Machiri Limited v Sogea-Satom Kenya Branch & another; Bank of Africa Limited (Interested Party) (Civil Suit E027 of 2023) [2023] KEHC 21195 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21195 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E027 OF 2023

A MABEYA, J

JULY 28, 2023

BETWEEN

MACHIRI LIMITED ..... APPLICANT

AND

SOGEA-SATOM KENYA BRANCH ..... 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY ..... 2ND RESPONDENT

AND

BANK OF AFRICA LIMITED ..... INTERESTED PARTY

RULING

1. This is a ruling on an application dated January 27, 2023. It was brought, inter-alia, under Order 5 Rule 22(b), Order 13 Rule 2, Order 39 Rule 1, Rule 5, 6 & 8, Order 40 Rule 1 & 2, Order 46 Rule 20 of the *Civil Procedure Rules* and Section 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Section 7, Section 12(9) (a) of the *Arbitration Rules* and Article 159(2) (c).

2. The application sought orders that, pending the hearing and determination of the intended arbitration, an order of temporary injunction in the nature of a Mareva injunction do issue to freeze or restrain the interested party by itself or through its representatives from accessing, transferring from, moving or in any other way transacting in a manner to move any money whatsoever below the amount of Kshs 150 million & Euro 1,562,944.9 out of the respondent's bank account and credit balances held in A/C Nos xxxx & xxxx at the Bank of Africa (Kenya) Limited, Nairobi.

3. It also sought to restrain the 2nd respondent from paying out an equivalent sum to the 1st respondent while making payments in settlement of the subject contractual claims pending arbitration. There was

an alternative prayer that the 1st respondent do deposit an equivalent amount in a joint interest earning account in the names of the firms of advocates representing the parties.

4. The grounds for the application were set out on the body of the Summons and the affidavit of James Macharia Mbugua sworn on January 27, 2023. It was contended that the parties entered into the Kenya-Mombasa Airport Rehabilitation Subcontract Agreement-ICB No KAA/ES/MIA/617/C Agreement No CL/O85/2017 dated September 4, 2018 ("the said contract") which had an arbitral clause.

5. That the applicant and 1st respondent went to court under HC No E808 of 2021 which matter was sent to arbitration on August 2, 2022. That the arbitration has been commenced and the statement of claim sent to the ICC.

6. That there was a subsisting case number E959 of 2021 between the 1st and 2nd respondent which the applicant tried to be joined to but failed. That upon filing that application for joinder, the 1st and 2nd respondent reached a compromise that the 2nd respondent would be paying retention sums to the 1st respondent.

7. That the applicant had an identifiable stake in the pending payment to the 1st respondent from the compromise as the sum claimed therein by the 1st respondent arose from the works which were performed by both the 1st respondent as the main contractor and by the applicant as a domestic sub-contractor. That the applicant had successfully performed the works under the said contract but was yet to be paid the outstanding balance by the 1st respondent.

8. That the 1st respondent had already terminated the contract which was the only known asset and stands as a chose in action in E959 of 2021. That the 1st respondent is a company incorporated in France and has no any known property in Kenya.

9. That the applicant had a prima facie case pending to go for arbitration with high chances of success. That unless the orders sought were granted, the 1st respondent would take possession of the said funds that are in Kenya to defeat the applicant's claim in the arbitration. That the balance of convenience thus tilted towards the applicant.

10. The 1st respondent opposed the application vide the replying affidavit and further affidavit sworn by Mathieu Georges on 13/2/2023 and 16/3/2023, respectively. It was contended that the 1st respondent was registered in Kenya as a Limited Liability Company on October 10, 1994 and has operated in Kenya for the last 39 years and carried out several multibillion projects including the one in dispute.

11. That the 1st respondent had several ongoing projects and tenders and was a corporate citizen. That the allegation that the 1st respondent was an international company was thus false and having roots in Kenya and over 100 staff, the allegation that it was a flight risk was false.

12. That as admitted, the dispute was a subject in HC Misc App No E667 of 2020 filed by the applicant on March 24, /2020 and had already been decided. That the applicant raised similar issues in that matter and sought similar conservatory orders but was dismissed vide ruling delivered on August 25, 2020 thus paving way for the encashment of the advance payment guarantee and performance guarantee the subject of these proceedings.

13. That the issue of encashment of the guarantee was thus conclusively dealt with and the applicant was attempting to re-litigate it. That the application was *res judicata* even though the applicant had now added two additional peripheral parties.

14. That as pleaded by the applicant, the issues raised in this suit were already the subject of HCC No E808 of 2021 that was pending before court. That all the issues raised here ought to have been raised in that suit and the applicant was only forum shopping and was abusing the court process.

15. Further, that as admitted, the issues raised herein were subject of an ongoing arbitration process before the International Court of Arbitration (ICC) thus the Court lacked jurisdiction to determine the application.

16. That in the ruling of August 2, 2022, this Court stayed the proceedings in HCC No E808 of 2021 pending the hearing and determination of the arbitral proceedings before the ICC. That the contract was terminated due to the applicant's breach of the fundamental terms and failure to remedy the material breaches despite request by the 1st respondent.

17. That chances of the applicant succeeding in the arbitration were remote. That the applicant did not demonstrate any exceptional circumstance to justify granting of the orders sought and was a vexatious litigant.

18. The 1st respondent also filed a notice of preliminary objection dated 13/2/2023. It was based on grounds that the suit was res judicata, sub judice and the Court had no jurisdiction to hear the suit.

