



Armstrong & Duncan v Elat Limited & another (Miscellaneous Application E072 & E636 of 2021 (Consolidated)) [2023] KEHC 18159 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E072 & E636 OF 2021 (CONSOLIDATED)**

FG MUGAMBI, J

MAY 26, 2023

BETWEEN

ARMSTRONG & DUNCAN APPLICANT

AND

ELAT LIMITED 1ST RESPONDENT

AGUA KENYA LIMITED 2ND RESPONDENT

RULING

Background

1. The parties entered into an agreement dated June 20, 2020 for the design, construction and delivery of the Nakuru Integrated Development Project. A dispute ensued and the parties in accordance with the memorandum of agreement resorted to arbitration for dispute resolution.
2. The arbitrator Hon John Olago Oluoch was appointed as the sole arbitrator by the Chairman of the Chartered Institute of Arbitrators. On December 18, 2020 the final award was delivered against the applicant herein for the amount of Kshs 20,524,272/= exclusive of interest and costs.
3. The respondents in an application dated 1st February 2021 sought to have the arbitral award adopted and recognized as a decree of the court for purposes of execution and enforcement. The court by a ruling dated 17th March 2021 allowed the application. What followed thereafter was a series of applications and on March 15, 2022 the court directed that the applications be canvassed by written submissions. For the avoidance of doubt, the applications were filed on August 20, 2021, September 27, 2021, and August 24, 2023.
4. The applicant filed consolidated written submissions dated May 12, 2022 and the respondents filed theirs dated May 16, 2022.



Application dated August 20, 2021

5. This was the first application amongst the pending ones. It was filed by Elatt Agua Ltd (the respondents herein) against Armstrong (the applicant herein) under section 635 of the Companies Act No 17 of 2015, order 51 rule 1, Order 22 rule 35 of the Civil Procedure Rules 2010, section 1A, 3A, 6 and 63 of the Civil Procedure Act Chapter 21 Laws of Kenya and all enabling provisions of the law.

The application sought the following orders;

- a. Spent
 - b. That the Honourable court be pleased to pierce/lift the corporate veil of the respondent company so that the applicant can pursue execution against its individual directors.
 - c. That the Honourable Court order the Directors of the respondent company to jointly and severally pay the decretal amount in their individual capacity and on behalf of the respondent company or to be imprisoned and committed to civil jail for a period of less than six(6) months in default of payment of the decretal sums
 - d. That the Honourable Court be pleased to make such further orders in the interest of justice against the respondent Company and/or its directors.
 - e. That costs of the application be provided for.
6. The application was based on the grounds on the face of it and on the affidavit sworn by Ambassador Mwakai Siodated 20th August 2021. The grounds raised in the application were further buttressed by way of written submissions dated.
7. I will summarize the applicant's case as follows:
8. That although the arbitral award herein had been adopted as a decree of the court by a ruling dated 2nd March 2021 and decree issued on 17th March 2021, the applicant had been unable to trace any assets of the respondents in order to satisfy the decree.
9. That the respondents had concealed all their valuable attachable assets and were running their business in proxy entities.
10. That in a bid to avoid making good the decretal amount, the applicant's directors had emptied their bank accounts and made themselves unavailable to the applicant to even negotiate on settlement terms. Several attempts to access a property located on State House Road had also proved difficult due to the security around the area.
11. They had established that the applicant was a going concern and would be able to settle its debt but has simply refused to do so. In the submissions, it was observed that the respondent had established the fraudulent elements of the applicant's directors by frustrating the respondent's efforts to settle the decretal sum.
12. The applicant filed a replying affidavit dated December 20, 2021 sworn by Mwangi Murage and another one dated. The applicant stated that that it had applied to set aside the arbitral award of December 18, 2020 and had obtained interim orders for stay of execution against the arbitral award, pending the hearing and determination of Miscellaneous Application E636/2021.
13. The applicant denied having received or ignored any communication to settle the decretal sum. The applicant further denied any fraud on its part calculated at avoiding the payment and stated that the respondents had not furnished any prove of fraud.



