



REPUBLIC OF KENYA



**Kenya Utalii College v Unispan Limited (Civil Case E451 of 2024)
[2025] KEHC 1341 (KLR) (Commercial and Tax) (3 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 1341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E451 OF 2024
JWW MONG'ARE, J
MARCH 3, 2025**

BETWEEN

KENYA UTALII COLLEGE PLAINTIFF

AND

UNISPAN LIMITED DEFENDANT

RULING

1. The Applicant has by an Originating Summons application dated 6th August 2024 and filed under Sections 3A of the *Civil Procedure Act*, Section 17 of the *Arbitration Act*, Rule 3(1) of the *Arbitration Rules 1997* and Article 165(6) of the *Constitution* of Kenya moved this Honourable Court seeking the following orders: -
 1. Spent
 2. That this Honourable Court be pleased to set aside the Arbitrator's Ruling on jurisdiction.
 3. Spent
 4. That the costs of this application be provided for.
2. The said summons is supported by the grounds set out on its face and the supporting affidavit of Alloicius Mbeche, the Advocate seized with the conduct of this suit on behalf of the Applicants, sworn on 7th August 2024. The Respondent filed grounds of opposition to this application dated 31st October 2024. Although the court did direct the parties to file written submissions, at the time of writing this ruling, only the Applicant's submissions were on record, having been filed on 16th December 2024.



Analysis And Determination

3. I have carefully considered the application and the supporting affidavit and the grounds of opposition filed by the Respondent. I note that the court is called to determine whether the application before the court is competent and properly so before the court noting that the matter challenges the jurisdiction of the court to determine a question of jurisdiction before it.
4. Notably, the present application emanates from an arbitration matter in which the Arbitrator, having been duly appointed in line with the party's agreement, determined the question of jurisdiction and held that he held the requisite jurisdiction to hear the dispute. The Applicant is challenging that decision and argues that the said holding by the Arbitrator was erroneous on account that the dispute was time barred by application of the Law, having been filed 7 years after the dispute occurred and hence breaching section 4(2) of the *Limitation of Actions Act*.
5. At the hearing of this matter ex parte, this court allowed the prayer seeking to enlarge time to file the application outside the 30-day window allowed by the *Arbitration Act* within which a decision of the tribunal can be filed, a factor that the Respondent has raised in its grounds of opposition. The Respondent also takes issue with the fact that Advocate for the Applicant has sworn the supporting affidavit to this application, a fact that is frowned upon by the law, in contentious matters.
6. The Respondent argues that the Applicant has not demonstrated any special circumstances to invoke the jurisdiction of this court to interfere with the arbitral proceedings and neither has the Applicant demonstrated how the decision of the Arbitrator on the question of his jurisdiction is contrary to public policy.
7. On the issue of the challenge to the court having allowed the prayer for enlargement to file this appeal out the prescribed time of 30 days, the court having made a finding on the same will not revisit as to do so would amount to sitting on appeal on its own decision.
8. The second challenge is to the validity of the affidavit sworn by an advocate in conduct of the matter present before this court and whether or not it should be admitted, the court notes that the Respondent has failed, in mounting this challenge to the affidavit, to demonstrate how this offends the law. In any event Article 159 of the *Constitution* urges the court in "(2)(d) (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (d) justice shall be administered without undue regard to procedural technicalities;"
9. It is my view that the aspect of the advocate having sworn a supporting affidavit to the application in a matter in which he is on record for the Applicant is a technicality and does not in any way prejudice or limit the Respondent rights in the suit. I also note the issues that the advocate has deponed to relate to matters within his knowledge as he has attempted to explain the delay occasioned in filing the application to oppose the ruling of the Arbitrator on jurisdiction and laid full blame on actions emanating from his own law practice, and which to me appear to be matters within his knowledge. I find therefore that the affidavit herein is properly before the court and will not expunge the same from the record.
10. Turning to the substantive challenge on the ruling by the Arbitrator on whether or not the Arbitrator has jurisdiction, to proceed and hear the dispute before him, having been properly appointed in terms of the agreement between the parties and in line with the Arbitration Act and Rules, I note that this is matter governed by the doctrine of "kompetenz kompetenz", which is to the effect that the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement as set out under Section 17 (1) of the *Act*. The fact that a party has



appointed or participated in appointing an Arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal as provided for under Section 17 (4) of the Act. Under this doctrine, it is desirable that any challenge to the jurisdiction should be resolved as early as possible. The Act requires that a plea of lack of jurisdiction be raised latest at submission of defence (see Section 17 (2) of the Act).

11. The Applicant in bringing this application challenges the ruling of the Arbitrator on grounds that the said ruling violates the doctrine of public policy in that the same seeks to allow a matter that is time barred to proceed for hearing. The Applicant argues that the dispute subject matter arose in 2009 and that parties purported to commence the same way back in 2013 but it was not until 2020 when the Arbitrator was appointed to hear the dispute.
12. The Applicant takes issue with the determination by the Arbitrator on jurisdiction and argues that section 4 (1) of Limitation of Actions Act limits the period within which a dispute for breach of contract can be heard to Six (6) years. Section 4(1) of the said Act provides as follows:-

“ 4.

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

13. The Applicant further argues that the said ruling is against public policy. Section 17 (6) and (7) of the Arbitration Act allows an aggrieved party to challenge a ruling of the Arbitrator. It states that the ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court and the decision of the High Court shall be final. The challenge by the Applicant is that the ruling offends public policy. Public policy has been defined by the courts in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 E.A 366, where Ringera J.,(as he then was) explained the scope of public policy as a ground for setting aside an arbitral award as follows:-

I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality.....”

14. This definition of what amounts to public policy has been widely used in matters where parties have moved the court to intervene in arbitral proceedings. It is trite that, as cited above, section 4(1) of the Limitation of Actions Act, envisions a scenario where a court or a tribunal will hear and determine a matter falling under contract within six(6) years from the date of the breach of contract. Parties agree that the dispute subject matter of these proceedings arose in 2009 and was to be commenced in 2013



but for one reason or another, the Respondent only moved the arbitral process in 2020 when the Arbitrator was appointed and a challenge to his jurisdiction mounted. The decision of the Arbitrator was that he had jurisdiction to hear the dispute. It is my finding that the Arbitrator failed to appreciate the fact that the law only allows matters related to breaches of contract to be determined within a period of 6 years, unless and for good reason leave is sought to commence the suit out of time. The fact that the law allows the Arbitrator to make a determination of his own competence does not enjoin him to break the law. It is my finding therefore the decision by the Arbitrator to hear a dispute filed out the time allowed under the Limitation of Actions Act, violated the principle of public policy as it went against the law of the land and therefore the same cannot be allowed to stand.

15. In conclusion I find merit in the Originating Summons and I allow the same as prayed. Subsequently the ruling of the Arbitrator issued on 24th June 2024 is hereby set aside and vacated. As consequence therefore, the Arbitral Proceedings subject matter of this application stand terminated forthwith. Each party is directed to bear their own costs of the Application. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mbeche for the Applicants.

Ms. Essajee Holding brief for Mr. Khagram for the Respondent.

Amos - Court Assistant