19. The 2nd respondent opposed the application vide grounds of opposition dated 8/3/2023. The grounds were that the 2nd respondent was not a party to the agreement between the applicant and 1st respondent and was therefore improperly joined in the suit. That there was no arbitral agreement between the 2nd respondent and the applicant under which an interim measure of protection under section 7 of the *Arbitration Act* could issue and there was also no dispute between the applicant and 2nd respondent capable of being referred to arbitration.

20. That the 2nd respondent was not privy to the performance guarantee or advance payment guarantee issued by the interested party in favor of the 1st respondent. That the 2nd respondent was a peripheral party to the dispute and there was no compromise between the 1st and 2nd respondents as alleged. That the application was an abuse of court process and ought to have been dismissed.

21. The interested party also objected to the application vide the notice of preliminary objection dated 14/2/2023 and grounds of opposition dated 17/2/2023. It was based on grounds that the Court lacked jurisdiction by virtue of the *Arbitration Act*, the application was an abuse of court process and the applicant was forum shopping.

22. The grounds of opposition further contended that the interested party had no arbitral agreement with the applicant thus the application was incompetent. That the application did not meet the threshold for granting a mandatory injunction and there were no special circumstances to warrant granting of the orders sought.

23. The parties filed their respective submissions which this Court has considered. The Court will begin by determining the preliminary objections dated 13/2/2023 and 14/2/2023.

24. A preliminary objection was defined in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 to consist 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. It is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or if the court is called upon to exercise judicial discretion.

25. The present objection was grounded on the fact that this suit is res judicata, sub judice and that the Court lacks jurisdiction to hear the suit.

26. In *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR, the court analysed the necessary ingredients for the doctrine of res judicata to be met and held that: -

> " A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
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> i. The suit or issue raised was directly and substantially in issue in the former suit.
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> ii. That the former suit was between the same party or parties under whom they or any of them claim.
>
> iii. That those parties were litigating under the same title.
>
> iv) That the issue in question was heard and finally determined in the former suit.
>
> iv. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."

27. In the present case, it was contended that the dispute was a subject in HC Misc App No E667 of 2020 filed by the applicant on March 24, /2020 and had already been decided. That the applicant raised similar issues in that matter and sought similar conservatory orders as to those in this suit. That the matter was dismissed vide a ruling delivered on August 25, 2020 thus paving way for the encashment of the advance payment guarantee and performance guarantee the subject of these proceedings.

28. That the issue of encashment of the guarantee was thus conclusively dealt with and the applicant was attempting to re-litigate it.

29. That as pleaded by the applicant, the issues raised in this suit were already the subject of HCC No E808 of 2021 that was pending before Court. That all the issues raised here ought to have been raised in that suit and the applicant was only forum shopping and was abusing the court process.

30. This Court has seen the ruling in HC Misc App No E667 of 2020 March 24, /2020 as regards the applicant's applications dated March 24, /2020 and May 21, 2020. The suit was between the applicant and 1st respondent. The ruling was delivered on August 25, 2020. The application dated May 21, 2020 sought to restrain the encashment of two advance payment guarantees and a performance bond pending the hearing of the arbitration between the parties.

31. Those are the orders being sought in the present proceedings. The Court dismissed that application for reason that they were not made within a suit and were thus defective. It then follows that the issue of encashment was already dealt with and cannot be re-litigated by way of a similar application such as the one before this Court.

32. This Court has also seen the pleadings in HCCC No E808 of 2021 Machiri Limited v Sogea Saton the applicant and 1st respondent herein. The applicant sought Kshs 320,769,027.12 for breach of the said contract. The 1st respondent herein raised a preliminary objection against the entire suit on grounds that Clause 9 of the contract vested the jurisdiction of determining any disputes arising therefrom in arbitration.

33. Vide a ruling delivered on August 2, 2022, the court stayed those proceedings and referred the dispute to arbitration. It then follows that the matter is still pending in Court. From the applicant's own

admission, following that ruling, it instituted arbitral proceedings before the ICC and the proceedings are ongoing.

34. Section 6 of the *Civil Procedure Act* is clear that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. The aim of the rule is to pin-down parties to one litigation and avoid the possibility of contradictory verdicts by different courts in respect of the same issue. It also seeks to prevent multiplicity of proceedings.

35. It is clear that there is a pending suit, HCCC No E808 of 2021 Machiri Limited v Sogea Saton relating to the same issue in the present proceedings and the same was stayed pending arbitration. The applicant ought to have sought interim conservatory orders in that suit pending arbitration, and not by instituting another suit. The court is HCC No E808 of 2021 was already vested with jurisdiction over the said contract and was properly placed to grant such orders.

36. Allowing the applicant to have a third suit regarding the same issues will no doubt amount to an abuse of court process.

37. It matters not that the applicant has now added the 2nd respondent and interested party to this suit. They are not proper parties as they are not parties to the said contract. Moreover, a reading of the ruling dated August 25, 2020 at paragraphs 2 and 3 reveals that the bonds and guarantees were cashed on 9/6/2020.

38. The applicant brought an application dated June 11, 2020 seeking orders that the 1st respondent reverses the transactions encashing the guarantee and performance bonds issued by the interested party and that the 1st respondent's bank accounts held by the interested party herein be frozen or attached. That application was similarly dismissed vide the ruling of August 25, 2020.

39. This not only crystals this Court's finding on res judicata as far as the issue of encashment and freezing orders are concerned, but further demonstrates that the orders sought against the interested party would be in vain as the encashment has already happened.

40. In the circumstances, the preliminary objections are merited. The application dated January 27, 2023 is *res judicata* and *sub judice* and is hereby struck out.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE