



REPUBLIC OF KENYA



**Houseman General Contractors Ltd v Kitabu (Miscellaneous Application E068 of 2023) [2024] KEHC 15620 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION E068 OF 2023**

**A MSHILA, J**

**DECEMBER 6, 2024**

**BETWEEN**

**HOUSEMAN GENERAL CONTRACTORS LTD ..... RESPONDENT**

**AND**

**KARIUKI KITABU ..... APPLICANT**

**RULING**

1. The Applicant herein filed an application dated 14<sup>th</sup> June, 2023 seeking that this Court be pleased to set aside proceedings and subsequent orders issued on 25<sup>th</sup> May, 2023 in favour of the Respondent. The impugned orders extended the time to submit the Respondent's claim against the Applicant for arbitration. The application is supported by the Applicant's affidavit of even date in which he avers;-
  - a. The Applicant discovered that there were orders dated 25<sup>th</sup> May, 2023 extending time to refer the Respondent's claim to arbitration when he was filing a response to the application dated 22<sup>nd</sup> May, 2023 that resulted in the impugned orders.
  - b. The court had no jurisdiction to issue the impugned orders because the court's jurisdiction is limited by dint of Section 10 of the *Arbitration Act*.
  - c. There is no provision in the *Arbitration Act* that provides for extension of time within which to refer a matter to arbitration upon the expiry of time period stipulated in the contract.
  - d. The orders granted were final in that they were granted at the interim stage and granted ex-parte without granting the Applicant an opportunity to ventilate his case and thus he was condemned unheard contrary to the principles of natural justice.
  - e. If the orders sought were not granted the application will be rendered nugatory and the Applicant will suffer irreparable loss since the Respondent will file its claim against the



Applicant before the Arbitrator outside the agreed timelines contrary to the Arbitration Act and the contract.

2. The Respondent filed Grounds of Opposition in response to the application stating the following:-
  - a. The application is an abuse of the court process and this Court should dismiss it with costs because it is founded on wrong interpretation of the law and in total ignorance of the basic tenets of justice, constitutional order and the jurisdiction of the court.
  - b. The Applicant has not denied the Respondent's claim that the Respondent rendered a service and is entitled to Kshs. 3,116,993.34.
  - c. Article 165 (6) of the Constitution grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.
  - d. In exercising the powers under Article 165(6) of the Constitution, the High Court may call for record of proceedings before any subordinate court, person, body or authority referred to in Clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
  - e. Article 159 (1) of the Constitution provides that in the exercise of judicial authority, the courts and tribunals are required to dispense justice without undue regard to procedural technicalities.
  - f. It is a constitutional principle that the alternative justice system including arbitration shall not be used in a manner that is inconsistent with the Constitution or any other written law.
  - g. The Arbitration Act is subject to the Constitution and does not envisage a scenario where one can contract out his entitlement under the Constitution.
  - h. In extending time for the Respondent to pursue his rights enshrined in the Constitution, the Court rightly exercised its judicial discretion so as to advance the interest of justice and public policy.
  - i. There is no strict requirement that an order cannot be issued ex-parte especially if there is no prejudice that may be suffered by the absent party and that the nature of such an order is merely procedural and does not affect the rights of the parties to the dispute.
  - j. The supervisory jurisdiction of the court can only be limited by statute and the Arbitration Act does not contain any provision that ousts the court's jurisdiction.
  - k. The Applicant is keen to obtain an unjust enrichment at the expense of the Respondent as he does not want to pay for the services rendered and does not want the Respondent to ventilate the case before an arbitral tribunal as provided in the contract.
  - l. The absence of a provision to extend time in the Arbitration Act does not mean that time cannot be extended but it creates an avenue for parties to agree to extend time. Where parties do not agree then the court could intervene in the interest of justice and public policy.
  - m. The application leading to the impugned orders was procedural in nature and did not require participation of the Applicant. The extension of time by the ex-parte order did not violate any of the Applicant's rights or prejudiced him. The Applicant does not want to pay.



