



University of Nairobi v Nyoro Construction Company Limited & another (Arbitration Cause E011 of 2021) [2021] KEHC 380 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)

Neutral citation: [2021] KEHC 380 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E011 OF 2021
DAS MAJANJA, J
DECEMBER 22, 2021

BETWEEN

UNIVERSITY OF NAIROBI APPLICANT

AND

NYORO CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

KAIRU BACHIA, ARBITRATOR 2ND RESPONDENT

Section 35 of the Arbitration Act on applications for setting aside arbitral awards is not applicable where an arbitrator dealt with the issue of jurisdiction as a preliminary issue

Reported by Kakai Toili

***Statutes** – interpretation of statutes – interpretation of section 35 of the Arbitration Act - whether section 35 of the Arbitration Act on applications for setting aside arbitral awards was applicable where an arbitrator dealt with the issue of jurisdiction as a preliminary issue – Arbitration Act, 1995, sections 17(6) and 35.*

***Jurisdiction** - jurisdiction of the High Court – jurisdiction in arbitration matters - jurisdiction to entertain a late application or jurisdiction to extend time for filing an application to set aside a ruling of an arbitral tribunal on a preliminary question on jurisdiction - whether the High Court had the jurisdiction in such matters – Arbitration Act, 1995, sections 17(6) and 35.*

Brief facts

The 1st respondent entered into a contract with the applicant for the construction and completion of the proposed extensions to the applicant’s Lower Kabete Campus, in Nairobi. A dispute arose between the contracting parties whereupon the 1st respondent requested the President of the Architectural Association of Kenya (AAK) to appoint an arbitrator. The 2nd respondent (the Arbitrator) was appointed and the parties held preliminary meetings and exchanged pleadings but for unstated reasons, the proceedings did not proceed for close to four years.



The applicant raised a preliminary objection to the Arbitrator's jurisdiction on the grounds that the claim was time-barred considering when the claim arose and the time when the request of arbitration was made. The 1st respondent responded that the objection had not been raised earlier and therefore, being a substantive issue, it would require a formal notice and application from the applicant. After considering the parties' submissions, the Arbitrator dismissed the objection. Aggrieved, the applicant filed the instant application.

Issues

- i. Whether section 35 of the Arbitration Act on applications for setting aside arbitral awards was applicable where an arbitrator dealt with the issue of jurisdiction as a preliminary issue.
- ii. Whether the High Court had the jurisdiction to entertain a late application or extend time for filing an application to set aside a ruling of an arbitral tribunal on a preliminary question on jurisdiction.

Relevant provisions of the Law

Arbitration Act, 1995

Section 17 - Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitration award on the merits.

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

Held

1. The issues raised by the applicant before the Arbitrator were preliminary in nature. The applicant's notice of objection dated August 5, 2020 stated that it raised preliminary objections of law to the statement of claim dated February 17, 2016. The applicant's objection sought to oust the Arbitrator's jurisdiction and nothing could be more preliminary than an issue of jurisdiction which ought to be determined in the first instance although section 17(5) of the Arbitration Act (the Act) allowed the arbitral tribunal to deal with the issue of jurisdiction either as a preliminary question or in the award on merits. The Arbitrator dealt with the issue of jurisdiction as a preliminary issue as it was raised as such.
2. Once the arbitral tribunal had ruled on its jurisdiction, section 17(6) of the Act provided for recourse by the aggrieved party to the High Court. Section 17 of the Act was applicable in the circumstances of the instant case. Therefore, in as much as the applicant sought to set aside the ruling under section 35



- of the Act, it could not run away from the ambit of section 17 which provided that it ought to have filed its application within thirty days after the notice of the ruling.
3. Whether the decision of January 22, 2021, was referred to as an award was immaterial since the substance of the impugned decision was on the question of jurisdiction and fell within the ambit of section 17 of the Act. The court's jurisdiction to interfere in arbitral proceeding was circumscribed by section 10 of the Act which provided that, except as provided in the Act, no court would intervene in matters governed by the Act.
 4. The mode of intervention by the court in a ruling on jurisdiction was by way of an application to the High Court within 30 days as provided by section 17(6) of the Act. Had the issue of jurisdiction been reserved for and dealt with in the award on merits, then the party aggrieved would be entitled to apply to set aside the award under section 35 of the Act. Section 35 was not applicable to the facts and circumstances of the instant case.
 5. The application before the court was in substance an application under section 17(6) of the Act since it was an application to the court to set aside the ruling of the arbitral tribunal on the preliminary question as to whether it had jurisdiction. Consequently, section 35 of the Act, was inapplicable to the preliminary decision on jurisdiction. Such an application had to be made within 30 days of notice of the ruling and the instant court did not have the jurisdiction to entertain a late application or extend time for filing such an application.

