

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC APPLICATION CASE NO. E448 OF 2024

BETWEEN

PINNACLE PROJECTS

LIMITED.....APPLICANT

AND

DICKSON

MATU.....DEFENDANT

ANT

RULING

1. What is before this Honourable Court is the Applicant's Notice of Motion Application dated 16th May 2024 and it seeks to have this court recognize and enforce the Arbitral Award published on 5th September 2008 be adopted and recognized and be enforced as a decree of this Honourable Court. The said Application has been filed pursuant to Section 36 of the Arbitration Act and Rules 4 of the Arbitration Rules 1997, Section 59 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules.

2. The Application is supported by the grounds set out on its face and the supporting affidavit of FRANK NYAMORI, Legal officer of the Applicant Company. The Application is opposed and the Respondent has filed a Preliminary Objection dated 25th September 2024 and a replying affidavit sworn on 3rd March 2025. In the Preliminary Objection filed herein the Respondent raises the following grounds:-

- i. THAT the instant proceedings are irregular and unprocedural by virtue of the fact that there are already proceedings in respect of the same matter and between the same parties that is HC MISC APPLICATION NO. 742 of 2008.*
- ii. THAT the instant application should therefore be filed in the aforesaid proceedings.*
- iii. THAT the Application is fatally defective for want of compliance with mandatory provisions of section 36(3) of the Arbitration Act.*
- iv. THAT therefore the instant application should be struck out with costs to the Respondent.*

3. Both parties have filed written submissions which I have carefully considered.

ANALYSIS AND DETERMINATION

4. I have carefully considered the Application filed he supporting and replying affidavits filed by the parties and the

rival submissions thereto. It is not in dispute that the award that the court is being asked to recognize and adopt as an order of this court was published on 8th September 2008. Both parties agree that indeed an application to recognize and enforce the said award was filed before this court in **HC MISC APP. NO. 742 of 2008** and this court in the decision of Justice P. Kihara Kariuki J(as he then was) on 30th January 2009, set aside the said arbitral award. What is not clear is what transpired between the parties in the interceding period when the Applicants moved the Court of Appeal on 8th June 2020.

5. The Applicant has argued that the Preliminary Objection as filed fails the test of what Preliminary Objection is as set out in the locus classic case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) E. A 696** where the court stated as follows:-

“.....A preliminary Objection consists of pure points of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....”

6. To buttress their argument that the grounds set out in the Notice require the court to evaluate factual material before arriving at a decision as to what is pleaded as ground of objection is true or not. That the court will be called upon, among other things to determine whether there exists proceedings with respect to the same matter and between the same parties and whether *HC MIC. APP. NO. 742 of 2008* and the present suit are similar. The Applicant further argues that while it is not disputed that in so far as the matters in *HC. MISC. NO. 742 of 2008* are finalized and the court is functus officio, the award was brought back to life by the Court of Appeal decision and therefore the fresh application is merited and should be allowed.

7. I have considered the pleadings and the argument put forward by the parties in the affidavits filed in support and in opposition of the application thereto. Although the court has been called up to determine the Preliminary Objection filed herein, the court notes that Defendant having already filed a response to the present application, it is appropriate to determine the application before it to avoid multiplicity of decisions on the same matter. The court will therefore

consider the arguments put forth by the parties in the main application before it.

8. In opposing this application, the Respondents filed a replying affidavit and a notice of Preliminary Objection. The Respondent accuses the Applicant of forum shopping and argues that instead of filing the present motion in the original suit *HC MISC APP. NO. 742 of 2008*, the Applicants have taken to filing several suits to obtain orders of recognition and enforcement of the Arbitral Award of 5th September 2008 which was set aside by the Court in its decision rendered on 30th January 2009. The Respondents argue that the Applicants did file *HC MISC. APP. NO. E137 of 2024- PINNACLE PROJECTS VS DICKSON MATU* seeking similar orders as the present application and the said application was dismissed by the court once the Respondent filed an Objection to the said motion on similar grounds as those set out hereunder.

9. Section 36(3) of the Arbitration Act provides as follows;
“36(3)- Unless the High Court otherwise orders, the party relying on an arbitral award or applying for enforcement must furnish-

a. The original arbitral award or a duly certified copy of it; and

b. The original arbitration agreement or a duly certified copy of it.

10. I have considered the rival submissions filed herein. I agree with the respondent that the present application has failed to meet the tenets set out in the Arbitration Act in that the Applicant has in its action purported to circumvent the law as set out in the said Act of Parliament. The Court having, in *HC MISC. APP. NO. 742 of 2008*, declined to recognize and enforce the award as an order of the court and even the attempt to circumvent the orders of the court by filing the same application albeit in a different suit especially *HC MISC APP NO. E37 of 2022*, the court agrees with the Respondent that in filing the present motion, the applicant is looking for orders favorable to its cause, which amounts to forum shopping, a fact that is frowned upon by the court. The Court is also denied an opportunity to confirm from the record what orders were made by the Court in the said suit and the reasoning behind them as filing a fresh motion denies the court an opportunity to consider the previous records of the same court.

11. I find the therefore the present application is without merit. A similar application having been considered

by this court and a ruling setting aside the award delivered in *MISC 748 of 2008*. The Court also finds that this matter is similar or related to the Application filed in ***Misc. No. E137 of 2022 - PINNACLE PROJECTS V DICKSON MATU*** in which the court declined to recognize and enforce the said award. What emerges therefore is the Applicant has filed similar applications in several suits seeking similar orders and in essence the duplicity of these applications is likely to embarrass the court should there be two different findings in the various related matters on the same subject matter. The best cause available to the Applicant is to move the court in the original suit if the circumstances have changed since the granting of the previous order.

12. I find therefore and hold that the present Application amounts to an abuse of the court process and the same is without merit. I dismiss the said application and order that the Applicant shall bear the costs of the present application which are awarded to the Respondent. It is so ordered.

DATED SIGNED and DELIVERED virtually at NAIROBI this 7TH DAY of NOVEMBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF:-

1. Mr. Odongo for the Applicant.
2. Mr. Burugu for the Respondent.
3. Amos- Court Assistant

ORIGINAL