



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi & another v Sheikh (Civil Suit E728 of 2021)  
[2022] KEHC 574 (KLR) (Commercial and Tax) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 574 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E728 OF 2021**

**JN MULWA, J**

**MAY 24, 2022**

**BETWEEN**

**ALLY ISMAIL MWANGI ..... 1<sup>ST</sup> APPLICANT**

**COMPANY LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MOHAMED HUSSEIN SHEIKH ..... RESPONDENT**

**RULING**

1. Before the court is a Chamber Summons Application dated 19<sup>th</sup> October 2021 brought under Section 6 of the *Arbitration Act* 1995, Rule 2 of the *Arbitration Rules*, 1997; Section 3A of the *Civil Procedure Act* and Article 159(2) (c) of *the Constitution* of Kenya, 2010. The Defendants (applicants) seek that this suit be stayed and the dispute between the parties be referred to arbitration. They also seek costs of the application.
2. The application is based on the grounds stated at its face and the supporting affidavit of the 1<sup>st</sup> Defendant sworn on even date.
3. The Defendants aver that the dispute between them arose from an Agreement to Invest and Share Interest dated 17<sup>th</sup> March 2018 (hereinafter "the Agreement"). It is stated that under Clause 6 of the Agreement, there is an arbitration agreement in which parties agreed to refer any dispute arising therefrom to arbitration according to Islamic principles, and before a renowned Ulamaa to be agreed upon between the parties or a panel of renowned Ulamaas in case parties fail to agree on one.
4. They contend that they are ready and willing to participate in the arbitration proceedings but the Plaintiff has attempted to bypass the agreed dispute resolution process by filing this suit. It was thus their view that at this stage, this Court lacks the requisite jurisdiction to determine the suit.



5. In opposition, the Plaintiff filed a Replying Affidavit sworn on 25<sup>th</sup> October, 2021. He deposes that when the dispute arose, his advocates wrote to the Defendants’ advocates and proposed that the matter be referred to arbitration as per clause 6 of the agreement. That thereafter, his advocates engaged the Defendants’ advocates through several correspondences in an attempt to initiate the arbitration process but the Defendants frustrated the same through their lack of interest and cooperation.
6. By the above averments, the plaintiff has urged the court to dismiss the application with costs in the interest of justice. In the alternative, the plaintiff has urged the court to order the parties to proceed to arbitration under strict timelines with a caveat to adhere to the same, failure to which the matter should automatically revert and proceed in Court.
7. The application was canvassed by way of written submissions. Anchoring their submissions on the provisions of Section 6(1) of the *Arbitration Act* and the decisions in *UAP Provincial Insurance Company Ltd v Michael John Beckett* [2013] eKLR, *Yes Housing Co-operative Society Limited v Kenneth Onsare Maina* [2020] eKLR, *Shamji v Treasury Registrar Ministry of Finance* [2002] 1 EA 173 and *Kenya Pipeline Company Ltd v Datalogix Ltd & anor* [2007] eKLR, the Defendants/Applicants submit that where a dispute arises between parties to an agreement that has an arbitration clause, the court should not entertain a suit filed in that regard before the agreed dispute resolution channel is exhausted.
8. Further, the Applicants urge the court to be guided by the provisions of Article 159(2) (c) of *the Constitution* which obligates courts to promote alternative forms of dispute resolution such as arbitration when exercising judicial authority.
9. On the other hand, the Plaintiff/Respondent submits that the Defendants, through their delay tactics, have clearly demonstrated that they have no intention of proceeding to arbitration hence granting the orders sought will only slow down the wheels of justice. Further, the Respondent submits that the arbitral forum envisaged in their Agreement is different from the arbitral tribunal envisaged in the *Arbitration Act* hence difficulties may arise during enforcement of the eventual Award. They reiterated that if the court is however minded to grant the orders sought, the dispute should be referred to arbitration to a single arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya within 14 days of the date of this Court’s Ruling on the instant application.
10. I have considered the application, the affidavits in support and in opposition, as well as the submissions.
11. There is no dispute that the parties herein entered into an Agreement to Invest and Share Interest dated 17<sup>th</sup> March, 2018. Clause 6 of the said Agreement contained an arbitration clause which stipulates as follows: -

“ Any dispute arising out of this agreement shall be referred to arbitration according to Islamic principles and before a renowned ulamaa to be agreed upon between the parties. Should the parties not agree upon a Single Arbitrator then the matter shall be referred to a panel of renowned Ulamaas for arbitration.”
12. Section 6(1) 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. From the above provision, it is clear that if a matter is subject of an arbitration agreement, the court should stay the proceedings and refer the dispute to arbitration unless it is demonstrated that the agreement has no effect or that the claim is not arbitrable under the agreement. This is in line with the well settled principle that where a dispute resolution mechanism exists outside the court, it must be exhausted before the court’s jurisdiction is to be invoked- Article 159 (2) (c).
14. In the present case, the parties are in agreement that the claim before this court arose under the agreement and can indeed be referred to arbitration. The Plaintiff’s only concern is that the Defendants have been uncooperative and may frustrate or delay the resolution of the dispute if referred to arbitration. This court’s hands are however tied by the arbitration agreement and the above provisions of the law since the parties mutually and voluntarily agreed to arbitration as their preferred forum for resolution of disputes arising from the agreement. The court cannot therefore rewrite the terms of the agreement but will only give effect to the arbitration agreed on.
15. For the foregoing reasons, the court finds that the application dated 19<sup>th</sup> October 2021 is merited and is allowed.

**ORDERS:**

The dispute between the plaintiff and the Defendants herein, arising from the Agreement dated 17th March 2018 between the parties is hereby referred to arbitration, in accordance with muslim principles before a single renowned arbitrator (ulamaa), to be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya chapter, within 30 days of this ruling.

The costs of this application shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2022.**

**J.N.MULWA.**

**JUDGE**

