



**Samuel Kigera t/a Rufus Prime Builders & Fabricators v Kenton  
College Trust Limited (Commercial Civil Case E880 of 2021)  
[2022] KEHC 301 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E880 OF 2021**

**DAS MAJANJA, J**

**APRIL 28, 2022**

**BETWEEN**

**SAMUEL KIGERA T/A RUFUS PRIME BUILDERS &  
FABRICATORS ..... APPLICANT**

**AND**

**KENTON COLLEGE TRUST LIMITED ..... RESPONDENT**

**RULING**

**Introduction and Background**

1. By a standard Joint Building Council (JBC) agreement dated 3<sup>rd</sup> December, 2014 (“the Agreement”), the Respondent contracted the Applicant for construction works, supply of materials, installation of electric, plumbing and drainage works, external and building works associated with the Respondent’s senior staff apartments at Kileleshwa, Gichugu Road on Land Reference Number 209/ 3324.
2. A dispute arose between the parties in respect of the Final Account leading to the appointment of Simon Sali Malonza by the Architectural Society of Kenya as the sole arbitrator (“the Arbitrator”). At the commencement of the arbitral proceedings, the Respondent filed an application dated 24<sup>th</sup> March, 2021 seeking, inter alia, to dismiss the Applicant’s claim. In a ruling dated 13<sup>th</sup> August 2021 (“the Ruling”), the Arbitrator found merit in the Respondent’s application and held that the Tribunal had no jurisdiction to hear and determine the Applicant’s claims raised in the Statement of Claim and that it is time barred by virtue of the provisions of clause 45.3 of the Agreement.
3. It is the Ruling that is now subject of the Applicant’s Originating Summons dated 26<sup>th</sup> October 2021 made under section 17(6) of the *Arbitration Act*, Rule 3(1) of the *Arbitration Rules, 1997*, Order 50 Rule 6 of *Civil Procedure Rules*, Articles 165(2)(a) and 165(6) of the *Constitution* and section 3A of



the Civil Procedure Act. The Applicant seeks leave of the court to enlarge time for the application challenging the Ruling and that upon time being enlarged, the application be deemed to have been filed in time. He also seeks an order that the Ruling be set aside and the arbitration proceedings do commence afresh before a different arbitrator to be appointed by the Architectural Society of Kenya. The application is grounded on facts set out on its face together with the supporting affidavit of the Applicant sworn on 26<sup>th</sup> October 2021.

4. The Respondent opposes the application through the replying affidavit sworn by its director, Chris Banks, on 17<sup>th</sup> December 2021 together with the Notices of Preliminary Objection dated 29<sup>th</sup> November 2021 and 1<sup>st</sup> February 2022 respectively. The parties have also filed their respective submissions in support of their arguments.

### **The Application**

5. The Applicant contends that the Arbitrator erred in failing to find and appreciate that though the application under consideration was brought under section 17 of the Arbitration Act, it did not challenge substantive jurisdiction of the Arbitrator and that the rest of the grounds in support of the application related to the merits of the claim. He further contends that the Arbitrator failed to find that the question of whether there is in fact a dispute between the parties on matters agreed to be referred to arbitration purely relates to or is relevant when the court in considering whether the case should be referred to arbitration but is irrelevant when the arbitrator is called upon to deal with the substantive dispute.
6. The Applicant faults the Arbitrator for making a determination on the merits of the claim wrongly dressed and intertwined as issues of jurisdiction and thereby falling in grave error and that he failed to appreciate the correct factual and legal position that the application before him was merely a motion seeking to strike out pleadings on the basis of alleged lack of reasonable cause of action and nothing more.
7. The Applicant states that the Arbitrator erred in holding that he was ruling on a Preliminary Objection yet what was before him was only an application and not a Preliminary Objection. Further that he erred on the issue of time bar as it was neither raised nor canvassed by the parties in their replies and submissions hence the ruling was based on matters that he did not have the benefit of the parties' participation.
8. The Applicant claims that the even though the Ruling is dated 13<sup>th</sup> August 2021, he was unable to secure the copies of the Ruling upon being notified on account of his inability to pay the fees demanded by the Arbitrator before the release of the Award owing to the current dire financial status occasioned by the Covid-19 pandemic. That he was not aware that the Ruling had been secured by his Counsel as he was busy looking for funds to be able to secure the delivery of the award and it was only on 15<sup>th</sup> October 2021 when he managed to receive a copy of the Ruling from his Advocates, discussed the matter and immediately sought to file the present application. The Applicant blames his Advocate on record for inadvertently failing to liaise with him and receive instructions regarding the appeal herein for reasons beyond his ability. He states that the delay was not intentional and was caused by factors beyond his control and that of his Advocates.
9. The Applicant holds that the arbitral tribunal has jurisdiction to hear the dispute as it is the forum best suited to hear and determine the dispute which relates to complex construction matters. The Applicant depones that from the Ruling, the Arbitrator had predetermined the matter without hearing the parties hence it is in the best interest of justice to have a fresh arbitrator try the dispute once the court finds that this is a matter for arbitration.



