Wachira v Stecol Corporation (Miscellaneous Civil Application E056 of 2024) [2024] KEHC 16268 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISCELLANEOUS CIVIL APPLICATION E056 OF 2024

DKN MAGARE, J

DECEMBER 20, 2024

BETWEEN

JOHN MUTURI WACHIRA ..... APPLICANT

AND

STECOL CORPORATION ..... RESPONDENT

RULING

1. The miscellaneous application herein was brought under Order 51 rule 1, Order 50 rule 6, Order 46 rule 20(1), (2) & (3) of the Civil Procedure Rules. It seeks the following orders: -

    a. That this honorable court be pleased to issue an order directing that all matters pertaining to fraudulent and corrupt conduct in breach of contract agreements for February 2024 respectively be handled and or dealt with by this honorable court

    b. That this honorable court be pleased to issue an order directing the (DCI), Directorate of Criminal Investigation Kenya to carry out investigations over the fraudulent and corrupt conduct involving breach of contracts between the parties herein.

    c. That an order do issue restraining both parties in this matter from referring the matter to Arbitration until this application is heard and determined.

    d. That upon hearing and determination of this matter by this honorable court, time be enlarged if need be, to refer the matter to arbitration.

    e. That the respondent be condemned to pay the cost of this application.

2. The application is supported by the aaffidavit of John Muturi Wachira, the applicant sworn on 15/5/2024. It is one of the worst drafted applications I have ever come across, and has no regard completely to the doctrine of functus official and respect for arbitration. It also ignores entirely all the

basic rules regarding pleadings. The application is a mongrel that has no exactitude in drafting and prayers sought.

3. This will then make the writing of the ruling more unconventional. This is because the application is borderline and anathema to good pleadings. The application has three cardinal defects that cannot be rectified. The first aspect is that prayer 2 relates to alleged fraudulent and corrupt practices. This is in the realm of criminal law. The office and directorate of criminal investigation is established to handle such allegations.

4. Under Article 157(4) of *the constitution*, the Director of Public Prosecutions has power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. The court cannot usurp such powers. There is no evidence that a report was made to the police and was not acted upon.

5. If there was criminal conduct, then the criminal processes should be invoked. None has been invoked so far. The Director of Public Prosecutions has power to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed pursuant to Article 157(6)(a) of *the constitution*. It is noteworthy that under Article 157 (10) and (11) of *the Constitution*, theDirector of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. Further, in exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

6. In the circumstances, this court does not have executive authority to order proceedings be undertaken, as a fact matters dealing with corruption, are ringfenced under section of 11(d) of the Ethics and Anti-Corruption Commission. TheEthics and Anti-Corruption Commission is vested with powers to investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matters prescribed under this Act, the *Anti-Corruption and Economic Crimes Act* or any other law enacted pursuant to Chapter Six of *the Constitution*.

7. There is equally established the National Police Service and the Inspector General of Police under Articles 243 and 245 of *the constitution* with mandates to investigate crime. The procedure for reporting is well settled in law.

8. The second aspect relates to claims of fraudulent conduct. The claim for fraud has to be dealt with in a suit. There is no suit in this case. Order 3 Rule 1 provides as follows in relation to a suit:

    (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

9. There is no such suit in this matter. What is filed as a miscellaneous application is a disguised suit. To make matters worse, Order 2, Rule 10 (1) and 2 of the Civil Procedure Rules provide as follows:

> Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing— (a) (b) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just. (3) Where a party alleges as a fact that a person had knowledgeor notice.

10. The court can thus not determine fraud on the basis of spurious allegations on an affidavit. A miscellaneous application is not one of the ways of founding a suit. The court cannot be expected to pore though the documents just thrown to the court, and imagine what the dispute could have been. For example, there appears to be 2 sets of agreements. How does the court determine the veracity of one over another?

11. The third issue is the question of arbitration. The court is obligated under Article 159(2)(c) to promote and protect alternative dispute resolution mechanisms. The said Article posits as hereunder:-

(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...

12. The orders sought regarding arbitration are not tenable. In Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment) (with dissent - DK Maraga, CJ & P), the supreme court, addressed in extension the powers of the courts regarding arbitration as follows:

" 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.

