



REPUBLIC OF KENYA



**KENYA LAW**  
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**Easco Africa Limited v Ongeri & 2 others (Civil Case E013 of 2021)  
[2023] KEHC 2857 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E013 OF 2021  
JN KAMAU, J  
MARCH 28, 2023**

**BETWEEN**

**EASCO AFRICA LIMITED ..... PLAINTIFF**

**AND**

**ROSE AKOYO ONGERI ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL ADJAI OMOLO ..... 2<sup>ND</sup> DEFENDANT**

**BETHREHEMA FOUNDATION TRUST ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. In their Notice of Motion dated and filed on 23<sup>rd</sup> September 2021, the Defendants herein sought orders that the dispute between them and the Plaintiff herein be referred for determination and/or disposal by Mediation and that in the alternative, that the dispute be referred for determination and/or disposal by Arbitration pursuant to Article 45 of the Articles of Agreement dated 28<sup>th</sup> July 2017. They also sought the court to appoint a single Arbiter or Mediator to hear and determine the dispute herein.
2. The said application was supported by the affidavit of the 1<sup>st</sup> Defendant which she swore on 13<sup>th</sup> September 2021. The Defendants averred that the parties herein agreed on terms stipulated therein to govern the Proposed Extension of Flat Development on Parcel Number Kisumu/Konya/665 vide a Sale Agreement dated 28<sup>th</sup> July 2017.
3. They contended that Article 45 of the said Agreement stipulated that disputes arising therefrom were to be settled by Arbitration. They asserted that they had paid a total of Kshs 4,370,000/= but the Plaintiff failed to render a detailed account of the funds thus jeopardising their ability and capacity to raise funds from donors who required such detailed accounting as a condition precedent to disbursement of additional funds.



4. They contended that they were willing to settle this matter amicably without prejudice to the averments made in their Statement of Defence herein. It was their contention that having the matter determined by Mediation or Arbitration would be cost effective to all the parties herein and would restore the business relationship between them and the Plaintiff with a view to eventually completing the Project which was a charitable venture funded by various donors and intended to eventually operate as a home for disadvantaged destitute children.
5. In opposition to the said application, Hope Mbatha Makau, a Director of the Plaintiff swore a Replying Affidavit on 7<sup>th</sup> February 2022. The same was filed on 9<sup>th</sup> February 2022. The Plaintiff averred that the Defendants had admitted their claim and paid part of it and asserted that this court should enter judgment as had been prayed in the Plaint.
6. It was their contention that the present application offended the Arbitration Act in that the Defendants having entered appearance and filed their Defence on 31<sup>st</sup> August 2021 to the Plaint that was filed on 27<sup>th</sup> July 2021, they waived their right to rely on the arbitration clause. It was its case that the application of stay of proceedings could not be made after they had entered appearance and thus urged this court to dismiss the present application with costs to it.
7. The Defendants Written Submissions were dated 6<sup>th</sup> April 2022 and filed on 7<sup>th</sup> April 2022 while those of the Plaintiff were dated 23<sup>rd</sup> May 2022 and filed on 25<sup>th</sup> May 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

## LEGAL ANALYSIS

8. The Defendants submitted that whereas Section 6 of the Arbitration Act barred determination of a dispute once a Statement of Defence was filed, other provisions of the Law had no such inhibition. They contended that the Practice Direction on Court Annexed Mediation of 2018, Section 59, 59B and 59C of the Civil Procedure Act, Order 46 Rules 1, 2, 3, 5, 6 and 20 of the Civil Procedure Rules within the context of Article 159(2)(c) and 159 (2)(d) of the Constitution of Kenya 2010 all provided for determination of disputes by arbitration and/or mediation.
9. They also placed reliance on the case of Rev John Juma & 2 Others v Rev Patrick Lihanda & Others [2019] eKLR where it was held that where parties entered into a consent to settle the dispute in a particular manner that was recognised by the law, the court had no jurisdiction to alter the said consent unless the conditions for setting aside were established.
10. They further relied on the case of Machira Ltd v China Wuyi Ltd & KENHA [2018] eKLR where the court upheld the terms of the contract between parties therein that stipulated that any dispute arising be referred to arbitration as a last dispute resolution mechanism.
11. It was their case that it was a trend that matters of this nature were referred to arbitration as provided by the Contracts Statutory provisions (sic) or for Mediation under the Practice Directions for Court Annexed Mediation. They asserted that the purpose of the court process was to resolve the disputes and not to escalate disputes. They added that in the Project they had undertaken herein, the Plaintiff had been contracted to construct a charitable venture and that an acrimonious litigation would negate the noble purpose for which the project was intended.
12. On its part, the Plaintiff set out in great detail the factual basis of the dispute and placed reliance on the cases of Corporate Insurance Co Ltd v Wachira (1995-1998) EA and Martin Otieno Okwach & Charles Ongondo Were T/A Victoria Cleaning Services v Kenya Post Office Savings Bank [2014] eKLR where



the common thread was that by filing a defence, the applicants lost the right to rely on the arbitration clause and their disputes were therefore firmly stuck in court.

13. A perusal of Article 45.1 of the Articles of Agreement dated 28<sup>th</sup> July 2017 showed that terms therein were stipulated as follows:-

“SETTLEMENT OF DISPUTES

In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion of abandonment of the Works such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitration within thirty days of the notice. The dispute shall be referred to the arbitration (emphasis court) and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of Arbitration. The Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya or by the Chairman or Vice Chairman of the Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party.”

14. Clause 45.4 of the Agreement further stated as follows:-

“Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or different shall not commences unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicable with or without assistance of third parties (emphasis court).”

