



**Kiptoon v Sasam Limited & another (Civil Case 25 of 2015)
[2024] KEHC 5404 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 25 OF 2015
SM MOHOCHI, J
APRIL 25, 2024**

BETWEEN

KENNETH CHESIYNA KIPTOON APPLICANT

AND

SASAM LIMITED 1ST RESPONDENT

SAMUEL KIMUCHU GICHURI 2ND RESPONDENT

RULING

1. The Notice of Motion Application for determination by this Honorable Court is the one dated 15th June, 2022 by the Plaintiff/Applicant made under the provisions of Sections 80, 59B, 1A, 1B, 3A 63 of the *Civil Procedure Act* and Order 45 Rule 1(1), 46 Rule (20 (1-3) of the *Civil Procedure Rules*, 2010 and Articles 50 (1) 159 (1), (2) of *the Constitution*. The Applicant is thus seeking:
 - i. Spent
 - ii. That the Court be pleased to review and vacate its Ruling (wrongly titled “Judgement”) dated 28th July, 2016 staying further proceedings herein and referring this matter to Arbitration, and so instead revert this matter back to the Court for hearing and disposal or to be otherwise dealt with by Court
 - iii. That the Court be pleased to refer this matter to court annexed mediation
 - iv. That costs of this application be provided for.
2. The Application is predicated on the grounds thereof and the Supporting Affidavit of Kenneth Chesyna Kiptoon sworn on even date where he deposes that this matter was referred to Arbitration on 28th July, 2016 by the Court with an order for the parties to jointly appoint an Arbitrator within 30 days from the date thereof and failure to that one would be appointed by the Chairman of the



- Chartered Institute of Arbitrators. He averred that the Arbitration has never materialized and there have been new developments affecting the matter.
3. That the Applicant readily accepted the initial Arbitrator proposed by the Respondent. That the appointed Arbitrator thereafter declined the appointment due to work pressure and that ever since the Respondents have been declining to approve an alternative Arbitrator proposed or propose a different one. That the Applicant Petitioned the Chairman of the Institute of Chartered Arbitrators but the Arbitrator appointed has never been able to take up or commence the Arbitration since there has been no consensus on preliminary issues principally on the Arbitrator's remuneration.
 4. He further deponed that the 2nd Respondent's advocates wrote to the Arbitrator vide a letter dated 5th February, 2019 stating that, the 2nd Respondent was immobilized and would not be able to attend the hearings in the foreseeable future. This According to the Applicant meant the preliminary issues hindering the arbitration are thrashed out and the process may not start. Further that it is in the public domain that there is an impending move by the national and international law enforcement agencies to extradite the 2nd Respondent to Jersey Islands to face criminal charges related to money laundering and other economic crimes. That this would complicate and delay the matter further. That the extradition of the 2nd Defendant would make it impossible for the Applicant to recover his money which is subject of the dispute.
 5. That by the time the matter was being referred to Arbitration, Court annexed mediation had not been introduced and the same has been enacted into law under Sections 59A, 59B and 59C of the [Civil Procedure Act](#) and thus believes mediation would be most officious and cost-effective route. He added that he has been suffering and is in financial distress owing to the delay in determination of the matter. That from the averments it is unlikely that the Arbitration will commence. That referral of the matter to Arbitration has caused delay instead of hastening the determination. That in the interest of justice that the prayers sought do issue.
 6. The Respondents in opposition, filed a Replying Affidavit sworn by Samuel Kimuchu Gichuru on 25th August, 2022. He deponed that the Application does not advance any ground that could satisfy the threshold for varying or setting aside the terms of the Court Order. That Courts are not in the business of rewriting contractual agreements and if the application is allowed it would be to offend the said principle since the parties herein voluntarily agreed to resolve disputes arising via Arbitration
 7. He further stated that the Applicant's logic is flawed since he is not sick and immobilized that his health is not an issue, that the extradition is an imagination of the Applicant and has not happened or extraneous to these proceedings or the the Arbitration since the 1st Respondent is a juristic person and the registered owner of the suit property and further that the Applicant has not produced any evidence of the alleged impending extradition. He stated that the Applicant is the one who has failed to adhere to the directions of the Arbitrator and that the Arbitrator was appointed at the insistence of the Respondents after the Applicant resisted efforts to appoint one. He added that the application was bad in law as no viable legal grounds have been advanced to vacate the orders referring the case to Arbitration.
 8. Through a Supplementary Affidavit dated 6th September, 2023, the Applicant deponed that the 2nd Respondent in his response gave false information concerning his health status and impending extradition. That there is a public statement from the Office of the Director of Public Prosecutions confirming the impending extradition and medical condition of the 2nd Respondent at paragraph 7 of the ODPP's report dated 16th October, 2022. That the extradition of the 2nd Respondent would make it difficult for the Applicant to recover his money from the Respondents as access to the 1st Respondent would be difficult since he is the director and major shareholder of the 1st Respondent.



