



**Civicon Limited v Fuji Electric Company Limited & 2 others**  
**(Commercial Miscellaneous Application E747 of 2023)**  
**[2024] KEHC 3306 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3306 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL MISCELLANEOUS APPLICATION E747 OF 2023**  
**JWW MONG'ARE, J**  
**MARCH 18, 2024**

**BETWEEN**

**CIVICON LIMITED ..... APPLICANT**

**AND**

**FUJI ELECTRIC COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**EQUITY BANK (KENYA) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MARUBENI CORPORATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is with respect to two applications. The first application is the Applicant's Notice of Motion dated 28<sup>th</sup> August 2023 filed pursuant to the Provisions of Articles 47, 50(1), 165, 159 (2) (c) & (d) of the [Constitution of Kenya](#) 2010, Sections 1A, 1B, 3A, & 63 (e) of the [Civil Procedure Act](#) cap 21 Laws of Kenya, order 40 rule 1 & order 51 rules 1 & 4 of the [Civil Procedure Rules](#) 2010, Section 7 of the [Arbitration Act](#) No. 4 of 1994, and all the enabling provisions of the law. The Applicant is seeking the following orders: -
  - i. Spent;
  - ii. Spent;
  - iii. Spent;
  - iv. That this Honourable Court be and is hereby pleased to grant an injunction restraining the 3<sup>rd</sup> Respondent, M/s Equity Bank Limited, from honouring, paying, or settling the Performance Security Bond reference number EBKL/141/PBG00XXXX to 1<sup>st</sup> Respondent before the



dispute referred to arbitration by the Hon. Lady Justice J.W.W. Mong'are on 12<sup>th</sup> June, 2023 is subjected to and conclusively resolved through arbitration;

- v. That the Honourable Court be and is hereby pleased to grant an injunction restraining the 1<sup>st</sup> Respondent, from appropriating any monies advanced to the 1<sup>st</sup> Respondent, by the 3<sup>rd</sup> Respondent, in reference to the Performance Security Bond reference number EBKL/141/PBG00XXXX, and in the event that any amounts is so paid, the same be deposited with the Court for preservation, before the dispute referred to arbitration by the Hon. Lady Justice J.W.W. Mong'are on 12<sup>th</sup> June, 2023 is subjected to and conclusively resolved through arbitration; and
  - vi. That the costs of this Application be provided for.
2. The application is brought supported by the grounds on the face of the motion and by the supporting affidavit and supplementary affidavit sworn by Trevor Okoth the Applicant's Chief Financial Officer on 28<sup>th</sup> August 2023 & 30<sup>th</sup> January 2024. In opposition thereto, the 1<sup>st</sup> Respondent filed a replying affidavit sworn by its Deputy General Manager of Business Development Division on 8<sup>th</sup> September 2023, whereas the 2<sup>nd</sup> Respondent filed grounds of opposition dated 12<sup>th</sup> September 2023 raising the following grounds: -
- i. The application dated 28<sup>th</sup> August 2023 is fatally and incurably defective as it is not anchored on a suit contrary to Section 7 of the *Arbitration Act*, 1995 and rule 2 of the *Arbitration Rules* - See *Scope Telemantics International Sales Limited v Stoic Company Limited & another* [2017] eKLR;
  - ii. The dispute that to be referred to arbitration is under the Consortium Agreement dated 5<sup>th</sup> October 2018 between the Applicant and the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent is not a party to the Consortium Agreement and will not be a party in the arbitration proceedings;
  - iii. The application dated 28<sup>th</sup> August 2023 does not disclose any reasonable cause of action against the 2<sup>nd</sup> Respondent. The Applicant has not particularized any wrongdoing by the 2<sup>nd</sup> Respondent or infringement of the Applicant's rights by the 2<sup>nd</sup> Respondent in the application; and
  - iv. The Applicant has not sought any reliefs against the 2<sup>nd</sup> Respondent in the application dated 28<sup>th</sup> August 2023. The 2<sup>nd</sup> Respondent is not a necessary party for the hearing and determination of this application.
3. The second application is the 2<sup>nd</sup> Respondent's Notice of Motion dated 12<sup>th</sup> September 2023 filed under the Provisions of order 2 rule 15(a) of the *Civil Procedure Rules* 2010 and the inherent power of the Court seeking the following orders: -
- i. Spent;
  - ii. The application dated 28<sup>th</sup> August 2023 be struck out as against the 2<sup>nd</sup> Respondent; and
  - iii. The costs of the suit and of this application be awarded to the 2<sup>nd</sup> Respondent.
4. The application is premised on the grounds on the face of the motion. In opposition thereto, the Applicant filed a replying affidavit sworn by Trevor Okoth the Applicant's Chief Financial Officer on 30<sup>th</sup> January 2024.
5. The Applicant's case is that this Court referred the dispute between the parties herein to arbitration and lifted the status quo orders it had previously issued vide a ruling delivered on 12<sup>th</sup> June



