



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 24 OF 2019

UNIVERSITY OF NAIROBI..... APPLICANT/RESPONDENT

VS

SONGA OGONDA ASSOCIATES.....RESPONDENT/APPLICANT

RULING

1. A responsible Judicial Officer should be at the forefront in making efficient use of available judicial time and resources. Both are scarce.
2. The proceedings here relate to an Arbitral Award dated 24th November 2017 made in an arbitration between University of Nairobi and Songa Ogonda Associates. Before Court is an application seeking adoption and enforcement of that award. It is an application dated 8th January 2019.
3. The University, on the other hand, had sought to have the Award set aside in **Nairobi Miscellaneous Cause No. E089 of 2019 University of Nairobi –vs- Songa Ogonda Associates (hereinafter E089 of 2019)** on directions of the Court, that application proceeded in priority to this matter. But it was to come to an abrupt end when this Court upheld the Respondent’s Preliminary Objection of 24th April 2019 and struck out the Application.
4. The crux of the Court’s decision of 20th July 2020 was that the Application was time-barred by the provisions of Section 35 of the Arbitration Act. In that decision, I stated:-

“18. The arguments made for and against the Preliminary Objection herein regarding Section 35(3) of the Act were taken up, on all fours, in Nairobi High Court of Kenya at Nairobi Milimani Commercial & Tax Division Miscellaneous Cause No. E 083 of 2019 University of Nairobi –vs- Multiscope Consultancy Engineers Limited. Indeed because of the commonality of issues the two causes were heard together on the Preliminary Objections.”
5. It is hardly in dispute that the issue as to whether the setting aside applications in Nairobi Milimani Commercial & Tax Division Miscellaneous Cause No. E 083 of 2019 University of Nairobi –vs- Multiscope Consultancy Engineers Limited (E083 of 2019 or the Multiscope matter) and E089 of 2019 are time barred is a common question in the two matters.
6. It is also common cause that the University successfully obtained the leave of the Court of Appeal to appeal this Court’s Ruling of 13th May 2020 in HCC No. 083 of 2019.
7. In making that order, the Court of Appeal observed:-

“[18] An issue has been raised by the applicant regarding the interpretation of section 35(3) and this is a jurisprudential issue that ought to be addressed. The striking out of the applicant’s motion has also resulted in the applicant being shut out from the seat of justice, and there is an issue whether the learned Judge of the High Court properly directed himself in striking out the applicant’s motion or whether the learned judge made a decision that is so manifestly wrong and which has completely closed the door of justice to the applicant. We find that these are exceptional circumstances and it is appropriate that leave to appeal to this Court be granted so that these pertinent issues are fully ventilated and addressed by the Court.”

8. The Court of Appeal further stayed the enforcement proceedings in the Multiscope matter but on terms.

9. This Court is told that, following this Court's decision in E089 of 2019, the University moved the Court of Appeal for similar orders of leave and stay but the University's application is yet to be heard.

10. There is now an issue as to whether the current application should proceed or whether it should await the result of the Court of Appeal on the pending Application.

11. This Court has little difficulty in coming to an answer. The Court of Appeal has already decided that the issue arising out of this Court's decision regarding the interpretation and implementation of Section 35(3) of the Arbitration Act raises an important jurisprudential issue of exceptional circumstances. Having made that decision, the Court of Appeal may very well grant the University leave to appeal against the Court's decision in E089 of 2019. It seems logical and good use of decision to await the Court of Appeal's decision in that regard and also in the stay application.

12. It may be futile to commence the hearing of the enforcement proceedings only for the hearing or outcome to be stayed by the Court of Appeal. For purposes of making good use of judicial time I direct as follows:-

12.1. The enforcement proceedings are hereby stayed pending the hearing and determination of the Application by University of Nairobi for leave and stay of the Ruling of 20th July 2020 in E089 of 2019 University of Nairobi –vs- Songa Ogonda Associates.

12.2. The Applicant herein Songa Ogonda is at liberty to apply.

Dated, Signed and Delivered in Court at Nairobi this 14TH Day of October 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ochieng for Applicant.

Ngatia for Respondent.