Submissions

9. On 14th March 2023 while all the parties were in Court, they were directed to have the Application canvassed by way of written Submissions. Pursuant to that, parties herein obliged and the same was reserved for Ruling.

Applicant's Submissions

10. The Applicant filed his written submissions on 28th September, 2023. He submitted that the 2nd Respondents response does not dislodge his averments but rather affirms the grounds in support of the application that Arbitration process has never taken place or that the 2nd Respondent is of ill health and risks extradition. That the application is unique requiring recall of the matter.
11. It was submitted that the Court has power of review under Section 80 of the [Civil Procedure Act](#) as well as discretionary power under Order 45 of the [Civil Procedure Rules](#) to allow an application for review on grounds of discovery of new fact and for any sufficient reasons. It is submitted that the issue of ill health and extradition were not in the knowledge of the Applicant and that implementation of Court Annexed Mediation in the mainstream justice system qualifies as 'other sufficient reason'. Reliance was placed in the Case of *Wangechi Kimatta & another v Charan Singh* (C.A No. 80 of 1985) that sufficient reason needed not be analogous or related to the grounds listed for review.
12. It was submitted that it would be in the interest of justice for the Court to remove the expensive road blocks put in his way by the expensive process of Arbitration with reliance to Article 50 of [the Constitution](#). That Arbitration is no longer an appropriate forum for resolution and relied in the case of *Abdalla v Patel and another* [1962] EA 447.

Respondent's Submissions

13. The Respondents in their written submissions filed on 28th November, 2023 submitted that after a case is referred to Arbitration, Courts intervention is allowed under limited statutory circumstances as provided for under Section 10 of the [Arbitration Act](#) and relied on [Eunice Soko Mlagui v Suresh Parmar & 4 others](#) [2017] eKLR and [Kenya Alliance Insurance Co. Ltd v Annabe Muthoki Muteti](#) [2020] eKLR. That in essence, Parties can only wait to enforce the outcome of the Arbitrator.
14. It was further submitted that the Application has not invoked any provision of law that falls under Section 10 or that allows the Court to intervene and that the [Civil Procedure Rules](#) unless expressly adopted do not apply to Arbitral proceedings. That Rule 11 of the [Arbitration Rules](#) does not override Section 10. The Respondent also submitted that mediation was not one of the routes chosen for dispute resolution by the parties and the Applicant is attempting to make a back-door attempt at review.

Analysis and Determination

15. Having considered the pleadings, the written submissions, the cited authorities and considered the relevant provisions of the law relied on and applicable in this matter the two issues before Court for determination are: -
 - i. Does the court have jurisdiction to recall a matter referred to arbitration to entertain its hearing?
 - ii. Can prohibitive Arbitral costs on a party, be an exception to an arbitral referral?



16. In considering as to whether Court has jurisdiction to recall a matter referred to arbitration to entertain its hearing? This Court must trace the constitutional framework under Article 48 which provides for Access to justice.

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”

17. Article 159 (2) provides for guiding principles in the exercise of judicial authority as follows;

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, *Constitution* of Kenya, 2010 mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.”

18. The jurisdiction of the High Court flows from Article 165 include unlimited original jurisdiction in criminal and civil matters and is subject to Article 165 (5) which provides, that High Court shall not have jurisdiction in respect of matters reserved for the Supreme Court’s jurisdiction, nor shall it have jurisdiction for matters reserved for the Environment and Land and the Employment and Labour Court.

19. The High Court shall have jurisdiction, to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. *The Constitution* has entrenched an advanced Bill of Rights which among other things recognizes socio-economic rights of the Kenyan citizens.

20. Further the High Court has jurisdiction to hear an appeal from a decision of a tribunal appointed under *the Constitution* to consider the removal of a person from office, other than a tribunal appointed under Article 144 which makes provision for the procedure for removal of the President for reason of incapacity.

21. In addition, this Court shall have jurisdiction to hear any question respecting the interpretation of *the Constitution* including the determination of?

