



Virunga Limited & another v Kerai & another (As well as in their capacities as administrators of the Estate of Sapna Kanji Patel) (Miscellaneous Civil Application E600 of 2021) [2022] KEHC 12349 (KLR) (Commercial and Tax) (24 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E600 OF 2021**

EC MWITA, J

JUNE 24, 2022

BETWEEN

VIRUNGA LIMITED 1ST APPLICANT

VIRUNGA APARTMENTS LIMITED 2ND APPLICANT

AND

NAVIN PREMJI KERAI 1ST RESPONDENT

HIRBAI PREMJI KERAI 2ND RESPONDENT

AS WELL AS IN THEIR CAPACITIES AS ADMINISTRATORS OF THE ESTATE OF SAPNA KANJI PATEL

RULING

1. The applicant filed an application dated August 10, 2021, under section 36 of the [Arbitration Act, 1995](#) and rule 6 of the [Arbitration Rules, 1997](#), seeking leave to enforce the arbitrator's interim award published on July 12, 2021 by Calvin Nyachoti, the sole arbitrator. The application is supported by the affidavit sworn on August 13, 2021 by Karsan Harji Raghvani, the applicant's director.
2. The background of this matter leading to the present application stems from a dispute over lease agreements between the parties in respect of properties known as apartment numbers 1A, 1B, 2A, 2B, 3A and 3B and their respective stores erected on LR No 1870/IV/182 Nairobi. Pursuant to clause 4.4 of the lease, parties agreed to submit to arbitration all disputes and questions arising from the leases. A dispute was referred to arbitration and Calvin Nyachoti C Arb was appointed sole arbitrator by the Chartered Institute of Arbitrators.



3. The applicants filed an application dated April 29, 2021 seeking injunctive orders. Upon hearing both parties, the arbitrator issued interim injunction on July 12, 2021, restraining the respondents or their agents from selling, mortgaging, charging, or in any other manner disposing of or wasting the suit properties, pending the hearing and determination of the arbitral proceedings.
4. The applicants' claim is that the respondents through Dunhill Consulting Limited, advertised for sale the units forming the subject matter of the arbitral proceedings and the award of the tribunal. The applicants argue that they have justified apprehension that the suit properties are at risk of being disposed of, thereby likely to defeat the arbitral process since the respondents are indeed in the process of disposing of the suit properties. It is also deposed that there is no stay of execution of the interim award and that the interim award has been duly filed in this court and a copy thereof duly served on the respondents.
5. On their part, the respondents have filed a preliminary objection dated October 12, 2021. The respondents argue that the matter relates to a dispute on leases, an issue reserved for the Environment and Land Court (ELC) and, therefore, this Court has no jurisdiction to entertain this application. The respondents further argue that the application is incompetent, defective, bad in law and is an abuse of the court process and ought to be dismissed.

Applicants' Submissions

6. The applicants have filed written submissions dated January 31, 2022. They submit that under section 36 of the [Arbitration Act](#), this court has jurisdiction to recognize and enforce the arbitral award. The applicants further submit that the court's jurisdiction to hear the application is not limited under section 36 of the [Arbitration Act](#).
7. Drawing comparison between this court and the ELC, the applicants assert that although the two courts are of equal status, status is not the same as jurisdiction. In this regard, the applicants cite the Supreme Court decision in [Republic v Karisa Chengo & 2 others](#) [2017 eKLR. According to the applicants, the respondents have misapprehended the phrase "High Court" in section 36 of the [Arbitration Act](#) to include the ELC.
8. The applicants contend that the jurisdiction over the dispute between the parties lies with the arbitrator and that this court has not been invited to look into the merits of the interim arbitral award that was issued by the arbitrator. The applicants argue that pursuant to section 10 of the [Arbitration Act](#), neither this court nor the ELC has jurisdiction over the merits of the award. They rely on [Nyutu Agrovat Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch \(Interested Party\)](#) [2019] eKLR where the Supreme Court observed that appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself.
9. The applicants urge this court to allow the application since they have complied with the requirements under section 36 the [Arbitration Act](#), namely; existence of an arbitration agreement and a certified copy of the arbitral award which they have attached to the application.
10. Regarding costs, the applicants submit that costs are within the discretion of the court subject to such conditions and limitations as the court may be prescribed. They cite the decision in [Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others](#) (HC EP No 6 of 2013) as well as *Halsbury's Laws of England* 4th Edition (Re-issue), [2010] Vol 10, para 16.



