



REPUBLIC OF KENYA



**Tutui v Chebukati & 4 others (Civil Suit 635 of 2015)
[2022] KEHC 254 (KLR) (Commercial and Tax) (25 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 635 OF 2015
A MSHILA, J
MARCH 25, 2022**

BETWEEN

PAMELA MWIKALI TUTUI PLAINTIFF

AND

PATRICK OKOTH OCHWA 1ST DEFENDANT

WANYONYI CHEBUKATI 2ND DEFENDANT

SAMWEL SHADRACK OUMA 3RD DEFENDANT

JOB JUMA WELOBA 4TH DEFENDANT

**ERICK OKUMU OGOLA T/A COOTOW & ASSOCIATES
ADVOCATES 5TH DEFENDANT**

RULING

BACKGROUND

1. The Applicant filed a Notice of Motion dated 23rd March 2020 brought under Sections 3 and 3A of the [Civil Procedure Act](#) and Order 45 Rule 5 of the [Civil Procedure Rules](#) for the following orders;
 - a) The Court to vary, review and/or set aside the Orders issued herein on the 19th July, 2018 with all consequential orders flowing therefrom.
 - b) The Court to lift the order for stay of proceedings issued herein, to recall the matter back to this Court and give directions for the hearing and expeditions disposal of the instant suit on merit or any other appropriate orders in the circumstances.
2. The application was supported by the sworn Affidavit of PAMELA MWIKALI TUTUI who stated that the applicant had been unable to get the Arbitration proceedings re-started after the Court so



ordered. As a result, the applicant has suffered immense prejudice due to the inability, refusal and/or neglect of the appointed Arbitrator to initiate the proceedings.

3. The Respondents responded to the Application by filing Grounds of Opposition dated 18th November 2020 and stated that the Court has no jurisdiction and further that the Plaintiff ought not to have filed the present suit contained in its ruling of the 19th July 2018 (and which has not been appealed from) is binding upon the Plaintiff who cannot now seek a review to have this suit heard when the Court has held it has no jurisdiction and the suit ought not to have been filed in the first place.

APPLICANT'S CASE

4. The Applicant submitted that she has been desirous of having this matter determined at the Arbitration level which process has been frustrated by the appointed Arbitrator over the period of 6 years thereby leaving her with no choice than to move the Court for the variation and/or review of the Orders issued by Hon. Lady Justice Mary Kasango delivered on the 19th of July 2018 to the following effect: -

“In the end therefore, this Court Orders that this suit be and is hereby stayed, pending arbitration proceedings. The defendant is awarded costs of the Notice of Motion dated 14th March, 2016.”

5. The Applicant argued that she has satisfied the following 2 legal requirements for the issuance of the orders sought based on sufficient reason for seeking review and/or variation of previous Court orders.
 - a) The Applicant has established that the last Arbitrator to be agreed upon by the parties Arbitrator one Okong'o Omogeni has not renewed his practicing Certificate under the Arbitration Chapter and as such cannot proceed with arbitration.
 - b) The Plaintiff has also established that the Defendant/Respondent's refusal to agree on an alternative is indeed intended to frustrate her efforts to get this matter that touches on one of the sitting judges and Chairman of the IEBC delayed with no end in sight.
6. In view of the delay in the matter which has left the suit stalled for the last 6 years, the Applicant pleaded with the Court to lift the stay order issued herein and either fast track the hearing of the matter or appoint an independent Arbitrator to under the exercise within reasonable time.

RESPONDENTS' CASE

7. It was the Respondents' submission that the Applicant herein commenced an arbitration process as provided for in Clause 29 of the Partnership Agreement dated 1st June, 2006 between the parties herein and an arbitrator was duly appointed.
8. The Plaintiff having accepted to submit to Arbitration, cannot now seek to be heard before the Court as that amounts to an abuse of the Court process and a waste of the Court's time in any event, the Court lacks jurisdiction in the circumstances and should proceed to dismiss the application with costs to the Defendants.
9. Further, the application has failed to meet the rules set out therein for review of an order or decree. The provisions of Order 45 restrict the grounds for review and lay down the jurisdiction and scope of review limiting the same to the following grounds: - discovery of new and important matter or evidence or; on account of some mistake or error apparent on the face of the record, or

for any other sufficient reason.



