Bliss GVS Pharma Limited v Pan Pharmaceuticals Limited (Civil Appeal E129 of 2024) [2024] KEHC 16246 (KLR) (Civ) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16246 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E129 OF 2024

LP KASSAN, J

DECEMBER 19, 2024

BETWEEN

BLISS GVS PHARMA LIMITED ..... APPELLANT

AND

PAN PHARMACEUTICALS LIMITED ..... RESPONDENT

RULING

1. This is an application for stay of proceedings and reference to an arbitration for the following reasons:
    1. Arbitration clause in the agreement.
    2. Promotion of Articles 159 (1) of the Kenyan Constitution 2010 among other reasons.
2. I have read the affidavits, submissions and relevant authorities and in order to dispose this Notice of motion, I shall make the following notes;
    1. Clause 33 of distribution agreement state as follows:

        > "All disputes or differences whatsoever which will at any time hereafter arise between the parties in relation to this Agreement which the parties suing their best endeavors in good faith, cannot resolve, will be referred to arbitration before any legal proceedings are initiated. The arbitration shall be conducted in Mumbai in accordance with the Arbitration and conciliation Act of 1996. "
        >
        > This arbitration clause is regulated by the provisions of Section 6 of the *Arbitration Act* and I quote
        >
        > > " A Court before which proceedings are brought in a matter which is the subject of arbitration agreement shall, if a party so applies not

later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the matter 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 agreed to be referred to arbitration."

The above quoted section has generated a lot of interpretation and is shall form the basis of my ruling alongside the Clause 33 of Parties agreements. The ramification therefore of this clause when applied to reference clause pose the following legal and factual issues: -

1. It is undisputed that there is a valid arbitration clause. Both parties have agreed to this effect.

2. Whether there is a dispute to be referred to arbitration.

From the supplementary Affidavit, the Plaintiff is disputing the interest of 18 % and the figures arrived at. Can this be treated as a dispute? It is true that the arbitration clause did not specifically indicate the interest to be charged and so the question is, where did this figure come from and how will this Court resolve this matter? Sometimes it has been argued that a reference to arbitration is prompted by the fact that a mutually appointed arbitrator understands the parties beyond the horizon or the eyes of the Court. This reference by itself ameliorates the process of determining disputes by parties as it is bereft from formalities, application of laws/ statutes and uncertainty in interpretation of parameters and engagement of parties. The issues raised by the Defendant questioning the averments in the Supplementary affidavit insinuating delaying tactics or "creating a dispute "may be true or not but the fact is that pleadings have not been closed and so introduction of those "new" issue cannot be locked out.

2. Admission of part of the debt.

Sometimes in instances where a party admits parts of the debt, there would be no need to refer the matter to arbitration because such admission per se means that there is no dispute but others have also argued that where a debt is admitted and a dispute arises on extension of time to pay or penalties to be applied, the matter should be referred to an arbitrator to determine these issues. In other words, penalties, extension of time becomes a dispute after acknowledgement of a debt thus falling within the confines of Section 6 of the arbitration which intentionally uses the word " any dispute". How will for example this Court determine enlargement of time parties to have their dispute solved in Kenyan Courts instead of arbitration in India? Another reason as to why parties refer a matter to an arbitration is because of trust and conducive environment and this should be respected. Lastly, what can be termed as " admission of debt?". Can a letter which was not produced as an exhibit be considered as an admission of indebtedness? To me, admission of indebtedness must be unequivocal and can only be seen as a paragraph in the plaint (unfortunately I did not see the plaint).

the parties chose Mumbai, India and not Kenya. Should this Court therefore twist the wishes of our Kenyan Courts are obviously different- and or penalties Applicable? The reasonable expectation of parties with an arbitral clause is that their mutually agreed arbitrator has in its fingertips the solutions to this and in most cases given consistency in performance of chosen arbitrators, the parties know what they expect and perhaps that is why they chose such arbitrator. To the contrary, when the matter goes to Court, the complications of trials and

applications of many precedents giving different interpretation of the law creates uncertainty which is bad for business and generally investments. The mechanism used by an arbitrator in Mumbai, India and

3. The Role of Courts in determine an application of reference.

   This is a settled matter that should not be belabored. *The constitution* in Article 159 summarizes the importance of arbitration and limits interference by courts. It is not the role of Courts to analyze evidence such letters or supposed exhibits but to read the clause and the Act so as to determine if it was the intention of the parties to have their matter resolved by an arbitrator or not. If this Court for example was to hold that there was an admission of debt and proceeds to dismiss the application for reference what would this mean? To me that would be tantamount to a judgement of that amount without trial and so there would be no need to hear the matter on the amount unless one appeals against it. How can one challenge this when the Court holds that it is an admission of indebtedness? Execution would then follow or a guaranteed application for summary judgement.

4. Letters Witten without prejudice.

   > " How will an arbitrator deal with a " without prejudice" letter". Will he apply the same standard as myself or it will be different? Secondly how will such approach affect the legitimate expectations of parties?

   we have not reached that stage. Should this Court determine at this stage whether to rely on it? The answer is no. If this Court was to determine whether to rely on this letter or not then again the future trial will be compromised. For example, if I was to say that they are admissible, then they automatically become " future exhibits". The best way is to leave them as they are in order to allow a Judge who would hear this matter under any circumstances in future- and besides when this letter was written the arbitration clause was still in force and so the parties knew or ought to have known that they will eventually reach the arbitrator and so begs the question,

   Can they form part of evidence to be relied on? This matter is premature. It requires a real application especially during trial for the Courts to rule on its admission or not- and

5. Delaying justice

   It has been argued that sometimes a reference to an arbitrator is a delaying tactic for matters which are obvious. If this is the case, then why did parties choose reference to arbitration if that indeed is the case? In some other quarters, it is argued that when Courts open its doors to matters which are rightfully referred to Arbitration, there will be an added backlog of cases that will likely cause more delay.

6. Doctrine of exhaustion

   the number of Courts vis the Population is loud enough to embrace arbitration or ADR.

   This doctrine recognizes that not all disputes can be resolved in a formal Court. Courts should be the last option especially where other entities are involved. This has significantly impacted on case backlog and businesses. The balance between

3. Determination: The upshot of the above is that the Application dated 2nd of August 2024 is allowed as prayed and given the nature of this suit, each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024.

L. KASSAN

JUDGE

In the presence of:

Mbugua for the Applicant

Asil for the Respondent/Plaintiff

Carol - Court Assistant