



**Civicon Limited v Fuji Electric Company Limited & 2 others (Civil Suit E359 of 2022)  
[2023] KEHC 21373 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21373 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E359 OF 2022  
JWW MONG'ARE, J  
AUGUST 15, 2023**

**BETWEEN**

**CIVICON LIMITED ..... PLAINTIFF**

**AND**

**FUJI ELECTRIC COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MERUBEN CORPORATION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**EQUITY BANK(KENYA) LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On June 12, 2023 this court, pursuant to an application filed by the Defendant herein on September 30, 2022, issued orders staying these proceedings and directing the parties to submit the dispute to arbitration, in line with the consortium agreement entered into by the Plaintiff and the 1<sup>st</sup> Defendant, and in accordance with Section 6 of the Arbitration Act. In the said orders, the court vacated the *status quo* orders issued on 24/9/2022 that had restrained the 3<sup>rd</sup> Respondent from honouring the on demand performance bond between the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.
2. Subsequently and by a Notice of Motion dated June 14, 2023 the Applicant/Plaintiff moved the court under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 42 Rule 6(2) and Order 51 Rules 1 & 4 of the Civil Procedure Rules, Section 7 of the Arbitration Act and Rule 2 of the Arbitration Rules seeking the following orders:-
  1. Spent
  2. Spent
  3. Spent



4. Pending the hearing of and determination of the intended appeal by the plaintiff, there be an order restraining the 3<sup>rd</sup> defendant or its agents effecting any payment to the 1<sup>st</sup> defendant with respect to the Performance Security Bond Reference Number EBKL/141/PBG00007218.
  5. In The Alternative To Prayer 3, pending the conclusion of the arbitration proceedings ordered by the court, there be an order restraining the 3<sup>rd</sup> defendant or its agents effecting any payment to the 1<sup>st</sup> defendant with respect to the Performance Security Bond Reference Number EBKL/141/PBG00007218.
  6. Costs of this suit be provided for.
3. The application is supported by the affidavit of Trevor Okoth, the Chief Financial Officer of the Plaintiff. The application is opposed and the 1<sup>st</sup> Respondent has filed a replying affidavit sworn by Fumihiko Yoshiya, its General Manager of Business Development Division.
  4. When the matter came up for hearing ex-parte this court granted prayer 2 basically allowing the Applicant herein to file its appeal and further granted prayer 5 which was an alternate prayer to prayer 3 in the said notice of motion. I have considered carefully the arguments put forth by the parties in support and opposition to these proceedings. The Respondents have raised a preliminary jurisdictional issue that this court is now functus officio and cannot make any further orders, having stayed these proceedings and directed the parties to submit their dispute to arbitration. I will therefore consider this issue first before delving into the substance of the application on merit.
  5. The court must first establish if and whether it has jurisdiction over the matters before it.” whether this Honourable Court has jurisdiction to hear and determine this matter.” Courts and tribunal have been urged to determination the issue of jurisdiction at the outset where a challenge for the same arises in a matter before them. In the locus classica case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR Justice Nyarangi stated as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

6. *Black’s Law Dictionary* 11<sup>th</sup> edition defines the term functus officio as follows:-

“having performed his or her office; an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

In its ruling of June 12, 2023, this court did make a finding that the matters before the court be resolved through arbitration in line with the agreements between the parties. The court also stayed the proceedings herein pending the outcome of the arbitral proceedings as directed. On the June 15, 2023 on an ex-parte application by the plaintiff, the court granted leave to the applicant to appeal the said orders and also at the same time allowed prayer no. 5 which sought the following orders:-

“In The Alternative To Prayer 3, pending the conclusion of the arbitration proceedings ordered by the court, there be an order restraining the 3<sup>rd</sup> Defendant or its agents effecting



any payment to the 1<sup>st</sup> Defendant with respect to the Performance Security Bond Reference Number EBKL/141/PBG00007218”.

7. I have considered carefully the inter partes submission by both sides their pleadings and supporting documents made available to the court by both parties thereto and do agree with the argument by the Respondent that, the court, having stayed the proceedings herein the court by its order of June 12, 2023 the court is now functus officio and cannot make any other or further orders herein until the arbitration process is finalised. I note that the Applicant, instead of referring the dispute to arbitration as directed by the court immediately moved back to this court and sought leave to appeal the said orders of the court. Leave to appeal was granted. The court is however, having carefully evaluated and considered the rival arguments advanced by both sides, persuaded that it now bereft of jurisdiction and cannot make any further orders herein. In the circumstances therefore the ex-parte orders issued on June 15, 2023 in terms of prayer number 5 are hereby vacated and discharged forthwith. Having been granted leave to file an appeal against the ruling of June 12, 2023, the applicant is at liberty to move the appellate court for the said stay orders should they deem them necessary.
8. Costs of this application are awarded to the Respondents to be paid by the Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2023**

.....  
**J. W. W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Bosco holding brief for Ms. Kitoo for the Plaintiff/Applicant.

Ms. Omar holding brief for Lubano for the Respondent.

Sylvia- Court Assistant

