



REPUBLIC OF KENYA



**KENYA LAW**

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**Ntaryamira v Njoroge (Commercial Miscellaneous Application E731 of 2021)  
[2023] KEHC 24559 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E731 OF 2021**

**MN MWANGI, J**

**JULY 21, 2023**

**BETWEEN**

**SYLVANA MPABWANAYO NTARYAMIRA ..... APPLICANT**

**AND**

**RICHARD WAWERU NJOROGE ..... RESPONDENT**

**RULING**

1. Before me is a Chamber Summons application dated 3<sup>rd</sup> June, 2022 brought under the provisions of Section 37 of the *Arbitration Act*, 1995, Rule 4(2) of the Arbitration Rules, 1997 (L.N. 58/1997), Sections 3A & 5 of the *Civil Procedure Act*, Cap 21 and Articles 10, 159 & 165(1)(a) of *the Constitution* of Kenya, 2010. The applicant seeks the following orders -
  - i. Spent;
  - ii. That there be stay of proceedings in the application dated 25<sup>th</sup> August, 2021 filed by Richard Waweru Njoroge, the respondent herein, pending the hearing and determination of the applicant's Petition No. E244 of 2022;
  - iii. That the application dated 25<sup>th</sup> August, 2021 filed by Richard Waweru Njoroge, the respondent herein, be mentioned after the hearing and determination of Petition No. E244 of 2022; and
  - iv. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 6<sup>th</sup> June, 2022 by Sylvana Mpabwanayo Ntaryamira, the applicant herein. In opposition thereto, the respondent filed a Notice of Preliminary Objection dated 28<sup>th</sup> June, 2022 raising the following grounds –



- i. That the application offends Section 10 of the *Arbitration Act*, 1995 (the Act) which provides that no Court shall intervene in the matters governed by the Act except as provided therein;
  - ii. That the application is an attempt to circumvent Section 32A of the Act which provides that 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 (sic);
  - iii. That the application offends Section 35(1) of the Act which provides that recourse to the High Court against an arbitral award may be made only by way of an application for setting aside the award under sub-sections 2 & 3;
  - iv. That as such, this Honourable Court does not have jurisdiction to entertain the instant application; and
  - v. That the application is fatally defective hence ripe to be struck out with costs.
3. The instant application was canvassed by way of written submissions. The applicant's submissions were filed on 31<sup>st</sup> October, 2022 by the law firm of S. Musalia Mwenesi Advocates, whereas the respondent's submissions were filed by the law firm of Muriu, Mungai & Company Advocates LLP on 8<sup>th</sup> May, 2023.
  4. Mr. Mwenesi, learned Counsel for the applicant relied on the Court of Appeal holding in the case of *Samura Engineering Limited v Don Woods Limited* [2019] eKLR and submitted that the instant application has been made under the provisions of Section 3A of the *Civil Procedure Act* thus invoking this Court's inherent jurisdiction. He stated that this Court cannot be barred by the provisions of Section 10 of the *Arbitration Act* from invoking its inherent jurisdiction which need not be derived from Statute. He also relied on the Court of Appeal decision in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited T/A Wyco Paints* [2016] eKLR, where inherent jurisdiction was defined as a residual intrinsic authority which the Court may resort to, in order to put right that which would otherwise be an injustice.
  5. The applicant's Counsel contended that placing too much weight on the Court's jurisdiction to entertain proceedings resulting from an arbitral process will impede and hinder fair and proportionate resolution of the dispute. He stated that this is a proper case where the Court ought to draw on its residual intrinsic authority so that no injustice is occasioned by locking out the consideration of the applicant's critical issues pertaining to the fundamental and constitutional rights on grounds of technicalities of procedure. To this end, Mr. Mwenesi cited the Supreme Court decision in *Hussein Khalid & 16 others v Attorney General & 2 others* [2019] eKLR and urged this Court to consider substantive justice as opposed to procedural technicalities.
  6. It was stated by the applicant's Counsel that the applicant herein instituted proceedings in Petition No. E244 of 2022 *Sylvana Mpabwanayo Ntaryamira v Richard Waweru Njoroge* on grounds that her constitutional rights to a fair trial and her right to property as enshrined under Articles 50 and 40 of *the Constitution* of Kenya, 2010 had been violated and/or limited in the arbitration process and in the arbitral award dated 13<sup>th</sup> April, 2018 in contravention of Articles 24(1) & 25 of *the Constitution* of Kenya, 2010. He referred to the Court of Appeal case of *Gladwell Wangechi Kibiru v Lord Melvin John Blackburn* [2015] eKLR, where it was held that an arbitral award may be challenged on constitutional grounds and contended that notwithstanding the provisions under Section 35(1) of the *Arbitration Act*, the applicant has recourse to a Court of law by filing a Constitutional Petition in accordance with principles of justice as is the case herein.



