



**Pine Creek Limited & another v Linkham Services Limited & 2 others;
Resolution Group Limited (Interested Party) (Civil Case E092 of 2022)
[2023] KEHC 2746 (KLR) (Commercial and Tax) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E092 OF 2022
A MABEYA, J
MARCH 31, 2023**

BETWEEN

PINE CREEK LIMITED 1ST PLAINTIFF

PETER NDUATI 2ND PLAINTIFF

AND

LINKHAM SERVICES LIMITED 1ST DEFENDANT

DOMINIC PERSAD 2ND DEFENDANT

MICHAEL CRANFIELD 3RD DEFENDANT

AND

RESOLUTION GROUP LIMITED INTERESTED PARTY

RULING

1. This is a ruling on the defendants' notice of motion dated April 11, 2022. The same was brought under sections 2 & 6 of the [Arbitration Act](#) 1995.
2. The defendants sought to stay these proceedings pending reference and conclusion of arbitral proceedings. That in the meantime, they need not file a memorandum of appearance, statement of defence and other pleadings.
3. The application was premised, inter-alia, on the grounds that the parties entered into a Share Purchase Agreement ('the agreement') dated May 18, 2020. That it was agreed that any dispute arising out of or in connection with the said agreement would be resolved through amicable negotiations and if that failed, through arbitration.



4. That the plaintiffs instituted this suit in contravention of clause 15 of that agreement as the dispute set out in the plaint falls within the scope of arbitration as stipulated in the agreement. That the Arbitration Act 1995 ('the Act') grants this Court the authority to stay proceedings and refer the matter to arbitration as agreed by the parties.
5. Finally, that the defendants would be greatly prejudiced if they are forced to subject themselves to the jurisdiction of this Court contrary to the agreement.
6. In opposition, the plaintiffs filed a replying affidavit sworn by the 2nd plaintiff on May 9, 2022. It was averred that the agreement was executed as between Leapfrog II Holding Limited, Leapfrog Investment Group Limited, the defendants, the plaintiffs and the interested party.
7. That the 1st defendant undertook to purchase from Leapfrog II Holding Limited shares in the interested party with effect from the completion date and subject to the terms and conditions of the said agreement.
8. That the defendants failed to honour their own proposed dates of completion and failed to honour their duties and obligations under the agreement despite receiving their shares in the interested party company.
9. That the plaintiffs therefor approached this Court for an order of specific performance to compel the defendants to meet their end of the bargain as stipulated in the agreement and a mandatory injunction to compel the defendants to assess and settle all outstanding accounts of the interested party.
10. Further, that under clause 15.5 of the agreement, the parties could seek orders for specific performance or injunctive relief and that therefore, sections 2 and 6 of the Arbitration Act and Arbitration Rules were effectively rendered inoperative.
11. The plaintiffs asserted that this application was brought in bad faith and is part of the applicants' scheme to default in making good their end of the bargain under the agreement.
12. The 3rd defendant filed a supplementary affidavit sworn on May 12, 2022. He averred that the plaintiffs had acknowledged that the dispute arose from the agreement in contrast with the position earlier taken by the plaintiffs to the effect that the suit was premised on an alleged Share Purchase Agreement dated May 18, 2020.
13. That the plaintiffs do not dispute the existence of the arbitral clause but only claim that they have a right to file the dispute herein despite the existence of the arbitral clause.
14. That clause 15.5 of the agreement did not exempt claims for specific performance and injunction from the scope of arbitration and that the arbitrator has the power to order specific performance and assessment of alleged outstanding amounts as sought in the plaintiffs' suit.
15. I have considered the entire record including the submissions filed by the parties.
16. It is undisputed that the parties entered into a share purchase agreement dated May 18, 2020 ('the SPA'). The plaintiffs instituted this suit against the defendants vide a plaint dated March 22, 2022 claiming that the defendants had breached that agreement. They therefore sought for orders of specific performance to compel the defendants to meet the terms of the agreement and a mandatory injunction to compel them to assess and settle all outstanding accounts of the interested party within 90 days of grant of such order.



