Mathew v Kenya Electricity Transmission Company Limited (KETRACO) (Tribunal Case E005 of 2023) [2024] KELAT 507 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KELAT 507 (KLR)

REPUBLIC OF KENYA

IN THE LAND ACQUISITION TRIBUNAL

TRIBUNAL CASE E005 OF 2023

NM ORINA, CHAIR & G SUPEYO, MEMBER

FEBRUARY 22, 2024

BETWEEN

EARNEST KARAGANIA MATHEW ..... CLAIMANT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED (KETRACO) ..... RESPONDENT

RULING

1. This case concerns a dispute over a claim for compensation for structures which were erected on Land Reference Number Nanyuki/Marura/Block 8/5467 (Nturukuma), where a wayleave had been created by the Respondent.

2. When the suit was filed on 11th December 2023, the Tribunal directed that the Respondent file a response within a period of fifteen (15) days. However, the Respondent filed a Preliminary Objection challenging this Tribunal's jurisdiction upon entering appearance. The same was canvassed by way of written submissions and a ruling was delivered on January 31, 2024 dismissing it.

3. Having dismissed the Preliminary objection, the Tribunal directed the Respondent to file a Response within a period of seven (7) days and the parties to appear before the Tribunal on 8th February 2024 for further directions. The Respondent did not file a response as directed by the Tribunal. Instead, on the morning of 8th February 2024, the Respondent filed an application for stay pursuant to Section 6(1) of the *Arbitration Act*.

4. In its application, the Respondent seeks stay of proceedings before the Tribunal pending reference of the matter to arbitration pursuant to an arbitration clause in the Assignment of Easement Agreement signed between the Claimant and the Respondent. The Application was supported by the Affidavit of Lydia Wanja sworn on 7th February 2024. It was opposed by the Claimant's Replying Affidavit sworn on 12th February 2024. Rival submissions were filed on 19th February 2024.

5. From the outset, we observe that parties are bound by their agreements and it is not the business of courts to re-write those agreements. In Wringles Company (East Africa) –v- Attorney General & 3 Others (2013) eKLR the court held: - "that courts cannot re-write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the court cannot re-write the same."

6. Our role, therefore, is to be satisfied that the arbitration agreement between the parties meets the legal test, and that the application for stay has been brought timeously. The Respondent's Application is brought under Section 6 of the *Arbitration Act*. Section 6(1) thereof provides:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds –
>
> a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. That there is not in fact any dispute between the parties with regard to the matters to be referred to arbitration.

7. This provision enjoins us to make a determination whether the Respondent (the party who has brought the instant application) has made the application "not later than the time when the party enters appearance or otherwise acknowledges the claim..." and, secondly, whether the arbitration clause is valid, and, lastly, whether a dispute exists in regard to the matters agreed to be referred to arbitration. In Niazsons (K) Ltd –v- China Road & Bridge Corporation Kenya [2001] eKLR the Court of Appeal held as follows: -

> Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred. [Emphasis added]

8. On the first requirement, we are supposed to satisfy ourselves that the Respondent has taken no other step after entering appearance or has not acknowledged the claim. In this regard, the Respondent argues that it has brought this application timeously before taking any steps to acknowledge the claim. The Respondent relies on the case of Eunice Soko Mlagui versus Suresh Parmar& 4 others [2017] eKLR. The Court of Appeal stated as follows in this case:

> Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitration where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional

> objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration.

9. It is clear to us that a party who brings an application under Section 6 must not have taken any other step beyond entering appearance, and not just acknowledged the claim as argued by the Respondent. This position is also supported by the court of appeal's findings in the case of Mt. Kenya university Vs Step Up Holdings (K) Limited (Civil Appeal No. 186 of 2013) where it held that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter.

10. The party seeking to refer a matter to arbitration should, therefore, have taken no other procedural step before doing so. We now turn to the instant case to determine whether the Respondent complied with the provisions of Section 6.

11. The Respondent's counsel on record filed a Notice of Appointment on 21st December 2023. Two weeks later, on 4th January 2024, the Respondent filed a Notice of Preliminary Objection. As stated above, the said preliminary objection was dismissed on 31st January 2024 and the instant application filed on 8th February 2024. It is noteworthy that the Respondent's preliminary objection was on the basis that the- Energy and Petroleum Regulatory Authority (EPRA) has original jurisdiction in disputes involving wayleaves. Essentially, had we allowed the preliminary objection as urged by the Respondent, the assumption is that the Respondent was ready to submit to EPRA's jurisdiction. The Respondent did not at the first instance ask this Tribunal to down its tools to give way for Arbitration. To that extent, we are convinced that the application before us is an afterthought.

12. Contextually, and this is important in regard to this Tribunal, the Respondent filed this application three (3) days to the expiry of the sixty (60) days statutory timeline for resolving the Claim filed by the Claimant. That cannot be timeous by any standard. We hereby find and hold that the filing of a preliminary objection is a procedural step taken after the entering of appearance of the Respondent. We also hold that the instant application was not filed timeously as required under Section 6(1) of the *Arbitration Act*.

13. We have been urged to exercise our discretion in promotion of Article 159(2)(c) of *the Constitution*. We are not convinced that a referral of this matter to arbitration at this time would serve the ends of justice. What the Respondent is inviting us to do is to endorse its Stalingrad-like tactics in defending the case against it. We decline.

14. As the Respondent has failed to satisfy the first legal requirement, we see no reason in analyzing the other two, as it is a cumulative criteria. We hereby dismiss the Application with costs to the Claimant. The Respondent shall file and serve a response within seven (7) days hereof.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

DR. NABIL M. ORINA - CHAIRPERSON

MR. GEORGE SUPEYO - MEMBER

In the presence of:

Ondari for the Claimant

Ms. Mureithi for the Respondent

C/A: Everlyne