



**Harish Suresh Lakhiani & Hitesh Suresh Lakhiani (Suing as the Personal Representative ad Litem of the Estate of Suresh Rewachand Lakhiani v Ghanshyam Choithram Shahdarpuri; Global Apparels(K) Limited (Affected Party); Registrar of Companies (Interested Party) (Commercial Case E789 of 2021) [2022] KEHC 308 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E789 OF 2021**

**DAS MAJANJA, J**

**APRIL 28, 2022**

**BETWEEN**

**HARISH SURESH LAKHIANI & HITESH SURESH LAKHIANI (SUING AS  
THE PERSONAL REPRESENTATIVE AD LITEM OF THE ESTATE OF SURESH  
REWACHAND LAKHIANI ..... PLAINTIFF**

**AND**

**GHANSHYAM CHOITHRAM SHAHDADPURI ..... DEFENDANT**

**AND**

**GLOBAL APPARELS(K) LIMITED ..... AFFECTED PARTY**

**AND**

**REGISTRAR OF COMPANIES ..... INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. There are two applications before the court for determination. The Plaintiffs' Notice of Motion dated 9<sup>th</sup> September 2021 and the Defendant's and Affected Party's ("the Company") Notice of Motion dated 14<sup>th</sup> September 2021. The Plaintiffs' Notice of Motion is filed, inter alia, under Orders 40 and 51 of the Civil Procedure Rules and they seek the following orders:

1. Spent\*
2. Spent\*



3. This Honourable Court be pleased to issue an order restraining the Defendant/ Respondent, his agents or any persons acting under his instructions from denying the Plaintiffs / Applicants and /or the Legal Representatives of the estate of Suresh Rewachand Lakhiani {Deceased} access to the premises and Registered offices of Global Apparel {K} Limited at Athi River and / or any other premises belonging to the said company pending hearing and determination of the main suit.
  4. Spent\*
  5. This Honourable Court be pleased to issue an order restraining the Defendant/ Respondent, his agents or any persons acting under his instructions from excluding the Plaintiffs/ Applicants and /or the Legal Representatives of the estate of Suresh Rewachand Lakhiani {Deceased} from the day to day running and/or management of the affairs of the business of the Affected Company, including but not limited to inspection of the books of account and / or all documents relating to the operations of the company Global Apparels {K} Ltd pending hearing and determination of the main suit.
  6. Spent\*
  7. This Honourable Court be pleased to issue an order restraining the Defendant / Respondent by himself, his servants, agents and/or employees from disposing and / or transferring or in any other way dealing with the shareholding and / or Assets of Global Apparel {K} Limited pending hearing and determination of the main suit.
  8. This Honourable Court be pleased to issue an order that the Defendant/ Respondent furnishes to this Honourable Court and to the Defendant a complete set of the Affected Company's Bank Account numbers, Bank Account opening forms, mandate forms, and Bank Statements of all the Bank Accounts of the Affected from the year of inception {2001} to date.
  9. That this Honourable court be pleased to grant an order directing that the Officer Commanding Kitengela Police Station ensures compliance with the orders of this Honourable Court.
  10. That the cost of this Application be borne by the Defendant/ Respondent.
2. This application is supported by grounds set out on its face together with the supporting affidavit and further affidavit of Harish Suresh Lakhiani sworn on 9<sup>th</sup> September 2021 and 25<sup>th</sup> November 2021. It is opposed by the Defendant and the Company through the replying affidavit of the Defendant sworn on 27<sup>th</sup> September 2021 together with a Notice of Preliminary Objection of the same date.
  3. The Defendant's and the Company's Notice of Motion is made under section 6(1) of the Arbitration Act. They seek an order for stay of this proceedings and a referral of this matter to arbitration for hearing and determination. The application is supported by the grounds on its face and the supporting affidavit of Tom Mboya, the Company's Administration Manager sworn on 14<sup>th</sup> September 2021. It is opposed by the Plaintiffs through the replying affidavit of Harish Suresh Lakhiani sworn on 28<sup>th</sup> September 2021. Both applications were disposed by way of written submissions. Before I deal with the application, I propose to set out the essential facts borne out by the pleadings and depositions.
  4. Sometime in the year 2001, the Plaintiffs' father, Suresh Rewachand Lakhiani ("the Deceased") incorporated the Company and invested in a garment factory. As at 18<sup>th</sup> July 2001, the Company had a Share Capital of KES. 100,000.00 divided into 1,000 Ordinary Shares of KES. 100.00 each and the subscribers to the Memorandum and Articles of Association were the Deceased and Prakash



