Premji & another v Virunga Limited & another (Miscellaneous Civil Application E237 of 2021) [2022] KEELC 3342 (KLR) (23 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3342 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION E237 OF 2021

EK WABWOTO, J

MAY 23, 2022

BETWEEN

NAVIN KERAI PREMJI ..... 1ST APPLICANT

HIRBAI PREMJI KERAI ..... 2ND APPLICANT

AND

VIRUNGA LIMITED ..... 1ST RESPONDENT

VIRUNGA APARTMENTS MANAGEMENT LIMITED ..... 2ND RESPONDENT

RULING

1. The Applicants, filed this originating summons dated 17th December 2021, brought under Sections 28 of the *Arbitration Act*, Act No.4 of 1995. The originating summons sought a determination on the following questions: -

    i. Whether the Director/Shareholder of the 1st Respondent ought to present evidence clarifying his intentions behind the creation of the leases in question.

    ii. Whether summons ought to issue against the Director and majority shareholder of the 1st Respondent and Lalji Ragwani Advocate as witnessed in the matter of Arbitration between the parties herein?

    iii. Who is entitled to costs of this summons?

    iv. Pending the hearing and determination of the above issues the Honorable court be pleased to issue an order of stay of all further proceedings before the Arbitrator.

2. The Originating summons was supported by the 1st Applicants affidavit sworn on 17th December 2021 and also by the other grounds on the face of the application.

3. The Application was opposed. In Response, the Respondents filed a Notice of preliminary objection dated 26th January 2022 and also a Replying Affidavit sworn by Karsan Harji Ragwani on the same date.

4. When the matter came up for directions on 27th January 2022 and 28th February 2022, the court directed parties to file their written submissions for highlighting on 24th March 2022. The Applicants filed their written submissions dated 9th February 2022 through the law firm of Onyony & Co. Advocates while the Respondents submissions were dated 31st January 2022 and filed by Dr. Mutubwa Law Advocates.

5. During the hearing of the Application, counsel for the Applicants relied on their written submissions and affidavit filed in support of the Application. Counsel outlined five issues for consideration.

    a. Whether the doctrine of stare decision apply by the ruling of Environment & Land Court ELC Misc. Application No. 42 of 2020 and ELC suit No. 667 of 2017.

    b. Whether the Arbitral Tribunal inconsistency in application of the law has flawed the Arbitral process.

    c. Whether the Arbitral erred and or is biased in determining relevance of witnesses to proceedings.

    d. The question of issuance of summons for witness in Arbitral Tribunal.

    e. Costs of the application.

6. On whether or not the of doctrine of stare decision apply by the ruling of Environment & Land Court ELC Misc. Application No. 42 of 2020 and ELC suit No. 667 of 2017. Counsel submitted that in the rulings delivered on 28th July 2018 and 15th February 2021 the court had found it prudent to summon Mr. Kanji Kunverji Patel and Advocate Lalji Raghwani to give clarity as per their participation to the said proceedings and also that it was important for the arbitrator to consider all circumstances surrounding the executors of the leases of the apartments in order to determine the dispute between the parties so to arrive at a fair and just determination of the dispute of ownership of the apartments .

7. Counsel emphasized that the Respondents had failed to demonstrate what injury they would suffer in summoning of Mr. Kanji Kunverji Patel, majority shareholder and Director of the 1st and Respondent and Mr. Lalji Raghwani, the executing advocate. It was submitted that pronouncement by the ELC court was binding on the Arbitral Tribunal.

8. On whether the Arbitral Tribunal inconsistency application of the law has flawed the Arbitral process, It was submitted that in the Tribunal Ruling dated 24th November 2021, the Tribunal locked its independence by failing to appreciate that within the confines of assistance by the High Court in taking evidence it premised to reason that assistance sought is only for matters which evidence is hard to obtain.

9. On the issuance of summons for witnesses in Arbitral proceedings, counsel referred to section 125 of the *Evidence Act* Cap 80 and submitted that by dint of that provision, the witnesses cannot be excused from the Tribunal proceedings.

