



**Eunichem Limited & 2 others v Zheng Energy Limited (Insolvency Notice E082 of 2023)  
[2023] KEHC 21737 (KLR) (Commercial and Tax) (29 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21737 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY NOTICE E082 OF 2023  
DAS MAJANJA, J  
AUGUST 29, 2023  
IN THE MATTER OF THE INSOLVENCY ACT, 2015  
AND IN THE MATTER OF  
EUNICHEM LIMITED, CENTRIX LIMITED &  
NYIKA PHARMACEUTICAL LIMITED (DEBTORS)**

**BETWEEN**

**EUNICHEM LIMITED ..... 1<sup>ST</sup> APPLICANT  
CENTRIX LIMITED ..... 2<sup>ND</sup> APPLICANT  
NYIKA PHARMACEUTICAL LIMITED ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ZHENG ENERGY LIMITED ..... RESPONDENT**

**RULING**

1. On July 7, 2023, the creditor filed an evenly dated Statutory Demand with the court seeking Kshs. 39,000,000.00 from the Debtors. The debtors have assailed the Statutory Demand by filing the Notice of Motion dated July 27, 2023 that is supported by the affidavits of the 1<sup>st</sup> Debtor's director, Ivy Wacera Maina sworn on July 27, 2023 and August 14, 2023 respectively. The debtors seek to stay the current proceedings and/or any actions against them as the court lacks jurisdiction on the ground that Clause 18 of the Capital Venture Agreement dated June 20, 2019 executed by the parties ("the Agreement") provides that all disputes arising out of the Agreement between them are to be resolved through mediation/arbitration.



2. The creditor opposes the application through the replying affidavit of its director, Eunice Wambura Njoki, sworn on August 7, 2023. It states that the Statutory Demand remains unchallenged and is therefore valid. That the debt due to the creditor also remains undisputed and therefore there are no valid grounds for setting aside the demand. In any case, the creditor depones that the debtors cannot escape the jurisdiction of this court on the basis of an arbitral clause in the Agreement as they have already taken positive steps in these proceedings and admitted the court's jurisdiction by filing a memorandum of appearance in these proceedings. The creditor contends that the dispute resolution clause in the Agreement provides for arbitration or mediation in the first instance and thereafter arbitration which is optional and not mandatory.
3. The creditor avers that the parties have explored negotiations and mediation which have failed and that arbitration being optional, the dispute resolution clause in the contract between the parties cannot be a bar to this court's jurisdiction as the creditor did not opt for it. That this being a case of default and a proper case for summary Judgment, the Court's jurisdiction cannot be fettered by the arbitral clause and the creditor prays that the application be dismissed and the Statutory Demand be upheld by the Court.
4. In their rejoinder, the debtors claim that these proceedings are meant to settle personal scores. They maintain that all disputes between them are to be resolved by way of arbitration or mediation and not insolvency or court proceedings. That the amount in dispute, if any, can only be ascertained through arbitral proceedings and that the arbitration in the Agreement is mandatory in the event mediation fails.

### **Analysis and Determination**

5. The issue for resolution is whether the court should stay these proceedings and refer the dispute between the parties for arbitration. The parties are agreed that there is a dispute resolution clause in the Agreement which provides, in part, as follows:
  18. Arbitration & Mediation – Differences To Be Referred.

Whenever any difference arises between the parties before approaching the court, the parties shall endeavour to resolve the matter amicably through Arbitration or mediation;

    - i. If a dispute has not been settled amicably within a period of thirty (30) days (or such longer period as may be agreed upon between the Parties), any party may elect to commence arbitration....
6. Section 6(1) of the *Arbitration Act* which the debtors have invoked provides as follows:

6(1) 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, 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 with regard to the matters agreed to be referred to arbitration.
7. The creditor opposes the reference to arbitration on the ground that the debtors, by filing a memorandum of appearance in these proceedings, have taken positive steps in these proceedings thus admitting the court's jurisdiction and that the arbitration is optional and not mandatory. Indeed,



under section 6(1) of the *Arbitration Act*, for a party to succeed in its application for referral to arbitration and stay of proceedings, it ought to apply for stay, ‘not later than the time when that party enters appearance’. The Court of Appeal, in *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* NRB CA Civil Appeal No. 157 of 2000 [2001] eKLR expounded on this provision by stating as follows:

It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.

