



Lantech Africa Limited v Geothermal Development Company (Miscellaneous Application E776 of 2020) [2022] KEHC 10761 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E776 OF 2020**

WA OKWANY, J

JUNE 23, 2022

BETWEEN

LANTECH AFRICA LIMITED APPLICANT

AND

GEOTHERMAL DEVELOPMENT COMPANY RESPONDENT

RULING

1. The parties herein entered into an agreement for provision of drilling consultancy services for a period of 2 years. The contract was performed to completion but two years later, in 2017, the Respondent declared a dispute that was subjected to arbitration proceedings and a Final Award rendered.
2. The parties thereafter filed two applications; one for the enforcement of the Award and another, for the setting aside the award. Through a ruling delivered on 16th December 2020, this court allowed the application for enforcement of the award thus precipitating the filing of the application that is the subject of this ruling.

The Application

3. The applicant filed the application dated 15th January 2021 seeking the following orders:-
 1. Spent
 2. Spent
 3. Pending the hearing and determination of the intended Appeal by the Court of Appeal, this Honourable Court be pleased to stay the enforcement of the Arbitration Award dated 12th November 2019 pursuant to the Ruling and Orders of the Honourable Lady Justice Wilfrida Okwany of 16th December 2020.



4. Any other Order or directions that this Honourable Court may deem fit and just for the determination of this Application.
5. The costs of this Application be provided for.
4. The application is supported by the affidavit sworn by Mr. Adrian Topoti and is based on the following grounds:-
 - a. The Applicant and the Respondent entered into an agreement for provision of drilling consultancy services for a period of 2 years (July 1, 2013 - June 30, 2015). The contract was performed to completion. Two years later, in 2017, the Respondent declared a dispute.
 - b. That dispute was subjected to arbitration proceedings in accordance with the Agreement and a Final Award dated 12th November 2019 was made available to the parties on 13th March 2020. In the Award the Respondent was awarded, inter alia, a sum of USD 18,585,866.62 plus interest thereon.
 - c. On 26th March 2020 the Respondent made an application for correction of the Award under section 34 of the *Arbitration Act*. This application was disposed of on 6th April 2020 and a Corrected Final Award was issued to the parties.
 - d. On 12th June 2020, the Applicant filed a Chamber Summons Application seeking to set aside the Arbitration Award. The Respondent opposed the Application and raised a Preliminary Objection dated 23rd June 2020 on grounds that the Application to set aside the Award had been brought out of time.
 - e. In a Ruling delivered in a virtual court session of 16th December 2020, this Honourable Court upheld the Respondent's Preliminary Objection, struck out the Applicant's Application and allowed the application for enforcement of the Arbitration Award.
 - f. The Court allowed an oral application for stay of execution and granted stay of execution for a period of 30 days to enable the Applicant procure a copy of the Ruling and file a formal application for stay and or lodge an appeal at the Court of Appeal.
 - g. On 28th December 2020, the Applicant filed a Notice of Appeal and requested for a copy of the Ruling. The Ruling is yet to be made available to the Applicant leaving the Applicant in a very precarious position as regards its legal options.
 - h. The stay of execution period elapses on 16th January 2020 and the Applicant is reasonably apprehensive that the Respondent shall commence execution after that date.
 - i. Unless this application is heard urgently and the orders sought are granted, the Applicant shall suffer substantial loss.
 - j. It is therefore in the interests of fairness and justice that this Application is considered as a matter of urgency and the orders sought are granted.
 - k. The Applicant is ready and willing to abide by such terms as the Court should deem just and fit.
 - l. The Respondent shall not suffer any prejudice if this Application is allowed.
5. The respondent's Director Mr. Aquinas Wasike swore a replying affidavit in opposition to the application wherein he avers that the arbitral award was final and binding on the parties. He further



states that the application is statute barred and that the court lacks the jurisdiction to entertain the matter by virtue of Section 10 as read with section 32A and 36(1) of the *Arbitration Act* 1995. It is the respondent's case that orders for stay of arbitral awards is not provided for under the *arbitration Act*.

