



**Kimemia v Ngumi (Environment and Land Miscellaneous Application  
E083 of 2023) [2024] KEELC 5224 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5224 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E083 OF 2023**

**JA MOGENI, J**

**JULY 8, 2024**

**BETWEEN**

**FRANCIS MAHIGA KIMEMIA ..... APPLICANT**

**AND**

**ISAIAH WAWERU NGUMI ..... RESPONDENT**

**RULING**

1. This Ruling is in respect to the Notice of Motion Application dated 28/03/2024 brought under Articles 40, 48, 50, 159 of the Constitution of Kenya 2010, Section 1A, 80 of the Civil Procedure Act and Order 1 Rule 10, Order 8 Rule 3,5 and 8, Order 40, 45 rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. In the said application, the respondent/applicant is seeking for orders of stay of the ruling delivered by this court on 5/03/2024, injunction against implementation of the said orders, review of the same orders, vacation of the orders and reinstatement of the respondent/applicant's chamber summons dated 21/09/2023.
2. The Application is premised on the grounds on the face of it and the supporting Affidavit dated 28/03/2024 sworn by Isaiah Waweru Ngumi the respondent/applicant.
3. He averred that the order of 5/03/2024 condemned the applicant unheard. That whereas the respondent/applicant was present during the ruling, the Honorable Court declined to unmute to enable the respondent/applicant inform the court the reasons why he had not filed his replying affidavit on time.
4. He goes on to elucidate in his application that he did not file his replying affidavit owing to reasons beyond his control being that the counsel representing him in the Arbitral Tribunal Mr. Antony Huka Khamati passed way in the year 2018 as confirmed by the portal for Law Society and evidenced through annexure IWN1. Further that the other counsel who represented him in Arbitral Tribunal Mr. Edwin Njeru Gichovi has since been struck off the Roll of Advocates as evidenced by annexure IWN2.



5. He contends that he will suffer irreparable harm if his opposition is not heard and prayers are not granted. He averred that he wishes to have his opposition to the Chamber Summons dated 21/09/2023 heard and determined on its own merit and that is why he seeks to have the Ruling delivered to be set aside and reviewed.
6. The respondent, Francis Mahiga Kimemia, opposed the application by filing a replying affidavit dated 9/05/2024 and averred that the applicant cannot state that he was not heard. That he was heard by the court and therefore the claim of not having been heard is not true. Further that the applicant has not provided sufficient grounds to warrant a review of the ruling dated 5/03/2024.
7. The parties agreed to canvass the application by way of written submissions. The at the time of writing this ruling only the respondent applicant had filed its submissions dated 25/05/2024 despite the court having given directions for disposal by way of written submissions.

### **Issues for Determination**

8. From the above pleadings, the main issue for determination is whether the applicant/respondent is entitled to the orders sought.
9. The applicant avers that the award made by the single arbitrator was not signed within 14 days as provided for by the law. Further that the adoption of the arbitration award is not one of the jurisdictions of this court and that due to territorial jurisdiction limitations, this court lacks the capacity to handle the application that was filed before this court for the applicant/respondent that led to the delivery of the ruling dated 5/03/2024.
10. The applicant's case is that he was unable to file a replying affidavit since he since one of his advocates died before filing it and then the other one he hired got struck off the disbarred by LSK. The documents attached marked "IWN1 and IWN2" all bear the 2024 date it is not clear from this when the advocate passed on or when the other advocate got struck off the roll.
11. At the same time the applicant claims that the court refused to unmute him there is no evidence to prove this allegation. The applicant has brought this application under Order 46 Rule 10, which provides that the Award was to be filed in Court within 14 days.
12. Order 46 of the [Civil Procedure Rules](#) provides for Arbitration under an order of the Court. Rule 1 of the said Order provides that parties in a suit may agree to refer the dispute between them to arbitration. It does not envisage a scenario where there is already an arbitration agreement between the parties. The arbitration proceedings in this matter were as a result of the arbitration clause in the agreement for sale of land between the applicant and the respondent. Therefore, the said arbitration proceedings were no longer under the supervision of this Court.
13. In the case of [Iris Properties Limited & Another v Nairobi City Council](#) [2002] eKLR the Court held as follows:-

