



Shaba Civil Engineering Constuction Limited v Tullow Kenya BV. (Civil Suit 2 of 2016) [2023] KEHC 17550 (KLR) (22 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL SUIT 2 OF 2016
JK SERGON, J
MAY 22, 2023**

BETWEEN

SHABA CIVIL ENGINEERING CONSTUCTION LIMITED APPLICANT

AND

TULLOW KENYA BV. RESPONDENT

RULING

1. The subject matter of this ruling is the Motion dated 19th May, 2022, taken out by Shabaa Civil Engineering construction Ltd, the applicant herein. The applicant filed the Affidavit sworn by Justus Ewoi in Support of the aforesaid Motion. The Applicant sought for the following Orders:-

This Honourable Court be pleased to enter Judgment in terms of the Complaint herein and in particular that the Respondent to pay the applicant the following: Kshs.56,675,759.66 arising from outstanding payments under the contract, interest on the above at 14% for sums due under IPC 4 and 5 from the due date until payment in full; damage cost for the company that KRA denied the company tax compliance certificate to operate till the company closed down since to date.

2. On 13th October, 2022, this court virtually delivered its Ruling allowing the Motion dated 19th May, 2022 as unopposed since this Court had noted that Tullow Kenya BV the Respondent herein had not filed its response nor submissions.
3. When the Respondent came to learn of the aforesaid outcome, it took out the Chamber summons dated 20th December, 2022 whereof it sought for Inter alia the setting aside of the order allowing the aforesaid motion and for reinstatement and rehearing afresh of the Motion dated 19th May, 2022.
4. This Court heard the Summons and allowed the same vide its Ruling delivered on 20th April, 2023. In the aforesaid Ruling, this court found merit in the Summons on the basis that the Respondent's



grounds of opposition and written submission though filed were inadvertently not considered in determining the motion. The ruling and Orders issued on 13th October, 2022 were set aside and the Motion dated 19th May, 2022 was reinstated for reconsideration by taking into account the Respondent's grounds of opposition and submissions both dated 27th July, 2022.

5. I have considered the grounds stated on the face of the Motion dated 19th May, 2022 plus the facts deponed in the Supporting Affidavit sworn by Justus Ewoi. I have also considered the Defendant's grounds of opposition plus the rival written submissions. It is the applicant's submissions that the motion should be allowed.
6. The Applicant's case was that the Defendant/Respondent had failed to pay the full contract sum to the Plaintiff/Applicant, prompting the Plaintiff/Applicant to proceedings in Court. The matter was directed by Court that it be referred for arbitration process. The proceedings were conducted and an arbitral award entered and published on 27th May, 2019.
7. The Plaintiff/Applicant was dissatisfied with the arbitral decision and award, then it filed an Application for review of the same at the High Court. The arbitral award was set aside by the High court in a decision dated 07th October, 2021.
8. Resultantly, the Plaintiff/Applicant – basing on the High Court's decision to set aside the arbitral award averred that the Court has thus the duty to enter judgment in terms of the filed plaint. It was further asserted that the Plaintiff's claim is for a liquidated sum in which the Court can enter Judgment in terms of the Plaint, and on the basis of the Court's decision in setting aside the arbitral award.
9. In advancing their application, the Applicant submitted that the arbitral award having been set aside, the claim by the Plaintiff stands and should be allowed as prayed. The Plaintiff also argued that the Respondent has not sought for leave of the High court to Appeal against the Court's decision, issued on the 7th October, 2022, thus there is no pending appeal in place.
10. The Plaintiff/Applicant maintained that Courts have held that appeals from the decision of the High Court reviewing an arbitral award is not of right but can only be pursued with leave of the Court. That in this instant case, no appeal has been preferred
11. It was further submitted that the crux of the dispute herein had been determined. That the court should proceed and enter judgment in terms of the Plaint that was filed herein.
12. In the alternative, that judgment be entered in terms of the claim presented before the arbitrator. Reliance was placed on the case of *Harit sbeth t/a Harit Sbeth Advocates v Sharma Charania* [2014] eKLR, where the Court held as that:

This Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject cross-examination.

