



REPUBLIC OF KENYA



**Punjani v Punjani (Miscellaneous Application 20 of 2017)
[2024] KEHC 1538 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 20 OF 2017
G MUTAI, J
FEBRUARY 16, 2024
IN THE MATTER OF THE ARBITRATION ACT, 1995
(AS AMENDED IN 2009)
AND
IN THE MATTER OF AN ARBITRATION**

BETWEEN

TAURAT PUNJANI APPLICANT

AND

ALI BADRUDIN PUNJANI RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 20th November, 2023. The application seeks the following orders;
 - a. Spent;
 - b. That in the first instance, the honourable court herein grant a stay of the hearing of the Notice to Show Cause dated 30th March 2023, slated for hearing on 23rd November 2023, pending the hearing of the application herein;
 - c. That in the first instance, the honourable court grants a stay of any and all proceedings pending the appeal of the ruling dated 27th October 2023;
 - d. That the honourable court herein issues an order for typed and certified proceedings in regard to the ruling dated 27th October 2023;
 - e. That the applicant/respondent at the time of the hearing of the said applications duly stated that she had consulted the Deputy Registrar, one Hon. Noelyne Akee Reuben, who apparently



assisted here in drafting the said amended decree and, as such, the said judicial officer should recuse herself from handling the matter herein;

- f. That the matter at the first instance the honourable court herein dismiss the suit in its entirety on the grounds that the suit has been instituted by a party against another that is not privy to the marriage contract dated 26th November 2000 seeing that there exists no person named Taurat Punjani in the said contract;
 - g. That the at the first instance the honourable court herein recall the adoption of the judgement of the Highness Prince Aga Khan Shia Imami Ismaili International Conciliation and Arbitration aptly named Rules for Mediation and Conciliation Proceedings states parties must voluntarily submit to their authority failure to which the matter cannot proceed for mediation. There was no such voluntary submission.
 - h. That costs be in the suit.
2. The application is premised on the grounds in the body of the Motion as well as on the Supporting Affidavits of the Respondent/Applicant and that of his counsel, Steve Nyamu, all sworn on 20th November 2023.
 3. The Respondent/Applicant stated that this honourable court did not make reference to the application of 8th September 2023 in its ruling of 27th October 2023, which contained an annexure from the Conciliation and Arbitration Board stating that they do not conduct the arbitration. The said omission was unfair as this matter commenced from the said board. He averred that it was frustrating that the court proceeded to allow an application dated 23rd August 2023, which had already been withdrawn vide a notice of withdrawal dated 31st August 2023. He deposed that the respondent filed defective affidavits that were not dated and that made reference to one Ali Barduni Punjani, who is not a party to the suit herein, and thus, the same ought not to have been allowed and or made reference to by the court in making its ruling.
 4. He further stated that the parties to a contract are the ones that should institute a suit to that effect. He deposed that the provisions of the Arbitration Act provide that for any application seeking to have an arbitration award adopted, a copy of the contract referencing that the parties shall submit to arbitration must be submitted. The contract referenced by the court was not entered into by both parties, that is, the Applicant/Respondent and the Respondent/Applicant, as he has never submitted to the authority of the board and or that of His Highness Prince Aga Khan Shia Imami Ismaili International Conciliation.
 5. He further stated that this honourable court has always allowed the emails produced by the Applicant/Respondent without subjecting them to any degree of scrutiny.
 6. In response, the Applicant/Respondent filed a Notice of Preliminary Objection and a replying affidavit sworn on 30th November 2023. The preliminary objection is on the grounds that this court lacks jurisdiction as an appellate court owing as the application is contrary to Section 59C (4) of the Civil Procedure Act and order 46 rule 18(2); as no appeal shall lie from a judgement entered as a decree; and the application is contrary to Section 66 of the Civil Procedure Act and that Order 45 rule 6 bars application to review orders emanating from a review.
 7. In her Replying Affidavit, the Applicant/Respondent stated that the issues raised by the Respondent/Applicant in his Supporting Affidavit, in particular paragraphs 1-16 and 21 and paragraph 13 of his counsel's affidavit, are beyond this court's jurisdiction as they were all determined in the ruling delivered on 27th October 2023. This court lacks jurisdiction in respect of issues raised in paragraph 17



of the Respondent/Applicant's affidavit and paragraphs 2 and 7 of his advocate's affidavit due to the subjudice rule. She also stated that the court cannot review its judgement twice.

