**SBI International Holdings AG v Kenya National Highways Authority (Commercial Case E968 of 2021) [2025] KEHC 12434 (KLR) (Commercial and Tax) (4 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12434 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL CASE E968 OF 2021**

**PM MULWA, J**

**SEPTEMBER 4, 2025**

**BETWEEN**

**SBI INTERNATIONAL HOLDINGS AG ..... PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... DEFENDANT**

**RULING**

1. This Ruling is in respect of the Plaintiff's Notice of Motion dated 15th February 2024 brought under Order 2 Rule 15(1)(a), (b), (c) and (d), and Order 51 Rules 1 and 3 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*. The Applicant seeks the following orders:

    i. That the defence dated 9th August 2023 be struck out as disclosing no reasonable defence;

    ii. That judgment be entered in the sum of USD 3,575,728.60 and Kshs. 1,356,180,186.16 as per the decision of the dispute board on 4/6/2021;

    iii. That Interest be awarded on the above sums at the discount rate of the Federal Bank of the united Sates plus 3% compounded monthly from 29th June 2021 until payment in full, and at the discounted rate of National Bank of Kenya plus 3% compounded monthly respectively, and

    iv. Costs of the suit.

**The Applicant's case**

2. The application is supported by the affidavit of Gilad Mishni sworn on 15th February 2024. It is averred that this suit was instituted by way of a Plaint dated 19th November 2021 seeking enforcement of the DAB's decision made on 4th June 2021 pursuant to Clause 20.4 of the General Conditions of Contract.

3. The Applicant argues that the contract makes the DAB decision binding upon the parties unless revised through amicable settlement or arbitration. It is asserted that the Defendant has not initiated arbitration to overturn the decision, and therefore, the DAB's decision remains binding and enforceable.

4. It is further contended that the Statement of Defence is, in substance, an appeal against the DAB decision. The Applicant submits that disputes on alleged anomalies, miscalculations or misinterpretations fall within the arbitral process, not before this Court. The Defence is therefore described as a collateral attack on the DAB's decision, disclosing no reasonable triable issue.

**The Defendant's case**

5. The Defendant relies on a Replying Affidavit sworn on 16th September 2024 by Eng. Samuel O. Gee. He deposes that this Court, by its Ruling of 28th July 2023, dismissed the Defendant's application to stay the proceedings and refer the dispute to arbitration. It is argued that the Defendant was thereafter compelled to file a Defence.

6. According to the Defendant, there is no limitation on what constitutes a defence, and the defence filed raises bona fide triable issues, particularly regarding anomalies and miscalculations in the sums awarded by the DAB.

7. It is further urged that unless such issues are ventilated at trial, the Defendant will suffer substantial prejudice. The Court is therefore urged not to act as a "rubber stamp" of the DAB's decision.

8. The application was canvassed by way of written submissions. The Plaintiff filed submissions dated 24th June 2024, while the Defendant filed submissions dated 17th September 2024.

**Analysis and determination**

9. Having considered the application, affidavits, and submissions of the parties, the issues arising for determination are:

    i. Whether the Statement of Defence dated 9th August 2023 discloses any reasonable defence or triable issues; and

    ii. Whether the Plaintiff is entitled to judgment as prayed.

10. The power to strike out pleadings is donated by Order 2 Rule 15(1) of the Civil Procedure Rules which provides that a pleading may be struck out if it discloses no reasonable cause of action or defence, is scandalous, frivolous or vexatious, may prejudice or delay fair trial, or is an abuse of process.

11. The principles governing striking out pleadings were laid down in DT Dobie & Co. (Kenya) Ltd v Muchina [1982] KLR 1, where Madan JA famously stated:

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

12. The same principle applies to a defence, if it raises even a single bona fide triable issue, it should not be struck out. In Patel v EA Cargo Handling Services Ltd [1974] EA 75, Duffus P. stated:

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. A defence which raises a triable issue should not be struck out."

13. The foundation of the Plaintiff's claim is the DAB decision dated 4th June 2021. Clause 20.4 of the FIDIC-based General Conditions of Contract provides that such a decision is binding unless and until it is revised by amicable settlement or an arbitration. It is clear from the wording of clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The clause creates an enforceable interim obligation, a party dissatisfied with the decision must still comply with it pending final determination in arbitration.

14. The Plaintiff's position is that no arbitral proceedings have been commenced to revise the decision of the DAB. I have perused the record and indeed find no evidence of arbitration having been initiated within the stipulated time. The Defendant issued a notice of dissatisfaction but has not demonstrated that it referred the dispute to arbitration and prosecuted it to conclusion. In effect, the DAB's decision remains binding and enforceable. In China Jiangxi International Kenya Ltd v Gemina Insurance Co. Ltd [2020] eKLR, the Court held:

> " A decision of a Dispute Adjudication Board is binding on the parties unless and until it is overturned by an arbitral award or amicable settlement."