10. The Respondent submitted that the Applicant has not indicated nor demonstrated that there's discovery of new or important matter/evidence, or whether there is a necessity to correct an error on the face of the record. The only reason shown by the Applicant is that she has been unable to get the arbitration proceedings re-started after the court so ordered and that as a result she's prejudiced.
11. Section 10 of the Arbitration Act prohibits the Court's intervention in the matters governed by the said Act. It follows that the Court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution.

ISSUES FOR DETERMINATION

12. The Court has considered the Application, the Response and the submissions by each party and the following issues are for determination;
 - a. Whether the Applicant has met the conditions for review of the court orders issued on 19th July 2018;
 - b. Whether the order of stay should be lifted;

ANALYSIS

13. The Applicant herein sought a review of the court orders issued on 19th July 2018 by Lady Justice Kasango. The orders granted stayed the suit pending arbitration proceedings.
14. Order 45, Rule 1(b) of the Civil Procedure Rules is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

- “(1). Any person considering himself aggrieved-
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

15. The aforesaid rule is based on Section 80 of the Civil Procedure Act; Cap. 21 Laws of Kenya which states as follows:

“Any person who considers himself aggrieved-



- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

16. Under the above mentioned Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously.
17. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist: -
- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - (b) There was a mistake or error apparent on the face of the record; or
 - (c) There were other sufficient reasons; and
 - (d) The application must have been made without undue delay.
18. The pertinent issue for determination herein, therefore, is whether the Appellant has established any of the above grounds to warrant an order of review.
19. The Applicant has not made any effort to convince the Court that it has established any of the grounds listed above. There has been no demonstration of discovery of new evidence, mistake apparent on the face of the record or any other sufficient reason.
20. What comes out of the Applicant’s argument is that she opposed the appointment of the arbitrator Okongo Omogeni. It was the Applicant’s averment that;
- “The Applicant has established that the last Arbitrator to be agreed upon by the parties Arbitrator one Okong’o Omogeni has not renewed his practicing Certificate under the Arbitration Chapter and as such cannot proceed with arbitration.”
21. Section 14(2) of the *Arbitration Act* lays down the procedure for challenging the appointment of an arbitrator as follows;
- “(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”
22. In any event the Applicant should have followed the above mentioned procedure as elaborated in the Arbitration Act. Therefore, the Application for review is improper in these circumstances.

Whether the order of stay should be lifted;



23. The second issue for determination is whether the order of stay pending arbitration proceedings should be lifted. It is imperative to note that the parties herein are bound by their terms of agreement in the Partnership Agreement dated 1st June 2006 in which their chosen forum for dispute resolution was arbitration as provided under Clause 29 of the said agreement.

24. It is apparent from the material placed before the court that arbitration was the choice of forum for dispute resolution and the same has been acknowledged by the Applicant. Thus, as the matter stands the Court lacks jurisdiction to hear and determine the matter as was held in *Monique Oraro v AAR Insurance Co. Ltd* [2019] eKLR where the court stated;

“This court from the evidence on record and submissions by respective Counsel of the parties, finds that there is a dispute for hearing and determination in arbitration proceedings. This is the choice of forum in the Arbitration Clause by the parties under the Sales Agency Agreement executed between the parties and therefore enforceable by the parties. The Arbitration Clause ousts the jurisdiction of the Court to hear and determine the matter.”

25. In light of the above, the orders of stay pending arbitration proceedings shall not be lifted.

FINDINGS AND DETERMINATION

26. For those reasons this court makes the following findings and determination;

- (i) The Court finds the application to review the Orders issued herein on the 19th July, 2018 to be devoid of merit and it is hereby dismissed with costs;
- (ii) The matter be and is hereby referred back to arbitration for the hearing and expeditious disposal of the dispute. The Order for stay of this suit pending hearing of the arbitration proceedings to remain in force;
- (iii) Mention on 30.5.2022 for directions or other appropriate orders.
- (iv) The applicant to bear the costs of the application;

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Museve holding brief for Guserwa for the plaintiff

No appearance for the A.B. Patel & Patel Advocates for the proceedings

Lucy-----Court Assistant

