



**Kenya Medical Supplies Authority v Ang'awa & another (Civil Suit E822 of 2021)  
[2022] KEHC 10161 (KLR) (Commercial and Tax) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10161 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E822 OF 2021**

**A MSHILA, J**

**JULY 22, 2022**

**BETWEEN**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... APPLICANT**

**AND**

**MARY A. ANG'AWA ..... 1<sup>ST</sup> RESPONDENT**

**TIMELESS COURIER SERVICES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The Applicant/2<sup>nd</sup> Respondent raised a Preliminary Objection dated 29<sup>th</sup> November 2021 against the Originating Summons dated 21<sup>st</sup> September 2021 on the following grounds: -
  - a. The entire Originating Summons is incompetent, procedural, incurable and an abuse of Court process.
  - b. An application seeking Leave to file proceedings out of time cannot be made in the same application as the substantive proceedings.
  - c. The Applicant herein is not one of the parties envisaged to take out Originating Summons under Order 37 Civil Procedure Rules.
  - d. The Civil Procedure Act and Rules do not apply to arbitral proceedings.
  - e. The Applicant prayed that the Originating Summons herein be struck out with costs
2. The Respondent/Applicant filed Grounds of Opposition dated 21<sup>st</sup> March 2022 against the Preliminary Objection on the following grounds;



- a. Article 159(2)(d) of *the Constitution* of Kenya provides that the courts shall exercise its judicial authority without undue regard to procedural technicalities;
  - b. The Applicant is entitled to a fair hearing under Article 50(1) of *the Constitution* of Kenya.
3. The Respondent/Applicant had filed a Notice of Motion dated 21<sup>st</sup> September 2021 supported by the sworn Affidavit of Anne Munene under Section 79G, 95, 1A, 1B and 3A of the *Civil Procedure Act*, Order 50 Rule 4 and Rule 6 of the Civil Procedure Rules for orders that;
- a. The Court to grant leave to which the Applicants may file their Application out of time against the conduct of the Arbitrator and the Ruling delivered on 22<sup>nd</sup> July, 2021 by the 1<sup>st</sup> Respondent.
  - b. Upon grant of leave to make the Application out of time, the Application annexed herein be deemed as duly filed and served.
  - c. The Court to stay the arbitration proceedings pending inter-partes hearing of this Application
  - d. The Court to stay the conduct of the arbitration process pending the hearing and determination of the Application for Termination of the 1<sup>st</sup> Respondent.
  - e. The intended Application has arguable chances of success.
  - f. The costs of and incidental to this Application be costs in the intended Application.

#### **Applicant/2<sup>nd</sup> Respondent's Case**

4. The Applicant/2<sup>nd</sup> Respondent stated that the Originating Summons filed by the Respondent/Applicant under various provisions of the *Arbitration Act* and Order 36 of the Civil Procedure Rules seeks to have the 1<sup>st</sup> Respondent removed from acting as an arbitrator while the second Application, a Notice of Motion, seeks leave to file the Originating Summons (already filed) out of time.
5. The Notice of Motion seeks to file matters raised in the Originating Summons out of time and premised on the Originating Summons which does not exist and is therefore a nullity thus the Court lacks jurisdiction in the matter.
6. The Applicant submitted that due to the nature of arbitration, the *Arbitration Act* has been modeled in such a way that it minimizes circumstances in which a court of law can intervene in the process and also restricts the timelines in which, where intervention is allowed, such interventions can be made. The restrictive nature is premised on Section 10 of the *Arbitration Act*.
7. It was also the Applicant's position that there is no provision under the *Arbitration Act* under which the Court can claim to have jurisdiction to extend time and such an application is therefore incompetent. The grounds for challenging the appointment of an arbitrator is provided for in Section 13(3) of the *Arbitration Act*. Section 14 allows an application to the High Court with the condition being that it must be done within 30 days. Any application made after that is misconceived and bad in law and procedurally incurable. One cannot bring in the argument of being denied access to justice.

#### **Respondent/Applicant's Case**

8. The Respondent/Applicant submitted on three main issues namely; - Whether the Court should dismiss the Suit on the basis of mere technicalities rather than the Substance of the Application; Whether the Respondent/Applicant's right to fair hearing have been infringed upon; and Who should bear the costs if any;



9. On whether the Court should dismiss the Suit on the basis of mere technicalities rather than the Substance of the Application; the Respondent/Applicant submitted that the Application dated 21<sup>st</sup> September 2021 seeks leave by the Respondent/Applicant to file suit out of time by way of Originating Summons. The said Application should be dismissed on the grounds that the Respondent/Applicant failed to approach the court using the correctly laid down procedures.
10. The Respondent/Applicant's approach to seek leave to file the Originating Summons out of time by way of Notice of Motion and filing the Originating Summons before leave was granted was an error and should be excused as the "undue technicality" does not go to the root or substance of the dispute before the Court. The Respondent/Applicant humbly submits that the court overlooks the undue technicality;
11. The term 'technicality' was defined by the Court in the case of *Kenya Ports Authority v Kenya Power & Lighting Co. Limited* [2012] eKLR by combining the meaning of the words Technical & Technical Errors:
 

