



Were (As legal representative of Peter Ouma Onyango (Deceased) v Karlson (Arbitration Cause E015 of 2023) [2023] KEHC 18938 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E015 OF 2023**

DAS MAJANJA, J

JUNE 16, 2023

BETWEEN

ROSE NYALWENGE WERE (AS LEGAL REPRESENTATIVE OF PETER OUMA ONYANGO (DECEASED)) APPLICANT

AND

MATS KARLSON RESPONDENT

RULING

1. The Applicant has moved the court by the Notice of Motion dated March 22, 2023 seeking the following orders under the provisions of sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 42 rule 6 of the *Civil Procedure Rules* and Article 159 of the *Constitution*:

- [1] This Honourable Court be pleased to issue an order of proceedings in respect of the Respondents Notice of Motion Application dated January 16, 2023 seeking leave to enforce as a decree of the Court, the Arbitrator's Final Award dated, made and published on November 20, 2021 pending the hearing and determination of the Appeal that was filed by the Applicant in the Court of Appeal in Civil Appeal No E626 of 2021.
- [2] The Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit and just to grant.
- [3] Cost of this Application be provided for.



2. The application is supported by the affidavit of Rose Nyalwenge Were sworn on March 22, 2022. It is opposed by the Respondent through his replying affidavit sworn on April 26, 2023. In addition to written submissions, the respective advocates made brief oral submissions in support of their positions.
3. Before I deal with the issues raised by the application, a brief background of the matter, that can be gathered from the parties' depositions, will suffice.
4. Peter Ouma Onyango ('the Deceased') represented by the Applicant filed an application being Nairobi HCOMM Misc No E1219 of 2020 Peter Ouma Onyango v Mats Kalsson seeking orders that the arbitration between him and the Respondent had no effect on the ground that the dispute was time barred under the *Limitation of Action Act* (Chapter 22 of the Laws of Kenya). The application was determined by a ruling dated March 24, 2021 (Mativo J) dismissing the application. The application precipitated an appeal to the Court of Appeal being Nairobi Civil Appeal No E103 of 2021, Peter Ouma Onyango v Mars Karlson. The appeal is still pending hearing and determination in the Court of Appeal.
5. The arbitration was completed by the Final Award dated November 20, 2021. The Respondent thereafter moved this court under section 36 of the *Arbitration Act* for the recognition and enforcement by the Notice of Motion dated January 16, 2023. It is this application that has precipitated the Applicant's application seeking stay of these proceeding pending the hearing and determination of the appeal in the Court of Appeal.
6. The thrust of the Applicant's case is that the present application seeking enforcement of the arbitral award is sub judice in light of the application pending Court of Appeal application as it is in respect of the arbitration between the parties and is directly and substantially in issue in the ongoing civil proceedings involving the same parties. The Applicant contends that what the appeal seeks is an order that arbitration proceedings seek cease to have effect which is the same ground which she has raised in opposition to the application for enforcement.
7. The Applicant has called in aid the provisions of section 6 of the *Civil Procedure Act* in support of its plea that this matter be stayed. It provides as follows:
 6. 'No court shall proceed with the trial of any suit or proceeding 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 or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'
8. The Applicant cites *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others [2002]eKLR* where the Supreme Court of Kenya explained the rationale and purport of the rule as follows:

'The purpose of sub- judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before



the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.'

9. The Applicant adds that there is real danger that the decision of this court may conflict with the decision of the Court of Appeal which would create uncertainty, lack of clarity, unpredictability and illegitimacy within the law. She further points out that this court is bound by the principles of stare decisis hence its process should yield to the dictates of the higher court.
10. The Respondent opposes the appeal on several grounds. He agrees that NAIROBI HCOMM MISC No E219 of 2020 was heard on merits and that there is an appeal pending therefrom but this it is not a ground to stay these proceedings. The Respondent submits that the Arbitration Act is a complete code and does not admit any appellate jurisdiction to the Court of Appeal in that case. He urges the court to be guided by section 10 and 35 of the Arbitration Act which restrict judicial intervention in the arbitral process hence there is no basis for this court to entertain or grant an order of stay as sought by the Applicant. It avers that this court has the jurisdiction to enforce a domestic award in accordance with section 36 of the Arbitration Act and granting the Applicant's application would amount to an abuse of the court process and undermine the good practice and timely administration of justice.
11. I have considered the arguments raised by the parties and I take the following view of the matter. On the issue whether the present application is sub judice, it is evident that although the present application and the pending appeal involve the same parties and concern arbitral proceedings, the subject matter is different. The present application is an application for the recognition and enforcement of an arbitration award under section 36 of Arbitration Act. The matter in the Court of Appeal is as appeal from a determination of the court dismissing an application to determine the arbitral proceedings on ground of limitation. It cannot be said that the parties are litigating the same issue when what is before this court and the Court of Appeal arise from different provisions of the Arbitration Act. Nor can it be contended that this application to set aside an award can be termed as one of the multiplicity of suits contemplated by section 6 of the Civil Procedure Act.
12. More importantly, these proceedings are governed by the Arbitration Act. It is therefore important to recall that this court's jurisdiction to interfere in arbitral proceeding is circumscribed by section 10 which provides that, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. Thus a party who seeks intervention in the arbitration process must point to a particular provision of the Arbitration Act that permits such intervention. The Applicant does not invoke any provision of the Arbitration Act but recites provisions of the Civil Procedure Act and the Civil Procedure Rules to support its case as I have set out in the earlier part of the ruling. This position that the Arbitration Act is a complete code on matters arbitration has been affirmed in several decisions including Nyutu Agrovat Limited v Airtel Networks Limited NRB CA Civil Appeal (Application) No 61 of 2012 [2015] eKLR and Kamconsult Ltd v Telkom Kenya Ltd and another NRB CA Civil Appeal No 92 of 2009 [2016] eKLR. In Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No 8 of 2009 [2009] eKLR, the Court of Appeal stated as follows:

'A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows 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 cannot override section 10 of the Arbitration Act which states: 'Except as provided in this Act no court shall intervene in matters governed by this Act'.
13. Finally, the section 35(1) of the Arbitration Act is very clear that, 'Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections



(2) and (3).’ An award can only be set aside on the grounds provided and cannot be stayed or even set aside outside the strictures recognised by the statute.

14. It is clear therefore that this court lacks jurisdiction to stay its proceedings to recognize and enforce an arbitral award based on a pending appeal from an earlier decision of the court in relation to the arbitration proceedings.
15. The application dated March 22, 2023 is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH OF JUNE 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Ondijo instructed by J. A. Makau and Company Advocates for the Applicant.

Mr Kimata instructed by Kimata Alutira and Company Advocates for the Respondent.

