



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E005 OF 2021

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT

AND OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF

ARTICLES 1,3,6,10,19,21,22,23,27,28,32,40,42,43,47,48,50,60,61,64,

65,67,159,161,165,258AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION ACT,2012

AND

IN THE MATTER OF LAND ACT,2012

AND

IN THE MATER OF THE CONTRAVENTION AND/OR APPREHENDED

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

LEGEND CONTRSRUCTION COMPANY LIMITED.....PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

ENG. ALUOCH F. ODHIAMBO.....2ND RESPONDENT

RULING

BRIEF FACTS

The matter for determination is the **Notice of Preliminary Objection** dated **17th September 2021**, brought by the 1st Respondent on grounds that;

1. That the Petition is an affront to section 35 of the Arbitration Act,1995.
2. That the Petition seeks to circumvent section 35 of the Arbitration Act,1995 as it does not meet the threshold set out in the aforesaid section to warrant the setting aside of an arbitral award.
3. That the Petition seeks to offend section 35 as the Petition has been filed out of time contrary to section 35 (3) of the Arbitration Act, 1995.
4. That the Petitioner's entire suit is fatally defective and an abuse of the court process.

The Notice of Preliminary Objection was canvassed by way of written submissions as directed by the court on 8th February 2022.

1st Respondent's Submissions

The 1st Respondent filed its submissions on 18th February 2022 where a number of issues were raised for determination which include the following:

- i. Whether the Preliminary Objection is proper.

It was the 1st Respondent's submission that a Preliminary Objection raises pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Reliance was placed in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 986**, and **Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCC No. 22 of 1999**.

That in determining Preliminary Objection, the court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law as was held in **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004**. The 1st Respondent further stated that before the court embarks on determining the merit of the Notices of Preliminary Objection, it will first determine whether what have been raised by the parties satisfy the ingredients of a Preliminary Objection as was held in **Oraro vs Mbaja (2005) 1KLR 141**.

It was submitted that the instant Preliminary Objection meets the threshold of being held as one as it raises a pure point of law, principally jurisdiction of the court and the competence of the Petition in light of section 35 of the Arbitration Act,1995.

- ii. (a) Whether the Environment and Land Court has jurisdiction to hear and determine the instant Application.

The 1st Respondent relied on the provisions of section 13 of the Environment and Land Court Act which provides for both original and appellate jurisdiction to hear and determine disputes and stated that the instant Petition does not concern any matter in line with the provisions of section 13. That the instant Petition entails issues commercial contract for the construction and maintenance of a national road and the substratum of the Petition relates to alleged violation of rights in arbitration proceedings which is a contract for maintenance of a road from Lolgorian to Kehancha (13) vide contract number KeNHA/RD/M/1279/2013/IPC/01. It was submitted that the contract in question concerns none of the grounds contemplated in section 13 of the Environment and Land Court Act.

That even where a Petition raises constitutional law questions, the same cannot be entertained by this court unless the underlying transaction is premised on issues relating to environmental planning and protection, climate issues, land use and planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land or any other dispute relating to environment and land. Therefore, the Petition does not raise any transaction contemplated under the jurisdiction of this court and this court lacks jurisdiction to hear and determine the Petition.

- (b) Whether the same can be transferred to a court of appropriate jurisdiction.

It was submitted that the decision by the Petitioner to file the suit in this court renders the same a nullity since this court lacks jurisdiction to hear and determine this suit, it lacks the power to transfer the same to a court of competent jurisdiction. That where a suit is filed in a court without jurisdiction, it is a nullity as was held in the case of **Joseph Muthee Kamau & Another vs David Mwangi Gichure & Another (2013) e KLR**, **Albert Chaurembo Muba & 7 others vs Maurice Munyao & 148 Others (2019) e KLR**, **Phoenix of E.A. Assurance Company Limited vs M. Thiga t/a Newspaper Service (2019) e KLR** and **ELC Case No. 40 of 2020 Thomas Mutuku Kasue vs Housing Finance Company Ltd and Legacy Auctioneers**.

The 1st Respondent stated that an error in filing a suit in an incompetent jurisdiction is fatal to the extent that the court will not concern itself with the business of agreeing to transfer the suit as was held in the case of **Boniface Waweru Mbiyu vs Mary Njeri & Another**. It was submitted that Petition in its entirety is fatally defective, incompetent and cannot be salvaged by way of transfer to a court of competent jurisdiction and should be dismissed with costs.

iii. Whether the Petition is an affront to section 35 of the Arbitration Act,1995.

