



**Kopo Kopo Inc v Kamau t/a Daisy Star Ventures (Commercial Appeal E101 of 2022)  
[2023] KEHC 24207 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24207 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E101 OF 2022**

**FG MUGAMBI, J  
OCTOBER 27, 2023**

**BETWEEN**

**KOPO KOPO INC ..... APPELLANT**

**AND**

**ROSEMAY NJERI KAMAU T/A DAISY STAR VENTURES ..... RESPONDENT**

*(An appeal against the decision of the Small Claims Court Adjudicator, Hon J.W. Munene delivered on 22nd July 2022 in Commercial Case No. E3427 of 2022)*

**RULING**

1. This is an appeal against the decision of the Small Claims Court Adjudicator, Hon J.W. Munene delivered on 22<sup>nd</sup> July 2022 in Commercial Case No. E3427 of 2022. The dispute between the parties emanated from an agreement wherein the respondent was advanced Kshs.120,000/= by the appellant. It was a term of the agreement that the respondent would repay the amount at Kshs.134,832/= inclusive of interest, within 60 days. A dispute ensued when the respondent paid back part of the loan and failed to pay an amount of Kshs.104,437/=.
2. The appellant filed a claim at the Small Claims Court in response to which the respondent filed an application for referral of the dispute to arbitration. The Learned Adjudicator allowed the application in a ruling delivered on 22<sup>nd</sup> July 2022.
3. Aggrieved by the said ruling, the appellant filed a Memorandum of Appeal in this court dated 5<sup>th</sup> August 2022 and written submissions dated 27<sup>th</sup> March 2023. The respondent in its response to the appeal relied on the grounds of opposition dated 21<sup>st</sup> November 2022 and filed no submissions.



## Analysis

4. The court has considered the rival pleadings and submissions that were filed. The main issue for consideration is whether the Learned Adjudicator erred in allowing the application for referral of the dispute to arbitration.
5. Arbitration as a dispute resolution mechanism is centered around the autonomy of parties. This means that it is a consensual process in which the source of the arbitrator's jurisdiction is the arbitration agreement between the parties. So central is the idea of party autonomy in the *Arbitration Act* that the law provides for a very limited avenue where the court may intervene in matters that are subject to arbitration.
6. Section 10 of the *Act* provides that except as provided in the *Act*, no court shall intervene in matters governed by the *Act*. This is important in that it creates certainty so that parties are assured that their intentions will be enforced by the courts at whatever costs.
7. It is now settled that where there is a clear intention by parties of the intention to have their dispute settled by arbitration, the options are very limited for the Court. I refer to the case of *Blue Limited v Jaribu Credit Traders Limited*, Nairobi (Milimani) HCCS No. 157 of 2008 where Kimaru, J stated inter alia as follows:

“It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration.”
8. Likewise, in *Kenya Pipeline Company Limited vs. Datalogix Limited and Another* Nairobi HCCC No. 490 of 2004, [2008] 2 EA 193, Warsame, J (as he then was) held that:

“It is clear from the reading of section 6(1) that ... the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship... It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration... Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter.”
9. These examples suffice for now and the long and short of this is that I find that the parties were bound by the arbitration clause in the said agreement and not even the provisions of section 3(a) of the *Small Claims Act* No. 2 of 2016 could override the intention of the parties to resolve their dispute through arbitration.
10. The argument by the appellant regarding the expenses of arbitration is not plausible. The appellant ought to have given due consideration to the pros and cons of arbitration and the amounts that were involved vis-à-vis the viability of arbitration at the time of signing the agreement and binding itself to the process. As earlier stated, it is imperative that courts provide the much needed certainty and assurance that once parties express an intention to resolve disputes through arbitration, that intention will be given effect by the courts.
11. In any case, arbitration as a dispute mechanism process is intended to be a much faster avenue than the courts hence the reason that parties select it over the court process. I note that the appellant does not



- deny having entered into the agreement and cannot thereafter be heard to opt out of the arbitration clause. No further consent was required beyond the consent that was made at the time of signing the agreement.
12. Having so stated, section 6 of the *Arbitration Act* provides that:
- “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...”
13. There are also numerous judicial decisions on the considerations that the court is required to consider in a section 6 application. In the case of *Blue Limited V Jaribu Credit Traders Limited*, Nairobi (Milimani) HCCS No. 157 of 2008 the court stated that:
- “Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance.”
14. Likewise, in *Niazsons (K) Ltd V China Road & Bridge Corporation Kenya*, [2001] eKLR the Court of Appeal in furtherance to section 6 of the Act elaborated on the factors that the court will consider in determining an application under this provision. These are:
- i. Whether the applicant has taken any step in the proceeding other than the steps allowed by section 6 of the Act;
  - ii. Whether there are any legal impediments on the validity, operation, or performance of the arbitration agreement; and
  - iii. Whether the suit indeed concerns a matter agreed to be referred.
15. I have considered the arbitration clause in question which is clause 20.2 of the agreement. It reads 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.”
16. By bringing the suit at the small claims court, the appellant had already acknowledged that there was a dispute. The clause is very clear about the width and breath of the disputes intended to fall under the dispute resolution process such that if they are not resolved by the customer care representatives would be resolved way of arbitration.
17. The court is also required to determine whether a party has taken any steps in the proceedings other than the steps allowed under section 6 of the Act. By taking any action towards the proceedings the respondent would be taken to have waived the right to proceed with arbitration. Fortunately, this is a



fact which is not controverted. The respondent entered appearance and contemporaneously filed the application for referral at the lower court and took no further steps towards the proceedings therein. This leaves no doubt on the respondent's intention to have the dispute resolved through arbitration.

18. As to whether there are any legal impediments on the validity, operation, or performance of the arbitration agreements, the appellant has not led any evidence to demonstrate any reasons that would make the arbitration clause inoperative or unenforceable. It is therefore my finding that the arbitration agreement is valid and capable of resolving the dispute between the parties.

#### **Determination**

19. The upshot of this is that I find no reason to disturb the finding of the lower court. Accordingly, this appeal fails and is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2023.**

**F. MUGAMBI**

**JUDGE**