15. The defence filed by the Defendant disputes the correctness of the DAB's calculations, alleging anomalies and misinterpretations. In substance, these are grounds for challenging the DAB decision before an arbitral tribunal, not before this Court.

16. The Court in Kundan Singh Construction Ltd v Tanzania National Roads Agency [2019] eKLR was clear that:

> " A court enforcing a DAB decision is not sitting on appeal against the correctness of that decision. Its duty is to enforce it as long as it has not been overturned by arbitration."

15. I have perused the defence dated 9th August 2023. The core of the defence is that the DAB allegedly committed errors in computation and misinterpretation of the contract. The defence invites the Court to reassess the factual and technical findings of the DAB and adjust the sums awarded. The question, therefore, is whether such a defence raises a triable issue in light of the contractual framework binding the parties. In my view these are precisely the kind of grievances that the contract mandates to be ventilated in arbitration, not in an enforcement suit. To allow such a defence would be to bypass the agreed dispute resolution process and convert the enforcement stage into a de facto appeal on the merits.

16. It follows that the Defendant's defence amounts to a collateral attack on the DAB decision, which remains binding until properly revised.

17. The Defendant argued that this Court, in its Ruling of 28th July 2023, allowed the suit to proceed, hence the defence must be heard. That submission is misconceived. The earlier ruling merely dismissed a stay application and did not validate the raising of issues that are contractually reserved for arbitration.

18. It is also a matter of public policy that courts should uphold and enforce dispute resolution mechanisms freely agreed by commercial parties, especially in complex infrastructure projects involving technical expertise. As emphasized by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another [2019] eKLR, party autonomy is a cornerstone of the arbitration and ADR regime, and judicial interference should be limited to preserving, not undermining, the agreed processes. If courts were to reopen DAB determinations at the enforcement stage, it would erode confidence in such mechanisms, prolong disputes contrary to the principle of expeditious disposal of cases under Sections 1A and 1B of the *Civil Procedure Act*, and undermine Kenya's attractiveness as a venue for international construction contracts.

19. A "triable issue" must be one that can be determined by the court within its jurisdiction and which, if established, would constitute a defence in law. Allegations which, by agreement of the parties, are exclusively referable to arbitration do not constitute triable issues in a court enforcement claim. As the Court of Appeal observed in Transcend Media Group v Independent Electoral and Boundaries Commission [2017] eKLR, parties are bound by the dispute resolution procedures they have freely chosen, and the court's role is to give effect to those choices.

20. It is my considered view, the defence herein is a collateral attack on a binding decision, raising matters that lie outside the remit of this Court in the current proceedings. It is therefore frivolous and vexatious within the meaning of Order 2 Rule 15(1) and amounts to an abuse of the court process. A pleading which seeks to reopen matters conclusively determined under contract does not disclose a reasonable defence.

21. While the threshold for striking out a pleading is high, the Court will do so where it is plain that the pleading discloses no reasonable defence or triable issue. As stated in DT Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1, the Court should be slow to strike out pleadings, but where the pleading is a sham or plainly untenable, it must be struck out to prevent abuse of process.

22. The defence herein does not disclose any triable issue; rather, it challenges the correctness of the DAB's findings, a jurisdictional overreach for this Court. I am satisfied that the defence is an abuse of the court process as the DAB's decision has not been set aside, revised or superseded by an arbitral award, and it remains enforceable as a contractual obligation.

23. The Plaintiff seeks interest at the contractual rates stipulated in the DAB decisions, namely, Federal Bank discount rate plus 3% compounded monthly for the USD component, and National Bank of Kenya discount rate plus 3% compounded monthly for the Kshs component.

24. Courts generally uphold contractual stipulations on interest unless shown to be unconscionable or contrary to law. In Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd [2014] eKLR, the Court of Appeal held:

> "Where parties have agreed on interest, the court has no discretion to interfere unless it is illegal, unconscionable or otherwise vitiated."

15. No evidence has been placed before me to suggest that the rates agreed are illegal or unconscionable. Accordingly, the contractual interest is enforceable.

16. Section 27 of the *Civil Procedure Act* provides that costs follow the event unless the Court orders otherwise. The Plaintiff, having succeeded, is entitled to costs of this application.

17. In the result, I find merit in the Plaintiff's Notice of Motion dated 15th February 2024 and make the following orders:

1. The defence dated 9th August 2023 is hereby struck out.
2. Judgment is entered for the Plaintiff in the sum of USD 3,575,728.60 and Kshs. 1,356,180,186.16, together with interest as prayed.
3. The Plaintiff shall also have the costs of this application and of the suit.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Counsel for all parties absent - Aware of ruling date.

Court Assistant: Carlos