



Mainga & 9 others v Transmara Sugar Company Limited (Miscellaneous Civil Case E001 of 2024) [2024] KEHC 13717 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
MISCELLANEOUS CIVIL CASE E001 OF 2024
F GIKONYO, J
NOVEMBER 4, 2024
(FORMERLY MIGORI HIGH COURT MISC. APP. NO.
E218 OF 2023)
IN THE MATTER OF ARTICLE 159 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF S. 15(A) OF THE ARBITRATION
ACT NO. 4 OF 1995
AND
IN THE MATTER OF SECTIONS 1A AND 1B OF THE
CIVIL PROCEDURE ACT
AND
IN THE MATTER OF AN APPLICATION FOR
TERMINATION OF THE ARBITRATORS MANDATE
AND
IN THE MATTER OF KENYENYA ARBITRATION
COMMITTEE
AND
IN THE MATTER OF AN APPLICATION**

BETWEEN

**OMARE MAINGA 1ST APPLICANT
JUSTUS INGISA NYAMORA 2ND APPLICANT**



ZACHARIA ONDARA 3RD APPLICANT
CHARLES OGANGA 4TH APPLICANT
JAPHETH K MEKUBO 5TH APPLICANT

AND

JOEL NYAITO APPELLANT

AND

MOSES MWENGEI MBECHHE 1ST APPLICANT
NELSON M MOKUA 2ND APPLICANT
NYAMBEEKI KIMONGE 3RD APPLICANT
MARTA MORAA OKEMWA 4TH APPLICANT

AND

TRANSMARA SUGAR COMPANY LIMITED RESPONDENT

RULING

Termination of the mandate of the arbitrator

1. The applicants vide originating summons dated 14/06/2023 sought orders to terminate the mandate of the arbitration committee of Kenya division and the cases to continue to hearing and determination at Rongo law courts.
2. The application is premised on section 15(a), 40 of the *Arbitration Act* 1995, rule 3(1) of the Arbitration Rules 1997 Article 159 of the *Constitution* 2010, order 37 and 3(1) of the civil procedure rules and section 1A, and 1B of the *Civil Procedure Act*, Order 22 Rule 22, Order 42, Order 51 Rule 1 and 3 of the Civil Procedure Rules.
3. The grounds for the application are contained in the application and the supporting affidavits of OMARE MAINGA sworn on 14/07/2023 and KERARIO MARWA the advocate for the applicants.

Background of the application

4. The applicants filed their cases at the Rongo law courts; Rongo PMCC Nos. 535, 579,587, 590, 607, 608, 609, 610, 613 and 616 all of 2017.
5. The cases were referred to arbitration by the Rongo court in terms of clause No. 9 of the contract between the parties. The high court and the court of appeal affirmed that the court cases be stayed pending arbitration by the committees.
6. In April 2021 the applicants commenced the reference to arbitration by invoking the jurisdiction of the Kenya division arbitration committee. However, despite the service of all committee members, the committee has not commenced arbitration or even communicated to the applicants in terms of section 20 of the *Arbitration Act* 1995. The delay has been over one year.
7. The applicants contend that it is in the interest of justice that the arbitrator's mandate be terminated to enable the applicants to seek justice from the other lawful fora.



8. The applicants further contend that the parties will not suffer any prejudice if the arbitrator's mandate is terminated as in any event the mandate has not been carried out.

The response

9. The respondent opposed the application vide replying affidavit sworn by SAMUEL KALU, the corporate and legal manager of the respondent on 15/11/2023.
10. The respondent contends that the applicants have not filed a statement of claim or pleadings for the arbitration committee to adjudicate on.
11. The respondent contends that pursuant to section 33 of the *Arbitration Act*, arbitral proceedings ought to be terminated by the final arbitral award or by an order of the tribunal where the claimant has withdrawn their claim, parties have come to a consensus or where the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
12. The respondent contends that if the application is granted would be tantamount to usurping the arbitral powers and functions which functions were conferred to it in the affirmative by the ruling in the court of appeal decision.
13. The respondent averred that the applicants have not come to this court with unclean hands having failed to disclose all material matters and facts to court and are therefore undeserving of the court's intervention. It is therefore in the best interest of justice that the applicants be directed to file a statement of claim before the committee.

Directions of the court

14. The application was canvassed by way of written submissions.

The applicants' submissions.

15. The applicants submitted that this court has powers through its supervisory powers over subordinate courts, bodies, and tribunals to terminate the proceedings before the Kenya arbitration division committee since the arbitrator has failed in his mandate and refer the matters to be heard by Rongo law court. The applicants relied on Section 15 of the *Arbitration Act* 1995, Article 165(6)(7) of the *Constitution*, *Sadrudin Kurji & Another V Shalimar Limited & 2 Others* [2006] eKLR, and *Nyutu Grovet Limited Vs Airtel Networks Kenya Limited* [2019] eKLR
16. The applicants submitted that a term of a contract for dispute resolution should not tie, bar, or limit the applicants from seeking justice through other available alternative means in the event that the mode of dispute resolution encapsulated in the contract is not yielding to any resolution or achieving its intended purposes.

The respondent's submissions.

17. The respondent submitted that without a claim having been filed, the arbitration committee had no pleadings to adjudicate on and therefore cannot be faulted for the delay. The respondent relied on sections 15(1)(a), 19A, 22 and 24 of the *Arbitration Act*.
18. The respondent submitted that if the mandate of the arbitration committee is terminated the recourse will be to appoint a substitute arbitration committee to hear and determine the dispute. The respondent relied on section 16 of the *Arbitration Act*.



