IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GATEMBU, J. MOHAMMED & KORIR, JJ.A.)

CIVIL APPEAL NO. 176 OF 2020

BETWEEN

THE COUNTY GOVERNMENT OF KITUI……APPELLANT

AND

HONOURABLE JUSTICE E. TORGBOR……1ST RESPONDENT

POWER PUMP TECHNICAL COMPANY LIMITED……2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (P. Nyamweya, J.) dated 23rd July 2018

in

HC. Misc. JR. Application No. 254 of 2018)

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JUDGMENT OF THE COURT

1. In this appeal, the appellant, The County Government of Kitui, is challenging a ruling of the High Court at Nairobi (**P. Nyamweya, J.** (as she then was)) delivered on 23rd July 2018. In that ruling, the court struck out, for being an abuse of the court process, an application dated 22nd June 2018 in which the appellant had sought leave to apply for judicial review to

quash, by an order of certiorari, an arbitral award made by the

1st respondent on 8th December 2017 and amended on 16th January 2018.

2. The background in brief is that the appellant, The County Government of Kitui entered into a contract with the 2nd respondent, Power Pump Technical Company Limited in June 2008 for the construction of a slaughterhouse. A dispute that arose under that contract was referred to arbitration by the 1st respondent as sole arbitrator who made a final award in favour of the 2nd respondent on 8th December 2017 as amended on 16th January 2018.

3. Dissatisfied with the arbitral award, the appellant moved the High Court at Nairobi (Commercial Division) with an application dated 10th May 2018, being High Court Misc. Application No. 193 of 2018, seeking leave to set aside the arbitral award. That application was struck out by the High Court on 5th June 2018.

4. Thereafter the appellant moved the High Court at Nairobi (Judicial Review Division) by an application dated 22nd June 2018, being Misc Civil Application No. 254 of 2018 seeking leave to apply for an order of certiorari to quash the arbitral award. That application was based on, among other grounds, that the arbitrator acted "arbitrarily, irrationally and capriciously" and in excess of his jurisdiction.

5. The 2nd respondent opposed that application and raised a preliminary objection contending that judicial review was not available to the appellant as the Arbitration Act provides "a separate and distinct regime of law" in relation to arbitration matters; that appellant's application was an affront to public policy of Kenya; a "shameless and baseless attempt by a losing party, to forum shop for a court likely (to) lend a sympathetic ear to it"; that the appellant was "estopped, debarred and precluded" from raising objections not having done so under Section 17 of the Arbitration Act.

6. Having heard counsel on the preliminary objection, the learned Judge of the High Court rendered the impugned ruling on 23rd July 2018, upheld the preliminary objection and struck out the appellant's application dated 22nd June 2018 on the grounds that it was an abuse of the process of the court.

7. The appellant has in this appeal challenged that decision on eight grounds of appeal as set out in the Memorandum of Appeal. We heard the appeal on 26th May 2025. Learned counsel **Mr. Musyoka** held brief for **Mr. Kanjama**, Senior Counsel and relied entirely on written submissions dated 21st May 2025. Learned counsel for the 2nd respondent **Ms. Linet C. Kithee**, though not having filed written submissions, urged the Court to uphold the impugned decision.

8. In support of the appeal, it was submitted for the appellant that although the learned Judge was right in concluding that the High Court had jurisdiction in special circumstances to deal with matters concerning arbitration under judicial review, the learned Judge erred in failing to find that this was a proper case for judicial review; that the matters raised by the 2nd respondent in its preliminary objection did not include doctrines of *res judicata* and estoppel on which the learned Judge based her decision; and that the learned Judge misdirected herself in considering "the non-pleaded doctrines of *res judicata* and estoppel by record" and thereby wrongly exercised her judicial discretion.

9. It was submitted further that the application before the Commercial Division of the High Court for setting aside the award was struck out on a procedural technicality of limitation of time and was not heard on merit; and that its dismissal would not amount to full and final determination of the rights of the appellant. In that regard the case of ***Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited [2016] eKLR*** was cited.

