



**Ford v Sultan Fadhil Maurice M Kilonzo Nicanory A Akanga t/a Fadhil & Kilonzo
Advocates (Civil Case 121 of 2008) [2023] KEHC 17532 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 121 OF 2008
DKN MAGARE, J
APRIL 27, 2023**

BETWEEN

COLLINS STEPHEN FORD PLAINTIFF

AND

**SULTAN FADHIL MAURICE M KILONZO NICANORY A AKANGA T/A
FADHIL & KILONZO ADVOCATES DEFENDANT**

RULING

1. The application filed herein is a strange one. It is liable for dismissal. The application was made on September 12, 2022 vide a Notice of Motion dated September 9, 2022. It is supported by an affidavit of Collins Stephen Ford sworn on September 7, 2022.
2. The reasons are set out at the foot of the application. The main complaint was that the arbitral tribunal has delayed. His last witness was allegedly to be heard on February 22, 2022.
3. The High Court has been around since 1897, the last 125 years. However, parties in their wisdom, or otherwise chose Arbitration as the process to go to. That is their forum.
4. On February 27, 2009, the Justice Serگون noted that the parties had an Arbitration Agreement and thus stayed the suit pursuant to Section 6 of the *Arbitration Act* which provides as doth: -

- ' 1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
 - (a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or



- (b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
 - (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 - (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.'
5. The difference between the stay under section 6 and other stays is clear cut. The stay under section 6 is actually a referral to the arbitral tribunal. The matter after referral ceases to exist in the high court.
 6. In the decision of [*Blue Limited vs. Jaribu Credit Traders Limited Nairobi \(Milimani\) HCCS No 157 of 2008*](#) where Kimaru, J stated inter alia as follows:

' It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff's suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court. That principle recognises the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party to an agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement. The issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. The court's concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by section 6(1)(a) of the [*Arbitration Act*, 1995](#). Having considered the agreement, the court holds that the arbitration clause is valid and is capable of being performed. Section 7(1) of the [*Arbitration Act*, 1995](#) grants to the court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement.'

7. In [*Kenya Alliance Insurance Co Ltd v Annabel Muthoki Muteti \[2020\] eKLR*](#), the court, G V ODUNGA had these to say: -

32. No party has contested that finding since the Respondent has not cross-appealed despite the fact that in this appeal it seemed to be contending that the matter ought not to have been referred to arbitration. Having referred the matter to arbitration the restrictive interventionist approach in section 10 of the said Act kicked in and the said section provides that:

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



8. The court continued, in *Kenya Alliance Insurance Co Ltd v Annabel Muthoki Muteti* (supra) that: -

' 41. In response to the appellant's argument that the Act cannot oust the court's jurisdiction, the judge stated;

'Upon closer scrutiny, however, and in particular in the context of arbitral proceedings, the argument is not, in my opinion, easily sustainable. The decision to settle for arbitration as the dispute resolution mechanism of choice is one that is consciously and deliberately taken by the parties. In settling for that mode of dispute resolution, the parties know the limits that are placed on their right to resort to the courts once they have opted for arbitration. In other words,

9. When settling for arbitration, the parties deliberately oust the jurisdiction of the courts or otherwise limit the right of the courts to intervene in their dispute. They have no access to the court except as provided under the law.

10. What the Applicant is doing is rehashing their opposition to the chamber summons dated May 15, 2008 where they opposed referral.

11. The dismissal on September 4, 2018 was upon issuance of notices. However, at the time it was issued, there was an order staying the entire suit. The order of stay binds both the court and the parties. A persusal of the file will have shown that the suit is stayed. The stay was at the instance of the Respondent. In *National Cereals & Produce Board v JK Muiruri (As a Receiver & Manager of) Kensack Limited & another [2010] eKLR*, the court of Appeal held as doth: -

' This was a comparatively straight forward case which should not have taken more than few weeks to be finalized. It was filed way back in July 1989, i.e some 21 years back and by the time it came up for hearing before the superior court on 2nd March 2005, over fifteen years had passed and all that had been done was to file one application after the other, most of which applications ended up not being heard at all; to be precise five applications are as yet not heard. Even worse, after parties had agreed to proceed to full hearing of the suit, and after the hearing had started, the appellant (the plaintiff), who should have been interested in the finalization of the case, sought further delay of the case on the pretext that its counsel had not been aware that the case had earlier been consolidated with another, a fact which any advocate reading the records of the case should have been aware of long before the hearing commenced even if he came to the case only one week to the hearing date, which was not the case here.

