



**Rao v Shreeji Chemicals Limited & 2 others (Commercial Miscellaneous Application E734 of 2021) [2023] KEHC 1892 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E734 OF 2021  
DO CHEPKWONY, J  
FEBRUARY 17, 2023**

**BETWEEN**

**MUKKASA GIRIDHAR RAO ..... APPLICANT**

**AND**

**SHREEJI CHEMICALS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HARESH VRAJLAL DAMODARDAS SONI ..... 2<sup>ND</sup> RESPONDENT**

**DELTA INTERNATIONAL FZE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the originating summons application dated September 30, 2020 (herein referred to as “The application”) filed under order 46 rules 5 and 20 of the *Civil Procedure Rules* 2010, sections 1A, 1B, 3A of the *Civil Procedure Act*, section 12 of the *Arbitration Act*, 1995, rule 3(1) of the *Arbitration Rules*, 1997 and article 159 (2) of *the Constitution* of Kenya. The application seeks the following orders:
  - a. Spent;
  - b. This Honourable Court be pleased to appoint Ms. Njeri Kariuki as the sole arbitrator pursuant to article 44 of the 1<sup>st</sup> respondent’s Articles of Association, in order to resolve the dispute between the applicant and the respondents;
  - c. In the alternative to prayer (a), this Honourable Court be pleased to appoint a sole arbitrator from the following list of two (2) arbitrators, in accordance with Article 44 of the 1<sup>st</sup> respondent’s Articles of Association, to determine the dispute between the applicant and the respondents;



- i. Ms. Esther Kinyenje;
    - ii. Mr. Kamau Karori.
  - d. The costs of this application be provided for.
2. The Application is supported by the Affidavit of the Applicant, Mukkasa Giridhar Rao sworn on 30<sup>th</sup> September, 2021.

### **The Applicant's Case**

3. According to the applicant, he is a shareholder and director of the 1<sup>st</sup> respondent (herein referred to as "the company") together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who are also shareholders of the company. He states that he was also the Operations Director of the Company until April 15, 2021, when on behalf of the Company the 2<sup>nd</sup> respondent, unlawfully terminated his employment. Upon the termination, he was required to transfer his shares back to the Company. However, a dispute arose with regard to the value of each share which dispute was referred to mediation but his was not successful. The applicant states that he obtained court injunctive orders against his removal and the change of the share capital of the Company.
4. In a bid to settle the dispute, the applicant invoked the Arbitration Clause of the Articles of Association where he proposed the appointment of one of the Arbitrators being Ms. Njeri Kariuki (Ms. Kariuki), Mr. Kamau Karori (Mr. Karori) and Mr. Kiragu Kimani (Mr. Kimani) as sole arbitrator but the Respondents rejected any of them and instead proposed Mr. Khagram whom the Applicant rejected on the basis that the said arbitrator had conducted mediation involving the parties which failed.
5. The Applicant then states that since the parties are unable to appoint an Arbitrator he seeks court's intervention to appoint a sole Arbitrator to appoint one from the list of nominees based on their credentials. He states that this court has jurisdiction under to appoint an Arbitral Tribunal pursuant to order 46 rules 5 and 20 of the *Civil Procedure Rules* 2010 and section 12 of the *Arbitration Act*, 1995 and therefore the application should be allowed.
6. The respondents opposed the application vide notice of preliminary objection dated October 21, 2021 and three Replying Affidavits sworn by each of the 3 respondents on October 21, 2021.

### **The Response**

7. In the notice of preliminary objections dated October 21, 2021, the respondents seek to have the originating summons struck out on the grounds that:-
- a. This honourable court lacks jurisdiction to hear the originating summons dated September 30, 2021 because the question of applicability of arbitration to the dispute touching on the parties herein is subjudice pending delivery of a ruling of November 4, 2021 by this court in HCOMM Petition No. 5 of 2021 Mukassa Giridhar Rao –vs- Shreeji Chemicals Ltd & 2 others. The Respondents further argue that the court does not have jurisdiction to deal with the originating summons since there is no Arbitration Clause".
8. The applicant also filed his supplementary affidavit sworn on October 29, 2021 and a further affidavit sworn on November 6, 2022 in response to the respondent's further affidavit sworn on November 4, 2022.



9. In response to the preliminary objection, the applicant filed its grounds of opposition dated October 29, 2021 in which he has raised the following grounds:
- a. That, the applicant's originating summons dated August 30, 2021 (originating summons) does not violate the rules of sub judice as the issues raised in the injunction application dated April 30, 2021 filed in HCCOMM Petition No.E005 of 2021 are separate from the issues raised in the originating summons.
  - b. That, ground 2 of the preliminary objection does not raise a pure point of law and therefore it is defective. The issue as to whether the dispute between the Applicant and the respondents is subject to arbitration by virtue of Clause 44 of the 1<sup>st</sup> respondent's Articles of Association or whether there is an arbitration agreement between the Applicant and the respondents, are issues of fact, which are liable to be contested and proven by way of evidence.
  - c. That, in accordance with Company Law jurisprudence, a Company's Memorandum and Articles of Association (MemArts) gives rise to a contract not only between a member and the company but also amongst the members of the company. Therefore, an arbitral clause in a Company's MemArts would govern disputes between a Company and its members as well as disputes amongst its members. As such, Article 44 of the Articles has been properly invoked for purposes of resolving the dispute between the applicant and the respondents.
  - d. That, this Honourable Court has the jurisdiction to appoint an Arbitral Tribunal pursuant to order 46 rules 5 and 20 of the *Civil Procedure Rules* 2010 and section 12 of the *Arbitration Act*, 1995, where parties have been unable to agree on the appointment of an Arbitrator.
  - e. That, the preliminary objection is brought in bad faith and is only intended to delay the hearing and determination of the originating summons.
  - f. That, the preliminary objection is misconceived and an abuse of the court process.
10. As directed by the court, the parties also filed their respective submissions for the Applicant dated October 29, 2021 and for the Respondent's submissions dated November 12, 2022 in support of their respective positions, all for the court's consideration.
11. The Respondent having raised a Preliminary Objection, it is pertinent that the same be addressed first before dealing with the issues in the application because if it succeeds, it may determine the application as a whole.

### **Determination**

12. It is trite law that preliminary objections should only be raised on a pure point of law. The aspect was discussed in the case of *Mukisa Biscuits Manufacturing Co. Ltd -Vs- West End Distributors*, [1969] EA 696, where the court 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 ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

13. For the preliminary objection herein to qualify to be a valid, it must satisfy the conditions set out on whether it is on a pure point of law or if it contains facts that need to be ascertained.
14. The respondents have stated that the application is subjudice by virtue of there being another pending suit HCCOMM Petition No. E005 of 2021 in which is pending a ruling. According to the Respondents, there is no arbitration agreement between the parties, hence the court has no jurisdiction to appoint an Arbitral Tribunal. The Respondents therefore hold that the preliminary objection is competent as it touches on the issue of this court's jurisdiction
15. The applicant on the other hand holds that its aim in HCCOMM Petition No.E005 of 2021 was to secure the interim orders to safeguard the subject matter of the intended arbitration, being the Shares. He states that the purpose of the originating summons is to request this Honourable Court to assist the parties to constitute an Arbitral Tribunal for purposes of ventilating their disputes. The applicant has not sought any orders with regard to the Shares in the originating summons and therefore the doctrine of subjudice does not arise.
16. The Applicant also argues that this Honourable Court has the jurisdiction to appoint an arbitral tribunal pursuant to order 46 rules 5 and 20 of the CPR and section 12 of the Arbitration Act, in circumstances where parties have been unable to agree on the appointment of an arbitrator following the provisions of an arbitral clause that binds them. The applicant therefore wishes to have the preliminary objection dismissed as it is misconceived and has failed to raise any credible points of law to warrant the summary dismissal of the Injunction Application.
17. Subjudice as a principle or doctrine is defined under section 6 of the Civil Procedure Act as follows;

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”
18. The court in the case of David Ndiu & others –vs- Attorney General & others 2021 eKLR, a bench of five Judges on subjudice held;-

“The rationale behind this provision (section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will...”
19. Also, the Applicant relied on the case of Republic –vs- Paul Kihara Kariuki, Attorney General & 2 others, Ex parte Law Society of Kenya [2020] eKLR, where the court defined “sub judice” as follows:

“The concept of sub-judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the



proceeding and such order can be made at any stage... In this regard, section 6 of the *Civil Procedure Act*[6] expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

20. In the instant case, even though the issue of appointment of an Arbitral Tribunal has not been raised in the HCCOMM Petition No.E005 of 2021 as stated by the Applicant, it is in dispute that the issue in that file deals with the dispute between the parties in the shareholding of the Company. So that even if this court allows the application for the appointment of an Arbitral Tribunal, the question for determination will be that issue of shares in the Company. This confirms that the issues are directly and substantially related which brings out the rationale of subjudice.
21. Having considered the issues raised herein, I find that the court in dealing with the HCCOMM Petition No.E005 of 2021, it will also address all the issues in dispute relating to the Company herein. In my humble opinion, appointing an Arbitral Tribunal to initiate arbitration proceedings, will amount to two concurrent suits running between the same parties, on the same issues. In that regard, this suit should be dismissed to pave way for the court to determine all the issues in the HCCOMM Petition No.E005 of 2021.
22. In the end, the respondents’ notice of preliminary objection is merited and the same is allowed as the originating summons application dated September 30, 2022 is dismissed with costs to the respondent.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Amayo counsel for Applicant

Mr. Muringi holding brief Mr. Oonge for the Respondents

Court Assistant - Sakina

