



**Ogake v Transmara Sugar Co. Ltd (Miscellaneous Application  
29 of 2022) [2023] KEHC 20993 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20993 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS APPLICATION 29 OF 2022**

**RPV WENDOH, J**

**JULY 20, 2023**

**IN THE MATTER OF S. 15 (A) OF THE ARBITRATION ACT NO. 4 OF 1995**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE  
TERMINATION OF THE ARBITRATORS MANDATE**

**AND**

**IN THE MATTER OF THE KENYENYA DIVISION SUGAR ARBITRATION COMMITTEE**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

**BETWEEN**

**JOB OINO OGAKE ..... APPLICANT**

**AND**

**TRANSMARA SUGAR CO. LTD ..... RESPONDENT**

**RULING**

1 The applicants moved this court via a notice of motion dated November 15, 2022 seeking the following orders: -

1. That the mandate of the arbitration committee at and of Nyamarambe Division be terminated for having failed to conduct the arbitration proceedings properly and with reasonable dispatch or at all.
2. That upon grant of prayer no. 1 above, this court do order that the cases referred to arbitration being Nos. 001/2, 002/22, 003/22, 004/22, 005/22, 006/22, 007/22, 008/22, 009/22, 010/22,



011/22, 012/22, 013/22, 014/22, 015/22, 016/22, 017/22, 018/22, 019/22, 020/22 and 021/22 by the committee be heard by Rongo Principal Magistrate's Court.

3. Costs of this application be in the cause at Rongo Court.
- 2 The application is based on the grounds found on the face of the application and the supporting affidavits of Job Oino Ogake the 1<sup>st</sup> applicant and Kerario Marwa, Advocate for the claimants.
- 3 The 1<sup>st</sup> applicant deposed that the applicants were referred to arbitration at Nyamarambe Division on or about the month of May 2021; that to date, the Nyamarambe Division Arbitration Committee has not finalized the arbitration nor has it rendered any award; that the Kenyan Arbitration Laws requires that arbitration be conducted properly and with reasonable dispatch; that the period already taken by the arbitrator in these cases cannot be said to be reasonable and it is injustice to them; that it is in the best interest of justice that the mandate of the arbitrator be terminated and the matters be referred to hearing and disposal by the court.
- 4 Mr. Kerario Marwa, Counsel for the applicants deposed that the applicants instructed him to file their cases at the Rongo Law Courts; that subsequent to the service of summons to the respondent, it filed an application under Section 6 of the Arbitration Act for stay and reference to arbitration; that there are High Court and Court of Appeal cases which have affirmed that cases be stayed pending the arbitration by the committee; that in the month of May to August 2021 he served the members of the arbitration committee under Clause 9 of the contract with reference to the letters dated March 16, 2021; that Counsel served the committee with the applicants' statement of claim, supportive documents and authorities; that since the matters were referred to arbitration, the Nyamarambe Sugar Arbitration Committee, has been unable to finalize the applicant's cases and render an award; that the delay by the arbitration committee is unacceptable and unexplainable under the law of arbitration which requires that proceedings be conducted properly and with reasonable dispatch; that the delay of more than one year is not in the interest of justice; that this court should invoke its powers under Section 15 of the Arbitration Act and terminate the arbitrator's mandate and the matters proceed at Rongo Law Courts.
- 5 The application was opposed. Mr. Samuel Kalu the Corporate and Legal Manager of the respondent filed a replying affidavit sworn and dated January 30, 2023. He deposed that the application is bad in law and fatally defective as it should have been filed by way of Originating Summons pursuant to Rule 3(1) of the Arbitration Rules, 1997; that the averments that the arbitration committee have been hesitant in finalizing and rendering its award is untrue; that the proceedings in the arbitration committee commenced in January 2022; that the applicants filed their statement of claim on January 5, 2022 and the respondents filed their responses on February 3, 2022.
- 6 It was further deposed that the matters were slated for hearing on February 21, 2022. However, the same could not proceed as the applicants' Counsel sought to secure the attendance of an expert witness with regard to the controverted report; that the matter came up for hearing on March 11, 2022 where it proceeded and the applicants were given 14 days to put in their submissions; that the applicants filed their submissions on April 19, 2022 and the respondents put in their submissions on September 21, 2022; that the applicants have approached this court barely 2 months after the respondent filed its submissions seeking to terminate the mandate of the arbitration committee.
- 7 It was also deposed that the mandate of the arbitration committee can only be terminated by the final arbitral award or where the claimant or parties agree to withdraw the claim among other reasons, pursuant to Section 33 of the Arbitration Act; that the applicants have not sufficiently demonstrated to this court that the delay by the arbitration committee in finalizing the proceedings is unreasonable and the application is mere allegations; that the application is premature and the parties have a right to appeal under Section 35 of the Arbitration Act and that either party is at liberty to set aside an award



issued by the Arbitration Committee. The court was urged to dismiss the application dated November 15, 2022 with costs.

