



AIG Kenya Insurance Co. Limited v Vivo Energy Kenya Limited (Arbitration Cause E032 of 2022) [2024] KEHC 11071 (KLR) (Commercial and Tax) (16 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E032 OF 2022
JWW MONG'ARE, J
SEPTEMBER 16, 2024**

BETWEEN

AIG KENYA INSURANCE CO. LIMITED APPLICANT

AND

VIVO ENERGY KENYA LIMITED RESPONDENT

RULING

1. What is before the court for determination is the Notice of Preliminary Objection dated 5th June 2023 (“the Objection”) filed by the Respondent in respect of the Originating Summons dated 5th May 2023 (“the Originating Summons”) that seeks to set aside the arbitral award dated 31st January 2023 (“the Award”) published by the arbitral tribunal chaired by Ms. Zehrabanu Janmohamed, SC. The Objection is opposed by the Applicant through the replying affidavit of Linda Kaniaru, its Claims Manager, Commercial Lines, sworn on 24th July 2023. The Objection was disposed by way of written submissions which were highlighted by the parties’ respective counsel, which I have carefully considered and shall make reference to in my analysis and determination herein.

The Objection

2. It is the Respondent’s position that the proceedings instituted by the Applicant by way of Originating Summons are incompetent, misconceived bad in law and that the same do not lie as against it for the preliminary reasons that this Court is barred by statute from intervening in the manner proposed by dint of sections 10 and 32A of the *Arbitration Act* (Chapter 49 of the Laws of Kenya), that the appellate jurisdiction of this Court has been improperly invoked as no competent Appeal that has been commenced or can be commenced by way of the Originating Summons as against the Award and that the intervention permitted by statute under section 35 of the *Arbitration Act* is independent of and cannot be exercised simultaneously with a section 39 (1)(b) intervention.



The Applicant's Response

3. In its response the Applicant argues that the Objection seeks to deny it access to justice notwithstanding the provisions of Article 48 of the Constitution that this court possesses unquestionable jurisdiction to consider the Originating Summons under section 39(1)(b) of the Arbitration Act, given the legitimate grievances raised by the Applicant in accordance with the said Section of the law and further, that the Arbitration Agreement dated 14th December 2020 executed between both parties, very clearly provides at Clause 6 thereof that the Award is subject to Appeal to the Court on a point of law and/or fact. For these reasons, the Applicant argues that a possible Appeal by either party was thus clearly anticipated by the parties and was provided for in the said Arbitration Agreement.
4. The Applicant further argues that it is abundantly clear that the provisions of section 10 and 32A of the Arbitration Act are harmonious with and not at odds with section 39(1)(b) of the Arbitration Act, which empowers the Court to intervene in an Arbitral Award. Given the foregoing, the Applicant states that a well-grounded Appeal has been initiated through the Originating Summons, specifically challenging the Award and that the Objection has absolutely no legal merit and should be dismissed with costs. In addition, and noting that since the Respondent has chosen to file only the Objection in response to the Applicant's Originating Summons, the Applicant's position is that the Respondent does not contest the said Originating Summons, which it urges the Court to be allowed as prayed.

Analysis and Determination

5. I have carefully considered the Preliminary Objection and the response thereto alongside the parties' written and oral submissions and to my mind there emerges one issue for determination to wit; "whether the Objection is merited in light of the reasons aforementioned by the Respondent." For a Preliminary Objection to be merited, the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others SCK Petition No. 10 of 2013 [2014] eKLR, endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696, where it was held that:-

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.

6. In sum, for one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence; it must not call upon the Court to exercise discretion.
7. The Preliminary Objection as filed seeks to challenge the jurisdiction of this court to determine the Originating Summons by stating that the court's jurisdiction cannot be invoked to determine both an Appeal and an Application to set aside at the same time as the Applicant has done in the present matter before this court. The Respondent has further stated that the present application, which is an Appeal, ought to have been brought by way of a Memorandum of Appeal rather than an Originating Summons.



8. Further, the Respondent argued that the court’s jurisdiction is limited by sections 10 and 32A of the Arbitration Act which provide that

“Except as provided in this Act, no court shall intervene in matters governed by this Act”
and

“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.”

