Careplus Limited v Ndugire (Miscellaneous Application E832 of 2021)
[2022] KEHC 225 (KLR) (Commercial and Tax) (25 March 2022) (Ruling)

Neutral citation: [2022] KEHC 225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E832 OF 2021

EC MWITA, J

MARCH 25, 2022

BETWEEN

CAREPLUS LIMITED ..... APPLICANT

AND

HARRISON NDUGIRE ..... RESPONDENT

RULING

1. The applicant Careplus limited (Careplus) has filed this motion dated 11th November 2021 under section 7(1) of the *Arbitration Act*, sections 1A, 1B, 3 and 3A of the *Civil Procedure ACT* and Orders 51 rules (1) and (10) of the *Civil Procedure Rules, 2010*, seeking, in the main, an interim measure of protection or conservatory order to preserve its business operations as a going concern by restraining the respondent, Harrison Ndugire (Harrison) from interfering in any manner whatsoever with its business and affairs pending the resolution of the dispute between the parties through arbitration.

2. Careplus also seeks an order staying proceedings and any consequential orders issued in the Chief Magistrates Court at Nairobi in CMCC NO. E1469 of 2021 pending the resolution of the dispute between the parties through arbitration, and an order directing that the dispute between the parties be referred to arbitration in accordance with clause 31 of its Memorandum and articles of Association.

3. The motion is premised on the grounds on its face, the supporting affidavit by Liu Zhi Gang and written submissions dated 10th December 2021. Careplus' case is that the respondent holds 1% shareholding following an agreement dated 11th April 2017 and was also appointed managing director. Both positions of managing director and shareholding were to laps automatically on termination of the agreement. Similar agreements were entered into between the major shareholder and the respondent while preserving the terms of the earlier agreement. Clause 31 of the Memorandum and Articles of

association contains a clause that any disputes arising be referred to two arbitrators to be appointed by each party.

4. Harrison violated the terms of the agreement forcing his removal as a director and termination of the agreement after a one-month notice had been served to him to pave way for a forensic audit to establish losses suffered by Careplus.

5. Harrison filed a suit before the Chief Magistrates Court, Milimani Commercial Courts (CMCC NO. E1469 OF 2021) and obtained orders allowing him access to the office to protect his interests as shareholder. According to Careplus, the orders were a derivative action which falls within the jurisdiction of this court under sections 238 and 239 of the *Companies Act*, 2015.

6. Careplus asserts that Harrison used the orders to its access offices and destroyed property and halted business operations and continues to commit criminal activities in its operations, including destroying evidence. Despite complaints made to the police, the criminal activities continue undeterred.

7. According to Careplus, it is in the process of initiating arbitration proceedings as required by its Memorandum and Articles of Association and, therefore, the proceedings before the Chief Magistrate's Court ought to be stayed; an order be issued by this court referring the dispute to arbitration and an order of protection be issued to enable it continue with its business while the parties pursue the arbitration proceedings.

8. Careplus argues that it has invested heavily and the activities by Harrison will adversely affect the business thus it will suffer irreparable loss and damage.

9. The Careplus relies on section 6(1) of the Arbitration Act that a court in which proceedings are brought in a matter that is the subject of arbitration agreement and before acknowledging the claim, may stay the proceedings and refer the matter to arbitration.

10. It also relies on *CWL Commercial (Edm) Inc. v Dynafour Real Estate, Partnership* 2013 ABQB 545 (CanLII) that as a matter of policy and law, the role of the court in relation to arbitration has been one of non-intervention. The objective of arbitration agreement and jurisprudence interpreting it is to promote adherence to those agreements.

11. Careplus also relies on section 7(1) of the Act that a party may seek an interim protection from the court before or during arbitral proceedings. It again cites on *Nyutu Agrovet Limited v Airtel Networks Limited* (Civil Application No. 61 of 2012[2015] eKLR that arbitration as a dispute resolution mechanism is not imposed on parties but they choose it freely.

12. Further reliance is placed on *Union Technology (K) Ltd v County Government of Nakuru [2017] eKLR* that parties are bound by mutual and agreed terms of the agreement.

Response

13. Harrison has filed a replying affidavit sworn on 6th December 2021 and written submissions dated 11th January 2022. He argues that termination of a director's or shareholder's position in a company is a matter of strict compliance with the law. (section 139 and 140 of the *Companies Act* through an ordinary resolution which was not done while section 141 states that the director to be removed ought to be given a fair chance to protest against the decision to remove him.

14. He asserts that the majority shareholder kept on changing the agreements to suit him depending on the success of Careplus; that the agreements did not provide for the process of removing a director and that the arbitration process should have been resorted to before the attempt to remove him and

therefore he had no option but to move the court when the majority shareholder purported to remove him without following the law.

15. According to Harrison, the termination notice served on him did not make any reference to arbitration and did not mention the alleged criminal activities

16. He contends that a director and shareholder is not employee of a company cannot be issued with a 30 days' notice to terminate shareholding. The alleged termination and removal was illegal. He also contends that Careplus has not shown that it will suffer loss that cannot be compensated by way of damage.