10. It was urged that contrary to the finding by the learned Judge, the objection by the 2nd respondent was not based on a pure question of law and did not meet the threshold in the case of ***Mukisa Biscuit Manufacturing Company Limited vs West***

End Distributors Limited [1969] EA 696; and that the learned Judge erred in declining to grant the appellant leave to file the substantive application for judicial review.

11. As already noted, beyond the plea by Ms. Kithee for the 2nd respondent for the Court to uphold the decision of the High Court, the respondents did not file written submissions.

12. We have considered the appeal and the submissions. The issue for determination is whether the learned Judge erred in upholding the preliminary objection by the 2nd respondent and in striking out the appellant's application for leave to apply for judicial review on grounds that the same was an abuse of the process of the court.

13. The grant or refusal of leave to apply for judicial review involves exercise of judicial discretion. Therefore, the circumstances under which this Court may interfere with the exercise of judicial discretion by a judge are limited. As stated by the Court in ***United India Insurance Company Limited v East African Underwriters (Kenya) Limited [1985] E.A***:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge***

misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account

of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.” [Emphasis added]

14. With that in mind, it is common ground that the dispute between the appellant and the 2nd respondent was referred to arbitration in accordance with the terms of their contract and that the 1st respondent, the arbitrator, made his award on 8th December 2017 which was subsequently amended on 16th January 2018. Thereafter, the appellant moved the Commercial Division of the High Court at Nairobi in Misc. Application No. 193 of 2018 in its bid to set aside the arbitral award. That bid failed when its application was struck out on 5th June 2018. Undeterred, the appellant then moved to the Judicial Review Division of the High Court with the application for leave to file substantive judicial review proceedings to quash the very arbitration award with respect to which it had failed in its bid before the Commercial Division to set aside.

15. Those are the circumstances that weighed on the learned judge’s mind in upholding the preliminary objection by the 2nd respondent and in striking out the appellant’s application. In doing so, the learned Judge observed, correctly in our view, that the issue that was before the Commercial Division of the High Court in the earlier application was the re-opening of the

arbitral award for setting aside which had been declined, before concluding that:

> ***"…an application for leave to commence judicial review proceedings of the arbitral award will have the same effect of reopening the said award for challenge, which has been expressly denied in a decision by a court of concurrent jurisdiction, and will thus amount to collateral attack of the said decision."***

16. The learned Judge concluded, again rightly so in our view, that the appellant's application was thus "not only in abuse of the process of the court" but that in addition, the court was estopped from dealing with the issues raised in the application and that the appellant could not, after exhausting the statutory procedure set out in the Arbitration Act, hope to get a second bite at the cherry by proceeding by way of judicial review. We respectfully agree.

17. We find no fault in either the reasoning or conclusion reached by the Judge. Estoppel and *res judicata* are to an extent founded on similar underlying principle. As the Supreme Court of Kenya expounded in the case of ***Florence Maritime Services Limited vs Cabinet Secretary Transport, Infrastructure & 3 Others [2021] eKLR***:

> ***"That the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which***

would ordinarily clog the Courts, apart from occasioning

unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

18. Similarly, estoppel is a bar that prevents the relitigation of issues.

19. In our judgment, the appellant has not demonstrated that the learned Judge of the High Court either misdirected herself in law, or that she misapprehended the facts, or that she took account of considerations of which she should not have taken account or failed to take account of considerations of which she should have taken account, or that her decision, is plainly wrong.

20. As regards the appellant's complaint that the 2nd respondent had neither pleaded *res judicata* nor estoppel, the preliminary objection taken by the 2nd respondent was based on, among other grounds, that application was an affront to public policy of Kenya and an "attempt by a losing party to forum shop" and that the appellant was "estopped, debarred and precluded from ever raising such objections" not having done so under the Arbitration Act. The matter of the application being an abuse of the process of the court was therefore a matter properly before the court. Moreover, as this Court stated in ***Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited [2015] KECA***

365 (KLR):

> ***"Under* section 3A *of the Civil Procedure Act the High Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court is preserved."***

21. In conclusion, the appeal fails and is hereby dismissed with costs to the 2nd respondent.

Dated and delivered at Nairobi this 30th day of January, 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....
JUDGE OF APPEAL

JAMILA

MOHAMMED

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR