



Lake Basin Development Authority (LBDA) v Erdemann Property Limited (Commercial Miscellaneous Application E009 of 2024) [2024] KEHC 7070 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL MISCELLANEOUS APPLICATION E009 OF 2024**

RE ABURILI, J

JUNE 13, 2024

BETWEEN

LAKE BASIN DEVELOPMENT AUTHORITY (LBDA) APPLICANT

AND

ERDEMANN PROPERTY LIMITED RESPONDENT

RULING

1. The applicant Lake Basin Development Authority (LBDA) vide an application dated March 26, 2024 brought under Certificate of Urgency sought orders to stay proceedings consequent upon the arbitral award dated February 15, 2024 that was issued on the March 16, 2024 by Dr. Wilfred Mutubwa.
2. It was the applicant's case that the arbitral award conflicted with public policy and was detrimental to the national interests as it was contrary to the rules of the *Evidence Act* by shifting the burden of proof, diminishing the applicant's evidence, determining issues outside the scope of the arbitration proceedings and dismissing the appellant's counterclaim; that the final award and/or operative award exhibited open bias against the applicant.
3. In response, the respondent filed a preliminary objection dated April 12, 2024 contending that the instant suit was fatally and irredeemably defective and for striking out limine as it fails to properly to invoke the court's lawful jurisdiction in contravention of sections 10, 32A, 32 B (1), 35 and 37 of the *Arbitration Act* as read with Articles 159 (2) (c) of the *Constitution* and Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules 2010*.
4. Mr. Lusi, Counsel for the respondent submitted that the application was fatally defective as no arbitral award had been made but rather, a partial award had been made. He relied on Sections 10, 32 & 33 of the *Arbitration Act*.
5. It was his submission that the law only permits intervention of the court where a final award is made. He relied on the case of *Owners of Motor Vehicle "Lillian S" v Caltex Oil (K) Ltd* Civil Appeal No. 50



of 1989 [1989] eKLR as well as that of *Oraro v Mbaja* where the courts in both instances dealt with what amounts to a proper preliminary objection.

6. Mr. Lusi further submitted on behalf of the respondent that the parties had appeared before the arbitrator for settlement on costs and that the final award was reserved for the 6.6.2024 and thus if this court considers the instant application before settlement of all matters before the arbitrator, the parties might file fresh application to recognize or set aside the award and thus there was likely to be double jeopardy for the respondent.
7. The respondent relied on the cases of *Ezra Odondi Opar v ICEA* Civil Appeal No. 98 of 2016 [2020] eKLR and *Kenfit Limited v Consolata Fathers* Civil Appeal No. 229 of 2006 [2015] eKLR where the Court of Appeal in both instances held that the 2 applications to set aside or recognize the awards were premature. The respondent further relied on section 33 (3) of the *Arbitration Act* on the termination of the mandate of the arbitrator.
8. Mr. Lusi further submitted that there was a distinction between an interim, partial and final award. It was further submitted that it was admitted by the applicant that there were proceedings ongoing before the arbitrator touching on the same award and as such, the applicant could not approbate and reprobate thus the court ought to allow the Preliminary objection.
9. Mr. Lusi submitted that the final award has not been made and thus the application before court was irregularly invoking jurisdiction of this court hence it was premature and fatally defective.
10. Mr. Ogejo counsel for the applicant submitted that the award was final and that the instant preliminary objection was not a preliminary objection as it was inviting the court to look at documents presented as evidence in the form of annexures by the applicant herein.
11. Mr. Ogejo further submitted that their application was provided for under section 35 of the *Arbitration Act* as well as Section 3 (1) of the said *Act* which defines what an arbitral award is and includes an interim arbitral award. Reliance was placed on the *Mitubell Case*.
12. Mr. Ogejo thus submitted that there was no preliminary objection capable of being prosecuted and as such, the court ought to dismiss the respondent's preliminary objection.

Analysis and Determination

13. The law with regard to Preliminary Objection was settled in the *locus classicus* case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court of Appeal for East Africa, Law J.A. and Newbold P. held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“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 points by way of Preliminary



Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

14. In the case of *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR the Court held 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 the contract giving rise to the suit to refer the dispute to arbitration ... 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’.”

15. The Supreme Court again reconsidered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR.

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants 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.”

16. The apex Court was clear that disputes ought not be summarily resolved. However, if a Preliminary Objection serves the public purpose of effective utilization of judicial time and other resources, then the court ought to entertain the Preliminary Objection. Thus, although the *dictum* in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others supra* is progressive and will indeed utilize judicial time, it should be applied on undisputed facts that would not need the calling of additional evidence.

17. As the respondent’s Preliminary Objection relates to the jurisdiction of this court, and as stated in the *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 where Law JA stated:

“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 the contract giving rise to the suit to refer the dispute to arbitration.” [Emphasis added]

18. I find that a preliminary objection to jurisdiction is no doubt a pure preliminary objection. I am satisfied that the respondent’s preliminary objection is an objection within the meaning advanced in the case of *Mukisa Biscuit supra*. It is properly before this court and I therefore proceed to determine the merits of that preliminary objection.