17. The issue for determination is whether this matter is for this Court or should be referred to arbitration. The SPA was produced by the defendants in their supporting affidavit. In order to determine the matter, it is imperative to set out the particular clauses that the respective parties relied on.
18. Clause 15.2 of the agreement states: -

' Subject to the Parties' right to election set out below, any dispute, controversy or claim arising out of or in connection with the agreement which cannot be settled amicably between the Parties as provided in clause 15.1, including a dispute as to the validity or existence of the agreement shall be resolved by arbitration in Nairobi, Kenya conducted in the English language pursuant to the rules of the London Court of International Arbitration.'
19. Clause 15.3 states: -

' The Arbitrator's decision shall be final and binding (in the absence of manifest error fraud) and may only be referred to court for the purpose of enforcement.'
20. Clause 15.5 continues: -

' The terms of this Agreement shall not prevent or delay the Parties from seeking orders for specific performance or interim or final injunctive relief on a without notice basis or otherwise.'
21. The plaintiffs submitted that arbitration was not the only envisioned way of dispute resolution under the agreement and that clause 15.5 of the agreement was an exclusionary with respect to the effect of clauses 15.1 and 15.2 of the agreement particularly with respect to orders of specific performance, interim or final injunctive reliefs.
22. On their part, the defendants submitted that all disputes arising out of the agreement should first be negotiated before being settled by arbitration. That there was no room for any other mode of dispute resolution than arbitration.
23. My understanding of clause 15 of the said agreement is that any dispute, controversy or claim that would arise from the agreement would be settled amicably initially and if that failed, through arbitration.
24. However, in sub-clause 5, the parties could seek orders of specific performance or injunctive relief. The sub-clause did not specify from which forum such reliefs could be sought. The plaintiffs contend it is this Court while the defendants insist that it could only be from the arbitral tribunal since under section 18 of the Act, the arbitrator has jurisdiction to grant an injunction as well as other interim measures of protection.
25. It is trite that, while interpreting a contract, the Court must give effect to the intention of the parties. The intention is to be discerned from the words of the text. The Court has to give the literal meaning of the words used.
26. In the present case, it should be recalled that the entire Clause 15 is about dispute resolution. After the parties had agreed to have arbitration as their preferred primary mode of dispute resolution, they included the sub-clause to the effect that; 'The terms of this Agreement shall not prevent or delay the Parties from seeking orders for specific performance or interim or final injunctive relief on a without notice basis or otherwise.'



27. Further to the foregoing, sub-clause 6 introduces the enforceability of the agreement. It provides that any order, award or decision of a court or arbitrator or settlement of the parties. The question that arise is, why and in what context was the court being introduced in the agreement. It is well known that on matters arbitral, courts have no jurisdiction.
28. To this Court's mind, the introduction of the fact of enforceability of orders and decisions of, inter-alia, the court was informed by the provision of sub-clause 5 of Clause 5. This is so because, the parties intended to remove the issues regarding 'orders of specific performance or interim or final injunction' from the general framework of dispute resolution in clause 15.
29. I take the foregoing view because of the words that follow the two reliefs and how they could be sought. It states that the said reliefs of specific performance or injunction, could be sought 'on a without notice basis or otherwise.'
30. Since the process of appointing the arbitrator is consensual, seeking a relief from the tribunal cannot then be without notice basis. The view I take is that, the 'without notice basis' was meant from the court.
31. In view of the foregoing, I hold that clause 15.5 of the SPA was exclusionary to clause 15.2 and 15.3 thereof. Accordingly, to the extent that the suit is only for specific performance and injunction, this Court has jurisdiction and there need be no reference to arbitration.
32. In the premises, I find that the application is without basis and dismiss the same with costs. The defendants are to enter appearance and deliver their defences as provided for by law.
- 33 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