13. It was the Plaintiff's Applicant's submission that the High Court in reviewing and setting the arbitral award aside; it had already considered the plausible defences that the Defendant relied on and found that the arbitrator was wrong in relying on the same defences. That therefore, this Court should find it proper to enter a summary judgment as per the Plaint.



14. Further, the Plaintiff posited that there are no longer any triable issues to be considered in this instant matter. That all the triable issues have been considered through the arbitral process, and the High Court in an Application for review reconsidered the same and rendered a decision.
15. Additionally, it was asserted that proceeding on a full trial would render the matter res judicata and sub judice, Contrary to Section 6 and 7 of the *Civil Procedure Act*. Reliance was placed in the case of *Nguruman vs- Jan Bonde Nielsen & Another* [2017] eKLR, where it was held that: “On whether this suit is sub judice the cited suits, Section 6 of the *Civil Procedure Act* provides that:” No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are any of them claim, litigating under the same title, where such suit or proceedings in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
16. It is further argued that the dispute between the parties remains unresolved under Clause 45 of the Agreement and conditions of contract for Building works dated 11th February, 2015 following the setting aside of the Final Award by Steven Oundo, Arbitrator dated 27th May, 2019 and published on even date.
17. The Respondent further stated that the award having been set aside by the Hon. Mr. Justice Wakiaga, there is therefore no award capable of a Judgment being entered under Order 46 of the *civil Procedure Rules*.
18. It is also pointed out that the Application seeks entry of Judgment and grant of Orders which were not prayed for in the Amended Plaint dated 27th March, 2017. The Respondent specifically stated that there was no prayer for interest on Kshs.56,675,759/66 at the rate of 14% p.a. for the sums due under IPC No.4 and 5 from the due date until payment in full.
19. It is also stated that there was no prayer for damage costs for the company that KRA denied the Company Tax Compliance Certificate to operate till the company closed down since to date.
20. Having considered the rival arguments, the following issues were left for the determination of this Court:-
 - i. Whether this Court has Jurisdiction to enter Judgment under Sections 1A, 1B, 3A and 25 of the *Civil Procedure Act* and Orders 21, 46 and 51 of the Civil Procedure Rules.
 - ii. Whether the dispute has been determined and whether there are more triable issues to be considered.
 - iii. Whether any award exists for Judgment to be entered thereon Under Order 46 of the Civil Procedure Rules.
 - iv. Whether the doctrines of sub judice and res judicata arise.
21. As regards the first issue as to whether the Court has jurisdiction to enter Judgment, it is the submission of the Plaintiff/Applicant that this Court has Jurisdiction to enter Judgment Under Section 25 of *Civil Procedure Act*. The Applicant pointed out that this suit was principally to recover sums due and owing from a construction contract the parties had entered.
22. The Plaintiff/Applicant also stated that the Arbitral Award having been set aside, it is its argument that its claim stands and should be allowed.