That being the case, the learned Judge was confined to matters before him. Much as we agree and it was conceded by both parties that he had discretion and jurisdiction to make the orders appealed against, that discretion was only to be exercised on matters that were before him and on the matters canvassed before him. Dismissal of the entire suit was not before him as there was no application for the same. Githinji J (as he then was) had dealt with such an application earlier on and dismissed it. We think, if the learned Judge was minded to consider dismissal of the suit on whatever basis of hearing, he should have invited the parties to address him on that aspect before he could take such a drastic action.



12. The matter was already stayed. There is no prosecution needed in a stayed matter. The stay was Applied for by the respondent. They have not set aside the stay. The suit is therefore reinstated. Order dismissing the suit on September 4, 2018 was issued in error.

13. In *James Kiiru Mwangi v Gibson Kimani Mwangi & Another [2021] eKLR*, the court, JK Seron, held as doth: -

'The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243* cited by the parties herein, rendered itself thus: 'In *Nyamogo and Nyamogo v Kogo [2001] EA 174* this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.'

30. From the foregoing, it is clear that an error apparent on the face of the record must be a self-evident error which need not require elaborate arguments to support it.

14. In the circumstances there is an error in dismissing the stayed suit. A stay of proceeding is an order barring or restraining parties from prosecuting a suit. If they don't prosecute it they are perfectly in order. If on other hand they prosecute a stayed order, they will be in contempt of court.

15. Unmerited in terms of delay in filing this application as it is, the Applicants were under no obligation to prosecute a stayed suit. To that extent the order of September 4, 2018 must give way.

16. However, I am concerned with the pace of arbitration. It is over 15 years since this suit was filed. I cannot vacate the order for arbitration on the grounds given. However, any decision made is likely to be set aside for misbehavior. Conducting an arbitration for over ten years is prima facie evidence of misbehavior.

17. However, I do not have an application before me under section 35 of the *Arbitration Act*. Finally, this court has no power to supervise, the arbitral tribunal like subordinate court. The tribunal is a creature of Article 159 2(d) of the *Constitution*, which provides that: -

' (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);



- (d) Justice shall be administered without undue regard to procedural technicalities; and
 - (e) 'The purpose and principles of this Constitution shall be protected and promoted.'
18. Any filing of documents in this matter after February 27, 2009, shall have no effect. The parties should be able to deal with their issues in the Arbitration tribunal.
19. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR* the Supreme Court, held as follows: -
- ' (33) What exactly does the term 'jurisdiction' mean? In *Republic v Karisa Chengo & 2 others SC Petition No 5 of 2015; [2017] eKLR*, we defined jurisdiction as the 'the Court's power to entertain, hear and determine a dispute before it.' Also, 'the sphere of the courts operations.' Is jurisdiction therefore synonymous with a right of appeal? In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal? Nyutu urges that Article 164(3) indeed grants such a right of appeal. We disagree. As urged by Airtel, this provision does not confer a right of appeal to any litigant. It only particularizes the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal.'
20. The supreme court concluded as doth: -
- ' (57) Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.'
21. This case, the Court cannot interfere with the Arbitral tribunal outside Section 35 of the *Arbitration Act*, which provides that: -
- ' Application for setting aside arbitral award
 - (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
 - (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;
 - (iii) Or 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
 - (vi) 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.

22. The end result is that there is application that has been made under section 35 of the *Arbitration act*. Without Applicant bringing himself within the purview of Section 35 of the *Arbitration Act*, we are not entitled to hear him. I have already said enough.

Determination

23. I make the following orders: -

- a. The order issued on September 4, 2018 dismissing the suit for want of prosecution is set aside and the suit is reinstated and remains stayed pending hearing and determination of the Arbitration.
- b. The rest of the application dated September 9, 2022. Lacks merit and is dismissed.
- c. Given that the respondent did not reply and the Application has partly succeeded, each party to bear their own costs.
- d. This file is hereby closed and returned to the Archives.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2023. Judgment delivered through Microsoft Teams Online Platform.

DENNIS KIZITO MAGARE



JUDGE

In the presence of:

Mr Asige for the Applicant

No Appearance for the Respondent.

Court Assistant - FIRDAUS

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