Kitonga & another v Total Kenya Limited & another (Civil Appeal 75 of 2019) [2025] KECA 1855 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1855 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 75 OF 2019

W KARANJA, F TUIYOTT & P NYAMWEYA, JJA

NOVEMBER 7, 2025

BETWEEN

TITUS KITONGA ..... 1ST APPELLANT

TINA HOLDINGS LIMITED ..... 2ND APPELLANT

AND

TOTAL KENYA LIMITED ..... 1ST RESPONDENT

ENERGY REGULATORY COMMISSION ..... 2ND RESPONDENT

JUDGMENT

1. The ruling dated 26th November 2018, which is the subject of this appeal, was issued by Nzioka J. following the 1st respondent's application dated 27th March 2018 filed on 3rd April 2018. The application was premised on Article 159(2)(c) of *the Constitution*, section 6 of the *Arbitration Act* and Rule 2 of the Arbitration Rules 1997. The 1st respondent sought an order that the suit be stayed pending referral, hearing and determination of the dispute through arbitration.

2. The application was predicated on the grounds that the appellants and the 1st respondent had entered into various Marketing Licence Agreements (M.L.A.) for 3 petrol stations; Machakos Total Service Station, Karen Station and Limuru Road Service Station owned by the 1st respondent; that it was an express term of the M.L.A. at Article Viii (iv) that any dispute, difference or question relating to the construction, meaning or effect of the M.L.A. would be referred to arbitration in accordance with the *Arbitration Act* (1995) or any amendment or re-amendment for the time being in force and that a dispute had arisen between the parties as to their respective rights and obligations under the M.L.A., which dispute should be determined by way of arbitration pursuant to the express terms of the agreement, but that in complete disregard of the arbitration agreement the appellants moved ahead and filed the suit on 7th March 2018.

3. Responding to the chamber summons by the 1st respondent, the 1st appellant admitted that he had entered into the said M.L.A. agreements with the 1st respondent and conceded that that the agreements contained an arbitration clause. It was contended that the said agreements were terminated by the 1st appellant who took possession of the petrol stations and it would be unfair for the 1st respondent to start invoking the clause on arbitration because he had filed the suit and finally that the 2nd respondent was not a party of the said M.L.A. agreement.

4. In the impugned ruling, the learned Judge, allowed the application and referred the matter for arbitration. The appellants are aggrieved by the ruling and have raised 8 grounds in their undated memorandum of appeal lodged on 4th March 2019, faulting the learned Judge for: not appreciating that the circumstances of the case were different as the appellant had sued the 2nd respondent who was not a party to the agreement between the appellants and the 1st respondent; not appreciating that the 2nd respondent was not bound by the provisions of the Arbitration clause as contained in the agreement between the appellants and the 1st respondent; not appreciating the fact that the dispute between the appellants and the 1st respondent cannot be determined in detail without the presence of the 2nd respondent; by making a finding that the issues raised in the pleadings refer to matters agreed on by the parties and which are a subject of arbitration; failing to consider the circumstances of the case and holding that the arbitration clause in the circumstances is independent, separate and severable from the main M.L.A. contract; making a finding that the 2nd respondent who is not a party to the M.L.A. contract cannot be dragged into an arbitration process and, finally, in making a finding that the court lacked jurisdiction in the matter before it in view of the arbitral clause.

5. The appellants thus pray: that the appeal be allowed with costs, the decision/ruling/orders of the trial Judge delivered on 26th November 2018 be set aside, that the 1st respondent's application dated 27th March 2018 and filed on 3rd April 2018 be dismissed with costs and that the appellants suit/claim to proceed before any other Judge in the Commercial Division.

6. A brief background of the appeal is that through a plaint dated 23rd January 2018, the appellants moved the High Court seeking various declarations and an award of damages as against the 1st and 2nd respondents following the cancellation of the M.L.A. for 3 petrol stations; Machakos Total Service Station, Karen Station and Limuru Road Service Station entered between the appellants and the 1st respondent.

7. Before the case could proceed further before the High Court, the 1st respondent filed a notice of appointment of advocates on 29th March 2018, a memorandum of appearance and a chamber summons application on 3rd April 2018 which yielded the ruling that is the subject of this appeal. In the application, the 1st respondent contended that the M.L.A. for the three petrol stations entered between the appellants and the 1st respondent contained an arbitration clause, and any dispute arising from the M.L.A.s was to be resolved through arbitration. After considering the application, the learned Judge agreed with the 1st respondent and ordered that the dispute be resolved through arbitration as per the agreements of the parties, and in the meantime the proceedings before the High Court were stayed.