23. The Applicant further argued that it is now over 9 months since the decision was made and the Respondent has not appealed nor sought for leave to Appeal against the decision of this court which set aside the arbitral award.
24. The Applicant also argued that the decision of Justice Wakiaga which set aside the arbitral award still stands and no Court of similar jurisdiction can entertain a relook at the substantive matter the Learned Judge considered unless on an Application for review of which none has been preferred.
25. The Defendant/Respondent on the other hand is of the submission that the dispute has not been heard, and hence there is no Judgment that has been pronounced hence the Court has no Jurisdiction under Section 25 of the [Civil Procedure Act](#) to enter Judgment.
26. It is also pointed out that the Order setting aside the Arbitral Award is a negative order hence no Judgment can be entered.
27. The Defendant/Respondent further stated that Under Sections 25 and 81(2) (f) (i) of the [Civil Procedure Act](#), no Judgment can be entered on the basis of a negative order. It is also argued by the Defendant/Respondent that the aforesaid Sections are limited to liquidated demands which is not the case in reliefs (a) and (b) which are in respect of unliquidated demands.
28. I have considered the competing submissions on the issue touching on Jurisdiction. I am convinced by the submissions put forward by the Plaintiff/Applicant that this Court having already considered the plausible defences that the Defendant relied on and found that the Arbitrator was wrong in relying on the same defences, the Court is entitled to enter summary Judgment. On the premises, I find that the Court has jurisdiction to enter Judgment. The substantive prayers are in any case respect of liquidated claims.
29. The second issue which arose for determination is whether there are more triable issues to be considered. According to the Plaintiff, there are no longer any triable issues that are to be considered herein. It is argued that all triable issues were considered vide the Arbitral Process and that this Court reconsidered the same on review thus setting aside the Arbitral Award.
30. The Plaintiff further stated that nothing was left out for further trial as relates to jurisdiction. The Defendant/Respondent is of the submission that the dispute remains unresolved. It is stated that the effect of the setting aside of the Arbitral Award is that the Plaintiff's liquidated demands remain undetermined therefore they ought to be referred to a different Arbitrator as per Clause 45 of the Agreement.
31. Having considered the rival arguments, I am persuaded by the arguments put forward by the Plaintiff that to maintain the suit as it is would militate against the Plaintiff enjoying the fruits of its successful litigation. The main prayer sought in the Plaintiff is a liquidated claim, therefore it is right for this Court to convert the Plaintiff's Plaint to a positive order capable of being enforced by entering Judgment as sought in the instant Application.
32. As regards the third issue as to whether the crux of the dispute has been determined, it is the Plaintiff's submission that the dispute herein has been determined. The Plaintiff pointed out that this court has made a determination on the Arbitral Award and set it aside meaning that the claimant's claim as presented stands as claimed.
33. The Defendant/Respondent is of the contrary view that the dispute has not been determined and should therefore be resolved under Clause 45 of the Agreement. The Respondent argued that fresh Arbitration Proceedings should commence to conclude and determine the dispute.



34. In sum, the Respondent is of the submission that this cannot take any step to make a determination on the merits of the issues, therefore Judgment cannot and ought not to be entered as prayed in the instant Application.
35. Having considered the rival arguments, I have come to the conclusion that this Court having reviewed the award of the Arbitrator and setting it aside that it has already considered the plausible defences that the Defendant relied on and found that the Arbitrator was wrong in relying on the same. To this extend, this is a proper and fit case for this court to enter summary judgment as prayed in the instant application.
36. The final issue which arose for determination is whether the doctrines of sub judice and re judicata arise. The Plaintiff/Applicant is of the submission that to proceed on a full trial will render the matter sub judice and res judicata.
37. It is pointed out that the matter having been heard and determined through Arbitral Proceedings and subsequently through the proceedings to set aside an award, it is only natural and fair to all the parties that the Plaint which was the basis of the Arbitral Proceedings be allowed as prayer since there is no issue which was left for any or future trial.
38. The Defendant/Respondent on the other hand is of the submission that the consequence of the setting aside of the Arbitral Award meant that no matter directly or indirectly and substantially in issue between the parties has been heard and fully determined at all as required by the Arbitration Agreement.
39. I have considered the rival submissions over the issue touching on sub judice and re-sub judice rule. There is no dispute that all issues in this matter were heard and determined through the Arbitration Process.
40. In my view, there is no serious and substantive issue that is left for any further trial. To attempt to do so will be subject the matter to a second and further trial whether the same has already been tried contrary to the provision of Sections 6 and 7 of the Civil Procedure Act.
41. In the end, I find the motion dated 19th may, 2022 to be meritorious. It is allowed. Consequently, Judgment is entered in favour of the Plaintiff/Applicant and against the Defendant/Respondent as prayed in the aforesaid Motion with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MAY, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Angwenyi holding brief for Wetangula for Defendant

No Appearance for the Plaintiff

