



**Kenya Re-Insurance Corporation Limited v Roadtainers (Mombasa)
Limited & another (Miscellaneous Civil Application E053 of 2023)
[2023] KEHC 24619 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E053 OF 2023
MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

KENYA RE-INSURANCE CORPORATION LIMITED APPLICANT

AND

ROADTAINERS (MOMBASA) LIMITED 1ST RESPONDENT

APA INSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 26th January, 2023 brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. The applicant seeks the following orders -
 - i. That the Honourable Court be pleased to make an award on costs in favour of the applicant in the matter of an Arbitration before Hon. E. T. Gaturu between Roadtainers (Mombasa) Limited v APA Insurance Company Limited and Kenya Reinsurance Corporation Limited;
 - ii. That the Honourable Court do make such further orders as it deems fit and just in the circumstances; and
 - iii. 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 the same day by Edward Omotii, learned Counsel for the applicant. In opposition thereto, the 1st respondent filed a Notice of Preliminary Objection dated 23rd March, 2023 raising the following grounds –



- i. This Honourable Court lacks jurisdiction to entertain this application as the Court's jurisdiction under Sections 35, 36 and 37 of the *Arbitration Act* is limited to the matters specified therein. Taxation of costs before the Arbitral Tribunal is not among the issues for jurisdiction of the Court;
 - ii. The supervisory jurisdiction of the High Court on matters regarding Arbitration does not extend to the Court taxing the costs incurred by parties before the Arbitral Tribunal;
 - iii. The applicant having taxed its costs in Misc No. E621 of 2021- Kenya Re-Insurance Corporation v Roadtainers (Mombasa) Limited & another is estopped from filing another application seeking leave to tax its costs before the Arbitral Tribunal; and
 - iv. This entire suit is incurably defective and an abuse of the Court process and should be struck out with costs to the 1st respondent.
3. The instant application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Eno & Associates Advocates on 18th May, 2023. The 1st respondent's submissions were filed on 26th May, 2023 by the law firm of Wamae & Allen Advocates. The 2nd respondent did not participate in this application.
4. Ms. Katila, learned Counsel for the applicant submitted that vide a claim dated 10th June, 2021, the 1st respondent lodged an Arbitral claim against the 2nd respondent and the applicant arising from a Road Traffic Accident in the Republic of Uganda involving motor vehicle registration No. KAN 661X/ZB 4273 belonging to the 1st respondent. That Hon. E.T. Gaturu was appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya) as the sole Arbitrator to adjudicate over the said dispute. Counsel stated that the Arbitral claim was founded on an arbitral clause contained in a private motor vehicle insurance policy signed between the 1st and 2nd respondents herein.
5. She further submitted that the applicant filed a Notice of Preliminary Objection before the Arbitral Tribunal challenging its jurisdiction to entertain the said claim for lack of an arbitration agreement or a valid arbitration agreement between the applicant and the respondents and the said Preliminary Objection was dismissed by the Arbitral Tribunal as it found that it had jurisdiction to entertain the claim as framed. It was stated by Counsel that the Arbitral Tribunal then proceeded with the hearing of the dispute between the parties and directed parties to file submissions. She stated that aggrieved by the decision of the Arbitral Tribunal, the applicant moved to the High Court to challenge it by way of an Originating Summons dated 11th August, 2021 and on 9th September, 2022, the High Court found that the Arbitral Tribunal lacked jurisdiction to entertain the arbitral proceedings against the applicant for lack of a valid arbitration agreement between the applicant and the respondents, thus the applicant ceased to be a party before the Tribunal.
6. Ms. Katila referred to Sections 25 and 36 of the *Arbitration Act* and stated that the said provisions are applicable where an Arbitral Award has been issued and a party wishes to either set aside the Arbitral Award, recognize or enforce it. She indicated that Section 37 of the *Arbitration Act* on the other hand sets out the grounds for recognition or enforcement of an Arbitral Award. She stated that the applicant has moved this Court under its inherent jurisdiction to award it costs of the arbitral proceedings since the *Arbitration Act* and Rules do not deal with this matter. She also stated that since the applicant is neither challenging any arbitral award nor enforcing one, the 1st respondent's objection under Sections 35, 36 & 37 of the *Arbitration Act* is misplaced.
7. Counsel for the applicant submitted that the reliefs sought by the applicant in the present application are not geared towards this Court undertaking taxation of costs of the proceedings before the