8. She further stated that the emails referred to were produced during the review of the judgement. The rules were amended and passed on 12th September 2015, when all boards ceased to arbitrate on new matters. She urged that the court lacks jurisdiction to intervene in matters that should have been raised before the tribunal.
9. She averred that she used her maiden name when she signed the marriage contract, which name is still on her identity card, before assuming her husband's name after marriage.
10. The respondent urged the court to dismiss the application with costs.
11. The matter was canvassed by way of oral submissions. Counsel for the Respondent/Applicant reiterated the contents of the depositions in support of the application. He also referred to the draft grounds of appeal and submitted that they were willing to deposit Kes.1,000,000.00 as security for costs.
12. The Applicant/Respondent, on the other hand, reiterated her position in her affidavit and submitted that this court is functus officio.
13. The respondent raised a preliminary objection in respect of the said provisions of law;

Section 59C (4) of the *Civil Procedure Act* provides;

1. A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.
2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.
3. Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.
4. No appeal shall lie in respect of any judgment entered under this section.

Order 46 rule 18 (2)

1. The court shall, on request by any party with due notice to other parties, enter judgment according to the award—
 - a. when no application has been made within the time allowed by rule 17; or
 - b. when an application under rules 13, 14 or 16 has been heard and determined and no other application has been made within the time allowed by rule 17; or
 - c. when an application under rules 14, 15 and 16 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal.
2. Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.
3. Order 49, rule 2 shall apply to the entry of judgment under subrule (1).

Section 66 of the *Civil Procedure Act*

Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.



Order 45 rule 6

“No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”

14. The preliminary objection raised by the Applicant/Respondent is on the jurisdiction of this Court. That being the case I must determine it before considering the application on the merits.
15. In dealing with the issue of preliminary objection the court in the case of *Rebecca Chumo versus Christina Cheptoo Chumo* [2021] eKLR stated:-

“The case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed 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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:-

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

16. Further, the court in the case of *DJC versus BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling) cited the Supreme Court decision in *Independent Electoral & Boundaries Commission versus Jane Cheperenger & 2 Others* [2015] eKLR where the court made the following observation as relates to preliminary objections:-

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

17. On the issue of jurisdiction Nyarangi, JA in the case of The *Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd* [1989] eKLR stated:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for



a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. The Supreme Court in the case of *Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated:-

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

19. In my view, the preliminary objection is misconceived. Section 59 (C) of the *Civil Procedure Act* refers to arbitration arising from a referral by the Court. The arbitration conducted by the Ismaili Board, whose decision the Respondent/Applicant contests, did not arise out of a referral by the Court. The preliminary objection is, therefore, without merit and is dismissed.

20. The Respondent/Applicant seeks a stay of proceedings pending the hearing of his intended appeal. It is trite law that a stay of proceedings is a very drastic remedy, sparingly granted by the Courts only in the clearest of cases.

21. Joel Ngugi, J (as then was) stated in *Turbo Highway Eldoret Ltd versus Dominic Njenga Muniu* [2020]eKLR that:-

“In *William Odhiambo Ramogi & 2 Others versus the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;



- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
20. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330: The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.
21. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances.”
22. My understanding of the applicant's case is that he is dissatisfied with the ruling of the court delivered on 27th October 2023. The court, in its ruling, considered the history of this matter. It is clear that the matters that the Respondent/Applicant is raising in the instant Motion are issues that this honourable court has dealt with before.
23. In dismissing the application, the court stated;
- “..further, the respondent /applicant took too long to bring this application. Information sought from NCAB was provided in September 2022 and March 2023. The respondent / applicant inexplicably sat on his laurels, and it was only on 1st August 2023, after the Applicant/Respondent filed an application for execution, that he was sufficiently motivated to file the review application. The said period, in the circumstances of this matter, is unreasonable and cannot be excused. Further, given the circumstances under which it was filed, it would appear to me that the application before me is intended to defeat execution by the Applicant/Respondent...the Respondent/Applicant has treated court proceedings with disdain. He failed to appear in court to defend himself when the award was lodged. It was only when it was adopted that he found time from his busy schedule to challenge the adoption of the award. When the adoption of the award was set aside, he took no further interest in the matter. It is now, when the Applicant /Respondent is trying to execute the award that he has found time to come to court. By so doing, he is abusing the process of the court and bringing our judicial system into disrepute.”
24. In my view, the Respondent/Applicant does not have an arguable appeal. The arbitral award was adopted by this court. No appeal is pending against that decision. To allow this application would,



in my view, unjustifiably deny the Applicant/Respondent the fruits of a judgment in her favour. I, therefore, decline to issue the orders of stay of proceedings.

25. Prayer (e) of the Motion is spent as the Deputy Registrar of this Court recused herself and won't be hearing this matter.
26. My understanding of prayers (f) and (g) of the Motion is that they seek to review the orders I made after considering the previous review application. I am afraid I cannot do so. Order 45 Rule 6 of the Civil Procedure Rules, 2010, is quite clear that no application for the review of a review decision can be entertained.
27. The application filed by the Respondent/Applicant is without merit. The same is dismissed with costs to the Applicant/Respondent.
28. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF FEBRUARY 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Taurat Punjani, the Applicant/Respondent (pro se litigant);

Mr. Steve Nyamu, for the Respondent/Applicant; and

Arthur, Court Assistant.