Application struck out.

Orders

Costs to the 1st respondent.

Citations

Cases

1. *Hinga; Ann Mumbi v Victoria Njoki Gathara* Civil Appeal No 8 of 2009; [2009] eKLR — (Mentioned)
2. *Kamconsult Ltd v Telkom Kenya Ltd & another* Civil Appeal No 92 of 2009; [2016] eKLR) — (Mentioned)
3. *Kenya Ports Authority v Baseline Architects & 3 others* Civil Case No 513 of 2013; [2014] eKLR — (Cited)
4. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* Petition No 12 of 2016; [2019] eKLR — (Explained)
5. *Nyutu Agrovet Limited v Airtel Networks Limited* Civil Appeal (Application) No 61 of 2012 [2015] eKLR — (Mentioned)
6. *Royal Ngao Holdings Limited v NK Brothers Limited* Miscellaneous Civil Application No E683 of 2020; [2020] eKLR) — (Explained)

Statutes

1. Arbitration Act Arbitration Act (cap 49) sections 17(2)(4); 35 (2)(a) — (Interpreted)
2. Arbitration Rules, 2020 (cap 49 Sub Leg) rule 7 — (Interpreted)
3. Civil Procedure Act (cap 21) sections 3A, 10 — (Interpreted)
4. Constitution of Kenya, 2010 article 159(2)(c) — (Interpreted)

Advocates

1. Ms Kilonzo instructed by Kilonzo and Company Advocates for the applicant
2. Mr Wachira instructed by RM Mutiso and Company Advocates for the 1st respondent



RULING

Introduction and Background

1. The applicant has filed the notice of motion dated 21st April 2021 made under section 35 (2) (a) of the *Arbitration Act* (“the Act”) and rule 7 of the *Arbitration Rules* seeking to set aside the award published by the 2nd respondent (“the Arbitrator”) on 22nd January 2021. I would like to point out that despite the applicant referring to the Arbitrator’s decision as an “Award”, it is titled, “ruling on respondent’s preliminary objection of Law on Jurisdiction of the Arbitral Tribunal”.
2. The application is supported by the affidavit of the applicant’s Chief Legal Officer sworn on 21st April 2021. It is opposed by the 1st respondent through the preliminary objection dated April 28, 2021 and the replying affidavit of Josiah Njoroge Njuguna, the 1st respondent’s Managing Director sworn on 16th August 2021. The parties have also filed written submissions in support of their respective positions.
3. The facts giving rise to this application are largely common ground. The 1st respondent entered into a contract with the applicant on March 21, 1990, for the construction and completion of the proposed extensions to the applicant’s Lower Kabete Campus, in Nairobi. A dispute arose between the contracting parties in July 2015 whereupon the 1st respondent requested the President of the Architectural Association of Kenya (AAK) to appointment an arbitrator. The Arbitrator was appointed on August 31, 2015. The parties held preliminary meetings and exchanged pleadings but for unstated reasons, the proceedings did not proceed for close to four years.
4. During a virtual meeting held on June 26, 2020, the applicant’s advocates indicated that they would be raising a preliminary objection to the Arbitrator’s jurisdiction on the grounds that the claim was time barred considering when the claim arose at the time when the request of arbitration was made. The 1st respondent’s counsel responded that the objection had not been raised earlier and that therefore, being a substantive issue, it would require a formal notice and application from the applicant.
5. Following deliberations by the parties, the Arbitrator issued a consent order for directions on the filing, response and hearing of the preliminary objection. After considering the parties’ submissions, the Arbitrator dismissed the objection by stating in part as follows in the Award:

3.1 On the matter of the respondent's compliance with sections 17 (2) & (4) of the *Arbitration Act*, 1995, I find that the respondent failed to raise the issue of the lack of jurisdiction on the part of arbitral tribunal within the timeline set out section 17(2), and that they did not give any reasons that would move the tribunal to consider the delay in raising the PO to be justified.

On that account alone, the respondent's Preliminary Objection on jurisdiction of the arbitral tribunal has failed but, without prejudice, I decided to exercise my discretion to rule on the other matters.

3.2 On the matter of whether or not the Claim of Kshs 7,448,558/= under Valuation No 28 of 18/06/2009, and the Interest thereof, fall Under a Contract that does not have an arbitral clause, I find that the administration of the second contract, which was primarily a completion of the remaining works of the first contract, under the supervision of the same consultants was under the JBC Agreement and Schedule of Conditions of Building Contract(with quantities), 1977 Edition, Revised and Reprinted in January 1990, which has an arbitration clause.

3.3 On the matter of limitations, I consider the claim of Kshs 16,479,406.57 under valuation no. 13 to be within the limitation period.



Considering the foregoing reasons, the respondent's notice of objection filed on 05/08/2020 is dismissed with costs.

6. It is this decision and Award that the applicant now seeks to set aside by its application

The Applicant's Case

7. The applicant maintains that the Arbitrator does not have jurisdiction and that the Award deals with a dispute not falling within the terms of the reference of the Arbitrator.
8. The applicant contends that the parties entered into two contracts; the first contract referred to in the introductory part which had an arbitration clause; and a second contract which had no arbitration clause. The applicant therefore urges that since the 1st respondent's claim was time barred under the first contract, the Arbitrator did not have jurisdiction to deal with it and that since the second contract had no arbitration clause, the Arbitrator also had no jurisdiction to deal with it.
9. The applicant submits that the disputes under the two contracts were consolidated and that the Act does not provide for consolidation of arbitral disputes. It further submits that in any case, the 1st respondent did not agree to and in fact objected to the consolidation of the claims under both contracts. In its view, the purported consolidation was meant to cure the time bar under the first contract and the lack of an arbitration clause under the second contract.

The 1st Respondent's Response

10. The 1st respondent assails the application on the ground that it is incompetent and ought to be struck out as it fails to comply with the timelines set under section 17(6) of the Act. The 1st respondent submits that the application was filed out of time as the Award was delivered on 22nd January 2021 yet the present application was filed in court without leave of court in April 2021. It further adds that in any event the Act does not have any provisions for leave to file the application out of time.
11. On the substance of the application, the 1st Respondent contends that the Arbitrator has the jurisdiction to determine its own jurisdiction under the doctrine of Kompetenz Kompetenz and that having so determined, the applicant is bound by that decision having submitted to the jurisdiction of the Arbitrator. In any event, the 1st respondent argues that the Award is only interim in nature as the full arbitration is yet to take place.

Analysis and Determination

12. I have gone through the parties' pleadings and submissions and I propose to deal with the preliminary issue raised by the 1st respondent impugning the application's competence.
13. The 1st respondent submits that since the Award was delivered on January 22, 2021 and the application was filed on April 21/ 2021, three months after delivery of the Award, it is incompetent as it runs afoul of section 17(6) of the Act. For ease of reference, section 17 of the Act provides as follows:

17.

- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—
 - (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and



- (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.
 - (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.
 - (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
 - (4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.
 - (5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitration award on the merits.
 - (6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.
 - (7) The decision of the High Court shall be final and shall not be subject to appeal.
 - (8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.
14. In response, the applicant states that the application was filed late but submits that section 17 of the Act does not apply to its application or the objection before the Arbitrator. It submits that the objection was not based on preliminary issues but raised substantive matters that went to the root of the arbitral proceedings whose success would have led to their termination.
15. The applicant further submits that it does not rely on section 17 of the Act that is limited to preliminary issues such as the qualification of an arbitrator to deal with arbitral proceedings or the method of appointment. It asserts that its application is filed under section 35 of the Act and raises issues that go to the root of the arbitration and deny the Arbitrator jurisdiction to determine the claims in limine by dint of the operation of the law. The applicant further submits that the absence of an arbitration clause is not a preliminary issue and similarly, a claim that is barred by time is not a preliminary issue. It contends that consolidation, unless by consent of the parties, is also not provided for under the Act and is not a preliminary issue.
16. The applicant cites *Kenya Ports Authority v Baseline Architects & 3 others ML HCCC No 513 of 2013 [2014] eKLR* where the court held that section 17(6) of the Act is not couched in mandatory terms and there is no provision in the Act that bars an aggrieved party from making an application for extension of time to the High Court once the thirty days have lapsed. In that case, the court held that it is enjoined to do substantial justice to the parties under section 3A of the *Civil Procedure Act*.
17. I reject the applicant's submission that the issues it raised before the Arbitrator were not preliminary in nature. Its "Notice of Objection" dated 5th August 2020 clearly states that it, "raises the following preliminary objections of law to the Statement of Claim dated 17th February 2016." The applicant's objection clearly sought to oust the Arbitrator's jurisdiction and nothing can be more preliminary than



an issue of jurisdiction which ought to be determined in the first instance although section 17(5) of the Act allows the arbitral tribunal to deal with the issue of jurisdiction either as a preliminary question or in the award on merits. In this case, it is clear that the Arbitrator dealt with the issue of jurisdiction as a preliminary issue as it was raised as such by the applicant.

