



**The Village @ Daystar Limited v Team Construction Limited (Commercial Case E393 of 2022) [2023] KEHC 24739 (KLR) (Commercial and Tax) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24739 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E393 OF 2022  
JWW MONG'ARE, J  
OCTOBER 30, 2023**

**BETWEEN**

**THE VILLAGE @ DAYSTAR LIMITED ..... APPLICANT**

**AND**

**TEAM CONSTRUCTION LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant on 6<sup>th</sup> day of October 2022 filed an Originating Summons application brought under Sections 17(5) & (6) of the Arbitration Act, 1995; Rule 3(1) & 11 of the Arbitration Rules 1997, Section 63 of the Civil Procedure Act and Order 37 and 40 of the Civil Procedure Rules 2010 seeking the following Orders:-
  1. Spent
  2. Spent
  3. That the Honourable Court and is hereby pleased to issue an order permanently restraining any further proceedings, in respect of the arbitration between Team Constructions Limited and The Village @Daystar Limited arising from an agreement for the construction of a student accommodation building on LR No 20892/195, Lukenya, Machakos County.
  4. That the Honourable Court be and is hereby pleased to issue an order setting aside the Ruling dated 23<sup>rd</sup> August, 2022 on the Respondent's Preliminary Objection dated 20<sup>th</sup> December, 2021, in respect of the arbitration between Team Construction Limited and The Village @Daystar Limited arising from an agreement for the construction of a student accommodation building on LR No 20892/195, Lukenya, Machakos County.
  5. That costs of this suit, be awarded to on full indemnity basis.



2. The originating summons is supported by the affidavit of Dominic Kiarie. In opposing the Originating Summons, the Respondent filed an affidavit sworn by Ramesh Gami on 24<sup>th</sup> October 2022, a director of the Respondent.
3. The dispute arises out of a Building Works Contract entered into by the parties for the construction of a proposed student accommodation at Lukenya, Machakos County, LR No 20892/195. Clause 45 of the agreement stipulated that disputes arising out of the said agreement be resolved through arbitration. A dispute arose and subsequent thereto arbitral proceedings were initiated and the Applicant raised a preliminary objection on the jurisdiction of the Arbitrator, which objection was subsequently dismissed by the Arbitrator. It is that decision rendered on 23<sup>rd</sup> August 2022 that the Applicant seeks to overturn by filing the current application before the court. The Applicant wishes to have the court determine whether the Respondent properly invoked the jurisdiction of the Arbitrator in compliance with clause 45 of the building works contract.
4. The Applicant brings the Originating Summons application seeking to set aside the Arbitral decision issued by the Hon. Arbitrator, Mr. F Kairu Bachia delivered on 23<sup>rd</sup> August 2022 and released to the parties on 7<sup>th</sup> September 2022. The Originating Summons also seek to stay the arbitral proceedings between the parties before the tribunal. The Applicant argues that the said proceedings are premature and offend the doctrine of ripeness and therefore the tribunal is devoid of jurisdiction on that account. It is further contended by the Applicant that the directions issued by the Project Architect to suspend the works did not amount to abandonment of the project and therefore Clause 45 on the arbitration of disputes arising from the Building Works Agreement was not triggered. The Applicant urged the Court to set aside the Arbitral Award and stay any further proceedings before him.
5. The Respondent opposed the application and filed a Preliminary Objection thereto. In the Preliminary Objection the Respondent argues that the Application offends the provisions of Sections 17(6) of the *Arbitration Act* which requires that a party to an arbitration dispute wishing to challenge an award should do so within 30 days after the award was delivered. The Respondent urged the court to be persuaded by the decision of Justice Mary Kassango in the case of *Royal Ngao Holdings v. N. K Brothers* (2020) eKLR where the court held that time did not begin to run when the ruling was released to the parties but when there was a ruling ready for delivery. The Respondent urged the court to find that the ruling in this case was delivered on 23<sup>rd</sup> August 2022 and a prior notice of the same had been given to the parties on 18<sup>th</sup> August 2022 while the application herein was filed before the court on 6<sup>th</sup> October 2022, way out of the 30-day period allowed by law.
6. The Respondent in its response to the issue put forward by the appellant in seeking to stop the arbitration process on the grounds that the jurisdiction of the Tribunal had not been properly triggered as per Clause 45 of the building contract argues that failure by the Applicant to make payments for works done after the Project Architect's issuance of a certificate of payment and an order for demobilization amounted to an abandonment of the project as envisioned by the said Clause 45 of the said Building Works Contract and therefore was a dispute capable of being submitted to arbitration in accordance with the terms of the Building Works Agreement between the parties. The Respondent argues further that the notice of the Project Architect to demobilize and leave the site before the project was completed could not be interpreted otherwise as the same was silent on what amounted to suspension of works or abandonment of works.