2023. The aforesaid status quo orders restrained the 3<sup>rd</sup> Respondent from effecting any payments to the 1<sup>st</sup> Respondent with respect to the performance Security Bond reference No. EBKL/141/PBG00XXXXX whose value is USD. 2,314,000.54. It averred that on 22<sup>nd</sup> August 2023 the 1<sup>st</sup> Respondent wrote to the 3<sup>rd</sup> Respondent demanding payment of the said Performance Security Bond. This prompted the 3<sup>rd</sup> Respondent to write to the Applicant on 23<sup>rd</sup> August 2023 notifying it of its intention to make the said payment.
6. Thereafter, the Respondent vide a letter dated 25<sup>th</sup> August 2023 wrote to the Applicant stating that the said amount should not be paid as the matter has not been ultimately resolved. The Applicant contended that the 3<sup>rd</sup> Respondent vide a letter dated 28<sup>th</sup> August 2023 informed him that it has resolved to pay the 1<sup>st</sup> Respondent a sum of USD 2,314,000.54. Therefore, the Applicant is apprehensive that if the orders sought herein are not granted, the intended arbitration proceedings will be rendered nugatory, and it will suffer substantial loss of USD 2,314,000.54. It further stated that the performance bond contract was not part of the Consortium agreement as alleged by the 1<sup>st</sup> Respondent.
  7. The aforementioned disagreement prompted the Applicant to file HCCOMM No. E359 of 2022-*Civicon Limited v Fuji Electric & 2 Others* against the 1<sup>st</sup> Respondent but the 1<sup>st</sup> Respondent filed an application seeking to refer the said matter to arbitration which application was granted. The Applicant then filed an application seeking orders of stay pending hearing and determination of an appeal lodged against the ruling delivered by this Court on 12<sup>th</sup> June 2023 and in the alternative interim reliefs pending the arbitration proceedings. Vide a ruling delivered on 15<sup>th</sup> August 2023, the Court in HCCOMM No. E359 of 2022 declined to issue any orders on grounds that it was functus officio having referred the dispute between the parties herein to arbitration.
  8. That since the application seeking orders of stay pending hearing and determination of an appeal lodged against the ruling delivered by this Court on 12<sup>th</sup> June 2023, and in the alternative interim reliefs pending the arbitration proceedings was not determined on merit, there is no bar to the present application. The Applicant asserted that it has invoked this Court's jurisdiction for an interim relief measure provided for under Section 6 & 7 of the *Arbitration Act*.
  9. The 1<sup>st</sup> Respondent in opposition thereto averred that the instant application is not properly before this Honourable Court as it is not premised on a suit as required under Rule 2 of the *Rules*, hence it is fatally and incurably defective. In addition, in obtaining the ex parte orders herein, the Applicant made material misrepresentation and/or failed to make full and frank disclosure of material facts to this Honourable Court such as the fact that the Applicant had filed a similar application in HCCOMM No. E359 of 2022-*Civicon Limited v Fuji Electric & 2 Others* seeking various injunction reliefs *inter alia* an order restraining the 3<sup>rd</sup> Respondent from paying the 1<sup>st</sup> Respondent the proceeds of the Performance Bond pending the conclusion of an alleged arbitration proceedings.
  10. However, the said application was dismissed with costs to the 1<sup>st</sup> Respondent vide a ruling delivered on 15<sup>th</sup> August 2023. The Court further noted that it was functus officio thus it couldnot make any other or further orders until the arbitration process was finalized. The 1<sup>st</sup> Respondent asserted that the instant application was res judicata since the question as to whether the Applicant is entitled to interim measures of protection pursuant to Section 7 of the *Arbitration Act* pending the conclusion of the arbitration proceedings was conclusively determined by the Court in a ruling dated 15<sup>th</sup> August 2023, and the parties to the instant application were similar to the parties to the proceedings that ended with a ruling delivered on 15<sup>th</sup> August 2023.



