



Sbi International Holdings (Kenya) v Kenya National Highways Authority (Civil Suit E287 of 2022) [2024] KEHC 12439 (KLR) (Commercial and Tax) (18 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E287 OF 2022
A MABEYA, J
OCTOBER 18, 2024**

BETWEEN

SBI INTERNATIONAL HOLDINGS (KENYA PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT

RULING

1. This ruling determines the application dated 26/5/2023. The same was brought under section 6(1) of the *Arbitration Act*, rule 2 of the arbitration rules, section 3A of the *Civil Procedure Act* Chapter 21 of the laws of Kenya. It sought the stay of proceedings pending referral of the dispute to arbitration in accordance with the agreement between the parties.
2. In support of the application, the applicant relied on the grounds on the face of the Summons and the supporting affidavit of Eng. Clarence Karotsworn on 26/5/2023. It was contended by the applicant that it entered into a contract with the respondent dated 17/5/2016 for dualing of the Kisumu Boys round about Mambo Leo junction road.
3. That the contract detailed an elaborate process for arbitration in the event of a dispute. That despite the existence of the arbitral clause, the respondent had proceeded to file the suit without first exploring the arbitration as stipulated in clause 20.7 of the General Conditions of Contract Fidic 2005. According to the applicant, the contract first gives room for amicable settlement of a dispute where it is referred to adjudication.
4. That despite as aforesaid, the respondent moved to court to recover the alleged sums instead of settling the dispute as stipulated in the contract. That it would be in the interest of justice to have an order for stay of proceedings with respect to the dispute emanating from the agreement pending settlement through arbitration.



5. The respondent opposed the application vide a replying affidavit sworn by Gilad Mishnion 16/10/2023. He stated that the application was res-judicata as it had previously been determined between the parties on separate rulings dated 15/9/2020, 19/4/2021 and 28/7/2023. That in separate suits, the applicant had filed similar applications challenging the jurisdiction of the High Court. That on 19/4/2021, the court consolidated the matters and held that the applications were res-judicata as a determination on the same had already been made in Nairobi High court Civil case no e075 of 2020 SBI International Holdings (Kenya) vs Kenya National Highway Authority.
6. The respondent stated that, in view of the International federation of consulting Engineers FIDIC, a contractor who uses its resources to undertake the works that upon completion and in the event of dispute, the first thing is to utilize the offices of the dispute board whose decision is expedited and implemented immediately. That this ensures that the contractor is settled without delay under the principle of “pay now argue later”.
7. That the respondent was a holder of the decision of the dispute board having utilized its resources to perform its obligations under the contract and being a holder of the favourable adjudication of the DB. That the applicant’s failure to heed to its obligation had prejudiced the respondent.
8. In its grounds of opposition dated 16/10/2023, the respondent stated that the application was res-judicata as it had been determined by Majanja J on 15/9/2020 in Nairobi High court commercial case no E075 of 2020. That it had also been determined by Mativo J, as he then was, on 19/4/2021 in Nairobi Commercial case No E228 of 2020 and Commercial cases nos. E375, E374, E377 OF 2020 as well as in E968 of 2021 and E967 of 2021.
9. It was contended that pursuant to clause 20.4 of the general conditions, the applicant was obligated to implement dispute board decisions in issue by paying the demanded sums promptly. That the decision of the dispute board had not been set aside by amicable settlement or arbitration.
10. That the applicant’s legal obligation to promptly give effect to the disputes board decision and payment of the sums to the respondent was not affected by the applicant’s right to file a notice of dissatisfaction with the disputes board. That the respondent was seeking to enforce the decision of the board and there was no dispute to warrant referral to arbitration.
11. The applicant filed a further affidavit sworn by Eng Clarence Karot dated 6/2/2024. He stated that the application was premised on sections 6 and 10 of the *arbitration Act* which deals with the jurisdiction of the court to hear and determine matters relating to arbitration. That the application was not res-judicata since it raises a preliminary point of law which challenges the court’s jurisdiction. That the application was founded on the doctrine of exhaustion of local remedies as provided for by statute under section 6(1) of the *arbitration Act* as well as article 159 of *the constitution*.
12. The applicant averred that the cases could be distinguished by this case as they dealt with the interpretation of clause 20.4 of the Bank Harmonized edition of the Conditions of Contract for construction Prepared and copyrighted by the international Federation of consulting engineers. That the Court could only deal with the interpretation of the contract where it finds that there was a valid jurisdiction.
13. Parties canvassed the application by way of written submissions which I have carefully considered. The primary question to resolve is whether the defendant/applicant has demonstrated a valid case for staying these proceedings pending referral to arbitration.
14. Before delving to the merits of the application, a preliminary point of law was raised, that the application is res-judicata.



15. Section 7 of the *Civil Procedure Act*, 2010 provides that: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

16. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR, held that: -

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit;
- b. That former suit was between the same parties or parties under whom they or any of them claim;
- c. Those parties were litigating under the same title;
- d. The issue was heard and finally determined in the former suit;
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

...

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

17. I have reviewed the evidence attached to the respondent’s replying affidavit dated 16/10/2023. I note that in HCCC E075 of 2020, the applicant made an application dated 30/4/2020 seeking the same orders. In its ruling dated 15/9/2020, the court declined to stay the proceedings and refer the matter to arbitration. The applicant also filed an application dated 5/10/2020 in HCCOM E228 of 2020 for the same orders. These applications were submitted in different courts, and in HCCC E375 of 2020, Justice Mativo addressed the issue and dismissed the application for referral to arbitration.

18. From the record, it is clear that the applicant has filed multiple applications seeking the same orders across various courts. The parties involved are the same, the subject matter is the same and competent courts have already made determinations on this issue.

19. Based on the above considerations, it is evident that the applicant has repeatedly sought the same orders in multiple courts. The principle of res judicata applies here. No amount of ingenious arguments can



save the applicant from the doctrine of res-judicata. In light thereof, the applicant's current request for a stay of proceedings pending referral to arbitration cannot be entertained.

20. Accordingly, I find that the application is barred by the doctrine of res judicata and strike it out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

