not in dispute that prior to filing the instant Motion, the applicant brought an application seeking to set aside the arbitral award save as to assessment of costs, under the proviso of Sections 35(1), 35 (2) (a) (iv) and 35(2)(b)(ii) of the [Arbitration Act](#) and Rule 7 of the [Arbitration Rules](#) 1997. It is apparent that the abovementioned application is yet to be heard and/or determined.
21. From my further study of the record, it is apparent that in the instant Motion, the applicant has moved this court by way of the [Civil Procedure Act](#) and its Rules.
22. The courts have generally stated that the provisions of the [Civil Procedure Act](#) and its Rules do not apply in arbitral proceedings, save in the manner set out under the Section 10 of the [Arbitration Act](#) which provides that no court shall intervene in matters governed by the [Arbitration Act](#) except in the manner provided therein and echoed under Rule 11 of the [Arbitration Rules](#) which provides that the [Civil Procedure Rules](#) shall apply to all proceedings under these Rules in so far as is appropriate.



23. The above position was echoed by the Court of Appeal in the case of Anne Mumbi Hinga v Victoria Njoki Gathara (supra) and whose decision I am guided and bound by, namely:

“A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states:

“Except as provided in this Act no court shall intervene in matters governed by this Act”.

In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award... The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd 1989 KLR 1.”

24. In view of all the foregoing circumstances, I am inclined to find that this court lacks jurisdiction to grant the order for a stay of execution sought by the applicant.

25. Consequently, the Notice of Motion dated 24<sup>th</sup> August, 2021 is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent

