



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

THE CONSTITUTION AND JUDICIAL REVIEW DIVISION

PETITION NO. 10 OF 2021

CALEB NGWENA 1ST PETITIONER

MILLICENT ADHIAMBO.....2ND PETITIONER

-VERSUS-

KENYA PORTS AUTHORITY 1ST RESPONDENT

MEMPHIS LIMITED 2ND RESPONDENT

RULING

(Petition seeking orders inter alia to compel the 1st respondent to contest an arbitration award; 1st and 2nd respondent having a lease from which a dispute arose; lease having an arbitration clause and the matter referred to arbitration; arbitrator making an award in favour of the 2nd respondent and awarding the 2nd respondent damages; in the petition, petitioners seeking orders inter alia to compel the 1st respondent to appeal the award; petitioners claiming that their constitutional rights have been violated; preliminary objection raised that the petition is a non-starter and should be struck off; preliminary objection allowed; constitutional petition not being the forum for challenging arbitral awards; in any event there being demonstration that there is already a pending appeal meaning that the petition is spent; suit struck off with costs)

1. The subject of this ruling is the preliminary objection raised by the 2nd respondent and filed on 30 April 2021. The 2nd respondent basically wishes to have this petition struck out and has raised various grounds. I will get to these shortly for I feel the necessity to give a background to this suit.

2. This suit was commenced by way of a Petition that was filed on 24 February 2021. The petition in its title states that it is “*In the matter of Mombasa Environment and Land Civil Suit No. 163 of 2018 Memphis Limited vs Kenya Ports Authority, H. Young and Co. East Africa Limited and Gibb Africa and the payment of Kshs. 715,000,000/= by Kenya Ports Authority to Memphis Limited.*” The petitioners claim that they have filed this petition in public interest and to uphold and defend the constitution. The 1st petitioner mentions that he is a human rights activist while the 2nd petitioner describes herself as a tax payer and citizen of Kenya and has an obligation to defend the constitution against infringement. The 1st respondent, Kenya Ports Authority, is a statutory body established under the Kenya Ports Authority Act, Cap 391, Laws of Kenya. The 2nd respondent is a limited liability company. In the petition, it is pleaded that the 1st respondent is the registered proprietor of the land parcel Mombasa/MN/4770 situated off Kipevu Road in Changamwe and that it has never waived its rights and interest in the said property. It is pleaded that on 17 April 2009 the 1st and 2nd respondents entered into a lease for a period of 33 years and that the said lease had a covenant between the 1st and 2nd respondent that the 2nd respondent will pay standing premium timely and develop the lease property within a specific period of 2 years from the

date of the lease agreement which the 2nd respondent breached and failed to perform the covenanted obligation. According to the petitioners, the 2nd respondent failed to bear the cost of construction of the streetlights, side roads drains and sewer, serving the adjoining land. The petitioners contend that the 2nd respondent never adhered to the strict timelines set out in the lease agreement to either develop or put up light industries, as envisaged in the lease, and failed to pay the standing premiums as agreed, and this noncompliance of the foregoing covenants as contained in the lease amounted to breach of terms of the lease which entitles the 1st respondent the right to re-enter and develop and/or use the suit land without any inhibitions being laid by the 2nd respondent.

3. The petitioners plead that sometime in December 2017, the 1st respondent entered the suit property which led to the 2nd respondent alleging breach of the lease and trespass and proceeded to file the suit *Mombasa ELC No. 163 of 2018, Memphis Limited vs Kenya Ports Authority & 2 Others*, which case was later referred to arbitration. The petitioners aver that the arbitrator, after hearing the parties, proceeded to make an award in favor of the 2nd respondent in the sum of Kshs. 715,000,000/= as compensation for loss of its leasehold interest in the suit land, together with costs, and the 1st respondent is yet to challenge or appeal against it. The petitioners proceed to make some arguments impugning the award. The petitioners list the particulars of breach of the petitioners' fundamental rights. They state that Article 10, Article 47 and Article 50 of the constitution have been violated and abused. The petitioners further claim that in the conduct of its role as a government agency, the 1st respondent failed to obtain valuers' reports or engage the National Land Commission to assess and determine the level of compensation that ought to have been made, and this amounted to the infringement of Article 201(d) and Section 79 and 92 (d) of the Public Funds Management Act 2012.

