Maseno University v Eldo Rotsa Construction Limited & 2 others (Miscellaneous Civil Application E138 of 2021) [2022] KEHC 12727 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12727 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CIVIL APPLICATION E138 OF 2021

FA OCHIENG, J

AUGUST 26, 2022

BETWEEN

MASENO UNIVERSITY ..... APPLICANT

AND

ELDO ROTSA CONSTRUCTION LIMITED ..... 1ST RESPONDENT

ARCHITECTURAL ASSOCIATION OF KENYA ..... 2ND RESPONDENT

ARCH. JULIUS MUTHUI ..... 3RD RESPONDENT

RULING

1. This ruling is on the preliminary objection which was filed by the 1st respondent. The said objection raises the following 3 issues;

> " a) That the notice of motion is incompetent,irregular and improperly before the court,the same not being predicated in any way on a suit contrary to rules 1, 2, 3 and 11 of the *Arbitration Rules, 1997* and Orders 3 (1) and 37 of the *Civil Procedure Rules,2010*.
>
> b) That the order of stay of proceedings sought by the applicant are contrary to the express provisions of sections 14 (8) and 17 (8) of the *Arbitration Act*, 1995 hence this court lacks the jurisdiction to grant the same.
>
> c) Thatwhereas the application is couched as though it is one for the challenge of an arbitrator, under sections 13, 14 and 15 of the *arbitration act,* cap 49, this court lacks jurisdiction to entertain such an application which should in the first instance be made before the arbitrator, Arch Julius MF Mutunga, the 3rd respondent herein at the preliminary meeting that was slated on October 19, 2021, and as such this suit is premature and an abuse of the court process, on

the grounds that the applicant's notice of motion and the orders sought are premature and mischievous."

2. Pursuant to the provisions of section 17 (6) of the *Arbitration Act*;

> "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."

3. The High Court does not have original jurisdiction to determine the question about whether or not an arbitral tribunal had jurisdiction. That question must first be raised before the arbitral tribunal.

4. In accordance with the provisions of section 17 (7) of the *Arbitration Act*, the High Court only has jurisdiction when it is moved by a party who is aggrieved with the ruling of the arbitral tribunal. And, in that regard, the decision of the High Court is final.

5. The Maseno Universtiy is well aware of that legal position. I say so because the university quoted the following words from the decision in *Chania Gardens Limited v Gilbi Construction Company Limited & Another* Hc Misc Cause No 482 of 2014;

> "Undoubtedly, the challenge has to be decided first by the arbitrator before the party challenging the arbitrator applies to the High Court for removal of the arbitrator."

6. Although the university has told the court that it had raised the issue of jurisdiction, before the arbitral tribunal, I find that the quest for;

> "..... an explanation on the legality of the appointment of the arbitrator ...." did not constitute a challenge about the jurisdiction of the arbitral tribunal.

7. More significantly, I find that the arbitral tribunal had not rendered a ruling on the issue of jurisdiction, which would then have been the basis for moving the High Court.

8. Accordingly, I uphold the preliminary objection, and do hereby strike out the notice of motion dated October 18, 2021.

9. Costs of the said application and also the costs of the preliminary objection are awarded to the 1st respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF AUGUST 2022

FRED A. OCHIENG

JUDGE