## Analysis and Determination.

7. I have carefully considered the pleadings by the parties and the submissions made thereto including the List and Bundle of Authorities provided by the parties. From my analysis of the said documents two issues emerge for determination:- to wit,
- i. Whether the Application was filed outside the set timelines as per section 17(6) of the *Arbitration Act* as raised in the Preliminary Objection by the Respondent.
  - ii. Whether the Arbitrator has jurisdiction to entertain the arbitral proceedings.

8. The Respondent has filed a Preliminary Objection alongside its response to the application urging the court to dismiss the application as filed as having been brought outside the set timelines by the *Arbitration Act*. Section 17(6) of the *Arbitration Act* provides as follows:-

“Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.”

9. It is trite that a preliminary objection must be on a point of law as was held by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F where Law JA (as he then was) had this to say:-

“....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 the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

10. The Respondent in urging the court to find that the application was filed outside the timelines set out by the law and by dint of the operation of the law argued that this court could not sit to consider the application as filed as failure to comply with the statutory timelines set by the *Arbitration Act* under Section 17(6) deprived the court of the requisite jurisdiction to entertain the matter. Having perused the record as made available by the parties to the court, I note that on 18<sup>th</sup> August 2022 the Arbitrator notified the parties that the Award was going to be delivered on 23<sup>rd</sup> August 2023. Subsequently the Arbitrator did deliver the said Award on the 23<sup>rd</sup> August 2023. As Justice Mary Kasango held in the case referred to this court by the Respondent of *Royal Ngao Holdings Limited v. N. K Brothers* (2020) eKLR, time did not begin to run when the ruling was released to the parties but when the ruling was ready for delivery, similarly in the case before me, I find that once parties were notified by the Arbitrator that the ruling would be delivered on 23<sup>rd</sup> August 2023, any party wishing to take any precipitate action as regards the Award should have put in motion any applications and filed them timeously. In the instance case, the Applicant waited until the 6<sup>th</sup> of October to file the present Application which was, in my view, clearly outside the 30-day period set by the *Arbitration Act* under Section 17(6) thereto.



11. I am therefore persuaded that the Preliminary Objection as filed is on a point of law in line with the Court of Appeals decision on Mukisa Biscuit(supra) and a determination of the same will fully determine the issue before the court in the present application. I am satisfied that the said Preliminary Objection is merited and I will allow the same with costs to the Respondent.
12. There were two issues identified earlier on by the court in this matter. Having satisfied myself that the application is filed outside the timelines set by the law and upheld the Preliminary Objection herein, I hold and find that it will not be necessary for the court to determine the second issue as set out in the application in respect of the jurisdiction of the Arbitrator. The upshot of the findings above is that the application before the court is unsuccessful. The same was filed outside of timelines allowed by the law and therefore the court lacks the requisite jurisdiction to consider and determine the same. The same is therefore dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

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

**JUDGE**

In the Presence of:

1. Mr. Miano holding for Mr. Lusi for the Applicant.
2. Ms. Akello for the Respondent.
3. Amos - Court Assistant

