



**Isaac's Investments Company Limited v Nyakundi & another (Miscellaneous Cause E447 of 2022) [2023] KEHC 23587 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 23587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CAUSE E447 OF 2022  
DO CHEPKWONY, J  
AUGUST 24, 2023**

**BETWEEN**

**ISAAC'S INVESTMENTS COMPANY LIMITED ..... APPLICANT**

**AND**

**HARON G NYAKUNDI ..... 1<sup>ST</sup> RESPONDENT**

**ARCHIPOINT CONSULTING ARCHITECTS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect to the Notice of Motion application dated 15<sup>th</sup> June, 2022 and therein the Applicant is seeking orders:
  - a. Spent;
  - b. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to stay the ongoing Arbitral Proceeding between the Applicant and the 2<sup>nd</sup> Respondent.
  - c. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to issue an order restraining the 1<sup>st</sup> Respondent from publishing an award in the Arbitration proceedings between the Applicant and 2<sup>nd</sup> Respondent.
  - d. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to compel the 1st Respondent to issue an up to date accurate account of all sums received from the Applicant and 2nd Respondent in respect to the Arbitral Proceedings.



- e. That this Honourable Court be pleased to terminate the mandate of the 1<sup>st</sup> Respondent herein from proceeding with the Arbitral proceedings between the 2<sup>nd</sup> Respondent and the Applicant.
  - f. That this Honourable Court be pleased to issue an order directing the 1<sup>st</sup> Respondent to refund to the Applicant all funds paid in respect to the arbitral proceedings between the Applicant and the 2<sup>nd</sup> Respondent and to refund the Applicant's costs.
  - g. That this Honourable Court be pleased to issue an order directing that the Arbitral proceedings as between the Applicant and the 2<sup>nd</sup> Respondent to commence de novo and be heard by an Arbitrator other than the 1st Respondent herein to be appointed by the Chairman Architectural Association of Kenya.
  - h. That the costs of this Application be borne by the Respondents.
2. In response thereto, the 2<sup>nd</sup> Respondent filed Notice of Preliminary Objection dated 30<sup>th</sup> June, 2022 based on the following grounds:
- a. That the arbitral proceedings abated as per Section 33 of the *Arbitration Act*, 1995 as the final arbitral award was published and the parties notified on 26th August, 2019.
  - b. That the Applicant has no *locus standi* to institute these proceedings to challenge the arbitral award as the statutory timelines contemplated in Sections 34 and 35 of the *Arbitration Act*, 1995 have long lapsed.
  - c. That Sections 13 and 14 of the *Arbitration Act* whereupon the said application is anchored are not applicable as the 1st Respondent is *functus officio* and has been since the publishing of the award in August, 2019.
  - d. That the said application discloses no reasonable cause of action, is incurably defective and bad in law and ought to be dismissed with costs to the respondents.
3. The Notice of Motion and the Notice of Preliminary Objection are both the subject of this Ruling but the court will first consider the Notice of Preliminary Objection which may have the effect of disposing off the entire application if it is found successful.
4. The court in the case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696 defines a preliminary objection thus:

“----a preliminary objection consists 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.



5. According to the 2<sup>nd</sup> Respondent, the arbitral proceedings abated upon the publication of the final award on 26<sup>th</sup> August, 2019 and that the statutory timelines for challenging the final award under Sections 34 and 35 of the [Arbitration Act](#) having lapsed, the Applicant either lacks the locus standi in the case or a reasonable cause of action in the case and the 1<sup>st</sup> Respondent is therefore functus officio.
6. Based on the Preliminary Objection raised herein the main issue that has arisen for determination is whether the final Arbitral award was published. The 2<sup>nd</sup> Respondent has attached the final award delivered on 26<sup>th</sup> August, 2019 which the court has considered and deems as the final award of the arbitral proceedings between the Applicant and 2<sup>nd</sup> Respondent.
7. It is trite law that under Section 32A of the [Arbitration Act](#) an arbitral award is final and binding. The said provision states:-

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”

8. The purpose of the limiting the court’s intervention or arbitral proceedings is to protect the autonomy of the arbitration process and to promote it as a means of quicker dispute settlement. The Supreme Court in the case of [Nyutu Agrovets Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch \(Interested Party\)](#) [2019] eKLR held that:-

“(52) We note in the above context that, the [Arbitration Act](#), was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the [Arbitration Act](#) indicates that, “the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process.” It was also reiterated that the limitation of the extent of the Courts’ interference was to ensure an, “expeditious and efficient way of handling commercial disputes.”

(53) Similarly, the Model Law also advocates for “limiting and clearly defining Court involvement” in arbitration. This reasoning is informed by the fact that “parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.” Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.”

9. Under the [Arbitration Act](#), the general position provided for under Section 10 is that courts should not intervene with matters governed by the [Act](#) except where it is provided to the contrary by the [Act](#). Under the [Act](#), when it comes to an arbitral award, the court has only two available recourses, which is setting it aside under Section 35 of the [Act](#) or lodging an appeal under Section 39 of the [Act](#).



10. In this case, the Applicant has filed the Notice of Motion Application dated 15<sup>th</sup> June, 2022, seeking stay of the arbitral proceedings and an order restraining the 1<sup>st</sup> Respondent from publishing the final award. From the facts adduced by both Respondents, the 1<sup>st</sup> Respondent had already published the final award dated 26<sup>th</sup> August, 2019 and the only recourse available for the Applicant is either to lodge an appeal or file an Application seeking the setting aside of the final award.
11. In view of the aforesaid, this court finds that the Notice of Preliminary Objection has merit since it is raised on a pure point of law and does not require any ascertainment of facts since it is clear that the final award was published. In the resultant, the following orders issues:-
  - a. The Notice of Preliminary Objection is hereby allowed and effect thereof is that the Notice of Motion dated 15<sup>th</sup> June, 2022 is dismissed with costs to the Respondents.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24<sup>TH</sup> DAY OF AUGUST, 2023.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

Mw. Mwachofi holding brief for M/S Imbosa for Applicant

Court Assistant – Nancy-

In the presence of:

Mr. Wasonga holding brief for Mrs. Opiyo for Respondent

Court Assistant – Martin/Sakina

