



**Put Sarajevo General Engineering Company Limited v Hamilton Harrison
& Mathews (Commercial Miscellaneous Application E375 of 2024)
[2025] KEHC 4381 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E375 OF 2024**

MN MWANGI, J

MARCH 28, 2025

**IN THE MATTER OF: AN ARBITRATION BETWEEN PUT SARAJEVO
GENERAL ENGINEERING COMPANY LIMITED AND THE GOVERNMENT
OF THE REPUBLIC OF KENYA MINISTRY OF LOCAL AUTHORITIES**

AND

**IN THE MATTER OF: AN ARBITRATION BETWEEN PUT SARAJEVO
GENERAL ENGINEERING COMPANY LIMITED AND THE GOVERNMENT
OF KENYA MINISTRY OF WORKS AND HOUSING, ROADS DEPARTMENT**

BETWEEN

**PUT SARAJEVO GENERAL ENGINEERING COMPANY
LIMITED APPLICANT**

AND

HAMILTON HARRISON & MATHEWS RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 30th April 2024 pursuant to the provisions of Order 9 Rule 9(a), Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law, seeking orders that Messrs Asembo & Company Advocates be granted leave to come on record for the applicant in arbitration proceedings involving Put Sarajevo General Engineering Company Limited and the Government of Kenya, Ministry of Local Authorities and the Ministry of Public Works and Housing, Roads Department.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Josephine Oluoch, the applicants' Human Resource & Personnel



Manager. She averred that the applicant had engaged the respondent to represent it in two arbitration proceedings against the Government of Kenya, and agreed that legal fees would be paid after settlement of the arbitration awards. She deposed that instead of awaiting payment, the respondent filed an insolvency petition against the applicant, claiming unpaid legal fees of Kshs.828,700/=, which case is still pending before the High Court.

3. Ms Oluoch stated that on 19th February 2024, the Attorney General confirmed the Government's payment of Kshs.26,868,445.35 to settle the arbitration awards. That subsequently, the applicant proposed that the legal fees due to the respondent be agreed upon and deducted before the balance is remitted, but the respondent refused and has to date taken no steps to collect the aforesaid funds, effectively delaying resolution of the insolvency petition. She asserted that due to the breakdown in the Advocate-client relationship between the parties herein, the applicant seeks to change its legal representation to secure its settlement funds, meet its financial obligations, and resolve the insolvency petition.
4. In opposition to the application, the respondent filed a replying affidavit sworn on 14th May 2024 by Mr. Kiragu Kimani (SC), an Advocate of the High Court of Kenya and a partner in the respondent law firm. He averred that the respondent represented the applicant in two arbitration proceedings but could not enforce the first award or obtain the second award due to lack of instructions and payment of the Arbitrator's fees. He deposed that there was no agreement that legal fees would only be payable upon settlement of the Arbitral Awards. He contended that the applicant had previously acknowledged its debt and made partial payments but later failed to settle the outstanding amount despite multiple reminders, which led the respondent to initiate insolvency proceedings which were upheld as properly served by the Court.
5. Mr. Kiragu Kimani (SC) stated that on 19th February 2024, the Attorney General confirmed receipt of Kshs.26,868,445.35 for the Arbitral Award and requested for a signed discharge voucher from the applicant company's Directors to release the funds. He stated that the applicant's Advocates neither responded to nor provided the signed discharge voucher. He denied receipt of a copy of the Settlement Agreement referred to by the applicant and maintained that there is no justification for the orders being sought by the applicant herein, since the only step needed is the submission of the signed discharge voucher to facilitate the release of the funds currently held by the Attorney General.
6. The respondent also filed Grounds of Opposition dated 14th May 2024 raising the following issues-
 - i. There is no evidence to support the application;
 - ii. The deponent of the affidavit in support of the application, Josephine Oluoch, is not competent to swear to the facts;
 - iii. The affidavit in support of the application is sworn by Josephine Oluoch the Human Resource and Personnel Manager of the applicant. Josephine Oluoch has not given details of her involvement in either the arbitrations which give rise to the debt or the correspondence relating to the debt;
 - iv. The applicant has not produced a Board resolution showing that Josephine Oluoch is an officer of the applicant and authorizing Ms. Oluoch to swear the supporting affidavit on its behalf;
 - v. The applicant has not produced the alleged Agreement on payment of fees that is referred to at paragraph 3 of the supporting affidavit of Josephine Oluoch. The Agreement that Ms Oluoch alleges in that paragraph that the respondent's costs would only be paid once the arbitration awards were settled would be an illegal fee agreement contrary to Section 46(c) of the *Advocates Act*, Cap 16 Laws of Kenya;