Respondents' Submissions

11. The respondents have filed written submissions dated December 17, 2021. Their main contention is that the ELC is the court with jurisdiction to determine the dispute between the parties concerning leases over the suit properties. To buttress this argument, the respondents rely on article 162 (2) of the [Constitution](#) as well as section 13 of the [Environment and Land Court Act](#).
12. The respondents argue that a purposive interpretation of section 36 of the [Arbitration Act](#) yields to the conclusion that the ELC is the proper court to adopt the interim award. The respondents rely on [Jacob Cheruiyot & another v Joseph Gitau Mwangi & 3 others](#) [2020] eKLR and [United States International University v Attorney General](#) [2012] eKLR.
13. The respondents urge this court to dismiss the application with costs.

Determination

14. Before this court is an application to recognize and enforce an interim award published on July 12, 2021. The respondents have challenged this court's jurisdiction to hear and determine that application. Their contention is that the matter having arisen from a lease agreement, the proper court to hear the application is the ELC. The applicants maintain that this court is the proper forum to hear and determine the application.
15. Parties are in agreement that the dispute arose from a lease agreement which had a clause (clause 4.4) requiring parties to submit any dispute to an arbitrator to be appointed by The Chartered Institute of Arbitrators. When a dispute arose, it was heard by Calvin Nyachoti, the sole arbitrator, who published an interim award in favour of the applicants on July 12, 2021, now the subject of this application.
16. Jurisdiction is critical in any dispute before a court. When raised, the court must pause and interrogate the issue and satisfy itself that it has jurisdiction over the matter before proceeding any further. (See [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR).
17. In [Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar \(Interested Party\)](#) [2019] eKLR, the Supreme Court stated:

[60] It is now settled that a court cannot "arrogate to itself jurisdiction through the craft of interpretation." The Court's jurisdiction is donated by either the [Constitution](#) or Statute or both. And, a court's jurisdiction is not a matter of procedural technicality but one that goes to the root of the Courts' adjudication process. If a court lacks jurisdiction to entertain a matter, it downs its tools.

(See also [Samuel K Macharia & another v Kenya Commercial Bank Limited & 2 others](#) (Application 2 of 2011, [2012] eKLR)
18. The dispute in this matter arose from a lease between the parties dated June 15, 2015, a copy of which is annexed to the application. The lease was prepared under the [Land Act, 2012](#) and [Land Registration Act, 2012](#) and was granted to the applicants for a consideration. The applicants took up the premises for use or occupation.
19. According to the applicants, which is not denied, the sole arbitrator issued an injunction restraining the respondents from dealing with the subject properties in any manner, including selling charging or disposing of the properties. That means the respondents were restrained from using or dispossessing the applicants use of the premises.



20. Article 162(2) of the Constitution confers jurisdiction to the ELC to deal with disputes relating to environment and the use and occupation of, and title to land. This jurisdiction is also restated in section 13 of the ELC Act. More importantly, section 2 of the Land Act defines “court” to mean the ELC established under the Environment and Land Court Act, 2011.

This is the court that is to hear disputes arising from use, occupation, and title to land.

21. The applicants argue that the issue before this court is recognition and enforcement of an arbitral award which has nothing to do with inquiry into the merits or demerits of that award. The applicants further argue that section 36 of the Arbitration Act identifies the High Court as the court to recognize and enforce an arbitral award.
22. The applicants assign a narrow interpretation of the word “High court.” The Act came into existence in 1994, prior to the promulgation of the Constitution, at a time when the High Court was the only court that had jurisdiction over recognition and enforcement of arbitral awards in the country. After promulgation of the Constitution in 2010, jurisdiction was shared with both the ELC and the ELRC. In that case, jurisdiction of this court to recognize adopt and enforce arbitral awards is dependent on the subject matter of the dispute. Where the dispute falls under the jurisdiction of any of the superior courts of equal status, only the court under whose jurisdiction the dispute falls will have jurisdiction to deal with the issue of recognition and enforcement of arbitral awards in such disputes.
23. That in my view, is the proper interpretation of the word, “High Court” in the Arbitration Act. I take this view because section 7 of the sixth schedule to the Constitution (transitional and consequential provisions), requires that

“All law in force immediately before the effective date (August 27, 2010) continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution”.

That means the word High Court in the Arbitration Act should be construed to include the ELC and ELRC where appropriate to make it compliant with the jurisdictional demarcation of the courts of equal status.

24. That being my view of the matter, I agree with the respondents that the issue before court being recognition adaptation and enforcement of interim arbitral award arising from a dispute over leases which falls under the jurisdiction of ELC, that is the court with jurisdiction to deal with the matter.
25. The applicants’ argument that the application has nothing to do with inquiry into the merit or lack of it of the interim award and, therefore, this court has jurisdiction, has no legal basis and cannot be sustained in view of clear constitutional and statutory text on the jurisdictional demarcation.
26. In the circumstances, I find the preliminary objection that this court has no jurisdiction meritorious and I sustain it. The application dated August 10, 2021 is declined and struck out with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2022

E C MWITA

JUDGE

