Kopo Kopo Inc v Genius Executive Limited (Commercial Appeal E098 of 2022) [2023] KEHC 24206 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E098 OF 2022

FG MUGAMBI, J

OCTOBER 27, 2023

BETWEEN

KOPO KOPO INC ..... APPELLANT

AND

GENIUS EXECUTIVE LIMITED ..... RESPONDENT

RULING

Background

1. The parties herein entered into in a sale and purchase agreement dated 18th June 2022 wherein the appellant advanced Kshs.200,000/= to the respondent. The respondent made some payments towards the debt but failed to repay the amount of Kshs.152,903/= and as a result, the appellant filed a claim at the Small Claims Court on9th June 2022 to recover the outstanding debt. This was SCC COMM E3431 of 2022.

2. The respondent entered appearance on 16th June 2022 and filed an application for referral of the matter to arbitration under section 6 of the *Arbitration Act* on 19th June 2022. In a ruling dated 8th July 2022, the Learned Adjudicator stayed the proceedings and referred the dispute to arbitration.

3. The appellant was aggrieved by the said ruling hence this appeal filed vide a Memorandum of Appeal dated 29th July 2022 and written submissions dated 27th March 2023. In its response to the appeal the respondent relied on its grounds of opposition dated 21st November 2022.

Analysis

4. I have carefully considered the pleadings, written submissions and the authorities cited by rival parties. The main issue for determination is whether the appellant has made out a case to warrant setting aside the decision of the Learned Adjudicatorreferring the dispute to arbitration. More particularly, whether

the applicant had satisfied the conditions to be met before referring a matter to Arbitration as set out in section 6(1) of the *Arbitration Act*, 1995.

The said section provides 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, 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."

5. Against this background, it is not in dispute that the parties herein executed the sale and purchase terms agreement or that the said agreement contained an arbitration clause being clause 20.2 which read as follows:

> " Any dispute arising to or in connection with this agreement that is not resolved by customer care center representatives shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 60 days of the notification of a dispute upon the application of either party by the chairman for the time being of the chartered institute of arbitrators Kenyan Branch."

6. The clause is very clear about the width and breath of the disputes intended to fall under the dispute resolution process. It provides that any dispute arising under the agreement if not resolved by the customer care representatives would be resolved way of arbitration.

7. I have no difficulty in finding that the dispute before the court satisfies this criterion. I also have no difficulty finding that the arbitration agreement is valid and capable of resolving the dispute between the parties as the appellant has not led any evidence to demonstrate any reasons that would make the arbitration clause inoperative or unenforceable.

8. The main bone of contention is that the application for referral to arbitration was not filed at the time when that party enters appearance but rather, was filed two days later. In asking the Court to grant the appeal, the appellant referred to decisions including *Adrec Limited V Nation Media Group Limited*, [2017] eKLR. The court stated that:

> " Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

9. The Court of Appeal in *Charles Njogu Lofty V Bedouin Enterprises Ltd,* [2005] eKLR dealt with an appeal from the High Court being HCCC No. 1756 of 2000 where the appellant entered appearance on 6th November 2000, and filed his amended defence and counterclaim on 11th June 2002, and then on 20th April 2002 filed an application for referral of the dispute to arbitration. The court concurred

with the decision in Civil Case No. 1756 of 2000 *Bedouin Enterprises Ltd. v Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments*. The Court of Appeal opined that:

> " ...Even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings."

10. Likewise, the court (Gikonyo, J) considered a much shorter timeline between the time of entering appearance and filing an application under section 6 of the *Arbitration Act*, in *Dioceses of Marsabit Registered Trustee v Techno Trade Pavilion Ltd*, HCCC No. 204 of 2013. The Learned Judge observed thus:

> " Instead of filing its defence to the suit, the Applicant filed the present Application on the 24th June 2013. The Application was, therefore, filed fourteen (14) days after the filing of the Memorandum of Appearance. Section 6(1) of the Act is clear, unambiguous and unequivocal, in that a party applying for a stay of proceedings, shall apply not later than the time when that party enters appearance or files any pleadings. This Application should have been filed on the 10th June 2013 together with the Memorandum of Appearance and not fourteen (14) days later."

11. The respondents referred this court to article 159 of *the Constitution* and the need for the court to give effect to mechanisms of alternative dispute resolution. I have agonized over the unfortunate circumstances in this case especially the delay of only 48 hours by the respondent to put in the application for referral to arbitration. The application should have been filed at the time of entering appearance.

12. Comparing this to the 14 days' delay in Dioceses of Marsabit Registered Trustee (supra), the Court was categorical in that case that by entering appearance on the 10th June, 2013 and waiting for some 14 days before applying for stay of the proceedings, the applicant lost its right to rely on the arbitration clause. For that reason, the application was clearly untenable and could not possibly succeed.

13. As to whether the short period of 48 hours should make a difference in this circumstance, I recognize the need for certainty and clarity in the law particularly since the terms of section 6(1) are set out in mandatory terms. Parties bringing an application under section 6(1) ought to know that the mandatory terms of the law must be complied with. Opening any slight window, short as the period may have been, would in my view, have a negative impact on the certainty around arbitration proceedings.

Determination

14. The upshot of this is that the Learned Adjudicator erred in allowing the application. The appeal is merited and the ruling of the lower court is hereby set aside with costs to the appellant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27TH DAY OF OCTOBER 2023.

F. MUGAMBI

JUDGE

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