6. On 18th January 2021 the respondent raised a preliminary objection which I will consider first as its outcome will determine the fate of the application.
7. The preliminary objection is premised following grounds:-
 1. That the Application in question is bad in law and is in fact statute -barred and this Honorable Court is currently Without Jurisdiction to entertain the same or to grant stay of execution as Civil Procedure Rules are not available to the Applicant in light of the salient provisions of Sections 10 as read together with 32A and 36(1) of the *Arbitration ACT*, 1995.
 2. That no application for leave to appeal has been made or obtained from the Court of Appeal thus if no competent Appeal can be preferred, no stay can be granted.
 3. That no security for performance of the Award has been offered.
 4. That the Application is otherwise an abuse of the Court process, against the principle of finality and is plainly non-sustainable.
8. The applicant submitted that the court's civil jurisdiction was invoked once the court was invited to set aside or enforce an arbitral award and that the Civil Procedure Rules are applicable where the Arbitration Rules make no provisions. The applicant argued that an application for stay of execution is one of the ways that the court exercises control of the execution process.
9. On its part, the respondent submitted that the provisions of the Civil Procedure Rules are not available to the applicant herein by virtue of Section 10, 32A and 36(1) of the *Arbitration Act*. It was submitted that the jurisdiction of the court is circumscribed by statute under Section 32 A of the *Arbitration Act* that upholds party autonomy and finality of the award. The respondent argued that an attempt to stay enforcement was a measure of recourse against the award.
10. The main issue for determination is whether this court has jurisdiction to hear entertain the application. *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* [1969] EA 696 case sets out the parameters of a preliminary objection as follows: -

“so far as I am aware, 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 per Sir Law J.A.”

Sir Charles Newbold P. in the same case stated that:

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued 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 exercise of judicial discretion.”
11. The respondent's objection is premised on the grounds that the court lacks the jurisdiction to grant stay of execution as the Civil Procedure Rules are not applicable in arbitral matters in light of the provisions of Sections 10 as read together with Section 32A and 36(1) of the *Arbitration Act* 1995. The respondent referred to the decision in *Anne Mumbi Hinga vs Victoria Njoki Gathara* [2009] eKLR where the Court of Appeal held that applications under the civil procedure were not provided for in the *Arbitration Act*.



12. Section 10 of the Act clearly stipulates that:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”
13. Section 32A of the [Arbitration Act](#) on the other hand provides that: -

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act”.
14. The applicant contended that the court invoked its civil jurisdiction when it was invited to set aside the award thus making the Civil Procedure Rules applicable where the arbitration rules have made no provision. According to the applicant, in granting orders for stay, the court would simply be controlling the execution process.
15. It is trite that the court’s jurisdiction stems from [the Constitution](#) or statute. It is clear that the [Arbitration Act](#) does not provide for stay of execution of the arbitral award pending appeal.
16. In *Anne Mumbi Hinga* case (supra) the court stated that:-

“In light of the above, the Superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Act. This includes entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or judgment/decreed arising from the award.”
17. Section 10 of the [Arbitration Act](#) limits the court’s intervention in arbitration matters. This therefore means that this court does not have jurisdiction to intervene in any manner that is not specifically provided by the [Arbitration Act](#) which is a complete code.
18. One of the key objects of Arbitration is to promote or facilitate finality of disputes and once parties choose arbitration as their preferred mode of settlement of their dispute, the court can only intervene as provided by the law.
19. In *Erad Suppliers & General Contracts Limited v National Cereals & Produce Board* [2013] eKLR the court stated that:-

“This finality of the arbitral award is one of the hallmarks of arbitration comes. Its effect is to limit the applicability of the Civil Procedure Rules and intervention by the court in arbitral proceedings. In the circumstances, stay of execution of the decree issued by the court on 9th March 2012 under the Civil Procedure Rules could therefore not have arisen. As Odunga J had rightly pointed out in his ruling of 8th February 2012, the Civil Procedure Rules are only applicable to arbitral proceedings as appropriate and certainly Order 42 of the Civil Procedure Rules is not of them. I therefore wish to reiterate his views that this court does not have jurisdiction to entertain the application that has been filed by the Applicant herein. This is because the court can only intervene in arbitral proceedings as provided for under Sections 6, 7, 12, 14, 15, 16A, 17, 18, 28, 32B,35, 36, 37, 38 and 39 of the Act.”
20. In view of the foregoing, and having noted that there are no provisions in the [Arbitration Act](#) that expressly permit this court to grant the orders sought I find that the Preliminary Objection is merited and I therefore uphold it. Consequently, I find that the instant application is misconceived and I therefore dismiss it out with costs to the respondent.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. A. S. Masika & Ohaya for Lantech Africa Ltd

Mr. B. Angwenyi for Guto Mogere for Geothermal Development

Court Assistant- Sylvia