10. During the highlighting of the written submissions filed by the parties learned counsel Ms. Machio argued that the application should be allowed since they had demonstrated the role played by each witness in the leases and further that they had laid down a basis as to why their testimony was necessary before the Tribunal.

11. Leaned counsel Mr. Onyony also submitted that the supreme court in the *Synergy Holdings v Cape Holdings Limited* (2019) eKLR had stated that the court may interfere with the Arbitration proceedings so as to prevent an injustice from occurring. Counsel also argued that forestalling of calling of those witnesses was a denial of the right to a fair hearing and that the court has the right to interfere where the candid rule of justice is about to be denied.

12. In their written submissions dated 31st January 2022, Learned Counsel for the Respondents Dr. Mutubwa outlined two issues for consideration. These were; whether this court has the jurisdiction to hear the suit herein and whether the matter in the suit herein is res judicata.

13. On whether this court has jurisdiction to hear the suit, counsel argued that section 28 of the *Arbitration Act* refers to the High Court and not the Environment & Land Court.

14. It was also submitted that the Arbitrator having dismissed the application, then the necessary approval required under section 28 of the Act had not been granted and hence the application had fallen short of the crucial element of the required approval.

15. On whether the matter was res judicata, counsel argued that the Tribunal had pronounced itself on the question of summoning the witness and as such the application having sought for the same orders as were sought at the Tribunal was res judicata.

16. I have considered the application, the affidavits filed in support and opposition, the written and oral submissions made. In my view, it is not desirable at this stage for the court to go into the merits of the dispute pending before the Tribunal. I will however begin by addressing a preliminary issue on whether this court has jurisdiction to hear the application filed herein. The broad jurisdiction of the Environment and Land Court is donated by Article 162 of *the Constitution* which establishes the three tiers of Kenya's Superior Courts. It provides thus:

    1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

    2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

        a) Employment and labour relations; and

        b) The environment and the use and occupation of, and title to, land.

    3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

    4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

17. In the discharge of the mandatory obligation placed on it by *the Constitution*, Parliament enacted the *Environment and Land Court Act* and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

    13 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 interest 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 health 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.

5. Deleted by Act No. 12 of 2012.

6. Deleted by Act No. 12 of 2012.

7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

   a. interim or permanent preservation orders including injunctions;

   b. prerogative orders;

   c. award of damages;

   d. compensation;

   e. specific performance;

   f. restitution; or

   g. declaration; or

   h. costs

18. It is to be noted that under Article 165(5), *the Constitution* expressly bars the High Court against exercising jurisdiction in respect of matters reserved for the Supreme Court or falling within the jurisdiction of the third tier superior courts established under Article 162(2) of *the Constitution*. Article 165(5) of *the Constitution* provides thus

> " The High Court shall not have jurisdiction in respect of matters
>
> a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution, or

b) falling within the jurisdiction of the courts contemplated in Article 162(2)"

19. A plain reading of the above constitutional and statutory framework on the jurisdiction of the Environment and Land Court reveals that the Environment and Land Court which is the court contemplated under Article 162(2)(b) of *the Constitution*, has a broad constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land. *The Constitution* donated powers to Parliament to legislate a legal framework elaborating on that broad constitutional framework. In so doing, Parliament at Section 13(7) of the *Environment and Land Court Act* empowered the Court to make any order or grant any relief as the Court deems fit and just.

20. It is not lost to me that, in its day to day adjudication of disputes relating to environment and the use, occupation and title to land, the Court is often confronted with parties raising objections towards its jurisdiction on the basis of an existing provision that simply refers to "High Court' and not "Environment and Land court". The *Arbitration Act* of 1995 was enacted before the 2010 Constitution when we only had the High Court.Paragraph 7 of the Sixth Schedule of *the Constitution* of Kenya 2010, in addressing such circumstances stipulates as follows:-

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. (2) If, with respect to any particular matter- (a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and (b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

21. The Environment and Land Court is a superior court and has the same status as the High Court. It is among equals when it stands with the High Court with all its divisions. It is imbued with all the powers of the High Court. As the High Court is expressly excluded by *the Constitution* to deal with matters under Article 162, there is a constitutional imperative thrust upon this Court to deal with all aspects of disputes that relate to Environment, Use and Occupation and title to Land wherever they arise within Kenya. To hold otherwise would be anathemic to *the Constitution* and would abridge the rights of parties to access justice. It would run counter to the principles set out in Article 159 (1) of *the Constitution* am therefore satisfied beyond doubt that under Section 13 of the *Environment and Land Court Act*, this court has jurisdiction to hear the Application filed herein. That jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.