4. In the petition, the petitioners ask for the following orders:-

a) *A declaration that the rights and fundamental rights of the petitioners under Article 21 and 50 of the Constitution of Kenya will be violated and threatened.*

b) *A declaration that the arbitration process undertaken failed to comply with the principles and values under Article 10 of the Constitution of Kenya therefore unprocedural unconstitutional null and void.*

c) *An order of permanent injunction restraining the 1st respondent by themselves, their agents, servants and/ or any other person acting on their instructions from authorizing, approving or allowing and/or permitting the 1st respondent from settling the award of Kshs. 715,000,000/=*

d) *An order directing the 1st respondent to lodge an appeal against the arbitrators' award made on 20 June 2020*

e) *Cost of this petition*

f) *Any further reliefs or orders that this honorable court shall deem just and fit to grant to meet the end of justice.*

5. Alongside the Petition, the petitioners filed a Notice of Motion Application. They sought *inter alia* conservatory orders restraining the 1st respondent from paying the 2nd respondent the money awarded by the arbitrator.

6. The respondents appointed counsel and entered appearance. The 1st respondent has filed a replying affidavit to oppose the petition. The 2nd respondent filed the preliminary objection that is the subject of this ruling. The preliminary objection is drawn as follows :-

1. *The Petitioners have filed as evidence in their Petition a Complaint filed in the Environment & Land Court Civil Case No. 163 of 2018, between Memphis Limited as Plaintiff and Kenya Ports Authority Limited as Defendant. That suit is still pending in the Environment & Land Court. (see exhibit JJM 5).*

2. *An Order emanating from that suit, given on the 25th July 2018 is also exhibited at page 122 on that Petition.*

3. *The issues raised in Civil Case No. 163 of 2018, as well as in this Petition, are matters relating to LEASE of property known as MN/1/4470 registered as CR 45421/1.*

4. (Abandoned).

5. In the alternative and without prejudice to the foregoing, the 2nd Respondent further objects to the Petition and the Notice of Motion, for the following further reasons:

a) Any questions relating to any perceived shortcomings in arbitral proceedings (if any exist) have to be addressed through the sole mechanism provided for in the Arbitration Act. The same cannot find remedies through the filing of a Petition or any other proceedings outside the provisions of that Act.

b) There is already filed in the Environment & Land Court, Civil Appeal No. 23 of 2020, Kenya Ports Authority -v- Memphis Limited. These proceedings are also on-going in that Court.

c) The 2nd Respondent herein, as Respondent in Civil Appeal No 23 of 2020, which was filed in Court on 4th September 2020, cannot comment any further in the merits or otherwise of that appeal, since the same is still pending determination.

6. This Petition was filed on 24th February 2021, when Civil Appeal No. 23 of 2020 was already pending determination in the Environment & Land Court, as it still is.

7. In the circumstances, the bringing of these proceedings is akin to an abuse of the process of the Court, and both the Petition and Notice of Motion ought to be struck out.

7. I directed that the preliminary objection be canvassed first. Counsel did file their written submissions and made brief highlights.

8. Mr. Buti, learned counsel for the 2nd respondent submitted that according to Article 159(2) of the Constitution, the court is to be guided by some mandatory principles such as alternative dispute resolution including arbitration. He submitted that one Articles of the Constitution cannot be elected above another, and the Arbitration Act is a derivative of Article 159 of the Constitution. According to Mr. Buti, if the implementing Act provides for a procedure, the court is to be guided by that procedure, and arbitration is a mode of dispute resolution recognized by the Constitution. He submitted that the petition wallows into matters already pending determination by this court. He pointed to Section 10 of the Arbitration Act which inter alia provides that no court shall intervene in matters governed by the said Act. He submitted that the Arbitration Act makes no provisions for an award to be attacked through the medium of a constitutional petition. He submitted that the petitioners are therefore wrongly before this court, and cannot also find a way to any other court, without first following the route prescribed by the Arbitration Act. He submitted that the petitioners are fully aware of the existence of *Mombasa ELC No. 163 of 2018* as they have exhibited the plaint. He further submitted that there is now pending an appeal being *Mombasa ELCA No. 23 of 2020*, with Kenya Ports Authority as appellant and Memphis Limited as respondent, which is pending determination. He used the analogy of a boxing match and submitted that the match between the two respondents is still on going.

9. Counsel for the 1st respondent Mr. Imende, submitted that he supports the preliminary objection filed and the submissions of Mr. Buti. He added that the process is laid down in the Arbitration Act for challenge of an arbitration award.