Arbitrator, but to having this Court decide that the applicant should be paid costs of Arbitration. She further submitted that the applicant filed a bill of costs in Misc. No. E621 of 2022 but the costs sought in the said bill were limited to the costs incurred in prosecuting the Originating Summons dated 11th August, 2022 before the High Court. She referred to Section 32B of the *Arbitration Act* which gives the Arbitral Tribunal powers to make a determination on costs and expenses. She relied on the case of *Golden Homes (Management) Limited v Mohammed Fakruddin Abdullahi & another; Golden Homes Limited (Interested Party)* [2019] eKLR and submitted that since the applicant fully participated in the arbitral proceedings but had its name struck off from the said proceedings before the final award was made, it is only this Court that has the inherent powers to award it costs of the said proceedings.

8. Mr. Kigata, learned Counsel for the 1st respondent submitted that taxing of costs before the Arbitral Tribunal is not among the supervisory powers of the High Court. He referred to Sections 35, 36 & 37 of the *Arbitration Act* and submitted that the said provisions grant the High Court specific powers in its supervisory jurisdiction over matters regarding arbitration which include setting aside an Arbitral Award or recognizing and/or enforcing an award. He further submitted that it will be a miscarriage of justice for the High Court to tax costs incurred before the Arbitral Tribunal in its supervisory jurisdiction over the Arbitral Tribunal as it will be akin to the High Court taxing costs incurred by a party in the Magistrate's Courts in exercise of its supervisory jurisdiction.
9. Mr. Kigata referred to Section 32B of the *Arbitration Act* and stated that the said Section is explicit that the Arbitral Tribunal has powers to make a determination on costs and that such powers are not donated to the High Court in its supervisory jurisdiction over the Arbitral Tribunal. He further stated that a determination on costs ought to be part and parcel of the Arbitral Award and published by the Tribunal and thereafter, a dissatisfied party can seek redress at the High Court under its supervisory jurisdiction and if the High Court finds that the Arbitrator assessed costs based on grounds that can impeach such an award, the High Court can set aside the award and re-tax the costs.
10. Mr. Kigata submitted that a Court exercising supervisory jurisdiction cannot assume jurisdiction not donated by an Act of parliament and/or *the Constitution*. He stated that the applicant taxed its costs in Misc. No. E621 of 2021- *Kenya Reinsurance Corporation v Roadtainers (Mombasa) Ltd & another* after it filed an application to have its name struck out of the proceedings before the Arbitral Tribunal hence it is estopped from filing another application seeking leave to tax its costs before the Arbitral Tribunal.

Analysis And Determination.

11. 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 filed by the 1st respondent as well as the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the 1st respondent's Preliminary Objection should be sustained; and
 - ii. If the answer to the above issue is in the negative, if costs of the arbitral proceedings should be awarded to the applicant.
12. In the affidavit filed by the applicant, it deposed that the Arbitration Tribunal no longer has jurisdiction to pronounce itself on the issue of costs in relation to the applicant, since the applicant is no longer a party to the arbitral proceedings by virtue of a ruling dated 9th September, 2022 delivered by the High Court.



Whether the 1st respondent's Preliminary Objection should be sustained.

13. In the case of *Oraro v Mbaja* [2005] eKLR, a Preliminary Objection was described by Ojwang J (as he then was) in the following words-

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified 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. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

14. The 1st respondent's case is that this Court has no jurisdiction to award costs as a result of proceedings before the Arbitral Tribunal and that the High Court's supervisory jurisdiction on matters regarding Arbitration does not extend to taxing costs incurred by parties before an Arbitral Tribunal. The applicant on the other hand submitted that it has moved this Court under its inherent jurisdiction to award it costs of the arbitral proceedings since the *Arbitration Act* and Rules do not deal with this matter. The applicant argued that the provisions of Sections 35, 36 & 37 of the *Arbitration Act* are not applicable in the application herein as the applicant is not seeking an order to set aside, recognize or enforce an Arbitral award.