18. Once the arbitral tribunal has ruled on its jurisdiction, section 17(6) of the Act provides for recourse by the aggrieved party to the High Court. I therefore reject the Applicants submission that section 17 of the Act is inapplicable in the circumstances of this case. Therefore, in as much as the applicant seeks to set aside the ruling under section 35 of the Act, it cannot run away from the ambit of section 17 which provides that it ought to have filed its application within thirty days after the notice of the ruling.
19. Whether the decision of January 22, 2021 is referred to as an Award is immaterial since the substance of the impugned decision is on the question of jurisdiction and falls within the ambit of section 17 of the Act. It is important to recall that this court's jurisdiction to interfere in arbitral proceeding is circumscribed by section 10 of the Act which provides that, "Except as provided in this Act, no court shall intervene in matters governed by this Act". Thus the mode of intervention by the court in a ruling on jurisdiction is the by way of an application to the High Court within 30 days as provided by section 17(6) of the Act. Had the issue of jurisdiction been reserved for and dealt with in the Award on merits, then the party aggrieved would be entitled to apply to set aside the Award under section 35 of the Act. I therefore find and hold that section 35 of the Act is not applicable to the facts and circumstances of this case.
20. The applicant concedes that if its application is under section 17 of the Act, then it is out of time. It however relies on *Kenya Ports Authority v Baseline Architects & 3 others (supra)* where Ogola J., held as follows:
 - (17) In any case, the section in question is not couched in mandatory terms. Further, there is no provision in the said Act that the aggrieved party is barred from making the relevant application to the High Court once the said thirty days have lapsed. It is also worthy to note that this court is enjoined to do substantial justice to the parties under section 3A of the [Civil Procedure Act](#).
21. There is also the decision in *Royal Ngao Holdings Limited v NK Brothers Limited ML HC Misc. Civil Application No E683 of 2020 [2020] eKLR* where Kasango J, took the view that the defaulting party must first seek leave to file the application out of time and that the failure to seek such leave is fatal. I am not persuaded that the time limited for approaching the court can be extended much less by filing an application for leave for several reasons. First, section 10 of the Act limits what the court can do to matters provided for under the Act. This position that the Act is a complete code on matters arbitration has been affirmed in several decisions including [Nyutu Agrovet Limited v Airtel Networks Limited](#) NRB CA Civil Appeal (Application) No 61 of 2012 [2015] eKLR, [Kamconsult Ltd v Telkom Kenya Ltd and another](#) NRB CA Civil Appeal No 92 of 2009 [2016] eKLR and [Ann Mumbi Hinga v Victoria Njoki Gathara](#) NRB CA Civil Appeal No 8 of 2009 [2009] eKLR. In the latter decision, the Court of Appeal held as follows:

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".



22. The reason for this approach is not difficult to discern and was summarized by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* SCK Petition No 12 of 2016 [2019] eKLR as follows:

‘...the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the *Arbitration Act* indicates that, “the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process.” It was also reiterated that the limitation of the extent of the courts’ interference was to ensure an, “expeditious and efficient way of handling commercial disputes.”

- (53) Similarly, the Model Law also advocates for “limiting and clearly defining court involvement” in arbitration. This reasoning is informed by the fact that “parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.” Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our *Constitution* in article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all courts to promote it. However, the arbitration process is not absolutely immune from the court process, hence the present conundrum.

Conclusion and Disposition

23. In conclusion, I find and hold that the application before the court is in substance an application under the section 17(6) of the Act since it is an application to this court to set aside the ruling of the arbitral tribunal on the preliminary question whether it has jurisdiction. Consequently, section 35 of the Act, is inapplicable to the preliminary decision on jurisdiction. I also hold that such an application must be made within 30 days of notice of the ruling and that this court does not have the jurisdiction to entertain a late application or extend time for filing such an application.
24. For reasons I have stated, it must now be abundantly clear that the notice of motion dated 21st April 2021 is incompetent. It must be and is hereby struck out with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M Onyango

Ms Kilonzo instructed by Kilonzo and Company Advocates for the applicant.

Mr Wachira instructed by R M Mutiso and Company Advocates for the 1st respondent.

No appearance for the 2nd respondent.