14. The applicant stated that it had not misrepresented itself or reneged on its obligations under the memorandum of association. It also denied diverting funds to any other project.
15. The applicant denied having been a party to the arbitration proceedings and denied any knowledge of the arbitral award dated December 18, 2020. The applicant also denied having been served with the decree dated March 17, 2021 contending that it had not failed or neglected to pay the decretal amount. The applicant further contended that there was no evidence that the applicant's directors had channeled any of the respondent's money to individual accounts. It was averred that the company that the respondents were referring to was another separate entity and a stranger to the applicant.
16. The applicant further denied receiving letters from the respondent calling upon it to satisfy the decree and stated that it has never concealed its assets.
17. The applicant stated that the initial arbitrator, QS Festus Litiku had been appointed by both parties as arbitrator but the respondents objected to his appointment and after this.
18. There after there was no formal appointment of the second arbitrator and the applicant was not notified about the appointment of Hon Olago Oluoch and did not participate in the proceedings. There are no records that there was a preliminary meeting or other meetings with the parties. The applicant did not appoint counsel to represent it after the 1st arbitrator resigned because they did not have notice of the appointment of the second arbitrator.
19. There was representational fraud by the respondents who entered into the MoU as two entities before later joining into an entity known as Elatt Agua, and this is how they were known throughout the arbitral proceedings. This would lead to legal problems as it was not easy to tell who the parties really were. The parties who received the award are therefore not the same parties that entered into the agreement with the applicant initially.
20. There was procedural fraud emanating from the lack of notification of the appointment, proceedings and conclusion of the arbitral proceedings under the second arbitrator, that the records were not well kept by the second arbitrator and that the award was not communicated to parties in reasonable time.
21. There was fraud as to content which was misrepresented and concealed in the arbitration proceedings.
23. The dispute was not contemplated by and did not fall within the terms of reference of the arbitration because the parties therein were the applicant and the 1st and 2nd respondent and not the single entity. The dispute according to the applicant arose from the non payment of funds by a third party known as Within Foundation, which was not a party to the agreement between the former parties. It is for this reason that the application to enjoin the third party had been filed so as to enable the court make a just determination.

The application dated August 24, 2023

24. This application was filed by the applicant herein before the first application had been determined. It was brought under Order 40 rules 1,2&4, Order 46, Order 51 rule 1 of the [Civil Procedure Rules 2010](#), Section 1A, B and 3A of the [Civil Procedure Act](#), Section 7 and 35 of the [Arbitration Act](#), Articles 47,50 and 159 of the [Constitution of Kenya, 2010](#) and all enabling provisions of the law.

The application sought the following orders;

- a. Spent
- b. Spent



- c. Spent
 - d. That the Honourable court be pleased to allow the applicant to file its application to set aside the final arbitral award of Hon John Olago Aluoch dated December 18, 2020 out of time and that the application herein be deemed duly filed in so far as it relates to the prayers to set aside the aforesaid arbitral award.
 - e. That the Honourable court be pleased to set aside the arbitral award of Hon John Aluoch dated December 18, 2020.
 - f. That the court be pleased to issue any other or further orders and or directions as it may deem fit and expedient to issue.
 - g. That the costs of this application be provided for.
25. The application was supported by the grounds on the face of it and by the supporting affidavit sworn by Mwangi Murage. The applicant's case was that it did not participate in the arbitral proceedings as they were conducted in a manner to hinder its participation. The applicant further observed that the respondents withheld the award from it with an aim of ensuring that time would lapse before the applicant filed an application for setting aside the award. It was the applicant's contention that the arbitral proceedings were against the applicant's right to a fair trial and the applicant would stand to suffer irreparable financial loss if the orders sought were not granted. The applicant pleaded that the arbitral award dealt with a dispute that was not contemplated by or falling within the terms of reference to arbitration.
26. In its submissions dated, the applicant observed that it was not notified of the second sole arbitrator's appointment and the subsequent arbitral proceedings. Further, the applicant submitted that the respondents had misrepresented themselves throughout the dispute resolution process as they had entered into the MOA as Elatt Limited and Agua Kenya Limited but later changed to Elatt Agua. The applicant's position was that changing the identity at will, the respondent misrepresented itself. The applicant faulted the arbitrator for not formally calling a preliminary meeting and failing to make the award and its contents known to the applicant within good and reasonable time.
27. On whether the dispute was contemplated within the terms of reference, the applicant submitted that the memorandum of agreement did not envisage a dispute where the proponent of the project did not settle the project manager's fees. The applicant urged the court to allow the application for setting aside the award out of time.
28. The 1st respondent opposed the application vide a replying affidavit sworn by Wesley Kipkore on October 8, 2021. The 2nd respondent filed a replying affidavit dated October 12, 2021 sworn by Ambassador Mwakai Sio. The respondents filed joint submissions dated October 25, 2021. May 16, 2022. Briefly stated, the case by the respondents was as follows:
29. That the High Court's jurisdiction was limited to applications for setting aside and enforcing an arbitral award by virtue of sections 35 and 36 of the *Arbitration Act*. The Act prescribed guidelines along which these should be done and the grounds for setting aside the award had not been proved. As such the court was functus officio.
30. That it is particularly not true as alleged by the applicant that the proceedings were riddled with fraud. All parties had submitted to the jurisdiction the proceedings, they all took part in appointing the arbitrator, both parties attended the proceedings and the award was issued on account of admission



of liability by the applicant. The arbitration proceedings reflect that the Managing Director of the applicant was present and the allegation otherwise amounts to perjury.