- i. the question whether any law is inconsistent with or in contravention of *the Constitution*;
- ii. the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*;
- iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and



- iv. a question relating to conflict of laws under Article 191? relating to between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.
22. Finally, the High Court shall have any other jurisdiction, original or appellate, conferred on it by legislation.
23. This Court has power of review under Section 80 of the *Civil Procedure Act* as well as discretionary power under Order 45 of the Civil Procedure Rules to allow an application for review on grounds of discovery of new fact and for any sufficient reasons.
24. Section 7 of the *Arbitration Act*, provides for Interim measures by court
- “(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application”.
25. Section 10 of the *Arbitration Act*, provides for the extent of Court intervention:
- “Except as provided in this Act, no court shall intervene in matters governed by this Act”.
26. Order 63 of the *Civil Procedure Rules* provides that, to prevent ends of justice being defeated the Court may, if it so prescribed (e) make such other interlocutory orders as may appear to the Court to be just and convenient.
27. I have laid out the legal framework to illuminate the powerful nature of the jurisdiction of this court, and that, the parties have clearly been unable to utilize the arbitral clause for over seven (7) years, Arbitration is touted as forum where parties will mutually resolve their disagreements and disputes in an expedited manner and how this arbitral referral by Hon Janet Mulwa J on the 28th July 2016 has become a quagmire with the Applicant clearly unable to afford the Arbitrators fee and the Respondents that have postured that the only way and no other way, can their dispute be adjudicated otherwise than within the Arbitral clause context.
28. This Court has had to agonize on the notions of access to justice the proliferation of “copy and paste” inclusion of arbitral clause for claims that many arbitrators would decline to take up, for in such cases the arbitrators fee would significantly match the amount(s) claimed thereby having stand-off of an arbitrator unable to proceed because of not being paid his initial deposit.
29. It is noteworthy, that the original Court file disappeared at one point and the Court has had to order a reconstruction of the physical file, technology has caught up with such mischief, in that with digitization, the notion of missing file became a thing of the past and the digital files are secured against mischief.
30. This was a referral to an arbitral process by this Court while the primary suit was kept in abeyance to await the award. The Primary suit is now nine (9) years old and for all intents and purpose has been kept on the freezer with no end in sight and would constitute a backlog to this Court. I am of the view that this case deserves the urgent intervention of the Court.



31. The Respondent posits that, the parties are bound by the Arbitral clause and that once the Court refers the matter to arbitration its jurisdiction is curtailed within Section 10 of the *Arbitration Act*, this Court concurs on the rationale but would hasten to add that Section 10 of the *Arbitration Act* does not oust the Original and inherent jurisdiction of this Court to dispense justice and promote constitutionalism.
32. In the case of *Uber Technologies Inc. v Heller*, 2020 SCC 16 the Canadian Court of Appeal, in finding the Court has jurisdiction to determine validity of arbitral agreement without need for a referral and went further arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration. The Court went further by holding;
- “In addition to the two exceptions to arbitral referral in Dell and Seidel, a court may depart from the general rule of arbitral referral if an issue of accessibility arises. The assumption made in Dell is that if the court does not decide an issue, then the arbitrator will. Dell did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. Such a situation raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.”
33. This Court is not straight-jacketed or hamstrung and is thus exceptionally persuaded that, its intervention is urgently required to unlock the impasse in arbitration for continuity. The persisting situation is such that, the High Court Civil Case No 26 of 2015 shall continue to stay pending conclusion as the parties are unable to actualize the arbitral process as is contained in in their mutual impugned agreement for sale.
34. This Court finds partial merit in the Notice of Motion Application dated 15th June, 2022, that the sufficient reason test has been fulfilled by the Applicant to merit review and issuance of an interim measure of protection as follows;
- i. The Court Order dated 26th July 2016 is hereby reviewed and order number 3(a) is added thereon as hereunder;
- The Appointed Arbitrator shall undertake and conclude the Arbitration within ninety (90) days and in the event where parties or any party is uncooperative, and the period provided has lapsed, the Arbitrator shall prepare a brief report and refer the matter back to this court for further directions”.
- ii. The Court shall fix a mention date, within the next one hundred and twenty (120) days to review progress.
 - iii. The Costs of this Application shall be in the cause.

It is so Ordered

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 25TH DAY OF APRIL 2024.

.....

MOHOCHI S. M.

JUDGE