8. The debtors in this case filed their memorandum of appearance together with the application for stay of proceedings and reference to arbitration. These are the steps allowed by section 6(1) of the *Arbitration Act*. I therefore reject the creditor’s contention that the debtors submitted to the jurisdiction of this court by filing the memorandum of appearance. It is the steps taken after filing the memorandum of appearance that will determine whether the applicant has acquiesced or submitted to the jurisdiction of the court. If the applicant immediately and timeously files the application for stay and reference to arbitration before any other pleading then it is within the ambit of section 6(1) of the *Arbitration Act*. However, if it takes any other steps, including interrogating the merits of the dispute by filing a defence or such other pleading, then it will be taken to have submitted to the jurisdiction of the court (see *Charles Njogu Lofty v Bedouin Enterprises Ltd* NRB CA Civil Appeal No. 253 of 2003 [2005] eKLR). This ground of attack by the creditor fails.
9. The creditor also advances the ground that under the Agreement, arbitration is voluntary and not mandatory under the Agreement. Indeed, the arbitration clause states that in case of a dispute and before the parties’ approach court, “...the parties shall endeavour to resolve the matter amicably through Arbitration or mediation.” The use of the word “shall” and the disjunctive word “or” implies that it is mandatory for the parties to explore either arbitration or mediation. The arbitration clause then goes on to provide that if parties are not able to agree, “within a period of thirty (30) days (or such longer period as may be agreed upon between the Parties), any party may elect to commence arbitration...”. The use of the word “may” entitles any party to the Agreement to invoke arbitration after amicable resolutions have failed.
10. The creditor has annexed copies of minutes of meetings and correspondence between the parties regarding the outstanding debt claimed by the creditor. With the filing of the Statutory Demand, it appears that there has been no agreement between the parties in respect of the outstanding debt. I agree with the creditor that after mediation failed, it had the option to either commence arbitration or proceed with any other means of collecting its debt. Since the creditor has exercised the option of not commencing arbitration as provided for under the Agreement, the court cannot order it to proceed for arbitration because under the *Arbitration Act*, arbitration is a consensual process.
11. In reaching this conclusion, I am guided by two principles. First, that the court is obliged to enforce the contractual agreement between the two parties as the Court of Appeal held in *National Bank of Kenya Limited v Pipeplastic Samkout (K) & Another* [2001] eKLR that, “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.” Likewise in *Jeremiah Mucheru Ndibui v David Gichure* [2019]eKLR the court observed that, “A party cannot run away from the terms of the agreement. It has often been stated that the court’s function is to enforce contracts that the parties enter



into. The court cannot rewrite the party's agreements." Once the parties left the issue of arbitration as an option, the court is compelled to enforce that option once it is exercised by the party.

12. The second principle, is that arbitration under the *Arbitration Act*, is a consensual process. This was underscored by the Court of Appeal in *Nyutu Agrovet Limited v Airtel* [2015]eKLR where is stated that, "Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely ....." In this case, the Agreement entitled a party to elect to proceed to arbitration after amicable resolution has failed. The creditor has exercised its right to commence insolvency proceedings. It cannot be forced to proceed with arbitration at this stage. I would also point out that the debtors had the option of invoking the arbitration clause and had they done so, the court would have no difficulty in staying these proceedings.
13. For the reasons I have outlined, I now dismiss the debtors' application dated July 27, 2023. The debtors shall pay the creditors costs assessed at Kshs. 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF AUGUST 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Mbugua instructed by Karugu Mbugua and Company Advocates for the Debtors.

Mr Kamau instructed by Chege and Sang Advocates for the creditor.

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