8. The appellants and the 2nd respondent, through their respective counsel filed written submissions. The 2nd respondent did not file any submissions. At the virtual plenary hearing of the appeal, there was no appearance for the appellant but as they had filed written submissions, the Court decided to consider the same. Mr. Munyalo learned counsel for the 1st respondent informed the Court that he would entirely rely on the submissions, without making any oral highlights. On his part, Mr. Inyangu, learned counsel for the 2nd respondent informed the Court that the dispute was between the appellants and the 1st respondent and he did not, therefore, make any submissions.

9. In summary, the submissions by the appellants dated 5th August 2019 stated that any disputes arising between the appellant and the 1st respondent were governed by section 6(1) of the *Arbitration Act* pursuant to the arbitration clause in their agreement. However, the appellants contend that several disputes had arisen between them but the appellants never invoked the arbitration clause even though several disputes had arisen between them and the doctrine of estoppel, therefore, applied against the 1st respondent and the impugned ruling should, therefore, be set aside. Reliance was placed in John Mburu v Consolidated Bank of Kenya [2018] eKLR.

10. Further it was submitted that since the 1st respondent subjected itself to the jurisdiction of the court in HCCC 453 of 2016, it was not just and proper for a party to subject itself to the jurisdiction of the High Court in one courtroom and then on the same agreement in the next High Court courtroom purport to have a dispute relating to the same agreement referred to arbitration. It was also submitted that there was unreasonable and undue or inordinate delay of over seventeen (17) months on the part of the 1st respondent and the delay was prejudicial to the appellant.

11. It was further submitted that the continuous requests by the 1st respondent for adjournments in the matter for a period of seven (7) months is a confirmation by conduct that the 1st respondent had already submitted itself to the jurisdiction of the High Court but only to subsequently file a request to have the matter referred to arbitration. We were urged to consider the overriding objective under sections 1A and 1B of the *Civil Procedure Act* and the provisions of Article 159(2) of *the Constitution* as regards the matter of unreasonable delay.

12. It was also asserted that the 2nd respondent was not a party to the M.L.A. and hence cannot be a party to the arbitration process and this exclusion would serve to kill the appellants' case and claim.

13. We are urged to allow the appeal.

14. For the 1st respondent, the submissions dated 21st October 2019 were relied on. As to whether the issues raised in the suit are subject to the arbitration agreements, it was submitted that the main claim by the appellants is over invoiced fuel prices and that the issue about the invoicing of the price of the fuel is a matter that was contemplated by the agreement. It was submitted that this was because the agreement was to be interpreted in accordance with the laws of Kenya which allow for setting of fuel prices by a government agency through a gazette notice, further that the allegation of flouting any law or order by government when performing a contract is an issue that was reasonably contemplated by the agreement. It was submitted that the M.L.A. provided for any dispute and that the issue on how the prices will be determined was an issue of construction of the M.L.A. and, therefore, a proper issue for arbitration.

15. On the issue of estoppel was it was submitted that the issue is not raised in the grounds of appeal and is, therefore, not subject to determination by the Court pursuant to rule 104(a) of the Court of Appeal Rules, 2010 which prohibits an appellant from relying on any ground other than the ones stated in the memorandum of appeal.

16. Further, and without prejudice, the 1st respondent urged the High Court that it never breached the M.L.A, and there was, therefore no dispute to be referred for arbitration. It was submitted that even if there was to be a breach the party in breach cannot be stopped from applying for referral of a dispute to arbitration and relying on the arbitration clause in the agreement. It was contended that an arbitration clause forms a different contract from the main contract and survives even in instances where there's an alleged breach such as in this case and that even in instances of repudiation or where there are allegations of breach or any other disputes to a contract having an arbitration clause or arbitration contract, the same should be determined through arbitration.

17. It was submitted that the arguments above are supported by the principle of separability and the doctrine of kompetenz kompetenz. On the principle of separability section 17(1) of the *Arbitration Act* was referred to and reliance placed on Nedermar Technology BV v Kenya Anti-Corruption Commission & Another [2006] eKLR, Midland Finance & Securities Globetel Inc v Attorney General & Another [2008] eKLR and The Branch Manager Magma Leasing and Finance Limited and Another v Potluri Madhavilata & Another Civil Appeal No 6399 of 2009 (infra) and Heyman & Another v Darwins Ltd [1942]1 ALL ER 337 (infra) for the proposition that on separability and termination of the contract does not terminate the arbitration clause.

18. As regards the doctrine of kompetenz kompetenz reliance was placed on Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR it was submitted that even in cases where there is total breach of the contract the arbitration clause survives the total breach.

19. As to whether joining a 3rd party defeats an arbitration clause, it was submitted that the 2nd respondent is not opposed to the application that the suit be referred to arbitration and, therefore, the issue of prejudice cannot arise as they have not stated any prejudice they foresee and also that a mere joining of a 3rd party cannot itself automatically defeat the operation of an arbitration clause. It was submitted that it is clear from the plaint that no reliefs are sought against the 2nd respondents.