- n. The application is overtaken by events since the Respondent has already invited the Applicant to select an Arbitrator of his choice for consideration and that time has begun to run.
3. The application was canvassed by way of written submission in which each party submitted as follows;

### **The Applicant's Submissions**

4. The Applicant stated that the court had no jurisdiction to extend time within which the dispute could be submitted to arbitration. There was a dispute between the parties and as per Clause 45.3 of the agreement dated 16<sup>th</sup> August, 2017, the said dispute ought to have been declared against the Applicant by the Respondent and refer it to arbitration within ninety (90) days. The agreement does not provide for the extension of the ninety days period. The parties had agreed to a time bound arbitration. The parties excluded the court from adjudicating on any dispute between them except where allowed by the law.
5. The dispute is governed by the *Arbitration Act* (Act No. 4 of 1995) and the Arbitration Rules of 1997. Section 10 of the *Arbitration Act* provides that "except as provided in this Act, no court shall intervene in matters governed by this Act". The Applicant relied on the case of *Mareco Limited vs Mellech Engineering & Construction Limited (2019) eKLR* where it was held that when parties exclude court intervention in their arbitration agreement, the court will only interfere in specific instances under Sections 10 and 35 of the *Arbitration Act* 1995 and that extension of time is not one of those instances.
6. The Applicant cited the case of *Nairobi High Court Commercial Case No. E028 Oilfields Engineering and Supplies Limited vs Zakhem International Construction Company Limited & Another* where it was observed that the *Arbitration Act* is an almost self-contained legal regime both substantively and procedurally and that it excludes the application of the *Civil Procedure Act* and the Civil Procedure Rules to the arbitration proceedings. The Applicant stated that similar positions were held in *Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR*.
7. The Applicant relied on *National Bank of Kenya vs Pipeplastic Samkolit (K) Ltd & Anor (2000)eKLR*, where it was held that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved. The Applicant also relied on the case of *James Heather-Hayes v African Medical and Research Foundation (AMREF) (2014) eKLR*.
8. The Applicant stated that although it takes cognizance of the unlimited jurisdiction of the court as provided under *the Constitution*, it notes that the court in the case of *William Lonana Shena v HJE Medical Research International Inc. Cause No.1096 of 2010* (Unreported) upheld an arbitration Clause and held that even if the court had unlimited jurisdiction, this did not defeat an arbitration process grounded on statutes.

### **The Respondent's Submissions**

9. The Respondent submitted that on 1<sup>st</sup> August, 2017, it was contracted by the Applicant for the construction of a residential building in Kiambu County for a contractual sum of Kenya Shillings Thirty One Million Three Hundred Thousand (Kshs.31,300,000). The contract of works had a Clause referring any dispute resulting from the contract to arbitration.
10. The Respondent discharged its duties and the project was completed in 2019. The Applicant took possession of the unit in December 2019. As at 8<sup>th</sup> March 2022, the outstanding balance on the contractual sum was Kenya Shillings Three Million Two Hundred and Ninety Three Thousand and



- Thirty Four Shillings (Kshs. 3,293,034). The amount took into account revision on the contract which was executed by the Applicant and the Quantity Surveyor.
11. Due to the refusal by the Applicant to pay the outstanding amount, the Respondent instituted a suit in court through the Firm of M'Imniine & Mungai on 11<sup>th</sup> November, 2022 which was contrary to the Arbitration Clause. On 8<sup>th</sup> February, 2023 the Applicant through the Firm of Muiruri & Wachira Advocates agreed to the withdrawal of the suit to allow the same to be filed through the proper channel on condition that the Respondent pays a filing fees of Kshs. 71,600. The parties subsequently entered into a Consent dated 7<sup>th</sup> March, 2023 to withdraw the suit.
  12. The 90 days provided in the contract to refer any dispute to arbitration had lapsed while the Respondent was pursuing the dispute in court. The Respondent filed an application dated 22<sup>nd</sup> May, 2023 seeking for an order to extend the time within which to declare a dispute and refer its claim against the Applicant before the Arbitrator. The court granted the Respondent 90 days to declare the dispute and proceed with the arbitration.
  13. Although the *Arbitration Act* restricts the jurisdiction of the court in arbitration to matters provided for under the Act, Section 10 of the Act permits two possibilities for the court's intervention in arbitration. Firstly the court is permitted to intervene where the Act expressly provides for the intervention such as appointment of the arbitrator under Section 12. Secondly the courts have inherent jurisdiction to act in public interest. The courts are therefore entitled to intervene in arbitration proceedings even where it is not provided for expressly.
  14. The Respondent relied on *Sadrudin Kurji & Another vs Shalimar Limited & 2 Others (2006)eKLR*, where it was held that arbitration process provided for by the *Arbitration Act* is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This does not mean that the court will stand and watch helplessly where cardinal rules of natural justice are being breached. In *Tononoka Steels Limited v E.A Trade Development bank (PTA Bank) 2 (2000)* the court held that the court would intervene in arbitration on peripheral matters relating to the dispute and not on substantive matters.
  15. Section 10 of the *Arbitration Act* must be construed as to allowing the courts the leeway to intervene in arbitration in public interest even where it is not expressly so provided in the Act. The Act cannot be interpreted as to oust the inherent powers of the courts to do justice. Article 159 (2) (c) of *the Constitution* provides that the courts and tribunals must be guided by the principle of inter alia promotion of alternative forms of dispute resolution mechanisms, subject to Clause (3) which is to the effect that traditional dispute resolution mechanism should not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or is inconsistent with *the Constitution* or any other written law.
  16. An arbitration process begins by way of a declaration of dispute and issuance of a notice of arbitration. In the instant case, the notice was not issued and therefore it is doubtful and arguable that time did not begin to run. The filing of the suit before the court amounted to a declaration of the dispute for purposes of calculating time. The consent by the parties to have the matter withdrawn from court can also be argued to give validity to the said declaration of the dispute.
  17. The application for extension of time did not seek to address the subject matter of the dispute but was one meant to give life and meaning to the arbitration clause. Failure to issue the extension would result in an outcome that is repugnant to justice and morality. The Applicant admits liability and refuses to pay just because the Respondent did not raise the complaint in good time.