It was stated that the Petition seeks to challenge the Final Award dated 19th October 2017 which ought to have been brought in accordance with section 35 of the Arbitration Act,1995. That the procedure for challenging an arbitral award is laid down under section 35 of the Arbitration Act, 1995.The 1st Respondent therefore submitted that the Petition has been brought in order to circumvent the mandatory provisions of the Arbitration Act. Reliance was placed in the case of **Gabriel Mutava & 2 Others vs Managing Director Kenya Ports Authority & Another (2016) e KLR and Jackson Kabingu Gichohi vs Attorney General (2020) eKLR.**

It was the 1st Respondent's prayer that this court lacks jurisdiction to hear the Petition and should be dismissed with costs.

I have perused the file and do find that the Petitioner and the 2nd Respondent failed to their submissions as directed by the court.

Analysis and Determination

The 1st Respondent herein filed this Notice of Preliminary Objection on grounds that the Petition is an affront to section 35 of the Arbitration Act,1995, it seeks to circumvent section 35 of the Act as it does not meet the threshold set out in the aforesaid section to warrant the setting aside of an arbitral award and that the Petition has been filed out of time contrary to section 35 (3) of the Act.

In the case of **Hassan Ali Joho & Another V Suleiman Said Shahbal & 2 Others, Petition No. 10 OF 2013, [2014] eKLR** the Court held thus:

“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. 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 ... 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’.”

This court agrees with the submission of the 1st Respondent that the Preliminary Objection raises pure point of law. On the question of whether this court has jurisdiction to hear and determine the Petition;Jurisdiction has been defined in **Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350** as **“...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”**

The Environment and Land Court is established under Article 162 (2) of the Constitution of Kenya, 2010 and section 4 and 13 of the Environment and Land Court Act, 2011 which provides as follows:

Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

In the case of **S. K. Macharia, & another v. Kenya Commercial Bank limited & 2 others [2012] eKLR** it was held as follows:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise

jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

I have perused the Petition and do find that the Petition relates to a commercial contract where the Petitioner was contracted to carry out a road maintenance from Lolgorian to Kehancha (C13) vide contract number KeNHA/RD/M/1279/2013. A dispute arose between the parties and according to the contract, the same was to be resolved through arbitration.

The matter was referred to Arbitration and a Final Award was issued by the Arbitral Tribunal. The Petitioner herein being dissatisfied with the Award, filed this instant Petition to challenge the award where the same is brought as a constitutional Petition contrary to the provisions of the Arbitration Act. This court finds that it lacks jurisdiction to hear and entertain the Petition as it does not meet the threshold of section 13 of the Environment and Land Court Act as the Petition does not touch on matters related to land. I have also noted that the Petition has raised constitutional law questions which cannot be heard and determined by this court as the questions raised are not within the scope of section 13 of the Environment and Land Court Act. I agree with the submissions of the 1st Respondent together with the authorities therein that this court lacks powers to transfer the Petition to a court of competent jurisdiction.

On the issue of whether the Petition is an affront to section 35 of the Arbitration Act, 1995, the same provides as follows;

35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or (ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

The Petition seeks to challenge the Final Award of the Arbitral Tribunal. The Petitioner has alleged that the Award was not released to them until after 3 months when the time of Appeal had expired and that the delay was intentional. I have looked at the Award and do confirm that the same was issued on 19th October 2017. The Petitioner has failed to disclose the date when the Award was communicated to them and I am of the view that this Petition is fatally defective in the sense that it has been brought 3 years after the Award was issued which is contrary to

section 35 (3) of the Arbitration.

In the case of *Ezra Odondi Opar V Insurance Company of East Africa Limited Ksc Ca Civil Appeal No. 98 Of 2016 [2020] eKLR*, it was observed that:

“The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another*, SC Petition No. 12 of 2015 “the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes” “in a manner that is expeditious, efficient...” while also observing that Section 35 of the Act, “also provides the time limit within which the application for setting aside should be made.”

This court is of the view that the Arbitration Act, 1995 does not provide for extension of time to file an Application for setting aside an Arbitral Award and therefore the 3 months’ period is sufficient for a party to file an Application to set aside an Arbitral Award. It is the finding of this court that this court lacks jurisdiction to hear and determine the Petition as the Petition is an affront to section 35 of the Arbitration Act. In the upshot, the Petition dated 21st January 2021 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED ON 31ST MARCH 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.