7. He relied on the decisions in *Brian Martin Francis v Dr. Samuel Thenya Maina* [2021] eKLR and *Kenya Pipeline Company v Kenya Oil Company Limited* [2011] eKLR and submitted that the sale agreement dated 5<sup>th</sup> March, 2014 had ceased to be binding on the parties hence the remedy of specific performance was not available to the respondent. He indicated that the respondent accepted a refund of the deposit paid on the purchase price hence waiving his right to specific performance. Mr. Mwenesi relied on the case of *Macfoy v United Africa Ltd* [1961] 3 ALL F.R. 1169 at P. 1172 to support his argument that it would be judicious to grant a stay of proceedings to ensure that Petition No. E244 of 2022 is not rendered nugatory and the respondent's application for enforcement of the arbitral award and any orders issued thereunder, are not founded on an invalid contract.
8. He cited the Court of Appeal decision in *Prof. Daniel Mugendi v Kenyatta University & others* [2013] eKLR and contended that the Arbitral Award dated 13<sup>th</sup> April, 2018, the proceedings herein and the proceedings in Petition No. E244 of 2022 are all founded on the sale agreement dated 5<sup>th</sup> March, 2014 and the validity or otherwise of that agreement hence the Environment and Land Court is the competent Court to determine the dispute involving L.R. No. 27/158 (Original No. 27/14/22) I.R. No. 3669 alongside the applicant's claim of breaches of his fundamental rights. Mr. Mwenesi argued that allowing the instant application will enable the Court to regularize the proceedings by transferring these proceedings and Petition No. E244 of 2022 to the Environment and Land Court for hearing and determination.
9. Mr. Kenneth Wilson, learned Counsel for the respondent submitted that by an Agreement for Sale dated 5<sup>th</sup> March, 2014, the applicant offered to sell to the respondent Land Reference No. 27/158 (Original Number 27/14/22) but a dispute arose between the parties in relation to the said agreement, which dispute was referred to arbitration as provided for in the Agreement. He stated that the dispute was heard before a sole arbitrator and a Final Award which was in favour of the respondent was published on 13<sup>th</sup> April, 2018 and released to the parties on 8<sup>th</sup> June, 2018. He further submitted that the applicant failed to make good the Award and instead, on 9<sup>th</sup> July, 2013, he filed a Chamber Summons application in HCC Misc. No. 308 of 2018 *Sylvana Mpabwanayo Ntaryamira v Richard Njoroge Waweru* seeking to set aside the Final Award of 13<sup>th</sup> April, 2018, which application was dismissed with costs on 4<sup>th</sup> November, 2021 for want of prosecution. He stated that the respondent filed an application dated 25<sup>th</sup> August, 2021 seeking recognition and enforcement of the Arbitral Award which the applicant now seeks to stay.
10. Counsel for the respondent cited the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the Court settled what constitutes a Preliminary Objection. He stated that the fact that the respondent has not filed a replying affidavit in opposition to the instant application should not be construed to mean that the respondent admits the facts as pleaded by the applicant. He submitted that a Notice of Preliminary Objection is argued on the presumption that all the facts as pleaded by the applicant are correct. He cited Sections 10, 32A & 35(1) of the [Arbitration Act](#) and the Supreme Court decision in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch Interested Party* [2019] eKLR and stated that the role of the Court is merely facilitative, especially in instances where parties have voluntarily agreed to refer their dispute to arbitration.
11. In submitting that the principle of finality of arbitration as affirmed in Section 32A of the [Arbitration Act](#) is the basis for limitation of the Court's intervention in Arbitral proceedings, Mr. Kenneth Wilson relied on the Court of Appeal case of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR. He argued that based on the foregoing, this Court does not have jurisdiction to stay its proceedings on the pending application for recognition and enforcement of the Arbitral Award. He stated that this



Court cannot grant orders staying a process rightfully instituted and whose jurisdiction is ripe, based on grounds of a process outside the *Arbitration Act*.

### **Analysis And Determination.**

12. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the Notice of Preliminary Objection by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether the Preliminary Objection raised should be sustained; and
  - ii. If stay of the hearing of the application dated 25<sup>th</sup> August, 2021, should be granted pending the hearing and determination of the applicant’s Constitutional Petition No. E244 of 2022.
13. In the affidavit filed by the applicant, she deposed that she was and still is, the registered owner of the property at Ridgeways, Nairobi known as L.R. No. 27/158 (Original No. 27/14/22) I.R. No. 36698. She averred that an Arbitration Award was made on 13<sup>th</sup> April, 2018 purporting to order specific performance of an invalid contract that had ceased to legally exist, and to unlawfully transfer to the respondent the suit property. The applicant further averred that the said transfer was against her constitutional rights.
14. It was stated by the applicant that at the time of the making of the Arbitral Award, the suit property was valued in excess of Kshs. 150,000,000/=. She contended that she has since filed Constitutional Petition No. E244 of 2022 seeking orders that the Arbitration Award dated 13<sup>th</sup> April, 2018 made by Allen Waiyaki Gichuhi be declared null and void as it goes against the letter and spirit of *the Constitution* of Kenya, 2010.
15. The applicant asserted that the said Arbitral Award has no validity and is null and void; and it is not capable of recognition under the *Arbitration Act*, No. 4 of 1995, rendering it unenforceable. She stated that as a result, unless the instant application is allowed, her constitutional rights shall be defeated and Constitutional Petition No. E244 of 2022 shall be rendered nugatory.