22. After considering the issue of jurisdiction, the next issue that presents itself for this court's determination, is whether the Applicants are entitled to reliefs sought and specifically whether this court should intervene as stipulated under section 28 of the *Arbitration Act*. Section 28 of the Act stipulates as follows:

" The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence."

23. In understanding what a Court ought to consider on receipt of a request under section 28, I find great assistance from a text "Analytical Commentary on draft text of a Model Law on International Commercial Arbitration A/CN.9/264". In which on Article 27 (our Section 28) it reads:-

" Article 27 calls upon the courts to render assistance in taking evidence, in particular by compelling appearance of a witness, production of a document or access to a property for

inspection. Such assistance, although not frequently sought in practice and at times sought for dilatory purposes, is considered useful in view of the fact that the arbitral tribunal, under the model law and most existing laws, does not itself possess powers of compulsion..."

24. The court may, within its competence and according to its rules on taking evidence, execute the request in either of the following ways: "It may take the evidence itself (e.g. hear the witness, obtain the document or access to property and, unless the arbitrators and parties were present, communicate the results to the arbitral tribunal), or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion."

25. The words of section 28 seem wide enough to empower the Court to take evidence on behalf of the Tribunal and thereafter pass it on to the Arbitral Tribunal. Indeed, the Analytical commentary directly adverts to this. However, it seems that the Arbitral process may be better served if the Court, once satisfied that the request is merited, simply exerts its compulsive power by making an order that the evidence be presented directly to the Arbitral Tribunal. This is because, ultimately, it is the Tribunal that is the master of the facts and determines the matter and it is imperative that it receives and appreciates the evidence at first hand. The Tribunal may in the process make interventions to seek clarification or may be called upon to rule on the relevance or otherwise of evidence.

26. As is clear from the provisions, the Court will only consider a request after the Arbitral Tribunal has given approval for such request. The necessity for this green light from the Tribunal seems rather obvious. It is the Tribunal which hears and determines the matter and it is the Tribunal which should determine whether the evidence sought to be led or produced is necessary. It seems desirable that before a request is approved by Arbitral Tribunal, it should take full arguments on the matter and give a ruling as to why it approves the request. That said, as long as it is clear that an Arbitral Tribunal has approved the request, then the Court should consider it. This discussion has a direct bearing on the circumscribed role of the High Court in a section 28 request.

27. In the case of *Squishy Drinks Limited v Kevian Kenya Limited* (2021) eKLR, the Court held that section 28 of the *Arbitration Act*, 1995 only permits an arbitral tribunal to make a request to the High Court for assistance in taking evidence. As such, a party to an arbitration may only make the said request with the approval of the arbitral tribunal. It is not for the Court to determine whether or not the evidence sought is relevant. That prerogative, it needs to be emphasized, belongs to the Arbitral Tribunal.

28. In the instant case, it is a party who has requested for assistance after making the request before the Tribunal. Pursuant to the ruling delivered on 24th November 2021, the Tribunal dismissed the request and as such no approval was granted. In the circumstances the court cannot grant the said request without the approval of the Tribunal since the provision is couched in mandatory terms that the approval of the Tribunal is mandatory when seeking the intervention of the court. Blacks law dictionary, 11th Edition at page 127, defines "approval" to mean "to give formal sanction to; to confirm authoritatively." This approval was not granted herein.

29. In the end, the application dated 17th December 2021 is not merited and the same is dismissed with an order that each party do bear their own costs of this proceedings.

30. It is so ordered.

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

E.K WABWOTO

JUDGE

In the Virtual Presence of:

Mr. Onyony and Ms. Machio for the Applicants.

Ms. Anami holding brief for Dr. Mutubwa for the Respondents.

Court Assistant: Caroline Nafuna.

E.K WABWOTO

JUDGE