- Lakhiani who each owned a single share. On 15<sup>th</sup> September 2001, Narain Choithram Shahdadpuri, now deceased, was appointed as a third director of the Company through changes filed by the firm of D.V. Kapila & Company Advocates, where the Deceased now held 5,625 shares (37.5%), Prakash Lakhiani held 5,625 shares (37.5%) and Narain Choithram Shahdadpuri held 3,750 Shares (25%).
5. Prakash Lakhiani later transferred his shares to the Deceased and on 4<sup>th</sup> January 2010, resigned as a director of the Company leaving the Deceased holding 75% of the total shareholding and Narain Choithram Shahdadpuri holding the remaining 25%. On 9<sup>th</sup> February 2013, through a Special Resolution of the Company, the Company's Share Capital was increased from KES. 1,500,000.00 to KES. 50,000,000.00 with each share valued at KES. 100.00 and was split into 485,000 Ordinary Shares and 15,000 Preferential Shares. The Deceased was allocated 75% (363,750 Ordinary Shares) as well as all the 15,000 Preferential Shares with the remaining 25% Ordinary Shares (125,000 Ordinary Shares) being allocated to Narain Choithram Shahdadpuri.
  6. On 21<sup>st</sup> August 2014, the Annual Returns for the Company were filed indicating that the Share Capital of the Company was increased from KES. 50,000,000.00 to KES. 200,000,000.00 split to 500,000 Ordinary Shares valued at KES. 100.00 each and 1,500,000 Preferential Shares valued at KES. 100.00 each with the Deceased holding 375,000 (75%) Ordinary Shares and 1,500,000 Preferential Shares and Narain Choithram Shahdadpuri holding 125,000(25%) Ordinary Shares.
  7. On 14<sup>th</sup> October 2016, 125,000 Ordinary Shares and 750,000 Preferential Shares belonging to the Deceased were transferred to Narain Choithram Shahdadpuri and on 6<sup>th</sup> September 2017, 250,000 Ordinary Shares and 750,000 Preferential Shares were transferred from Narain Choithram Shahdadpuri to the Defendant. The Plaintiffs now claim that these two transactions were fraudulent, illegal and irregular and forms the basis of their suit against the Defendant, the Company and the Interested Party ("the Registrar").
  8. The Plaintiffs state that they are the legal heirs and successors to the Deceased by virtue of being his sons, and a Grant has since been issued by a Dubai Court on 7<sup>th</sup> February 2018. Their case is that following the aforesaid fraudulent actions, the Defendant is now solely and illegally running the affairs of the Company to the exclusion of the legal representatives and beneficiaries of the Estate of the Deceased and has blocked the Plaintiffs and family from accessing the Company premises. That the Company is now being run by the Defendant in an opaque manner prejudicing the interests of the family and lawful beneficiaries of the estate of the Deceased. In that regard, they now seek injunctive and other reliefs pending the hearing and determination of the suit. On the other hand, the Defendant and Company seek to stay the suit pending reference to arbitration. Since the Defendant seeks stay of the suit, it is incumbent upon the court to determine whether it has jurisdiction before proceeding to determine the Plaintiffs' application.

### **The Application**

9. As I stated earlier, the Defendant and Company's application dated 14<sup>th</sup> September 2021 is seeking stay of this proceedings and a referral of the matter to arbitration under section 6(1) of the *Arbitration Act*. It is not in dispute that Clause 32 of the Company's Articles of Association has a binding arbitration clause which states as follows:

Whenever any differences arises between the company on the hand and any of the members, their executors, administrators, or assigns on the hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or their after done, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach of otherwise



relating to the premises, or to these Articles or to any statutes affecting the Company or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, or whom once shall be appointed by each parties in difference.

10. The import of this clause is that all disputes arising as between the Company, its members, their executors, administrators or assigns and touching on inter alia the management of the Company are to be referred to arbitration. The Defendant and Company contend that the Articles of Association oust the court's jurisdiction to hear and determine this suit and it is proper that this suit be referred to arbitration.
11. The Plaintiffs oppose the application. They assail the competence of the Company's deponent by stating that there is no evidence to demonstrate that he is the Company's Administration Manager and that he has not annexed a company resolution by the Company or authority by the Defendant to enable him swear the deposition.
12. Substantively, the Plaintiffs contend that even though Clause 32 of the Company's Articles of Association provide that all disputes arising as between the Company as well as its members should be referred to arbitration this matter should not be referred to arbitration. The Plaintiff submits that the Defendant, having been charged in the Magistrates Court with several offences touching on the Company cannot be party to arbitral proceedings and that an Arbitrator would only be in a position to deal with the issue of breach of contract and not the Defendant's criminality and fraud which are a preserve of this Court. In sum, the Plaintiffs state that the proceedings before the Court relate to fraud and criminal conduct by the Defendant and thus not arbitrable and that the issue of whether an issue is arbitrable or not has been well settled by the courts in the country.
13. The Plaintiffs further contend that the Defendant cannot be termed as a member of the Company for the purposes of Clause 32 of the Articles of Association. They add that the issues involved in the dispute before the court are complex in nature and requires extensive evidence for which only this court would be suited to handle. They maintain that there is no justification for staying the matter and referring it arbitration.

