



Fondo & 3 others v Masha (Environment and Land Miscellaneous Application 24 of 2021) [2024] KEELC 51 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 51 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 24 OF 2021
EK MAKORI, J
JANUARY 17, 2024**

**IN THE MATTER OF: THE LAND ADJUDICATION ACT, CAP 284 READ TOGETHER
WITH THE LAND CONSOLIDATION ACT, CAP 283, LAWS OF KENYA IN THE
MATTER OF: THE ARBITRATION ACT, CAP 49 LAWS OF KENYA AND IN THE
MATTER OF: RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD
AND IN THE MATTER OF: PARCEL NO MWANDA/
MWALEMBENI/985 ADJUDICATION SECTION BETWEEN**

BETWEEN

**MTSUNGA SAIDI FONDO 1ST APPLICANT
ERICK KAZUNGU KATANA 2ND APPLICANT
TIMOTHY FONDO RUWA 3RD APPLICANT
HENRY MASHA KALAMA 4TH APPLICANT**

AND

NGUMBAO CHARO MASHA RESPONDENT

RULING

1. That the Arbitral Tribunal provided an arbitral award constituted under the [Land Adjudication Act](#) Cap 284 Laws of Kenya and published the same on 4th December 2020.
2. That on 5th July 2022, a Ruling was delivered by this court, (Odeny J.) arising from an application to adopt the Award as judgment of this Court. The Court decided as follows:
 - i. The Arbitral award dated 4th December 2020 be and is hereby recognized and adopted as a judgment of this Honourable Court.



- ii. Leave be and is hereby granted to the Applicant to enforce the Arbitral Award as a decree of the Honourable Court.
 - iii. The Respondent shall bear the costs of the application.
3. The Applicant contended in an application dated 12th April 2023 that it has been difficult to enforce the Arbitral Award, for now, one year down the line, the reasons being mainly that the Survey Kilifi needs to romp into these proceedings purely for purposes of enforcement of the Award.
4. The District Surveyor Kilifi County has been reluctant to enforce the Award stating it has not been directed specifically to the office for action and enforcement. The Applicant averred that the Respondent has started to develop the land without survey contrary to the Award. The Award must be enforced by the Applicants together with the assistance of the District Surveyor Kilifi County.
5. The application was opposed and a Preliminary Objection was taken dated 18th May 2023. The court directed both the application and the Preliminary Objection to be heard simultaneously. The Court also directed the same be canvassed by way of written submissions.
6. The grounds in opposition are that the award did not recognize the District Surveyor as the implementing and enforcement Agent. That the application offends Sections 28 and 29 of the [Land Adjudication Act](#). That the District Surveyor has no role in this matter. The application has been made to frustrate Appeal No. 24 of 2021 Malindi. That the Applicants have no locus standi in this matter so to speak. The Applicants gave a chronology of the events leading to the Arbitral award issued by the Arbitral Tribunal under the [Adjudication Act](#). This award was finally adopted by this Court on 5th July 2022 (Odeny J.). It has been impossible to implement and s deposed by the supporting affidavit sworn on 12th April 2022 by Mutsungu Saidi Pondo on behalf of the other Applicants and himself, it has been impossible to implement the award since the District Land Surveyor has not been directed to enforce the same. Several orders served on him have gone unheeded due to the said lacuna.
7. On the respondent has raised a Preliminary Objection, disputing the jurisdiction of this Court on grounds that the District Land Surveyor has nothing to do with the Award, there is a pending appeal to the Court of Appeal on the adoption of the award by this Court and that the pending application offends the [Land Adjudication Act](#), Sections 28 and 29 on obtaining the necessary consent before the commencement of the current proceedings.
8. As held by Law JA. in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] thus:

“...so far as I’m aware, a preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
9. The thrust of the Preliminary Objection squarely attacks the jurisdiction of this court, as held by Nyarangi JA.in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. I have given great thought to the primary application in this lawsuit as well as the Preliminary Objection and grounds in opposition. Whether the preliminary objection as raised is relevant is the question this court must decide. Whether Sections 28 and 29 of the [Land Adjudication Act](#) are violated by the application submitted in advance. Whether the Award does not concern the District Surveyor Kilifi. Whether the purpose of the application is to thwart Appeal No. 24 of 2021 Malindi. That, given this Court’s lack of jurisdiction, the Applicants have no standing to speak in this suit.
11. The Arbitral award is self-explanatory and this Court, (Odeny J.) delved into the jurisdiction of this Court on Arbitral Awards generally. The issue of consent to file a lawsuit under the Land Adjudication regime was also part of the menu placed before the judge when dealing with the adoption of the Award. The Court was fully satisfied that the operations of Sections 28 and 29 of the [Land Adjudication Act](#) Cap 284, had been met before the filing for the adoption of the Award was made. The Court then proceeded to adopt the Award as follows:

“This is an application for enforcement of an arbitral award as the judgment of the Court. The issue for the determination is whether the arbitral award is competent within the meaning of Section 36 of the [Arbitration Act](#) and therefore amenable to enforcement by this Court. Section 36 of the [Arbitration Act](#) provides for the recognition and enforcement of arbitration awards as follows: -

- (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section
- (2) ...
- (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its 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.

Section 37 further provides:

- (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

a party to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

 - (i) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;or



- (ii) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or
 - (iii) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
 - (iv) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
 - (v) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence; (b) if the High Court finds that—
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
 - (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.
- (2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

The 1st Applicant annexed a certified copy of the arbitral award dated 4th December 2020 to the supporting affidavit marked MSF-3. The respondent further stated that he was not aware of the arbitral proceedings and that the Applicant obtained it illegally.....

The Respondent has not substantiated the allegations that the award was illegally obtained by the Applicant by any tangible evidence and therefore has no probative value.”

12. The consent to approach this Court can be found in the final recommendations of the Arbitral Tribunal as follows:

“Its my recommendation that the plaintiff be issued with consent to go to Court and pursue them as the time for appeal had elapsed and once again the plaintiff not given an opportunity to find justice”

13. This Court cannot once again be asked to reconsider the issue of consent which was raised before Odeny J. It is quite late in the day. The wheels of justice should be left to roll on.

14. Nothing has been placed before this Court to show the position of Appeal No. 24 of 2021 Malindi. It has not been made known to this Court that there are orders of stoppage of the enforcement of the



Arbitral Award as adopted as the judgment of this Court, if any, the Respondent should have brought it to the attention of this Court, and this Court in salutation to the concept of preeminence and hierarchy of Courts, would have downed its tools. I then see no merit in the Preliminary Objection as raised. It has to collapse.

15. The pending application largely seeks to ameliorate the void left after the adoption of the Arbitral Award to include an enforcement mechanism since Government Officers had to come in for implementation purposes. The orders when served on the District Surveyor Kilifi County, did not want to hear none of it because no order from this Court commanded him or the Office responsible to undertake the implementation. As correctly stated by the Applicants, if no such orders are issued, the Award will never be implemented but remain otiose.
16. Considering the doctrine of minimum crucial intervention by this Court when it comes to the role of this Court on Arbitral Awards, which emphasizes the finality of those awards, and as held by the Supreme Court in *Nyutu Agrovat Ltd v Airtel Networks Kenya Ltd Chartered Institute of Arbitrators – Kenya Branch (Interested Party)* [2019] eKLR:

“Taking the position explained above therefore, in *AKN & another v ALC and others and other appeals* [2015] SGCA 18, the High Court had set aside an award pursuant to section 24(b) as read with Article 34(2)(a)(ii) & (iii) of the Model Law. On appeal, the Court of Appeal was categorical [paragraphs 38 & 39] that:

“In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts’ perspective, the parties to an arbitration do not have a right to a ‘correct’ decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process. In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.” [Emphasis added.]”

17. The Applicant does not seek to alter the Arbitral Award as adopted by this Court, but rather to have it enforced, by romping in the District Surveyor Kilifi County, to go to the ground and delineate the disputed parcels in accordance with the Award. The application dated 12th April 2023 is then rendered germane and is allowed as prayed. The issues raised in the Preliminary Objection dated 18th May 2023 are a replica of what Odeny J. ruled on 5th July 2022. The same is dismissed with costs.
18. Application dated 12th April 2023 is hereby allowed as prayed in its entirety with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 17TH DAY OF JANUARY 2024.

E. K. MAKORI

JUDGE

In the absence of parties who were notified by this court through email to attend.

Copies of the ruling to be transmitted to the parties electronically.