11. The 1<sup>st</sup> Respondent contended that the Applicant has no privity of contract in so far as the Performance Bond entered into between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent was concerned. It further contended that this Honourable Court lacked the requisite jurisdiction to issue the orders sought as the governing law clause of the relevant agreements entered into between the Applicant and the 1<sup>st</sup> Respondent is that of England and Wales, hence this application ought to be filed before the English Courts, if at all. The 1<sup>st</sup> Respondent stated that the Performance Bond is in the nature of an on demand-guarantee, hence payable unconditionally upon demand. This means that its enforcement is neither dependent nor affected by any underlying dispute between the parties herein.
12. The 1<sup>st</sup> Respondent's position is that the Performance Bond is a contractual arrangement between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent only, thus the Applicant has no locus standi to file the instant application as it does not enjoy any rights and obligation therefrom. Further, in the event the application herein is disallowed, the orders granted will be prejudicial to the 1<sup>st</sup> Respondent and completely undermine the commercial importance of Performance Bond as well as contravene well established principles and practice in commercial law regarding the enforcement of on-demand guarantees.
13. The 2<sup>nd</sup> Respondent's case is that the application dated 28<sup>th</sup> August 2023 is fatally and incurably defective as it is not anchored on a suit contrary to Section 7 of the *Arbitration Act*, 1995, and Rule 2 of the Arbitration Rules. In addition, the said application does not disclose any reasonable cause of action against the 2<sup>nd</sup> Respondent. It contended that the said application has not particularized any wrongdoing by the 2<sup>nd</sup> Respondent or infringement of the Applicant's rights by the 2<sup>nd</sup> Respondent. It further argued that it is not a necessary party for purposes of the hearing and determination of the application dated 28<sup>th</sup> August 2023 since no reliefs have been sought against it, and the Performance Bond which forms the basis of the Applicant's claim was issued in accordance with the terms of the Consortium agreement which the 2<sup>nd</sup> Respondent is not a party to.
14. The applications herein were canvassed by way of written submissions. I shall not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination.

### **Analysis and Determination**

15. Upon careful consideration and analysis of the pleadings filed by the parties in support and in opposition to the applications herein, together with the written submissions by Counsel for parties, the issues that arise for determination are: -
  - i. Whether this Court is functus officio;
  - ii. Whether the application dated 28<sup>th</sup> August 2023 is defective for not being anchored on a suit;
  - iii. Whether the application dated 28<sup>th</sup> August 2023 as against the 2<sup>nd</sup> Respondent should be struck out; and
  - iv. Whether the interim reliefs sought by the Applicant should be granted.

### **Whether this Court is functus officio.**

16. The 1<sup>st</sup> Respondent averred that in view of this Court's ruling delivered on 15<sup>th</sup> August 2023 in HCCOMM No. E359 of 2022-*Civicon Limited v Fuji Electric & 2 Others*, this Court was functus officio thus it could not grant the orders sought in the application dated 28<sup>th</sup> August 2023. It is now settled law that the doctrine of *functus officio* brings about the aspect of finality. A Court of law only



becomes *functus officio* once it has performed all its duties in a particular case and rendered a final decision.

17. It is not disputed that the Applicant filed an application in HCCOMM No. E359 of 2022 seeking similar orders as the ones sought in the application dated 28<sup>th</sup> August 2023. However, the Applicant contends that the said application was not determined on merits thus it cannot be a bar to the application herein. The 1<sup>st</sup> Respondent on the other hand asserted that the said application was dismissed with costs to the 1<sup>st</sup> Respondent.
18. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, in considering the doctrine of *functus officio* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 which reads: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

19. At this juncture it is important to note that the ruling referred to by the parties herein delivered in HCCOMM No. E359 of 2022 on 15<sup>th</sup> August 2023, was delivered by this Court. Be that as it may, I have gone through it and I note that at paragraph 7 of the said ruling the Court stated that having stayed the proceedings therein by its orders of 12<sup>th</sup> June 2023, it was now *functus officio* and could not make any other or further orders until the arbitration process was finalized. The Court went further to state that it was bereft of jurisdiction and advised the Applicant to move the appellate court for the stay orders since they have been granted leave to lodge an appeal, against the ruling delivered on 12<sup>th</sup> June 2023. Interestingly, instead of the Applicant heeding to the Court’s advice and seeking for stay orders at the Court of Appeal, it filed a miscellaneous application pursuant to the Provisions of Section 7 of the *Arbitration Act*, seeking interim reliefs pending hearing and determination of the dispute referred to arbitration.
20. It is noteworthy that this Court is not only of equal and concurrent jurisdiction to the Court in HCCOMM No. E359 of 2022, but is also similarly constituted. Therefore, filing a similar application between the same parties, seeking similar orders does not help a litigant, in this case the Applicant, evade the doctrine of *functus officio*. In *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 cited with authority by the Supreme Court in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* (*supra*) the Court held that: -

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”



21. Accordingly, in the absence of an order setting aside and or varying the previous orders of the Court issued in HCCOMM NO. E359 of 2022 on 15<sup>th</sup> August 2023, this Court finds and holds that it is *functus officio* hence it cannot entertain the Applicant's application dated 28<sup>th</sup> August 2023.

22. Having found that this court is *functus officio* in relation to the matter before it, the court will not consider the other issues identified and set out for determination hereinbefore. In the premise, the application herein is devoid of merit, and it is hereby struck out with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2024**

**J.W.W. MONG'ARE**

**JUDGE**

In the presence of:-

Ms. Noella Lubano and Mr. Kamara for the 2<sup>nd</sup> Respondent.

Waigwa holding brief for Ms. Kitoo for the Plaintiff.

Amos - Court Assistant

