



**Maingi Rongo PMCC NO. 535 of 2017 & 9 others v Transmara Sugar Co. Ltd  
(Miscellaneous Application 30 of 2022) [2023] KEHC 19479 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 19479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS APPLICATION 30 OF 2022**

**RPV WENDOH, J**

**APRIL 27, 2023**

**IN THE MATTER OF S. 15 (A) OF THE ARBITRATION ACT NO. 4 OF 1995**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE  
TERMINATION OF THE ARBITRATORS MANDATE**

**AND**

**IN THE MATTER OF THE KENYENYA DIVISION SUGAR ARBITRATION COMMITTEE**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**OMARE MAINGI RONGO PMCC NO. 535 OF 2017 ..... 1<sup>ST</sup> APPLICANT  
JUSTUS INGISA NYAMORA RONGO PMCC NO. 607 OF  
2017 ..... 2<sup>ND</sup> APPLICANT  
ZACHARIA ONDARA RONGO PMCC NO. 609 OF 2017 ..... 3<sup>RD</sup> APPLICANT  
CHARLES OGANGA RONGO PMCC NO. 579 OF 2017 ..... 4<sup>TH</sup> APPLICANT  
JAPHETH K. MEKUBO RONGO PMCC NO. 613 OF 2017 ..... 5<sup>TH</sup> APPLICANT  
JOEL NYAITO RONGO PMCC NO. 608 OF 2017 ..... 6<sup>TH</sup> APPLICANT  
MOSES MWENGEI MBECHHE RONGO PMCC NO. 616 OF  
2017 ..... 7<sup>TH</sup> APPLICANT  
NELSON M. MOKUA RONGO PMCC NO. 587 OF 2017 ..... 8<sup>TH</sup> APPLICANT  
NYAMBEKI KIMONGE RONGO PMCC NO. 610 OF 2017 ..... 9<sup>TH</sup> APPLICANT  
MARTA MORAA OKEMWA RONGO PMCC NO. 590 OF  
2017 ..... 10<sup>TH</sup> APPLICANT**



AND

TRANSMARA SUGAR CO. LTD ..... RESPONDENT

### RULING

1. The applicants moved this court via a notice of motion dated November 24, 2022 and they seek the following orders: -
  1. That the mandate of the Arbitration Committee at and of Kenya Division be terminated for having failed to conduct the arbitration proceedings properly and with reasonable dispatch or at all.
  2. That upon grant of prayer No 1 above, this court do order that the cases referred to arbitration continue to hearing and determination at Rongo Law Courts.
  3. Costs of this application be in the cause at Rongo Court.
2. The application is based on the grounds found on its face and the supporting affidavits of Omare Mainga the 1<sup>st</sup> applicant and Kerario Marwa Advocate for the claimants.
3. The 1<sup>st</sup> applicant deposed that the applicants were referred to arbitration at Kenya Division by order of the court on or about the month of April 2021; that to date, the Kenya Arbitration Committee has not commenced the arbitration process; that the Kenyan Arbitration Laws require that arbitration be conducted properly and within reasonable dispatch; that a period of over one year has been spent without the commencement of the arbitration process and it is unreasonable; that it is in the best interest of justice that the mandate of the arbitrator be terminated and this case and those of the other applicants be referred back to Rongo Law Courts for hearing and disposal.
4. Mr Kerario Marwa, counsel for the applicants deposed that the applicants instructed him to file their cases at the Rongo Law Courts; that subsequent to the service of summons on the respondent, it served an application under section 6 of the Arbitration Act for stay and reference to arbitration; that there are High Court and court of appeal decisions which have affirmed that cases be stayed pending the arbitration by the committees as envisaged in clause 9 of the contract between the parties; that in the month of April to May 2021, Counsel invoked the jurisdiction of the Arbitration Committee at Kenya Division by writing to the members of the committee and serving them with the relevant documents; that since the matters have been referred to arbitration, they have never commenced; that the delay is unacceptable and unexplainable under the law of arbitration which requires that proceedings should be conducted properly and with reasonable dispatch; that the delay of more than one year is not in the interest of justice; that this court should invoke its powers under section 15 of the Arbitration Act and terminate the arbitrator's mandate.
5. The application was opposed. Mr Samuel Kalu the Corporate and Legal Manager of the respondent filed a replying affidavit sworn and dated on January 31, 2023. He deposed that the application is bad in law as it should have been filed pursuant to rule 3(1) of the Arbitration Rules, 1997; that it is the applicants who have the duty to file their claims before the Arbitration Committee and in the absence of the claims, the Arbitration Committee has no claims to adjudicate on; that the applicants have a duty under section 19A of the Arbitration Act to facilitate proper and expeditious arbitral proceedings; that section 33 of the Arbitration Act provides that the proceedings ought to be terminated by the final arbitral award, an order of the tribunal where the claimant has withdrawn his claim, consent of the parties or where the tribunal finds the continuation of the proceedings is unnecessary.