31. It had taken more than one year for the applicant to approach the court to set aside the award. The issues that have been raised on the substance of the matters before the Hon Arbitrator are not matters that this court has jurisdiction to entertain.
32. In conclusion of the process the award was issued and copied to all parties. The applicant was present during the enforcement proceedings and in fact filed a preliminary objection to the application for enforcement.

Analysis

33. I have carefully considered the pleadings and arguments made by the parties and the authorities relied on. The first issue is whether leave should be granted to allow the applicant to file the application to set aside the award out of time. The timelines for an application for setting aside an award are set out under section 35(3) of the *Arbitration Act* which provides that;

- (3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

34. The Courts have time and again addressed the question of extension of time in similar circumstances as this. The Court of Appeal in *Ezra Odoni Opar v Insurance Company Of East Africa Limited* KSC CA Civil Appeal No 98 of 2016 [2020] eKLR, observed that:

The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in *Nyutu Agrovat Limited vs. Airtel Networks Kenya Limited* and another, SC Petition No 12 of 2015 “the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes” “in a manner that is expeditious, efficient...” while also observing that Section 35 of the Act, “also provides the time limit within which the application for setting aside should be made.

35. Further in *Dinesh Construction Company (K) Limited Vs Kenya Sugar Research Foundation* [2018] eKLR the High Court held that in the absence of any specific provision under *Arbitration Act* governing a procedure sought by a party the Court would lack jurisdiction to entertain such an application.
36. From the foregoing, while extension of time is an equitable remedy within the courts discretion, Section 10 of the *Arbitration Act* limits the court’s jurisdiction to only the matters governed by the *Arbitration Act*. The *Arbitration Act* does not provide for extension of time to set aside the award. I find that the court is bereft of the jurisdiction to determine the matter.
37. Even supposing the court had such jurisdiction, I wish to pronounce myself on the ground relied on that the applicant was not part of the arbitration proceedings and that the award was obtained fraudulently and un procedurally. Section 35 of the *Arbitration Act* provides that;

35. “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; or
 - (iii) 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.”

38. As to whether the applicant was notified of the arbitral proceedings, I have perused the award, the arbitrator stated that the parties did not dispute his appointment as an arbitrator. Further it was contended that the managing director of the applicant herein was present in the arbitration proceedings. I further note that the director of the applicant admitted the claim and it was on this basis that the award was delivered in favour of the respondent.

39. On appointment of the arbitrator, the 1st arbitrator Festus Litiku was appointed by the Chairman of Chartered institute of arbitrators on June 16, 2020. The arbitrator held his first preliminary meeting on 6th August 2020. However vide a letter dated August 17, 2020 the arbitrator recused himself citing conflict of interest for having previously worked for the applicant.

40. The chartered Institute of arbitrators on September 22, 2020 appointed the 2nd arbitrator Olago Aluoch John and the same communication was copied to all the parties. I note that the applicant was informed about the preliminary meeting and in an email dated 26th November 2020 confirmed



attendance. The arbitrator in an email sent to the parties on December 1, 2020 confirmed attendance of all parties and the fact that the applicant had accepted liability.

41. From the chronology of events, it is evident that the applicant actively participated in the arbitration proceedings. The appointment of the arbitrator was done in accordance to the agreement between the parties and every correspondence was copied to it. Furthermore, the *Arbitration Act* under section 14 provides the procedure for challenging the composition of the arbitral tribunal where if unsuccessful the same can be referred to this court. The applicant did not utilize the opportunity reserved by the Act to deal with its grievance. I find that the applicant has not proved that it was not part of the proceedings or appointment of the arbitrator.
42. On whether the dispute was contemplated or fell within the scope of reference to arbitration, the court has to examine the agreement in question. In *Synergy Credit Limited vs Cape Holdings Limited* NRB CA Civil Appeal No 71 of 2016 [2020] eKLR the Court of Appeal observed as follows regarding the issue of a dispute not contemplated in the terms of the reference: -

“In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties’ pleadings.

Paragraph 1 and 3 of the agreement provides as follows;

“The purpose of this memorandum of agreement is to govern the proposed contract between Technical partners of party B and Party C and within Foundation for enabling works and other civil works required in the Gitiri- Kinja Water Complex and the proposed sewer plants and sewer distribution project.