19. It is well settled that when jurisdiction is in issue, it must be determined first because without it, a court must down its tools since there would be no basis for continuing with the proceedings. (See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR).
20. It is the respondent's case that this court is not clothed with jurisdiction to entertain the applicant's application dated March 26, 2024 as doing so would be in contravention of Sections 10, 32A, 32B (1), 35 and 37 of the *Arbitration Act*. The respondent argues that the award issued by the arbitrator, upon which the applicant's Notice of Motion for stay of proceedings is anchored, is not a final award as advanced by the applicant but rather a partial award.
21. As stated herein above, the applicant argues that the award issued by the arbitrator is a final award and thus its application for stay of proceedings consequent thereon is well before the court.
22. Jurisdiction has been defined in *Halsbury's Laws of England* (4th Ed.) Vol. 9 at page 350 as:

“...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”
23. The preliminary objection in this case is hinged on the ground that this Court has no jurisdiction to hear and determine the application before it as there is no final arbitral award capable of being challenged before this court. The *Arbitration Act* and *Rules* provide for both the substantive and procedural manner in which matters arbitral are to be dealt with. The role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the *Act*. Section 10 of the *Act* provides that:

“Except as provided in this *Act*, no Court shall intervene in matters governed by this *Act*”.
24. By this section, the jurisdiction of the Court is limited and restricted and may only be invoked in very clear circumstances specified under the *Act*. Further, section 32A of the *Act* provides:

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this *Act*”.
25. The restriction on the jurisdiction of this Court on matters arbitral is founded on the fact that arbitration is simply a matter of agreement between parties. When parties agree that their dispute is to be settled by an arbitrator, and not by the national courts as by law provided, they also agree to accept the arbitrator's view of the facts and the meaning of the contract between them. In this regard, courts will not sit to hear the claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. This is the party autonomy that is embedded in the *Arbitration Act*.
26. The above position has been reiterated by the courts. In *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2020] eKLR, the Court of Appeal rendered itself thus:

“One of the significant features of the *Arbitration Act* (the Act) is the principle of party autonomy, which entitles parties to have their disputes resolved by the forum and in the manner of their choice. For that very reason, the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the *Act*.”



27. In *Geo Chem Middle East v. Kenya Bureau of Standards* [2020] eKLR the Supreme Court of Kenya quoted with approval Ochieng J's (as he was then) holding in the High Court that: -

“It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal.”

28. It is with the foregoing in mind that the Court will examine the preliminary objection before it. The grounds for the instant objection was that the instant suit was fatally and irredeemably defective and for striking out as the court had no jurisdiction to entertain it in light of the provisions of sections 10, 32A, 32B (1), 35 and 37 of the *Arbitration Act* as read with Articles 159 (2) (c) of the *Constitution* and Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules 2010*; that the award granted by the arbitrator was not a final award but a partial award.

29. Despite averments by the applicant that he annexed the award in question in his application, I have perused the record before court and note that no award is before court. However, it is not disputed by the applicant that the award issued by the arbitrator was for settlement of costs with the final award being reserved for delivery on the 6.6.2024 as contended and asserted by the respondent in his oral submissions.

30. An arbitral award is described in section 3 of the *Arbitration Act* as any award of an arbitral tribunal and includes an interim arbitral award. Section 32 (6) of the *Act* goes further to make provision for partial awards and provides that:

“An arbitral tribunal may, at any time, make a partial award by which some, but not all, of the issues between the parties are determined, and the provisions of this *Act* applying to awards of an arbitral tribunal shall, except in so far as a contrary intention appears, apply in respect of such partial award.”

31. Finally, section 32A of the *Act* goes further to provide for the effect of an award issued by an arbitrator as follows:

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this *Act*.”

32. From the above provisions it is clear that the *Arbitration Act* does provide that in certain cases, the arbitrator may make a partial award in relation to some but not all of the issues raised before him/her.

33. As earlier herein stated, the award dated February 15, 2024 and issued on the March 16, 2024, which is the basis upon which the applicant filed his application for stay of proceedings was a partial award and not an interim award. Indeed, it was undisputed that the arbitrator reserved the final award for delivery on the 6.6.2024.

34. This court is bound by sections 10 and 35 (2) of the *Arbitration Act* and the applicant has not demonstrated why this court should intervene in the circumstances. Accordingly, I find that this court is not clothed with jurisdiction to entertain the applicant's Notice of Motion dated March 26, 2024.



35. The upshot of the above is that I find the preliminary objection raised by the respondent to be meritorious. I uphold it and strike out the application dated March 26, 2024 for want of jurisdiction. As the parties are still litigating before the arbitrator and as they may still approach this court after the final award, I order that each party bear their own costs of the preliminary objection and the application dated March 26, 2024.
36. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2024.

R.E. ABURILI

JUDGE