### **Whether the Preliminary Objection should be sustained.**

16. In the case of Oraro v Mbaja [2005] 1KLR 141, The Court defined what constitutes a Preliminary Objection as hereunder -

“The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
17. The above means that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.



18. The respondent filed an application dated 25<sup>th</sup> August, 2021 seeking enforcement of an Arbitral Award published on 13<sup>th</sup> April, 2018. In the instant application, the applicant is seeking stay of the hearing of the application dated 25<sup>th</sup> August, 2021, pending the hearing and determination of her Constitutional Petition No. E244 of 2022 challenging the Arbitral Award published on 13<sup>th</sup> April, 2018 on constitutional grounds. The respondent submitted that pursuant to the provisions of Sections 10, 32A & 35(1) of the Arbitration Act, the role of the Court in instances where parties have voluntarily agreed to refer their dispute to arbitration is merely facilitative, thus this Court has no jurisdiction to stay its proceedings on the application that is pending, dated 25<sup>th</sup> August, 2021, that is pending hearing and determination.
19. On the other hand, the applicant's Counsel submitted that the instant application has been made under the provisions of Section 3A of the Civil Procedure Act thus invoking this Court's inherent jurisdiction, and as such, this Court cannot be barred by the provisions of Section 10 of the Arbitration Act from invoking its inherent jurisdiction which need not be derived from Statute. It was submitted that notwithstanding the provisions of Section 35(1) of the Arbitration Act, the applicant has recourse in a Court of law by filing a Constitutional Petition in accordance with principles of justice.
20. Section 10 of the Arbitration Act No. 4 of 1995 states that -

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”
21. The respondent submitted that this Court cannot grant orders staying a process rightfully instituted and whose jurisdiction is ripe, based on grounds of a process outside the Arbitration Act. The respondent's contention is that the Constitutional Petition filed by the applicant is not in conformity with and/or contemplated by the Arbitration Act hence pursuant to the provisions of Section 10 of the Arbitration Act, this Court has no jurisdiction to stay the hearing and determination of the application dated 25<sup>th</sup> August, 2021, which seeks enforcement of the Arbitral Award published on 13<sup>th</sup> April, 2018, as that is an application contemplated under Section 36 of the Arbitration Act No. 4 of 1995.
22. In determining whether this Court has jurisdiction to hear and determine the instant application, this Court first has to establish whether a Constitutional Petition challenging an Arbitral Award on constitutional grounds is contemplated by the Arbitration Act No. 4 of 1995. In the case of Gladwell Wangechi Kibiru v Lord Melvin John Blackburn & 4 others (supra) cited by the applicant, the Court of Appeal in determining an application for stay of execution pending appeal held as follows –

“We consider it arguable that the award in question can be challenged on constitutional grounds, the applicability or otherwise of the doctrine of res judicata and finality in litigation. In the result the decree and execution process then become challengeable and the argument that the process may be in breach of the applicant's constitutional rights may be tenable.”
23. Further, in the Supreme Court case of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) (supra), cited by the respondent, the Supreme Court in determining whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act held the following-

“We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may



lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured...

In that context and going back to the submissions by the parties, we recall that the Interested Party had raised an important observation to the effect that arbitral awards are now being set aside because they allegedly do not comply with constitutional principles. As urged by the Interested Party, when that happens, the High Court becomes the first and final Court of determining that issue. We are on our part persuaded by the argument that where an award is set aside on constitutional grounds, then that should be one of the exceptional grounds in which an appeal should be preferred against a decision made under Section 35 because Section 35 is clear as to the issues for which proof is required before setting aside of an arbitral award...

Reading each of the above provisions, alleged breaches of *the Constitution* cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of *the Constitution* are properly governed by Articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of Section 35 of the *Arbitration Act*..."