20. We are urged to dismiss the appeal with costs.

21. We have considered the record of appeal, the grounds of appeal and the submissions by counsel, including the authorities cited and the applicable law. This being a first appeal, our primary role is to re- evaluate, re-assess, and re-analyze the record and then determine whether the conclusions reached by the learned Judge are to stand or fall and give reasons either way - see Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR).

22. In our view, the issue arising for determination in this appeal is whether the arbitration clause in the parties' M.L.A.s ousted the High Court's jurisdiction to hear and determine the matter.

23. There is consensus by the appellants and the 1st respondent that there were M.L.A.s between them which provided for arbitration as a dispute resolution mechanism in case of disputes. On the import of the arbitration clause in the M.L.A.s, the appellants argued that even if there was an arbitration clause the 1st respondent had terminated the contract between them and as such the said termination meant that the High Court's had jurisdiction. The appellants also contended that the joining of the 2nd respondent in the matter who was not a party to the M.L.A.s meant that the 2nd respondent was not subject to arbitration and so the clause on dispute resolution could not apply to it.

24. The 1st respondent, on the other hand, maintained that, as was held by the High Court, the appellants were subject to the arbitration clause as the agreement between them was on the issue of how fuel prices will be determined which was an issue of construction of the M.L.A.s. The 1st respondent submitted that they entered appearance and made an application for stay of proceedings and referral of the matter to arbitration as provided by section 6(1) of the *Arbitration Act*. The section states that:

> " 6. Stay of legal proceedings -1.A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it 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."

25. The manner in which section 6(1) of the *Arbitration Act* ought to be interpreted and applied has been addressed by the Court in numerous decisions. In Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] KECA 376 (KLR) the Court pointed out that:

> "Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The afore- quoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred."

26. In Mt. Kenya University v Step Up Holding (K) Ltd [2018] KECA 125 (KLR) this Court was unequivocal:

> "We have construed section 6 of the *Arbitration Act* on our own and... We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter."

27. In Adrec Limited v Nation Media Group Limited [2017] KECA 106 (KLR), the Court reiterated that:

> "Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the *Arbitration Act*."

28. In this case the 1st respondent on 3rd April 2018 filed a memorandum of appearance and contemporaneously a chamber summons application seeking stay and that the matter be referred to arbitration. Even though there was some delay thereafter, the appellants had already been put on notice that the respondent wanted compliance with the arbitration clause. It cannot, therefore, be argued that the delay in question divested the 1st respondent of its right to pursue the matter through arbitration. In our view, and as was held in Corporate Insurance Company v Loise Wanjiru Wachira [1996] KECA 70 (KLR), once the suit was filed, the only remedy available to the appellant was to seek a stay of proceedings and reference to arbitration. The 1st respondent's promptness in filing the stay application was enough reason for the trial court to allow it. By filing an application for stay of legal proceedings within the prescribed time, the 1st respondent entitled itself of recourse to arbitration.

29. On the issue as to whether arbitration survived the termination of the M.L.A.s our view is that arbitration can be invoked even where the contract has been terminated as long as obligations of parties under the contract remain unfulfilled. In any event, the M.L.A.s provided that arbitration was to decide

'a dispute (of any kind whatsoever) arising between the parties in connection with, or arising out of the M.L.A.s which would include a dispute in respect to termination of the contract.

30. In regard to the issue of the 2nd respondent not being a party to the M.L.A.s, hence not bound by the arbitration clause, we agree that the 2nd respondent cannot be bound by the arbitration clause. However, joinder of the 2nd respondent to the proceedings before the High Court did not invalidate or void the arbitration clause/agreement between the appellants and the 1st respondent.

31. The dispute between the appellants and the 2nd respondent could be severed and resolved through the Court as the dispute between the appellants and the 1st respondent is resolved through their chosen dispute resolution method, that is, arbitration. In any event, we note that the 2nd respondent has not challenged the ruling in question, and its counsel stated in court that the appeal was between the appellants and the 1st respondent. We say no more in that regard.

32. We find that there was a valid arbitration clause in place between the appellants and the 1st respondent; that a dispute arose between the parties which was arbitrable and the parties were bound by their M.L.A.s. Therefore, the learned Judge properly applied section 6 of the *Arbitration Act* and the other relevant laws in allowing the 1st respondent's application.

33. In the end we find this appeal devoid of merit and dismiss it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2025.

W. KARANJA

JUDGE OF APPEAL

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F. TUIYOTT

JUDGE OF APPEAL

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P. NYAMWEYA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.