“Combining the meanings of these words, "procedural technicalities" may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. ’
12. The Respondent/Applicant opined that Article 50(1) read together with Article 159 of *the Constitution*. Article 50(1) provides the protection of all parties' rights and each right ought to be protected but not at the expense of another party.
13. It was the Respondent/Applicant's contention that in instances even where the court thought that the application before it had not been brought before them in the appropriate procedure, the court would in the interests of justice deem it as amended and bring it under the more appropriate procedure and deal with it as such hence upholding the right to a fair hearing without undue regard to procedural technicalities.
14. On the issue of who should bear the costs if any; The Respondent/Applicant submitted that the 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 29<sup>th</sup> November, 2021 only aims to delay the cause of justice and the same should be dismissed with costs.

### **Issues for Determination**

15. After considering the Application and the written submissions by the respective parties, the court frames only one issue for determination;
  - a. Whether the Preliminary Objection is merited?

### **Analysis**

16. On 21<sup>st</sup> September 2021, the Applicant filed a Notice of Motion seeking inter-alia that the Respondent/Applicant be granted Leave to file Originating Summons out of time which necessitated the filing of the Notice of Preliminary Objection herein.
17. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Second, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points



of law. As was stated in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* [1969] E.A 696 AT Pg. 700-

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”

18. It is not in dispute that the Respondent/Applicant seeks to file the Application dated 21<sup>st</sup> September 2021 out of time against the conduct of the Arbitrator.
19. As rightly pointed out by the 2<sup>nd</sup> Respondent/Applicant herein, the general approach on the role and intervention of the court in arbitration in Kenya is provided in Section 10 of the *Arbitration Act* which stipulates that except as provided in the Act, no court shall intervene in matters governed by the Act.
20. It was the 2<sup>nd</sup> Respondent/Applicant's case that there is no provision under the *Arbitration Act* under which the Court can claim to have jurisdiction to extend time and such an application is therefore incompetent. The grounds for challenging the appointment of an arbitrator is provided for in Section 13(3) of the *Arbitration Act*. Section 14 allows an application to the High Court with the condition being that it must be done within 30 days. Sections 13(3) and 14 of the *Arbitration Act* provide as follows; -
  13. Grounds for challenge
    - (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.
    - (4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.
  14. Challenge procedure
    - (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
    - (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.
    - (3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.
21. It is imperative to note the wording of Section 14 (3), apart from giving the High Court the jurisdiction to determine the matter; the section is couched in discretionary terms using the word 'may'. The



provision does not use the word 'shall' which would have made it mandatory for a party to challenge the matter in the High Court within 30 days. It is the court's view therefore that it has jurisdiction under the above provision to determine the Respondent/Applicant's Application.

22. Secondly, a Preliminary Objection must first, raise a point of law based on ascertained facts and not on evidence as was held in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* (supra)

“In the words of Sir Charles Newbold P, at page 701,

...A preliminary objection is in the nature of what used to be a demurrer. 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 the exercise of judicial discretion.”

23. The 2<sup>nd</sup> Respondent/Applicant herein has raised the Preliminary Objection against the Originating Summons on two (2) limbs. The first relates to the title of the Originating Summons in that it was brought under the provisions of the *Civil Procedure Act* and the Civil Procedure Rules; whereas it ought to have been brought under the correct provisions of the *Arbitration Act*; there are legions of authorities that speak to substance as opposed to technicalities in instances where applications had not been brought before the court in the appropriate procedure. In the interests of justice courts have deemed such applications as amended to bring it under the more appropriate procedure and have dealt with them, hence upholding the right to a fair hearing without undue regard to procedural technicalities.
24. The second limb deals with the thirty (30) day timeline for filing of the application to challenge the matter in the High Court; this issue raised requires evidence on dates and documentation that needs to be verified and to be proved.
25. Based on the above-mentioned reasons, this court is satisfied that the Preliminary Objection as drawn does not meet the desired threshold of a Preliminary Objection as it does not raise pure points of law.

### **Findings and Determination**

26. In the light of the forgoing this court makes the following findings and determinations.
- i. The Preliminary Objection is found lacking in merit and it is hereby overruled;
  - ii. Each party to bear its own costs;
  - iii. Mention on 26/10/2022 for Directions on the Originating Summons.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2022.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Miss Ochieng holding brief for 2<sup>nd</sup> Respondent/Applicant

No appearance for the Respondent

Lucy-----Court Assistant