15. Notably, it was clear that intention of the parties herein was that if any dispute arose between them, it would be settled amicably with or without the assistance of a third party and if that failed the dispute was to be heard and determined by an arbitrator. In essence, they were clear that they did not wish the court to resolve their dispute, their preference being resolution through alternative dispute resolution mechanisms that are envisaged under Article 159(2)(c) of the Constitution, 2010 which states:-

“In exercising Judicial authority courts and Tribunals shall be guided by the following principles –

alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”

16. As the court was so mandated by Article 159 (2) (c) of the Constitution of Kenya, it was called upon to promote other forms of dispute resolution where the parties agreed to such alternative mode of dispute resolution and not to usurp jurisdiction where there was a dispute if such out of court resolution was appropriate.
17. Indeed, courts recognise that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.
18. Having said so, once a matter was filed in court, the referral of the dispute for resolution by way of alternative dispute resolution mechanisms under Section 6 (1) of the Arbitration Act No 4 of 1995, Section 59B and Section 59C of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 46 Rule 1 of the Civil Procedure Rules, 2010 with the backing of Article 159(2) (c) of the Constitution of Kenya was conditional.



19. The present application was premised on the provisions of Section 6(1) of the Arbitration Act which stipulates as follows:-

“A court before which proceedings are brought in a matter which is the subject of an 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, (emphasis court) stay the proceedings and refer the parties 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
- c. with regard to the matters agreed to be referred to arbitration”.

20. An applicant seeking to stay proceeding and referral thereof to arbitration should make an application for the same at the time of entering appearance or before acknowledging the claim in question as this very court held in the case of Eunice Soko Mlagui v Suresh Parmar & 4 others [2013] eKLR which decision was subsequently upheld by the Court of Appeal.

21. Notably, the Defendants entered appearance in the suit herein on 31<sup>st</sup> August 2021. Their Memorandum of Appearance was dated 30<sup>th</sup> August 2021. They also filed their Statement of Defence also dated 30<sup>th</sup> August 2021 on 31<sup>st</sup> August 2021.

22. As the Plaintiff herein pointed out, the Defendants waived their right to have the dispute herein resolved by way of arbitration when they failed to file an application for stay of proceedings pursuant to Section 6(1) of the Arbitration Act at the time of entering appearance in respect of the Plaint dated 26<sup>th</sup> July 2021 and filed on 27<sup>th</sup> July 2021. The moment they filed the said Statement of Defence, the court became firmly seized of this matter and ousted this matter from the ambit of the Arbitration Act.

23. However, all was not lost as the parties could still have the dispute resolved by way of arbitration. They were at liberty to apply to the court for an order of reference pursuant to Order 46 Rule (1) of the Civil Procedure Rules which states that:-

“Where in any suit all the parties (emphasis court) interested who are not under disability agree (emphasis court) that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.,

24. It was clear from Order 46 Rule (1) of the Civil Procedure Rules that the court cannot grant an order for reference to arbitration on its own motion. It had to be moved by the parties to the suit. Until it was so moved, the matter remained firmly within the court system where the court could give appropriate orders to have the matter heard out of the court system.

25. Notably, the parties herein still had the option of the matter being resolved by way of mediation or other forms of alternative dispute resolution other than arbitration.

26. Section 59B of the Civil Procedure Rules states that:-

The Court may—

- a. on the request of the parties concerned; or



- b. where it deems it appropriate to do so (emphasis court); or
  - c. where the law so requires, direct that any dispute presented before it be referred to mediation.
27. Section 59C of the *Civil Procedure Act* stipulates that:-  
A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral (emphasis court).
28. Notably, Section 59B and Section 59C of the *Civil Procedure Act* did not necessarily require the consent of the parties to refer the parties to mediation or other forms of alternative dispute resolution mechanisms as the court had power to refer such matter to the said mechanisms where it considered it appropriate to do so or considered the case suitable for such referral.
29. According to the Agreement between the parties herein, their intention at inception was to have any disputes between them resolved by way of amicable settlement and/or arbitration. Despite having been aware of Clause 45 of the Agreement, the Plaintiff did not disclose the same to the court. The Defendants were desirous of trying to resolve the matter amicably. Now that the parties herein were now firmly within the jurisdiction of this court, it had power and jurisdiction to refer the parties to mediation pursuant to Section 59B of the *Civil Procedure Act*.
30. Indeed, referring the parties to mediation was within the mandate of courts to promote resolution of disputes by alternative dispute resolution mechanisms. Having considered the relationship between the Plaintiff and the Defendants herein, this court was not persuaded that referring them to Court Annexed Mediation (CAM) would prejudice the Plaintiff or that the Plaintiff was likely to suffer any prejudice. If there was any prejudice to be suffered, then it did not demonstrate the same.
31. Notably, no hearing date had been fixed in this matter. The CAM was expected to be completed within sixty (60) days with additional time being given upon request of the parties if no settlement had been arrived at and they still wished to explore possibilities of an amicable out of court settlement. It was not mandatory that the process end with a Mediation Agreement Settlement. Parties still had the liberty to come back to court for the resolution of the dispute by the court in the event no Mediation Settlement Agreement was arrived at.

## **DISPOSITION**

32. For the foregoing reasons, the upshot of this court's decision was that the Defendants' Notice of Motion Application dated and filed on 23<sup>rd</sup> September 2021 was merited and the same be and is hereby allowed in terms of Prayer No 3 therein.
33. It is hereby directed that this matter be mentioned before the Deputy Registrar High Court Kisumu on 11<sup>th</sup> April 2023 for the appointment of a Mediator.
34. Matter to be mentioned before the court that will have been assigned this file on 16<sup>th</sup> June 2023 to confirm if there will have been a Mediation Settlement Agreement for adoption by the court and/or for further orders and/or directions.
35. It is so ordered.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of March 2023**

**J. KAMAU**

**JUDGE**

