Tumaz and Tumaz Enterprises Limited v Magnate Ventures (Civil Appeal E103 of 2022) [2023] KEHC 21752 (KLR) (Commercial and Tax) (29 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E103 OF 2022

DAS MAJANJA, J

AUGUST 29, 2023

BETWEEN

TUMAZ AND TUMAZ ENTERPRISES LIMITED ..... APPELLANT

AND

MAGNATE VENTURES ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon.E. Wanjala, PM dated 8th July 2022 at the Nairobi Magistrates Court, Milimani in Civil Case No. 2531 of 2021)

JUDGMENT

Introduction and Background

1. The Respondent is company in the business of facilitating/providing outdoor and indoor advertising solutions through various media among others, Billboards, Suburban Signs and Digital Displays. By a Local Purchase Order ("the LPO") dated 18.07.2019, the Appellant sought the advertising services of the Respondent by ordering a number of billboard advertisements to be placed in towns around the country and for a contract sum of Kshs. 2,308,400.00. Further to the LPO, the parties also executed an Agreement dated 23.07.2019 ("the Agreement") capturing their business relationship with the Respondent expected to provide the advertising services for a term of 13 months.

2. By a plaint dated 12.03.2021, the Respondent filed suit in the Subordinate Court claiming that despite setting up the billboards and raising an invoice for the agreed sum of Kshs. 2,308,400.00, the Appellant had issued it with post-dated cheques that were dishonoured. The Respondent sought judgment for the Kshs. 2,308,400.00.

3. When served with process, the Appellant filed an application dated 10.05.2021 seeking that the suit be stayed and the dispute between the parties be referred to arbitration as per Clause 17.1 of the LPO and Clause 10.8 of the Agreement in accordance with section 6(1) of the *Arbitration Act*.

4. The Respondent objected to the application on several grounds. It stated that the LPO is not a binding contract as it is merely an offer and does not encompass all the three essential elements of a valid contract being offer, acceptance and consideration. That it does not reflect an agreement between the parties as it was not executed by either the Appellant or the Respondent and that the Respondent did not agree to its terms hence the parties executed the subsequent Agreement. The Respondent contended that the arbitration clause is null and void, inoperative and incapable of being performed and that there is no dispute between the parties that can be referred to arbitration.

5. On 08.07.2022, the Subordinate Court delivered a ruling dismissing the application. As regards the LPO the court stated that it was not contract as it was not executed by the parties. As regards the Agreement, the court held that the Appellant had failed to prove the nature of the dispute to be referred to arbitration. It is this ruling that forms the basis of this appeal. The appeal was canvassed by way of written submissions.

Analysis and Determination

6. Even though the Appellant raises 11 grounds of appeal, it collapses them into two; whether the Subordinate Court erred by holding that the LPO was not a contract as it was only signed by the Appellant and whether the Subordinate Court erred by holding that the Appellant had not indicated the nature of the dispute to be referred to arbitration hence the application was not tenable.

7. The general and accepted principal is that arbitration is dependent on the consent of the parties and the court is duty bound to honour that agreement and give effect to their wishes by staying court proceedings pending reference to arbitrations. In *Nyutu Agrovet Limited v Airtel Networks Limited* NRB CA Civil Appeal (Application) No. 61 of 2012 [2015] eKLR, the Court of Appeal held that,

> " Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here."

8. Resolution of the issues in this appeal turns on the interpretation and application of section 6(1) of the *Arbitration Act* to the circumstances of this case. It 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.

9. The existence of an arbitration clause is a condition precedent for invoking section 6(1) of the *Arbitration Act*. It is common ground that the LPO and the Agreement contain arbitration clauses. While the Appellant asserts validity of the LPO, the Respondent states that it is not binding and urges that the arbitration clause in the LPO is null and void, inoperative or incapable of being performed as

it incorporates a tiered dispute resolution mechanism involving mediation and arbitration which are both elective and not mandatory. That there is an existing waiver to any claim that Kenyan courts are not a convenient or proper forum and that it is evident that an aggrieved party is at liberty to institute a suit in court. In the Respondent's view, there is no prohibition on seeking relief from the court as the dispute resolution mechanism is elective and not mandatory.