I agree with the Respondent’s submission that indeed, jurisdiction is central in judicial proceedings and as Nyarangi JA., in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR 1 when the learned Judge famously and simply put it, “jurisdiction is everything.” It is therefore clear that a court cannot arrogate itself jurisdiction that it does not have and the same is determined by either the Constitution or statute (see Samuel Kamau Macharia v Kenya Commercial Bank and Others SCK Application No. 2 of 2011 [2012] eKLR).

9. The parties agree that in arbitration proceedings, the Arbitration Act grants the court jurisdiction to determine applications to set aside awards (section 35) and Appeals to

“confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration” (section 39).

Under section 39(1) of the Arbitration Act, the jurisdiction of the court to determine an Appeal is subject to the parties’ agreement on the same. Both parties agree that there exists an arbitration agreement dated 14th December 2020 that reserves the parties’ right to Appeal against the Award. Therefore, it can be stated that up to this point, the parties have both the right to apply to set aside the Award and a right to Appeal against the Award. It should also be noted that in both instances, the Award can be set aside, the only difference being the grounds for doing so. An application under section 35 is limited by the grounds in subsection 2 whereas an Appeal is limited only to questions of law arising in the course of the arbitration.

10. I have carefully gone through the Arbitration Act and it is my understanding that sections 35 or 39 do not limit or prohibit an applicant or Appellant from filing an Appeal or application under both sections at the same time. I also note that nothing in the Act stops a party from filing an application to set aside an award under section 35 and then later file an Appeal under section 39. I agree with the Applicant that indeed, it would be a waste of precious judicial time to proceed in such a manner as this would be against the court’s objective of ensuring resolution of disputes in a manner that is expeditious, efficient and devoid of procedural technicalities as was encouraged by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SCK Petition No. 12 of 2016 [2019] eKLR. I therefore find that nothing in the Arbitration Act stops the Applicant from invoking both sections 35 and 39 of the Arbitration Act in the same cause and at the same time.

11. On whether the Applicant ought to have approached the court by way of a Memorandum of Appeal rather than an Originating Summons, the Applicant has argued that section 39(2) provides that an Appeal by any party may be made to the court on any question of law arising out of the award “On



an application or Appeal...” The Applicant has further argued that on Rule 3(1) of the Arbitration Rules provides that

“Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date.”

I am therefore in agreement with the Applicant that flowing from the aforementioned provisions, a party can Appeal to the court through an application, that is, an Originating Summons and that this application will be deemed as the substantive pleading for the Appeal by the court.

12. In doing so I am guided by the Court of Appeal decision in Ann Mumbi Hinga v Victoria Njoki Gathara Nrb CA Civil Appeal No. 8 of 2009 [2009] eKLR where the Court expressly stated that all the provisions including the Civil Procedure Act and Rules do not apply to arbitral proceedings because section 10 of the Arbitration Act makes the Arbitration Act a complete code and Rule 11 of the Arbitration Rules (which the Respondent has relied on) cannot override section 10 of the Arbitration Act. I disagree with the argument put forward by the Respondent in its submission that the intervention by way of an application is only available to a party during the pendency of the arbitral proceedings while that by way of an Appeal is after the publication of an arbitral award as I find nothing in the Arbitration Act that makes such a distinction.

Conclusion and Disposition

13. It is therefore my net findings that the Applicant is not barred by the Arbitration Act from invoking both sections 35 and 39 in the same application and the court is not also barred from hearing and determining such an application at the same time. In my view the court can make a decision based on either of the two sections of the Act considering that the objective of both provisions is to inter alia set aside the Award. I also hold that nothing stops the Applicant from approaching the court by way of an Originating Summons rather than a Memorandum of Appeal as the Arbitration Act and the Arbitration Rules obligate parties to file applications including those under section 39 of the Arbitration Act, by way of an Originating Summons. The upshot of my finding is that that the Preliminary Objection dated 5th June 2023 has no merit and is hereby dismissed. Costs are in the cause.
14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Fred Ngatia (SC) and Mr. Karungo for the Applicant.
2. Mr. Kimani Kiragu (SC), Mr. Luseno and Mr. Ochieng for the Respondents.
3. Amos - Court Assistant