6. Counsel further deposed that if the application is granted, it would be tantamount to usurping the powers of the tribunal; that the applicants have not demonstrated that the delay has been caused by the Arbitration Committee; that the applicants have approached this court with unclean hands having failed to disclose material facts and therefore undeserving of the court's intervention.
7. I have considered the application, the affidavits in support of the application, the annexures thereto, the respondent's replying affidavit and submissions.
8. The respondent faulted the manner in which these proceedings have been commenced before this court. The respondent is of the view that the application is incompetent and fatally defective as it was filed as a notice of motion as opposed to an originating summons and should be struck out. To support this position, the respondent relied on the findings in *Chania Gardens Limited vs Gilbi Construction Company Limited & another* (2015) eKLR where the court, faced with a similar situation as this one, struck out the application for procedural impropriety.
9. The applicants brought this application under section 15 (a) of the *Arbitration Act* which reads: -
  - “(1) The mandate of an arbitrator shall terminate if-
    - a. he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch..”
10. The law under rule 3 (1) of the *Arbitration Rules* provides that the mode of commencement of proceedings under section 15 (a) of the *Arbitration Act* shall be made by originating summons. It provides: -
  - “(1) Application under section 12, 15, 17, 18, 28 and 39 of the act shall be made by originating summons made returnable for a fixed date before a judge in chambers and shall be served on all parties at least fourteen days before the return date.”
11. The law makes it mandatory that the only way to proceed with applications under section 15 of the *Arbitration Act* such as the one before this court is through an originating summons. It is a well-established law that where there is a procedure to be followed for the redress of any particular grievance prescribed by the *Constitution* or statute, that procedure should be strictly followed. See the findings in *Speaker of National Assembly v Njenga Karume* (2008) I KLR. The applicants did not proffer any reason as to why they sought to commence these proceedings via a notice of motion as opposed to originating summons as provided for under the law.
12. This court has severally held that article 159 cannot be used to cure all manner of procedural indiscretions. The institution of a proper suit goes to the root of a court's jurisdiction. If the dispute before the court is commenced inappropriately, there is nothing for the court to decide. The manner in which a suit is instituted cannot be a mere technicality. The Court of Appeal in the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* (2017) eKLR held: -
  - “...despite the foregone, the court still went ahead to exercise its discretion in favour of the 1<sup>st</sup> respondent by invoking that Article, the overriding objective under the *Civil Procedure Act*, and the interest of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be a mere technicality. It is the basis of jurisdiction, obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised



his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or the 2<sup>nd</sup> respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override statutory provisions. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.”

13. Further rule 3(3) of the [Arbitration Rules](#) provides: -

“another application arising from the application made under sub - rule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date.”

14. The law states in mandatory terms that any subsequent application shall be by summons. If this court is to allow the notice of motion to stand as it is, then what would happen if a party is interested in making another application in this matter there would be two different set of pleadings over the same subject matter whereas the rules contemplate that the pleadings should be of a similar nature.

15. From the foregone analysis, it is this court’s view that the notice of motion application dated November 24, 2022 is incompetent and fatally defective. The notice of motion is hereby struck out with costs to the respondent.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 27<sup>TH</sup> DAY OF APRIL, 2023**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of;**

Mr. Achola holding brief for Mr. Kerario for the Applicant.

No appearance for the Respondent.

Nyauke Court Assistant.