10. I propose to begin with the contention by the Respondent that the LPO issued by the Appellant was not binding on it. *Black's Law Dictionary* (9th Ed.) defines a, "Local Purchase Order" as,

> " A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale."

The Respondent does not deny that it was pursuant to the LPO that the parties executed the Agreement and then the Respondent went ahead to set up the billboards and issue the invoice as per the LPO. In my view, and I agree with the Appellant, this provision of services signaled the Respondent's acceptance of the LPO and created a legally binding agreement between them. The Respondent cannot claim that just because they executed a further agreement then this intimated that it did not agree with the terms of the LPO. If anything, a reading of the Agreement and in particular Clause 4 thereof shows that it incorporates the LPO as it calls for the Appellant to,

> " .... issue post-dated cheques for the first month of advertising services as specified on the LPO issued by the Advertiser"

I therefore find that in providing the advertising services as per the LPO issued by the Appellant, the Respondent accepted its terms and created a legally binding contract between itself and the Appellant. The arbitration clause therein therefore applies to it.

11. As to whether the arbitration clause therein is null, void and inoperative as advanced by the Respondent, I hold that that LPO has two provisions that are contradictory. Clause 16.1 of the LPO provides,

> " The Kenyan Courts shall have exclusive jurisdiction over any claim arising under this Purchase Order..."

While Clause 17.1 states, in part, that,

> " In the event of any dispute, controversy , or claim arising out of relating to this LPO ..... both parties shall meet at an agreed location to attempt to resolve the dispute in good faith .... Should the dispute not be resolved within sixty (60) days after such meeting, the complaining party shall seek remedies exclusively through arbitration administered under the *Arbitration Act*...."

Both provisions provide two open avenues for the parties to resolve their dispute, the courts and through arbitration. Since the court must give effect to the parties' intention to provide both modes of dispute settlement, the Respondent cannot be faulted for electing to file suit. I therefore hold that the arbitration clause in the LPO can be avoided by election of either party.

12. The Respondent admits the existence of an arbitration clause in the Agreement but averred that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration as the debt is undisputed. Under section 6(1)(b) of the *Arbitration Act*, the court may reject an application for stay if there is in fact no dispute to be referred to arbitration.

13. According to the Respondent, there is no dispute to be referred to arbitration as it delivered the services required under the Agreement for which the Appellant has failed to pay. In its deposition before the Subordinate Court, the Appellant only stated that a dispute has since arisen in the implementation of the contract but does not state the nature of the dispute. The Subordinate Court correctly relied on the court's decision in *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR where it was held that an applicant must specify the dispute and the nature of the dispute it desires to be referred to arbitration. On section 6(1)(b) of the *Arbitration Act*, the Court of Appeal in *UAP Provincial Insurance Company Ltd v Michael John Beckett* [2013] eKLR held that,

> " The words that there is not in fact any dispute between the parties" appearing in Section 6(1)(b) of the *Arbitration Act* are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay proceedings."

14. Based on the material on record, I do not see any dispute that would be referred to arbitration based on the fact that the Respondent rendered services to the Appellant under the Agreement for which the Respondent has failed to pay. The Appellant has not given any reason why it has not made any payment. I therefore find and hold that the Subordinate Court did not err in dismissing the Appellant's application for stay of the proceedings and reference of the dispute to arbitration.

Disposition

15. I dismiss the appeal. The Appellant shall pay the Respondents costs assessed at Kshs. 45,000.00.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Muhuyu instructed by Javier, Georgiadis and Sylvester Law LLP Advocates for the Appellant.

Mr Oira instructed Nyaanga and Mugisha Advocates for the Respondent.