10. The petitioners' advocate, Mr. Mkan submitted that the essential test in Article 159 2 (d) and (e) of the Constitution is doing justice and the avoidance of technicalities. He submitted that under Article 165 (3) and (d) of the Constitution, the jurisdiction to determine the question affecting fundamental rights and freedoms and/or interpretation of the constitution are exclusively conferred to the High Court. Counsel submitted that this is based on the case of *Republic vs. Karisa Chengo and 2 others (2017) eKLR*. Counsel submitted that Article 22 as read together with Article 260 of the Constitution makes provision for any assertion of a right if the Bill of Rights is violated or threatened. Counsel submitted that this was captured in Rule 4 of the Constitution of Kenya Protection of Rights and Fundamental Freedom Practice and Procedure Rule 2013, thus the petitioners are before the appropriate court. Counsel further cited the case of *Mukisa Biscuit vs. West End Distributors Ltd (1969) EA 696* where the court stated that a preliminary objection ought to be on a point of law and capable of disposing the entire suit. Mr.Mkan submitted that most of the matters pleaded in the preliminary objection can only be determined after evidence has been rendered and ventilated, but they cannot be able to stand on their own. Counsel cited the case of *Mumo Matemu vs. Trusted Alliance Society of Human Rights*. Counsel submitted that preliminary objections ought not to be used as A sword in defence as it will end up increasing costs unnecessarily. He submitted that the preliminary objection is not merited and does not meet the test to qualify for determination as a preliminary

objection and should therefore be dismissed.

11. I have read and carefully considered the pleadings and rival submissions by the respective parties. Before addressing the preliminary objection, I must first address whether this preliminary objection is properly before this court.

12. What constitutes a preliminary objection was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, where it was held that:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

13. Much more recently, the Supreme Court again considered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR*:-

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

14. I have in mind the holding in the above two cases on preliminary objections, and I hold the view that the preliminary objection herein is well raised. The petitioners appear very much aware of the dispute between the two respondents regarding the lease over the suit property. They have indeed annexed the plaint in their petition. They are also aware that the lease had an arbitration clause and that the matter was referred to arbitration under the Arbitration Act. They are also aware that the arbitrator rendered his award and awarded the sum of Kshs. 715,000,000/= to the 2nd respondent. They have in fact annexed the arbitration award. The 1st respondent, aggrieved by the award has preferred an appeal to this court, being *Mombasa ELCA No. 23 of 2020*. The Memorandum of Appeal is annexed to the replying affidavit of the 1st respondent. That appeal is pending. It must be understood that arbitration is one of the forms of dispute settlement recognized by the Constitution. Mr. Buti correctly pointed at Article 159 of the Constitution which provides as follows :-

Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(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, 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.

15. It will be seen that arbitration, which is one of the alternative means of dispute resolution, is properly recognized by the Constitution. The Arbitration Act, Act No. 4 of 1995 has an elaborate mechanism of dispute resolution through arbitration. Where parties have through contract agreed to submit themselves to arbitration, then Section 39 of the Arbitration Act provides for the procedure of setting aside an arbitral award. It is drawn as follows:-

“(1) Where in the case of a domestic arbitration, the parties have agreed that—

a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall

a) determine the question of law arising;

b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.”

16. Clearly a constitutional petition is not the forum where one can seek to impugn an arbitration award. The legal channels set out are what needs to be followed. In the case of *S. K. Macharia, & another v. Kenya Commercial Bank limited & 2 others [2012] eKLR* the Supreme Court held that:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”

This court cannot embrace a jurisdiction it does not have.

17. In the petition, there is a prayer to compel the 1st respondent to lodge an appeal against the award. I am not sure whether an outsider can compel a party to appeal a decision made in an arbitration award. But this is moot because already the 1st respondent has lodged an appeal against the award, being *Mombasa ELC Appeal No. 23 of 2020*. Even if I was to direct the petition to proceed, there is no subject matter, because the principal order that the petitioners want has already been overtaken by events.

18. Whichever way I look at it, this preliminary objection must succeed and it so succeeds.

19. The only issue left is costs. Courts would ordinarily be slow to condemn a party who files a constitutional petition in public interest. However, in the instance of this case, despite being duly informed that there is an appeal already filed, the petitioners have not been gracious enough to concede that their petition is truly overtaken by events, assuming for a moment that there was a cause of action in the first place. There must be good faith in public litigation. If a party is keen to continue with spurious litigation and continue to waste precious judicial time, even when it is obvious that there is nothing to litigate over, then it is doubtful whether such case is filed in good faith in the interest of the public and such party cannot complain when he is condemned to pay costs. I have my serious doubts as to the bona fides of the petitioners. They will therefore pay the costs of this suit.

20. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA



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