



Wilken Telecommunications (Kenya) Limited v Kenya Railways Corporation (Miscellaneous Civil Application E368 of 2024) [2025] KEHC 129 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E368 OF 2024
JWW MONG'ARE, J
JANUARY 17, 2025**

BETWEEN

WILKEN TELECOMMUNICATIONS (KENYA) LIMITED APPLICANT

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. This ruling relates to the Applicant's Notice of Motion dated 29th April 2024 and the Respondent's undated Preliminary objection filed herein on 27th May, 2024.
2. I will first address the Preliminary Objection, which raises significant issues regarding jurisdiction. In essence, the objection challenges the application on the grounds that it is not based on a suit, which is a mandatory requirement under Section 7 of the *Arbitration Act* and Rule 2 of the Arbitration Rules, 1997. Additionally, it argues that the application fails to adhere to the prescribed procedures for seeking redress for the grievance in question, as outlined in *the Constitution*.

The Application Dated 29th April, 2024.

3. The application is brought pursuant to Article 159(2) (c) of the constitution, Section 7(1) of the *Arbitration Act*, Rules 2 & 3 of the Arbitration Rules and all other enabling provisions of the law.
4. The application seeks the following reliefs:
 - i. spent



- ii. That pending the inter-parties hearing and determination of this Application, this court be pleased to issue an interim order of protection compelling the Respondent to grant the Applicant access to the MGR corridor in the terms of the agreement.
 - iii. That pending the inter parties hearing and determination of this application, this Honourable court be pleased to issue an interim order of protection, in the form of a temporary injunction, prohibiting, the Respondent, either by itself, associate, affiliates, agents, employees or third parties which may have contracts with the Respondent from interfering with the Applicant 's exclusive use of the MGR corridor.
 - iv. That pending the intended arbitration between the parties herein, this Honourable court be pleased to issue an interim order of protection, in the form of a temporary injunction, prohibiting the Respondent, either itself, associates, affiliates agents, employees or third parties which may have contracted with the Respondent from interfering with the Applicant 's exclusive use of the MGR corridor in the terms of the Agreement.
 - v. That pending the intended Arbitration between the parties herein, this Honourable court be pleased to issue an interim order of protection compelling the Respondent to grant access to the MGR corridor
 - vi. The costs of the application be provided for.
5. The application is based on the grounds outlined in the record and supported by the affidavit of Andrew Lopokoiyit, the Applicant 's director, sworn on 29th April 2024 and 2nd May 2024. The Applicant states that it entered into a lease agreement with the Respondent on 13th October 2021 for a wayleave to lay fibre optic cables along the MGR corridor for 20 years, with a 5-year exclusivity period beginning on 13th October 2023 and ending on 13th October 2028. The Applicant alleges that, despite the exclusivity period under the agreement, the Respondent has permitted Mobile Telephone Networks Limited (MTN) and its affiliates to use the wayleave to lay their fibre optic cables along the MGR corridor. This breach has rendered the corridor inaccessible to the Applicant, causing ongoing financial losses. The Applicant further argues that Section 7 of the *Arbitration Act* does not mandate that an application for interim protection measures be grounded on a substantive suit.
 6. In response, the Respondent filed a Notice of Preliminary Objection alongside a Replying Affidavit sworn on 4th June 2024 by Stanley Gitari, the Acting General Manager of Legal Services and Corporation Secretary of the Respondent.
 7. The Respondent argues that the Applicant 's application is flawed and cannot be remedied because it lacks the mandatory anchoring on a suit, as required by Section 7 of the *Arbitration Act* and Rule 2. The Respondent further claims that the Applicant failed to pay the agreed consideration of Kshs. 52,890,000/= within 30 days, as stipulated for the wayleave. This delay prevented the Respondent from handing over the site or supervising the work, leading to the issuance of a Notice of Intention to Terminate the Contract on October 9, 2023. Additionally, the two-year period for laying cables expired on September 1, 2023, complicating the matter further. However, the Respondent notes that the site has already been handed over, and the Applicant is not barred from installing the fibre optic cable per the agreement. The Respondent contends that the Applicant has not demonstrated that the subject matter is at risk of being wasted or that irreparable harm would result, as any harm could be addressed through damages.



8. I have carefully considered the pleadings, affidavits, and submissions by the parties. To my mind the primary issue for determination is whether the Applicant is entitled to the reliefs sought to preserve the status quo pending the hearing and determination of the arbitral proceedings.
9. However, before addressing the primary issue, it is important I address the issue of jurisdiction as raised by the Respondent in the Preliminary objection. Jurisdiction is a foundational principle in law, determining a court's power to hear and decide a case. Establishing jurisdiction is essential before delving into substantive legal issues, as it validates the court's ability to render enforceable judgments and without jurisdiction, a court ought to down its tools.
10. The Respondent challenges the instant application and avers that Rule 2 requires such an application to be brought together with a suit. The provisions of rule 2 states as follows:

Rule 2 of the Arbitration Rules, 1997 (“the Rules”) which states as follows:

“Applications under sections 6 and 7 of the Act shall be made by summons in the suit.”

11. The Applicant filed the Notice of Motion which is not anchored on any suit. The Court of Appeal, when faced with a situation similar to the one before this court, dealt exclusively with the interpretation of Rule 2 of the Arbitration Rules and examined the import of Article 159 of *the Constitution*, specifically addressing the extent to which the provisions of Article 159 can be applied.
12. The Court of Appeal in *Scope Telematics International Sales Limited v Stoic Company Limited* NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR where it considered the import of rule 2 of the Rules and held that compliance with the rule was mandatory. It stated as follows:

It must be borne in mind that the substantive provision that the 1st Respondent invoked was Section 7 of the Act. The 1st Respondent was seeing (sic) an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See *Speaker of National Assembly vs. Njenga Karume* [2008] 1 KLR 425). The 1st Respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2010] eKLR; *Dishon Ochieng v SDA Church, Kodiaga* (2012) eKLR; *Hunter Trading Company Ltd v Elf Oil Kenya Limited*, Civil Application No. NAI. 6 of 2010). Despite the foregoing, the court still went ahead to exercise its discretion in favour of the 1st Respondent by invoking that Article, the overriding objective under the *Civil Procedure Act*, and the interests of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other



interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd Respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

13. Guided by the above decision, this court finds that it lacks jurisdiction to determine the issue in dispute due to the Applicant 's failure to anchor the same on a suit. Consequently, this court upholds the undated Preliminary Objection filed on 27th May, 2024.
14. Having concluded that this court lacks jurisdiction to determine the application, I find it unnecessary to address the merits of the application. Accordingly, I strike out the Notice of Motion dated April 29, 2024, with costs awarded to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 17TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence:-

1. Mr. Chetambe holding brief for Mr. Omiti for The Applicant.
2. Ms. Jumba holding brief for Mr. Kamau Muturi for The Respondent.
3. Amos - Court Assistant