54. the Model Law indeed advises that all instances of courts intervention must be provided for in legislation. That is the explanation that the Model Law accords to Article 5 which is in pari materia with Section 10 of the Act. The said Section 10 provides, "Except as provided in this Act, no Court shall intervene in matters governed by this Act." On the other hand, Article 5 provides, "In matters governed by this Law, no court shall intervene except where so provided in this Law."

In illuminating the meaning of Article 5, the explanatory notes of the Model Law provide that, beyond the instances specifically provided for in the law, no Court shall interfere in matters governed by it. That further, the main purpose of Article 5 is to ensure predictability and certainty of the arbitral process. That understanding is also discerned in the Court of Appeal decision of Singapore in the case of L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal 2012 SGCA 57 where the Court stated that:

> " The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model Law and to 'exclude any general or residual powers' arising from sources other than the Model Law....The raison d'être of art 5 of the Model Law is not to promote hostility towards judicial intervention but to 'satisfy the need for certainty as to when court action is permissible'."

13. The court only intervenes in matters arbitration when properly invited and the invitation has not been done pursuant to Section 7 of the *Arbitration Act*.

    (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.

14. Further, the original jurisdiction has not been invoked under Section 12 (5) (6) and (9) of the *Arbitration Act*. The arbitration process is ring fenced and is not to be lightly invoked. In 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), Justice Majanja stated as follows: -

> " 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:
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> > " ....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."
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> > 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."
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> 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."

15. It is thus otiose to invoke the *Arbitration Act* in the middle of spurious disputations. Arbitration must be dealt with in a more puritan way and not to commingle agenda related to arbitration with other insinuations.

16. There is nothing in the application worth dealing with in arbitration. Further, a party cannot restrain another party from invoking their rights to refer a matter to arbitration. There is no evidence of any arbitration process either agreed upon or commenced. The dispute herein is therefore premature and affected by the doctrine of ripeness.

17. An issue for determination must not only be ripe for determination but must also not be either academic or hypothetical. In *Jesse Kamau & 25 Others –v- Attorney General Misc. Application 890 of 2004*, the court dealt with the doctrine of ripeness (and justiciability) and held as follows:

> On the question of Ripeness (of issues for adjudication) and the courts' competence to issue declaratory orders, Hon. Orengo submitted that the issue at hand must not only be ripe for determination but must also not be either academic or hypothetical. He referred us to the excerpts from the case of Blackburn vs Attorney – General and Justice Ringera's remarks in the Njoya case that one of "the most fundamental aspects of the court's jurisdiction is that we are not an academic forum and we do not act in vain does indeed resonate in line with authorities and legal texts." The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. Stamp LJ in Blackburn vs Attorney General (supra) states at p.138 3 h J.
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> > "It is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical".
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> In Matalinga and Others vs Attorney General [1972] E.A. 578 Simpson J held: Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it."
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> In the Matalinga case, the Plaintiffs (representatives of an unincorporated association) had sued the Attorney General for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the Director of Personnel review and rectify salary structures.
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> The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was also contended that the jurisdiction

to give a declaratory judgment must be exercised "sparingly" with great care and jealously and "with extreme caution.

18. There is neither initiation of the process of arbitration, nor is there a threat to scuttle one in situ. There is thus nothing to restrain. There is equally no reason to restrain any party. The matters raised are civil in nature and ought to be ventilated in the correct forum. There is nothing showing that the Applicant has a justiciable case. He did not address the question of delay.

19. It is unnecessary to deal with reasons for delay as whatever is to be done has not been given or shown what is to be done. The upshot is that the application lacks merit and is accordingly dismissed.

Determination

20. In the circumstances, I make the following orders:-

    a. The application dated 15/05/2024 lacks merit and is accordingly dismissed.

    b. I do not find it necessary to address the question of jurisdiction as it is academic having found that there is no application before the court.

    c. Costs of 30,000/= to the Respondent payable within 30 days. In default execution to issue.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by:-

Mathaiya Baru & Ass. Advocates for the Applicant

Mr. Maringa for the Respondent

Court Assistant – Jedidah