8 I have considered the application, the affidavits in support of the application, the annexures thereto, the respondent's replying affidavit and submissions by the applicants.

9 The respondent faulted the manner in which these proceedings have been commenced before this court. The respondent is of the view that the application is incompetent and fatally defective as it was filed as a Notice of Motion as opposed to an Originating Summons. The respondent urged this court to strike out the application.

10 The applicants brought this application under Section 15 (a) of the Arbitration Act which reads: -

(1) The mandate of an arbitrator shall terminate if-

a. he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch..”

11 The law under Rule 3 (1) of the Arbitration Rules provides that the mode of commencement of proceedings under Section 15 (a) of the Arbitration Act shall be made by Originating Summons. It provides: -

(1) Application under section 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.”

12 The law makes it mandatory that the only way to proceed with applications under Section 15 of the Arbitration Act such as the one before this court can only be through Originating Summons. It is now settled law that where there is a procedure to seek redress of any particular grievance prescribed by the Constitution or Statute, that procedure should be strictly followed. See the findings in Speaker of National Assembly vs Njenga Karume (2008) I KLR. The applicants did not proffer any reason as to why they sought to commence these proceedings via a Notice of Motion as opposed to Originating Summons as provided under the law.

13 This court has held severally that Article 159 cannot be used to cure all manner of procedural indiscretions. The institution of a proper suit goes to the root of a court's jurisdiction. If the dispute before the court is commenced inappropriately, there is nothing for the court to decide. The manner in which a suit is instituted cannot be a mere technicality. The Court of Appeal in the case of Scope Telematics International Sales Limited vs Stoic Company Limited & Another (2017) eKLR held: -

“...despite the foregone, the court still went ahead to exercise its discretion in favour of the 1<sup>st</sup> respondent by invoking that Article, the overriding objective under the Civil Procedure Act, and the interest of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be a mere technicality. It is the basis of jurisdiction, obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or the 2<sup>nd</sup> respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.”



14 Further, Rule 3(3) of the Arbitration Rules provides: -

“Another application arising from the application made under Sub - Rule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date.”

15 The law states in mandatory terms that any subsequent application shall be by summons. If this court is to allow the Notice of Motion to stand as it is, then what would happen if a party is interested in making a further application? There would be two different sets of pleadings over the same subject matter whereas the Rules contemplate that the pleadings should be of a similar nature.

16 From the foregone analysis, it is this court’s view that the Notice of Motion application dated November 15, 2022 is incompetent and fatally defective and therefore cannot lie.

17 A further observation is that the proceedings before the Nyamarambe Arbitration Committee are at an advanced stage. The parties have presented their respective cases and the only remaining pending issue is the delivery of the arbitral award by the arbitration committee. There is nothing to demonstrate that the arbitration committee has refused to determine the matter. The respondent has deposed that they filed their submissions on September 21, 2022. At the time when the applicants filed this application, there was a lapse of 2 months since the parties finalized the hearing including filing submissions.

18 Although there is no particular timeline set on when the arbitral award should be delivered by the arbitration committee, Article 159 (2) provides the guiding principle that courts and tribunals should observe when executing their mandate. The Constitution provides: -

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

19 To this end, the arbitration committee is expected to deliberate and deliver an award in a timely manner. Even at the time of delivering this ruling there is no indication that was given to this court that the arbitral award has been delivered.

20 In the event that the arbitral award has not been delivered to the parties, as at the time of this ruling, this court in the exercise of its supervisory mandate conferred upon it under Article 165 (6) of the Constitution directs that the Chairperson and the Members of the Nyamarambe Arbitration Committee deliver their arbitral award within 30 days of this ruling.

21 The following orders do issue: -

1. The Notice of Motion dated November 15, 2022 is allowed on condition that:-

a. The Chairperson and the Members of the Nyamarambe Arbitration Committee do deliver the Arbitral Award within 30 days of this ruling.

b. In default of (2) above, the Nyamarambe Arbitration Committee’s mandate will stand terminated and the matters be heard and determined as filed before the Rongo Law Courts.

2. The Applicants to extract and serve the order of this court within 14 days to the Chairperson and Members of the Nyamarambe Arbitration Committee.



3. Each party shall bear its own costs.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 20<sup>TH</sup> DAY OF JULY 2023**

**R. WENDOH**

**JUDGE**

Ruling Delivered In The Presence Of;

N/A for the Applicant.

N/A for the Respondent.

Nyauke Court Assistant.