24. The Supreme Court in the aforementioned case held that the kind of intervention contemplated under Section 35 of the *Arbitration Act* is an application for setting aside an Arbitral Award only. The learned Judges further held that breaches of *the Constitution* cannot be properly introduced for adjudication by the High Court by way of an application to set aside an Arbitral Award. I therefore hold that when challenging an Arbitral Award on constitutional grounds, the party dissatisfied with the award must file a Constitutional Petition pursuant to the provisions of Articles 165(3) and 258 of *the Constitution* and thereafter, the High Court shall assume jurisdiction pursuant to the provisions of Section 35 of the *Arbitration Act* and make a determination thereof. Based on the foregoing, my finding is that the applicant's Constitutional Petition No. E244 of 2022, which the applicant says she has filed challenging the Arbitral Award published on 13<sup>th</sup> April, 2018 is in conformity with Section 10 of the *Arbitration Act* No. 4 of 1995.
25. The applicant has urged this Court to invoke its inherent jurisdiction under Section 3A of the *Civil Procedure Act*, 2021 and determine the instant application. Inasmuch as an application for stay of proceedings is not provided for in the *Arbitration Act* No. 4 of 1995, this Court can still invoke its inherent jurisdiction and consider it, if it thinks it is necessary for the ends of justice. Inherent jurisdiction was addressed by the Court of Appeal in the case of Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints (supra) as hereunder –

“The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury's Laws of England, 4<sup>th</sup> Edn. Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending



proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. See also Meshallum Waweru Wanguku (supra”).)

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.”

26. Having found that the High Court can assume jurisdiction pursuant to the provisions of Section 35 of the *Arbitration Act* and hear and determine the applicant’s Constitutional Petition No. E244 of 2022 in conformity with Section 10 of the *Arbitration Act* No. 4 of 1995, this Court finds that it is in the interest of justice for it to invoke its inherent jurisdiction under Section 3A of the *Civil Procedure Act* and determine the instant application. In the circumstances, I hold that this Court has the requisite jurisdiction to hear and determine the instant application. Consequently, the respondent’s Preliminary Objection fails.

If stay of the hearing of the application dated 25<sup>th</sup> August, 2021, should be granted pending the hearing and determination of the applicant’s Constitutional Petition No. E244 of 2022.

27. The respondent has not filed a replying affidavit in opposition to the instant application. This then begs the question of what the effect of the respondent’s failure to file a replying affidavit is. This question was answered by the Court of Appeal in the case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR as hereunder -

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants’ claims?”

28. The applicant herein is seeking an order for stay of the hearing of the respondent’s application dated 25<sup>th</sup> August, 2021 seeking enforcement of an Arbitral Award published on 13<sup>th</sup> April, 2018 pending the hearing and determination of the applicant’s Constitutional Petition No. E244 of 2022. The respondent submitted that he has not filed a replying affidavit to controvert the facts as pleaded by the applicant but that should not be construed to mean that he admits the facts as pleaded by the applicant. The Preliminary Objection was argued only on the assumption that all the facts as pleaded by the applicant are correct.
29. Based on the foregoing, I hold that the facts as averred in the applicant’s affidavit are not sufficient to prove her claim. The principles to be considered by a Court when dealing with an application for



stay of proceedings were considered by the Court in the case of Kikambala Housing Estate Limited v Akash Devani & 10 others [2020] eKLR, where the Court in declining an application similar to this one held that: -

“An order for stay of proceedings should not be granted as of course merely because it has been sought. The court must appreciate the constitutional dictate for the expeditious disposal of the case and only stay proceedings in very compelling cases. This is what I get from the author of Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, on the threshold for stay of proceedings;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

30. In this instant, in as much as it is assumed that what is averred in the applicant’s affidavit as factual evidence is admitted by virtue of the respondent’s failure to file a replying affidavit, the applicant still has a duty to discharge its burden of proof pursuant to the provisions of Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya by demonstrating that there exists Constitutional Petition No. E244 of 2022 between her and the respondent to warrant this Court to exercise its discretion in her favour.
31. On perusal of the applicant’s affidavit in support of the instant application, it is evident that there are no annexures attached to the said affidavit in support of the applicant’s allegation that there exists Constitutional Petition No. E244 of 2022 between the parties herein, challenging the Arbitral Award published on 13<sup>th</sup> April, 2018 on constitutional grounds. The applicant ought to have annexed pleadings of Constitutional Petition No. E244 of 2022 to demonstrate existence of the said petition. As a result, this Court has no way of ascertaining the applicant’s averments since what is before this Court are bare allegations by the applicant, which have not been substantiated by solid evidence.
32. It is trite that an order for stay of proceedings is a power which ought to be exercised sparingly and only in exceptional cases. In addition, an order for stay of proceedings will only be granted in instances where it is shown beyond all reasonable doubt that the proceedings sought to be stayed ought not to be allowed to continue.
33. The upshot is that the application dated 3<sup>rd</sup> June, 2022 is bereft of merit. It is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**



## **JUDGE**

In the presence of:

Mr. Mwenesi for the respondent/applicant

Mr. Diri h/b for Mr. Kenneth Wilson for the applicant/respondent

Ms B. Wokabi – Court Assistant.