- vi. The exchange of correspondence between the applicant and the respondent as set out in the replying affidavit is an admission of the debt due to the respondent from the applicant;
 - vii. The provisions regarding recovery of costs from a client are set out in Sections 48 and 49 of the *Advocates Act*. There is no requirement for taxation unless the client has disputed the quantum of the bill before action is taken. The applicant did not dispute the quantum of the respondent's bills of costs and in fact made partial payment of these bills. The first challenge to the respondent's bills of costs was in the replying affidavit of Josephine Oluoch sworn on 31st October 2021 and produced as exhibit JO 2 to her supporting affidavit. This is clearly an afterthought;
 - viii. The allegations by Josephine Oluoch are not credible as being the Human Resource & Administration Manager she has completely contradicted the admissions by the Managing Director of the applicant at pages 8, 14, 20 & 21 of the exhibit to the replying affidavit;
 - ix. A liquidator appointed by the Court over the assets of the applicant would have powers to ensure that the assets of the applicant are realized and distributed to the applicant's creditors. The funds released by the Ministry of Local Government would constitute such assets that the Liquidator has power to realize;
 - x. The application is an abuse of the Court process as it raises similar issues that were raised by the applicant in the replying affidavit of Josephine Oluoch sworn on 31st October 2021 in response to Insolvency Petition E020 of 2020; and
 - xi. Other grounds and reasons as set out in the replying affidavit of Kiragu Kimani filed herein, and the nature of the case and other reasons to be given at the hearing of the application.
7. In opposition to the instant application the respondent also filed a Notice of Preliminary Objection dated 14th May 2024 raising the following grounds –
- i. This Court lacks the jurisdiction to issue the orders sought under the provisions cited by the applicant or at all. The Civil Procedure Rules have no application;
 - ii. The Court can only intervene in arbitral proceedings in the manner prescribed by Section 10 of the *Arbitration Act*, Cap 49 Laws of Kenya. The Court's intervention in the manner proposed by the applicant is not contemplated by the Act; and
 - iii. There is no power to intervene in the manner sought before Insolvency Petition number E020 of 2020 - In the matter of Put Sarajevo General Engineering Company Limited is heard and determined.
8. In a rejoinder, the applicant filed a supplementary affidavit sworn on 17th May 2024 by Ms Josephine Oluoch, the applicant's Human Resource & Personnel Manager. She contended that the arbitration Rules allow for the application of Civil Procedure Rules and that her competence has not been challenged in related insolvency proceedings. She claimed that the applicant proposed a professional undertaking to pay the respondent Kshs.5,828,700/= within three days of receiving the settlement sum, avoiding the need for taxation. Ms Oluoch emphasized the urgency of releasing the funds currently held by the Attorney General before the government's fiscal year-end and asserted the applicant's constitutional right to legal representation of its choice.
9. The instant application was canvassed by way of written submissions. The respondent's submissions were filed on 5th November 2024 by the law firm of Hamilton Harrison & Mathews Advocates, but the applicant despite being given several opportunities to file submissions, did not do so.



