



**University of Nairobi v Nyoro Construction Company
Limited & another (Miscellaneous Application E093 of 2022)
[2023] KEHC 3289 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E093 OF 2022**

DAS MAJANJA, J

APRIL 20, 2023

BETWEEN

UNIVERSITY OF NAIROBI APPLICANT

AND

NYORO CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

KAIRU BACHIA, ARBITRATOR 2ND RESPONDENT

RULING

1. The applicant has invoked sections 3A and 95 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and section 17 of the *Arbitration Act*, 1995 to seek extension of time to file the application to challenge the 2nd respondent's Arbitral Award dated January 22, 2021 ("the Award") out of time and an order setting aside the Award in its notice of motion dated 4th February 2022. The application is supported by the affidavit of its Acting Director, Facility Management, Tracisio Maina Thuita, sworn on February 4, 2022. It is opposed by the 1st respondent ("the respondent") through the preliminary objection dated February 22, 2022. The 2nd respondent ("the Arbitrator") did not participate in these proceedings. Both parties filed written submissions while counsel for the applicant highlighted the same before the ruling was reserved.
2. The facts giving rise to the application are not in dispute. Following publication of the Award, the applicant filed an application dated April 21, 2021 in *University of Nairobi v Nyoro Construction Company Limited and Another* (Arbitration Cause E011 of 2021) [2021] KEHC 380 (KLR) seeking to set aside the Award. The 1st Respondent opposed the application and by a ruling delivered on 22nd December 2021, I struck out the application. More particularly, I stated as follows:



- (23) In conclusion, I find and hold that the application before the court is in substance an application under the section 17(6) of the Act since it is an application to this court to set aside the ruling of the arbitral tribunal on the preliminary question whether it has jurisdiction. Consequently, section 35 of the Act, is inapplicable to the preliminary decision on jurisdiction. I also hold that such an application must be made within 30 days of notice of the ruling and that this court does not have the jurisdiction to entertain a late application or extend time for filing such an application.
- (24) For reasons I have stated, it must now be abundantly clear that the Notice of Motion dated April 21, 2021 is incompetent. It must be and is hereby struck out with costs to the 1st Respondent. [Emphasis mine]
3. The question for the court's consideration is whether the court has jurisdiction to extend time for the applicant to set aside the Award. The applicant is aggrieved by the Award on the ground that part of the Respondent's claim before the arbitral tribunal is time barred, that the claim includes a contract that does not have an Alternative Dispute Resolution clause and that the claim comprises two contracts which have been consolidated for arbitration without the consent of the applicant. While these claims may be valid, the applicant must surmount the first hurdle of the timelines erected by the *Arbitration Act*, 1995 on when an application to challenge the ruling on jurisdiction may be made. In this case, section 17(6) provides, "Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter".
 4. In response to the applicant's application, the Respondent has raised a preliminary objection. It contends that the application is res-judicata on the grounds that the earlier application seeking to set aside the Award was determined by the court. In its view, the court in the Ruling, considered whether the applicant could file an application for extension of time under section 17 of *Arbitration Act* and the *Civil Procedure Rules*. It submits that the court unequivocally held that an applicant cannot seek extension of time to file such an application from the High Court. The Respondent further submits that the only recourse for the applicant is to appeal if aggrieved and that for all intents and purposes this application is res-judicata and cites *Invesco Assurance Company Limited v Auctioneers Licensing Board and Another* [2020] eKLR and *Independent Electoral and Boundaries Commission v Maina Kiai* NRB CA Civil Appeal No. 105 of 2017 ([2017] eKLR).
 5. The applicant rejects the contention that its application is res-judicata on the ground that the court merely struck out the earlier application and left undetermined the issue whether the Award ought to be set aside. The applicant relies on a persuasive decision from the Nigerian Supreme Court in *Abayami Babatunde v Pan Atlantic Shipping and Transport Agencies Ltd* Supreme Court of Nigeria S.C. No. 154/2002 where the court emphasized the proper order in a case that has not been heard on merit is to strike it out.
 6. The parties are at one on the doctrine of res judicata which is anchored in section 7 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and which provides:

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.



7. The Court of Appeal in The *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others* (Supra) summarized the elements of the doctrine as follows:

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
8. I agree with the applicant that the doctrine of res-judicata does not apply to any determination on the merits of the Award as the court did make any determination on the merits. However, the issue that the court determined in the ruling is whether the court had jurisdiction to set aside an Award outside the time limited by section 17 of the *Arbitration Act*. In that Ruling, and it is abundantly clear from the passage that I have excerpted above, that first, the application was in substance an application under section 17 of the *Arbitration Act* which is the case in the present application. Second, that such an, “application must be made within 30 days of notice of the ruling and that this court does not have the jurisdiction to entertain a late application or extend time for filing such an application.” In view of this holding, the applicant cannot, once again, apply for extension to time, the court having already determined that it lacks jurisdiction not only to consider that application which is out of time but also to extend the time for consideration of such an application. The only recourse for the applicant, if the law permits, is to appeal.
9. I therefore strike out the notice of motion dated February 4, 2023. It is hereby struck out with costs to the 1st Respondent which costs are assessed at Kshs. 80,000.00.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Kilonzo instructed by Kilonzo and Company Advocates for the applicant.

Mr Wachira instructed by R. M. Mutiso and Company Advocates for the 1st Respondent.

No appearance for the 2nd Respondent.