17. Harrison argues that since the majority shareholder resides in China, he had no option but to come to court to get orders to assist him continue running the company as the person who had knowledge on the costs of running the company including customers who had to be supplied with drugs. It is his case that Careplus, through the majority shareholder, has not come to this court without clean hands.

18. According to Harrison, on 11th October 2021 when he attempted to get his money (Kshs. 1,857,008), he was immediately presented with an undated agreement purporting to compel him to return 200 shares he had acquired in Careplus. He however refused to sign the agreement because it intended to remove him as a shareholder and director. This led the majority shareholder to send him the termination notice.

19. The majority shareholder purported to give two people power of attorney to enable them run the company thus sidelining him. Those people started using the police to prevent him from accessing Careplus premises, while the majority shareholder has o been purporting to pass fictitious company resolutions which is illegal. The majority shareholder has also barricaded the premises to prevent him from accessing the applicant's premises which is also illegal.

20. He relies on *Mohammed Jelle Omar & another v Ali Salal & another [2020] eKLR*, which upheld the supremacy of sections 139, 140 and 141. He argued that Careplus did not follow the law.

21. On whether the court should grant a conservatory order, Harrison asserted that the order is not deserved and cites the Supreme Court decision in *Gitarru Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* on the principles on which a conservatory order may be granted.

Determination

22. I have considered the application and the response. I have also considered the decisions relied on by the parties. The issue that arises for determination is whether this court should refer the matter to arbitration and if that be the case, whether it should issue an interim conservatory order to protect the business of Careplus pending determination of the arbitral proceedings.

23. Careplus argued that there exists a clause in its memorandum and articles of association to refer any dispute to arbitration. It therefore asserted that the dispute should be determined by an arbitrator as provided for in that clause.

24. Harrison on the other hand argued that the majority shareholder's action of removing him as a director and shareholder violated the *Companies Act* is matter that can only be determine by a court and not an arbitrator.

25. During the hearing of this application, counsel for Careplus admitted that Harrison had been removed after a notice was served on him as was required by the agreement. Harrison, therefore, ceased to be a shareholder and director in terms of that agreement.

26. From the conceded facts, it is clear that the issue of whether Harrison was lawfully removed as a director and shareholder of Careplus is not an issue that an arbitrator could deal with. It is a question of law; more so whether the law was followed and whether that action can stand. This is because section 139 of the *Companies Act* provides the manner of removing a director. The section provides that a company may by ordinary resolution at a meeting, remove a director before the end of the director's term. A special notice is however required for a resolution to remove a director under the section is passed.

27. Section 141 confers on a director the right to protest removal. It states that once a company receives a notice of motion for a resolution to remove a director, the company is required to send a copy of that notice to that director. The director concerned, whether or not a member of the company, may be heard on the discussion at the meeting convened to remove him. These are procedural requirements so that a director may not be removed without being given a fair hearing. They recognize the right to procedural fairness in Article 47 (1) of *the Constitution*.

28. It would be the court and not an arbitrator that would decide whether a director could be removed through any other means, before expiry of his term or without resigning, and whether or not such an action sidestepped *the constitution* and the law and should would be allowed to stand.

29. It is also worth noting, that section 6 of the Arbitration Act is clear that proceedings may not be referred to arbitration if the court was of the view that the agreement, the subject of the application, was null.

30. From what has been put before the court in terms of the pleadings and arguments, there is clear doubt on the legality of the agreement if it was the basis of removing Harrison without following the law. However, since it is Careplus that has moved the court on the basis that article 31 of its Memorandum and Articles of Association requires parties to go to arbitration in the event there is a dispute, I will not say more.

31. In the circumstances, I am of the considered view, that an arbitrator would not have jurisdiction to determine the lawfulness of the action to remove Harrison as a director and shareholder, whether by the Majority shareholder or whichever other way, before expiry of his term or resignation.

Conservatory orders

32. Careplus also sought conservatory orders to protect its business as the matter made its way through the litigation process. According to Careplus, Harrison's conduct was criminal in nature and threatened its business environment. Harrison denied committing any criminal acts that threatened the business. His case was that the Majority shareholder was using the police to keep him out of the company premises, thus preventing him from accessing the work place.

33. The law is settled when a court may issue a conservatory order. In Gitarru Peter Munya v Dickson Mwenda Kithinji & 2 others (supra) the Supreme Court was clear that a conservatory order is remedy in public law as opposed to private law and laid down the principles under which such orders may be granted to protect public interest as opposed to a private cause.

34. In the present case, the parties before court are private entities pursuing private and personal interests. A conservatory order would not therefore be appropriate in the circumstances of this case.

35. Furthermore, having found that the matter is not a suitable one for reference to an arbitrator, and the position of Harrison not being clear yet whether he could be removed as a director and shareholder without following the law, it would be inappropriate to issue any injunctive orders that would be prejudicial to him. If the majority shareholder broke the law, the court would be aiding violation of the law if it issued any restraining orders. This would be a case where one breaks the law and urges the court to protect that violation. That is not why the court exists.

36. For the above reasons, the application dated 11th November 2021 is declined and dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH 2022

EC MWITA

JUDGE