## The Respondent's Reply

10. The Respondent's preliminary objection is grounded on section 10 of the Arbitration Act which provides that no court shall intervene in matters governed by the Act except as provided therein and that it does not provide for extension of time under section 17(6) of the Arbitration Act. It adds that Order 50 Rule 6 of the Civil Procedure Rules does not apply to matters under the Arbitration Act hence the court does not have jurisdiction to extend statutory timelines. The Respondent further states that the right of appeal under section 17(6) of the Arbitration Act is limited to rulings by a tribunal admitting jurisdiction and the court lacks jurisdiction to apply section 17(6) to the present application.
11. On the issue of receipt of the Ruling, the Respondent contends that the Applicant is not being candid as the Arbitrator notified the parties on 16<sup>th</sup> August 2021 that the Ruling was ready for collection whereupon the Respondent paid the full fees for the Ruling including the Applicant's portion. The Arbitrator then sent a copy of the Ruling to both parties on 13<sup>th</sup> September 2021 which was within the 30-day statutory timeline. The Respondent avers that the Applicant did not have to pay the Arbitrator's fees prior to filing an appeal as he already had a copy of the Ruling. Further that the Applicant has not given any reasonable explanation for filing of the application 60 days out of the statutory period.
12. The Respondent states that the Arbitrator considered the issue of his jurisdiction as required by law and arrived at the correct conclusion. It adds that there must be finality to litigation especially where parties have agreed to strict timelines.

## Analysis and Determination

13. Before I deal with the substance of the application, I propose to first deal with the preliminary issues raised by the Respondent as they would dispose of the matter if successful. The Preliminary Objection can be condensed to a singular question whether the court has jurisdiction to grant leave to an applicant to file an application under section 17(6) of the Arbitration Act out of time. The import of section 17(6) of the Arbitration Act is common to the parties and provides as follows:

17(6) 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.
14. The Applicant condemns the Arbitrator for finding that the application was brought under section 17 of the Arbitration Act yet it did not challenge jurisdiction. In this respect, I think the Applicant blows hot and cold. He specifically invoked section 17 in the application and has indeed in this matter invoked section 17(6). Further, the issue whether a claim is barred either by contract or by statute is an issue of jurisdiction which if successful would mean that the tribunal cannot entertain the claim any further. I therefore hold that this matter is properly before this court as an appeal against the Arbitrator's finding on jurisdiction.
15. The Respondent is correct to state and cite section 10 of the Arbitration Act which provides that 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. This means that the Arbitration Act is a complete code on matters governed by the statute and that the court can only intervene in matters arbitration only in the manner permitted by the Act. This position has been affirmed in a catena of decisions including *Nyutu Agrovet Limited v Airtel Networks Limited NRB CA Civil Appeal (Application) No. 61 of 2012 [2015] eKLR*, *Kamconsult Ltd v Telkom Kenya Ltd and Another NRB CA Civil Appeal No. 92 of 2009 [2016] eKLR* and *Ann Mumbi Hinga v Victoria Njoki*



*Gathara NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR*. In the latter decision, the Court of Appeal observed as follows:

A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: “Except as provided in this Act no court shall intervene in matters governed by this Act”. [Emphasis mine]

16. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SCK Petition No. 12 of 2016 [2019] eKLR* the Supreme Court discussed the place of arbitration and the Arbitration Act as a self-governing process as follows:

[T]he 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.

17. The Applicant admits that its application has been filed out of time contrary to section 17(6) of the Arbitration Act, therefore, the question of when and how he received the Ruling does not arise. The question for consideration by the court is whether it can condone the delay and grant the Applicant the reprieve it seeks. The Arbitration Act does not provide any accommodation in that regard and I can only restate what the court stated in *University of Nairobi v Nyoro Construction Company Limited & another (Arbitration Cause E011 of 2021) [2021] KEHC 380 (KLR)* that an application such as the present one must be made within 30 days of notice of the ruling and that this court does not have the jurisdiction to entertain a late application or extend time for filing such an application.
18. The Applicant relies on the Nyutu Agrovet Case (Supra) to argue that the court has jurisdiction to intervene in cases where an injustice would result, this being such a case. I do not read this case as a warrant to intervene in arbitration matters willy-nilly. What the Apex Court stated is that judicial interference, outside the matters specifically provided for in the Act, should only be tolerated in exceptional instances given the principle of party autonomy and the limits imposed on the court’s intervention by statute.



19. I am of the firm view that section 17(6) of Arbitration Act does not provide for extension of time and the court does not have jurisdiction to extend statutory timelines therein. Further, the Applicant cannot have to any other law to circumvent not only the provisions of the Arbitration Act but also what the parties have consented to by their arbitration agreement.

**Disposition**

20. The upshot of my findings above is that the Applicant's Originating Summons dated 26<sup>th</sup> October 2021 is incompetent and must be struck out. It is now struck out with costs to the Respondent.

21. I assess the costs to be borne by the Applicant at KES. 60,000.00 only.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr Michael Onyango

Mr Mbigi instructed by P & C Kamunya Advocates for the Applicant.

Mr Gachuhi instructed by Kaplan and Stratton Advocates for the Respondent.