#### **Whether the court should order stay of proceedings**

14. The application for stay and reference to arbitration is premised on the exhaustion doctrine which provides that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction should be invoked. This principle is consistent with Article 159(2)(c) of the *Constitution* which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect. In *Standard Group PLC v Wesley Kiptoo Yegon & another ML HCCC No. 83 of 2018 [2019] eKLR*, the court held that arbitration is dependent on the existence of an agreement between the disputant parties which is a reflection of the role of consent as the basis of arbitration.
15. In this case, the Plaintiffs do not deny that under Clause 32 of the Company's Articles of Association, there exists an agreement between the parties that their disputes ought to be resolved through arbitration. Although the Plaintiffs' contend the Defendant is not a member of the Company, its own Plaint at para. 16, which I have to take as true and correct, states that the Defendant became a shareholder as a result of a transfer of ordinary and preferential shares from the now deceased Narain Choitram Shahadpuri. Further at para. 17 of the Plaint, they also admit that the Defendant is entitled to 250,000 ordinary shares but not the preferential shares.



16. In its response, I understand the Plaintiffs now seek to avoid the arbitration agreement for the reasons which I shall now consider. The applicable provision, section 6 of Arbitration Act, empowers the court to grant an order of stay where there is an arbitration agreement and the circumstances where a party may avoid it 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.

2. ....

17. From the above provision, an arbitration agreement can only be avoided where the court finds that it is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. The party seeking to avoid the arbitration agreement bears the burden of proof (see *Euromec International Limited v Shandong Taikai Power Engineering Company Limited [2021] KEHC 93 (KLR)*). Further, under section 10 of the Arbitration Act, the court cannot intervene in matters governed by the Act unless provided for hence the Plaintiffs' objection can only succeed if it falls within the confines of the exceptions in section 6.

18. Do the reasons for seeking to avoid the arbitration agreement fit within section 6(1)(a) and (b) aforesaid? I do not hear the Plaintiffs claiming that the arbitration agreement contained in the Articles of Association is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. If anything, the Plaintiffs expressly admit the existence of the arbitration agreement, they do not allege that it is null and void, inoperative or incapable of being performed. They also admit that there is indeed a dispute between themselves.

19. The Plaintiffs contend that the issues raised in this suit are too complex for determination by the arbitral tribunal and that the Defendant is facing criminal proceedings in relation to matters in issue. I reject this contention. Whether a dispute is arbitrable or not does not depend on its complexity. From the facts I have outlined, the issue for resolution relates to the transfer or otherwise of the shares in company. The transfer of shares, fraudulent or otherwise and the issue of management of the Company are governed by the Articles of Association hence fall within the range of disputes that the parties have agreed will be resolved through arbitration. Neither the Arbitration Act or the arbitration agreement exclude any dispute from arbitration on account of complexity. Further, the issue of criminal liability is separate from civil liability and cannot be the basis of avoiding the arbitration agreement.

20. Since the Plaintiffs, the Defendant and the Company are the principal parties and are the subject to the arbitration agreement, the court has no option but to enforce the agreement between them by staying the suit pending reference to arbitration. The position of the Registrar as I understand is formal. I have no doubt that it will comply and effect the result of the arbitration once it is completed.



21. Finally, and as a result of the order of stay I propose to issue, the application for injunction being part of the suit must suffer the same fate. The Plaintiffs are of course at liberty to invoke the provisions of the Arbitration Act to seek interim relief if they so wish.

**Disposition**

22. As results of the findings I have made, I allow the Defendant's and Affected Party's Notice of Motion dated 14<sup>th</sup> September 2021 on the following terms;

- (a) This suit be and is hereby stayed pending reference of the dispute between the Plaintiffs, the Defendant and the Affected Party to arbitration in accordance with Clause 32 of the Articles of Association of the Affected Party.
- (b) The interim orders in force are hereby discharged forthwith.
- (c) The Plaintiff shall bear the costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**D. S. MAJANJA**

**JUDGE**

Mr Elkington instructed by Elkington and Associates Advocates for the Plaintiffs

Mr Muriuki instructed by Isoe Nyakwana and Company Advocates for the Defendant and Affected Party.

Mr Odhiambo, Advocate instructed by the Registrar of Companies.