19. The respondent submitted that it is not the role of the court to terminate arbitral proceedings but to promote arbitration. The respondent relied on sections 10 and 33 of the Arbitration Act, and Article 59 of the Constitution, Chania Gardens Limited V Gilbi Construction Company Limited & Another [2015] eKLR.
20. The respondent submitted that allowing the application herein would be tantamount to usurping the powers of the arbitral tribunal.
21. The respondent submitted that the Rongo court is functus officio as the court of appeal rendered that the arbitral committee was the proper forum for the dispute resolution.

Analysis and Determination

22. This court has considered the application, the affidavits in support of the application, the annexures thereto, the respondent's replying affidavit, and submissions by the parties herein.
23. 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..”
24. This section deals with termination of mandate of arbitrator which may not necessarily abrogate the arbitration or confer jurisdiction upon the court to try matters subject of the arbitration. The law provides in section 16 of the Arbitration Act that: -

Where the mandate of an arbitrator is terminated under section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.
25. Therefore, unless parties agree to terminate the arbitration agreement, termination of the mandate of the arbitrator only gives way to substitution of arbitrator under section 16 of the Arbitration Act to carry out the arbitral mandate under the arbitration agreement.
26. The only time when the court will deny an arbitral tribunal mandate or jurisdiction is where the court finds:
 - a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. S.6(1)(a)(b) of the Arbitration Act.
27. These approaches are founded on the principle of non-interference with arbitral proceedings stated in section 10 of the Arbitration Act as follows: -
 10. Extent of court intervention

Except as provided in this Act, no court shall intervene in matters governed by this Act.
28. The principle of non-interference is now properly grounded in article 159(2)(c) of the Constitution which gives the court a clear and limited obligation; to promote other forms of alternative dispute resolution mechanisms including arbitration. Promote has been debunked using the human rights



lingual to mean- respect, protect and transform; which does not include such usurpation of jurisdiction or intrusion by courts in arbitral proceedings as has been suggested by the applicant.

29. Under section 22 of the [Arbitration Act](#): -
Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.
30. The applicants stated in no uncertain terms that; in April 2021 the applicants commenced the reference to arbitration by invoking the jurisdiction of the Kenya division arbitration committee. However, despite the service of all committee members, the committee has not commenced arbitration or even communicated to the applicants in terms of section 20 of the [Arbitration Act](#) 1995. The applicants lament the long delay.
31. An observation is made that, the respondent seems to suggest that the proceedings before the Kenya Arbitration Committee can only commence upon the filing of statement of claim by the applicants. Parties are free to agree on, which failing, the arbitral tribunal has the jurisdiction to determine the procedure to be followed by the arbitral tribunal in the conduct of the proceedings including hearing, manner of presentation and admission of evidence, filing and service of pleadings and documents, amendment of pleadings, language etc. S.20, 23, 24 and 25 of the [Arbitration Act](#).
32. The applicants did not address the claim that they have not filed any claim or pleading with the arbitral tribunal. Possibly, because they are aware of the provisions of section 20, 22 and 24 of the [Arbitration Act](#). Nevertheless, as part of the court's obligation to promote arbitration, there is nothing untoward in the circumstances of this case to require the applicants to file their statements of claim within 14 days before the arbitral tribunal. It is so ordered. But, this order does not derogate from or limit the provisions of section 20, 22 and 24 of the [Arbitration Act](#).
33. It was brought to the attention of this court that it is now over 2 years since this court (differently constituted) and the Court of Appeal upheld the decision to refer the dispute to arbitration in accordance with the arbitration agreement contained in the parties' contract.
34. Arbitration, by its very nature, is intended to be a faster and more efficient method of settling disputes as opposed to the court process which is often dogged by numerous procedural hurdles. Justifying the court to re-state the consensual nature of arbitration does not evince or vest power upon one party to veto or control the arbitral proceedings arbitrarily. Similarly, the general obligation to promote inter alia, arbitration in article 159(2)(c) of the [Constitution](#), combined with the civic duty under article 3 on every person to respect, uphold and defend the [Constitution](#), the arbitral tribunal cannot enjoy or wield any arbitrary power over arbitration proceedings; it must always act in accordance with the law; amongst others, the [Arbitration Act](#) and the [Constitution](#); and promote arbitration rather than suffocate it.
35. It appears that the conduct of the arbitral proceedings in this matter has been sluggish, to say the least; and the arbitrator has a significant share of the blame.
36. Given the delay that has occurred in these proceedings, the arbitral tribunal should be guided by the [Arbitration Act](#) and the principles of justice stated in Article 159 (2) of the [Constitution](#), specifically, that: -
- (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;



37. To this end, the arbitration committee is expected to deal with the dispute without delay immediately the statement of claim is lodged. Which failing, parties are at liberty to move the court for termination of mandate and the replacement or substitution of the arbitrator. This ruling be served upon the Kenya Arbitration Committee.
38. Except for the order to file statements of claim, the application does not meet the threshold for termination of mandate of arbitrator. And. It is hereby dismissed. No orders as to costs in light of the conduct of parties and Kenya Arbitration Committee.
39. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS
4TH DAY OF NOVEMBER, 2024.**

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F. GIKONYO M.

JUDGE

In the Presence of:

1. CA - Nyangaresi
2. Oduor for Respondent – present
3. Achola for Appellants - present