15. In the case of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Nyarangi, JA., held as follows on the issue of jurisdiction-

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. The facts of the case are that the 1st respondent lodged an arbitration claim against the applicant and the 2nd respondent. The applicant filed a Notice of Preliminary Objection before the Arbitral Tribunal challenging its jurisdiction to hear and determine the said claim for lack of an arbitration agreement or a valid arbitration agreement between the applicant and the respondents. The Arbitral Tribunal found that it had jurisdiction to hear and determine the dispute between the parties herein and dismissed the applicant's Preliminary Objection. The claim before the Arbitral Tribunal then proceeded to hearing and at the close of the hearing, the Tribunal directed parties to file written submissions.

17. Aggrieved by the decision of the Arbitral Tribunal, the applicant challenged it at the High Court vide an Originating Summons dated 11th August, 2021. On 9th September, 2022, the High Court found that the Arbitral Tribunal lacked jurisdiction to entertain the arbitral proceedings against the applicant for lack of a valid arbitration agreement between the applicant and the respondents thus the applicant ceased to be a party before the Tribunal. Based on the foregoing, the applicant has now moved the High Court seeking an order for costs incurred as a result of the arbitral proceedings against it. The applicant contended that in view of the fact that it is no longer a party to the arbitral proceedings, the Arbitration Tribunal no longer has jurisdiction to pronounce itself on the issue of costs in relation to it.

18. Section 32B of the *Arbitration Act* gives the Arbitral Tribunal powers to make a determination on costs and expenses arising out of arbitration proceedings. On perusal of the applicant's Notice of Preliminary Objection filed before the Arbitrator, I note that the applicant did not seek that the claim against it be dismissed with costs. Further, in the Originating Summons dated 11th August, 2021, the



applicant sought for an order that the Arbitral Tribunal's ruling dismissing its Preliminary Objection be reviewed, set aside and/or substituted with an order that the Arbitral Tribunal lacks jurisdiction to entertain the arbitral proceedings against the applicant on account of lack of an arbitration agreement or a valid arbitration agreement between the applicant and the respondent. Once again, the applicant did not ask for costs.

19. As correctly submitted by Counsel for the 1st respondent, a Court cannot assume jurisdiction not donated to it by an Act of parliament and/or *the Constitution*. That was the holding of the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, where the Court held as follows-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

20. In filing the instant application, the applicant has invoked this Courts inherent jurisdiction. The Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR discussed the extent of the Courts inherent powers as hereunder-

“The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury’s Laws of England, 4th 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.”

21. From the above extract from Halsbury’s Laws of England, inherent jurisdiction of the Court is part of procedural law and not substantive law and it is exercisable by summary process. As explained here before, the applicant did not seek costs when the claim against it was dismissed before the Arbitrator or in the High Court in its application challenging the Arbitrator’s finding that he had jurisdiction to determine the claim filed against the applicant and the 2nd respondent. Pursuant to the provisions of Section 32B of the *Arbitration Act*, the Arbitral Tribunal is clothed with the requisite jurisdiction to make a determination of costs and expenses arising out of arbitral proceedings and in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party. Based on the foregoing, it



is my finding that this is not a proper case for the applicant to invoke this Court's inherent jurisdiction as the issues raised in the instant application form part of substantive law and not procedural law.

22. In the premise, I find that the application herein is an afterthought having been filed after the applicant taxed its costs in Misc. No. E621 of 2021- *Kenya Reinsurance Corporation v Roadtainers (Mombasa) Ltd & another*, granted by the High Court vide its ruling delivered on 9th September, 2022. Further, the applicant is also guilty of piecemeal litigation having failed to raise the issue of costs incurred as a result of the arbitral proceedings before the Arbitral Tribunal and at the High Court, when it filed the Originating Summons challenging the Arbitrator's decision.
23. For the reasons explained hereinabove, I find that this Court has no jurisdiction to hear and determine the application herein. Consequently, I uphold the 1st respondent's Preliminary Objection and dismiss the application dated 26th January, 2023 with costs to the 1st respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Nyareso for the applicant

No appearance for the 1st respondent

Ms B. Wokabi – Court Assistant.