## Issue For Determination

18. The only issue for determination is whether this court had jurisdiction and was therefore right in extending the period within which the dispute could be referred to arbitration.

## Analysis

19. It is now settled law that where a court finds that it has no jurisdiction, it must immediately down its tools. That position was made clear in the case of *The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited* (1989) KLR 1, where the Learned Judge stated:-

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

20. Section 10 of the *Arbitration Act* provides:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

21. Clause 45.3 of the Contract dated 16<sup>th</sup> August, 2017 between the parties herein states:-

“Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.”

22. In the case of *County Government of Nyeri v Eustace Gakui Gitonga* [2019] eKLR the court observed:-

“It is argued that the fact that time ran out on the applicant to file the application, this court cannot extend time. A plain reading of Section 17(6) clearly indicates that the time lines are not cast in stone. Even in normal proceedings there are adversities of life that would lead to delay in complying with the time lines set down by the law. A strict application that would amount to upholding an illegality would not be in the interests of justice, or the public interest. That *Arbitration Act* is implemented within the framework of living realities of the parties. And extension of time weighed against an award made without jurisdiction, extension of time would carry the day. I find company in this in decision of *Kimondo J in Kamau Njendu t/a Gitutho Associates vs Consolidated Bank of Kenya Ltd* [2014] eKLR. For the purpose of determining whether or not the arbitrator has jurisdiction, this court has the jurisdiction to extend time.”

23. Although this Court agrees that its jurisdiction is circumscribed under the *Arbitration Act*, the circumscription does not tie the court's hands to the point that the court cannot address peripheral matters relating to the dispute subject to arbitration. The court agrees with the position in *Sadrudin Kurji & another v Shalimar Limited & 2 others* [2006] eKLR that:-

“We may as well add that arbitration process as provided by the *Arbitration Act* is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This, however, does not mean that the Courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence, in exceptional



cases in which the rules are not adhered to, the courts will be perfectly entitled to step in and correct obvious errors.”

24. This Court had jurisdiction to extend time for the dispute to be referred to arbitration to avert the absurdity that would have been occasioned by not granting the extension order. The fact that there is a dispute between the parties is not contested. Neither is the fact that there is an Arbitral Clause in the Agreement between the parties. The only problem was that the Respondent sought for arbitration outside the 90 days period agreed by the parties. The delay was occasioned by the Respondent’s advocates by following the wrong channel of adjudication. The Applicant was aware of this fact and even consented to having the matter withdrawn of court on condition that he be paid his filing fees of KShs. 71,600. It is only reasonable that the Applicant agrees to the extension to facilitate arbitration.
25. In light of the above, this Court is satisfied that it had jurisdiction and was right in extending time for referring the dispute to arbitration to give meaning and intendment of the arbitral clause in the agreement.

### **Findings And Determination**

26. For the forgoing reasons, this Court makes the following findings and determinations:-
- i. This court finds that it had jurisdiction and was therefore right in extending the period within which the dispute could be referred to arbitration.
  - ii. The application is found to be devoid of merit and it is hereby dismissed.
  - iii. The Applicant shall bear the costs of this application.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024**

**ABIGAIL MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

M/S Ochieng for the Applicant

M/S Alosa for the Respondent