10. Ms Obwangi, learned Counsel for the respondent submitted that the real issue between the parties herein stems from the applicant's refusal to pay the respondent's fees, attempting to bypass payment by redirecting it to another firm. Counsel relied on the Court of Appeal case of *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR, and urged this Court not to facilitate the applicant's actions as the *Arbitration Act* does not grant the Court authority to interfere in representation changes, pre or post-award, beyond its specified provisions. In submitting that the instant application amounts to an invitation for this Court to exercise a jurisdiction not conferred on it by any law, Ms. Obwangi referred to the Supreme Court case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR.
11. Counsel cited the case of *Thinwa Njoroge v Samuel Murage Wachira & another* [2022] eKLR, and argued that even if the provisions of the *Civil Procedure Rules*, 2010 were applicable, Order 9 Rule 9 thereof requires that an application for a change of Advocates be made within the same proceedings, which is not the case herein. She submitted that the affidavit in support of the instant application was deposed to by an individual who has not shown her involvement in the arbitration proceedings or related correspondence. Counsel asserted that the respondent dealt with the applicant's Chairman and Managing Director and no evidence had been tendered to show that Ms Oluoch works for the applicant or was authorized to act on its behalf.
12. She relied on the case of *James Kariuki & another v Peter Kariuki & 2 others* [2009] eKLR and argued that Ms. Oluoch's affidavit fails to comply with Order 19 Rule 3 of the *Civil Procedure Rules*, 2010 as she lacks first-hand knowledge and has not disclosed the sources of her information, thus it should be disregarded. Ms Obwangi relied on the Court of Appeal case of *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR, and submitted that pursuant to Section 45 of the *Advocates Act*, an Agreement for remuneration of an Advocate must be in writing and executed by the client or his representative which is not the case herein.

Analysis And Determination.

13. I have considered the instant application, the grounds on the face of it, and the affidavits filed in support thereof. I have also considered the replying affidavit, grounds of opposition and the Notice of Preliminary Objection filed by the respondent, and the written submissions filed by Counsel for the respondent. The issues that arise for determination are –
 - i. Whether the respondent's Notice of Preliminary should be upheld; and
 - ii. Whether the application herein is merited.

Whether the respondent's Notice of Preliminary Objection is merited.

14. The validity of a Preliminary Objection was discussed by the Court in the case of *Oraro v Mbaja* [2005] 1KLR 141, where Ojwang J., (as he then was) expressed himself as follows –

The principle is abundantly clear. A 'preliminary objection' correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts a matter cannot be raised as a preliminary point. ... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not



itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

15. The Supreme Court weighed in on the issue of Preliminary Objections in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and stated that –

...Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

16. The respondent challenges this Court’s jurisdiction to hear and determine the instant application on grounds that it has no jurisdiction to do so pursuant to the provisions of Section 10 of the *Arbitration Act*. In the case of *Owners of the Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) Nyarangi, JA., held that as follows-

A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a Court had no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.

17. Judicial intervention in respect to arbitral processes and/or proceedings is very limited as provided for Section 10 of the *Arbitration Act* which states that –

Except as provided in this Act, no Court shall intervene in matters governed by this Act.

18. The applicant in arguing that this Court has the requisite jurisdiction to grant the orders sought contended that the Arbitration Rules allow for the application of *Civil Procedure Rules* in arbitral proceedings. The Court of Appeal in the oft cited case of *Anne Mumbi Hinga v Victoria Njoki Gathara* (supra) addressed itself on whether the provisions of the Arbitration Rules can override the provisions under the *Arbitration Act*. The Court stated thus –

A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior Court clearly shows that, all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act* which states:

“Except as provided in this Act no Court shall intervene in matters governed by this Act”.

In the light of the above, the superior Court did not have jurisdiction to intervene in any manner not specifically provided for in the *Arbitration Act*. ...

The provisions of the *Arbitration Act* make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate.

19. Further, the Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] KECA 1012 (KLR) stated as follows-

Certainly, I do not agree that the *Civil Procedure Act* applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to



pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil-like litigation, I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:

“11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules.”

The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10. (Emphasis added).

20. Bound by the aforementioned Court of Appeal decisions, this Court finds that it has no jurisdiction to entertain the instant application or grant the orders sought by the applicant as it has approached this Court pursuant to the provisions of Order 9 Rule 9(a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
21. It is my finding that the respondent’s Preliminary Objection is merited. It is hereby upheld with costs to the respondent. As a consequence thereof, I hereby strike out the applicant’s application dated 30th April 2024 with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MARCH 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Asembo for the applicant

Ms Saina h/b for Mr. Kiragu Kimani (SC) for the respondent

Ms B. Wokabi – Court Assistant.