“It is implicit from Rule 8 of the *Arbitration Rules*, 1997 that the effect of staying the suit and referring dispute to arbitration under S. 6 of the *Arbitration Act* is to terminate the suit save the question of costs of the suit. If parties in a pending suit reach an agreement that the matters in dispute be referred to arbitration and be determined in accordance with the *Arbitration Act*, the Arbitral Tribunal under the *Arbitration Act* supersedes the court in which the dispute is pending.



Further, the arbitral proceedings supersede the suit and the suit becomes spent save the question of costs of the suit. The Arbitral Award has to be enforced in accordance with the *Arbitration Act and Rules*. This is unlike where the parties in a pending suit have agreed to arbitration under the supervision of the court under order XLV CP Rules; which is not the case here. In that case, the arbitrator is required to cause the award to be filed in court in which the suit is pending (order XLV Rule 10 CP Rules) And, if, the court ultimately sets aside the award, the court supersedes the arbitration and proceeds with the suit (order XLV Rule 15(2) *CP Rules*)”. (underlining added)

14. Order XLV Rule 10 of the Old Civil Procedure Rules mentioned in the quotation above is equivalent to Order 46 Rule 10 of the *Civil Procedure Rules* 2010.
15. The result of the above findings is that the applicant/respondent was right in moving the court appropriately for the court to confirm that arbitral award made by the sole arbitrator. To file the application to confirm the Arbitral Award was therefore not misapprehension of the law.
16. The applicant/respondent also raised the issue of jurisdiction in his grounds of the application filed. 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.



17. 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.”

18. I have perused the application and do find that the application relates to and arbitral process on the sale of land where the contracted fell through because the Land Control Board consent was not given. The dispute that arose was resolved through arbitration.

19. The parties agreed to have a single arbitrator to resolve address their dispute since the sale agreement had provisions for arbitration. The arbitral award was only brought to the ELC court to confirm it and the ruling of 5/03/2024 confirmed the arbitral award.

20. Thus this court finds that it has jurisdiction to hear and entertain the application as filed by the respondent/applicants it does meet the threshold of section 13 of the *Environment and Land Court Act* as the arbitration touch on matters related to land.

21. The applicant/respondent has also sought to have the ruling of 5/03/2024 set aside. In ordinary *Civil Procedure Act* and the *Civil Procedure Rules*, under Order 45 an applicant for review of the court's Judgment and/or Ruling must show-

- a. Discovery of new evidence or important matter which the Applicant could not with exercise of due diligence have had or discovered at the hearing of the matter subject of review
- b. An error on the face of the record, or
- c. Some other sufficient cause (similar to new evidence or important matter and or error on the face of the records).

22. The application herein does not relate to an ordinary Civil Suit. The Application related to an arbitral award under the Arbitration Act and the Rules thereunder. And even if there were errors in the Ruling of 05/03/2024, no averments were made by the respondent/applicant of any such errors except that they contend that they were not given an opportunity to be heard after failing to file a replying affidavit upon being instructed and granted leave to do so. The result is that there is no basis of the Application even if it were arising out of an ordinary Civil action.

23. I am satisfied that the respondent/applicant has not made out a case for orders sought and I hereby dismiss the Notice of Motion Application herein dated 28/03/2024 with costs.

24. Those are the orders of the Court.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>th</sup> DAY OF JULY, 2024.**

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**MOGENI J**

**JUDGE**

In the presence of: -

Mr. Njoroge for the Applicant

Mr. Ngumi in Person/Respondent Applicant

Sagina - Court Assistant

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**MOGENI J**

**JUDGE**