Paragraph 4 of the agreement states as follows:

Dispute resolution

All parties agree that in the event that there is a dispute as to the interpretation of any of the clauses herein, the same shall be referred to an arbitrator to be agreed upon by the parties herein within 14 days after notice of such a dispute has been served by either party. Failure by the parties to agree on a common arbitrator, the arbitrator shall be appointed by the chairman for the time being of the Kenya Chartered institute of Arbitrators.”

43. A dispute ensued between the parties with regards to the role and interests of the project and there being an arbitration clause in the Memorandum of agreement where the respondents terminated the agreement and requested for a refund. When the same was not forthcoming the dispute was referred to arbitration. The arbitral award directly arose from the agreement and the relationships of the parties as per the agreement. It is therefore my finding that the award was on matters that fell within the scope of the arbitration.



44. For the above reasons, I find that the applicant did not establish a basis for setting aside the arbitral award dated December 18, 2020. Consequently, I dismiss the application dated August 24, 2021 with costs to the respondents.

Application dated 27th September 2021

45. The applicant filed an application dated September 27, 2021 brought under Order 1 rules 3,6,10 and 14 of the *Civil Procedure Rules 2010*, Sections 1A, B, and 3A of the *Civil Procedure Act* and all enabling provisions of the law.

The orders sought in the application are as follows;

- a. That within the Foundation a duly registered Trust under the *Trustees (Perpetual Succession) Act* having its registered offices in Rhapta Road 47, Second floor and P.O. Box 173,00625, Nairobi in the republic of Kenya and is hereby enjoined as a respondent
 - b. That the applicant be granted leave to amend the application pursuant to the addition within foundation as a respondent and to file and serve the amended application upon the respondents within 14 days.
 - c. That costs of this application be provided for.
46. The application was opposed by way of a replying affidavits dated 1st November 2021 sworn by Wesley Kipkore and Ambassador Mwakai Sio. The respondents case was that this application was misplaced as the court could not enjoin a party to the proceedings since the arbitration proceedings had already been concluded and that in any case, the court could not delve into the substratum of the matter. This was a power that the court did not have under the *Arbitration Act*. The respondents termed the application as a delay tactic.
47. With respect to the application the applicant's submissions were that the application was brought to assist the court in making a fair determination of the suit. I note that since the application of setting aside the award has been disposed of the application dated September 27, 2021 has been overtaken by events. In the premises, there is no reason to go into the merits of the said application.
48. In the upshot the application is dismissed. No orders to costs.

Analysis on the 1st application for lifting the corporate veil

49. I have considered the application, the response and the submissions. The main issue for determination is whether the court should pierce the corporate veil and hold the directors of the applicant (Armstrong) jointly and severally liable to pay the decretal sum. the House of Lords in *Salomon v Salomon* [1987]AC 78 established the principle of corporate personality where they held that the Company is in law enjoyed separate legal personality from its members. The same position has been adopted by our courts in emerging jurisprudence.
50. The Court of Appeal in the case of *Victor Mabachi & Anor v Nurtturn Bates Ltd* NRB CA Civil Appeal No 247 of 2005 [2013] eKLR held that

A company as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”



51. Likewise in *Aster Holdings Limited v City Council of Nairobi & 4 others* [2019] eKLR the court held that;

There is no doubt that a company is at law a separate legal entity which is different from its shareholders and subscribers. However, in some instances, the corporate veil of a company can be pierced. The circumstances under which the corporate veil of company may be pierced were well set out in paragraph 90 of Halsbury's Laws of England 4th Edition Vol 7 (1) which states as follows: -"Notwithstanding the effect of a company's incorporation, in some cases the Court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the Court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. "

52. From the foregoing, it is trite that the Company is a legal entity separate from its directors however the court in certain circumstances have pierced the corporate veil when it is evident that it has been used to shield fraud and improper conduct on the part of the directors of the company. Bearing that in mind, the court is tasked to determine whether the circumstances of this case as presented by the respondent allow for piercing the corporate veil.
53. The respondents' application is based on the grounds that it has been unable to trace the assets of the applicant and the directors have illegally transferred money from their accounts. The applicant has been faulted for failing to settle the decretal amount even after several letters have been sent to them.
54. Ringera J in the case of *Corporate Insurance Co Ltd v Savemax Insurance Brokers Ltd & Another* [2002] was quoted with approval in the case of *China Wu Yi Company Limited v Edermann Property Ltd & 2 others* [2013] eKLR where it was held that;

The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company."

55. In the instant case, I find that the material placed before the court is not sufficient to warrant lifting of the corporate veil. It should be noted that lifting the corporate veil is a strict exercise that should be conducted in exceptional circumstances upon proof of the director's fraudulent conduct or dealings. I am not satisfied that the respondents have placed any material before the court to support lifting of the veil. In this regard, I decline to grant the orders sought.
56. In the upshot, I find no merit in the application and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF MAY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

