



**Machiri Limited v Sogea-Satom Kenya Branch (Civil Suit E808 of 2021)
[2022] KEHC 11914 (KLR) (Commercial and Tax) (2 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E808 OF 2021
DO CHEPKWONY, J
AUGUST 2, 2022**

BETWEEN

MACHIRI LIMITED PLAINTIFF

AND

SOGEA-SATOM KENYA BRANCH DEFENDANT

RULING

1. This Ruling determines a Notice of Motion application dated October 18, 2021 and a Notice of Preliminary Objection dated October 14, 2021 both filed by the Defendant. The gist of both the application and notice of preliminary objection is the same, that is, to have the suit struck off and the dispute referred for arbitration pursuant to an arbitration clause in an agreement entered into by the parties.
2. To the statement into context and for purposes of precision, the Defendant through the Notice of Motion Application dated October 18, 2021, sought for the following orders;
 - a. That subject to prayer No.2 below, this court be pleased to stay the proceedings in this matter and refer the parties to arbitration.
 - b. That the Respondent herein, Machiri Limited, be ordered to institute arbitration proceedings regarding the dispute herein under the Rules of Arbitration of the International Chamber of Commerce before three (3) arbitrators appointed in accordance with the said rule within ninety (90) days from the date of the stay of the proceedings herein failure to which this suit shall stand struck out with costs to the Applicant, Sogea-satom Kenya Branch.
 - c. That this Honourable Court be pleased to issue such further orders as it shall deem fit and just in the circumstances of this case.



- d. That the costs of this application be borne by the Respondent.
3. That application is premised on eleven (11) grounds on its face, and further supported by an affidavit sworn on even date by Benoit Seurat, the Defendant's Administrative Financial Director. His case is that, the present dispute emanates from a contract between the Plaintiff and the Defendant dated September 4, 2018 in which its scope was rehabilitating aircraft pavement and AGL System of Moi international airport in Mombasa. Clause 29 of that Contract vests the jurisdiction to adjudicate and determine disputes arising therefrom to arbitration before three (3) arbitrators to be appointed in line with the Rules of Arbitration of the International Chamber of Commerce. Therefore, this court lacks the requisite jurisdiction to hear and determine the matter, In addition, it is averred that the suit has not only been filed in circumvention of Clause 29 of the Contract but also offends the legal doctrine of forums non conviniens. The Defendant thus describes the present suit as fictitious, frivolous and vexatious and craves for the court to strike it out in limine.
 4. The grounds in the Notice of Preliminary Objection are equally the same as reproduced above and a summary thereof is that this court lacks jurisdiction by virtue of Clause 29 of the Contract which provides the first recourse to disputes between the parties as arbitration.
 5. The Plaintiff opposed the application by filing a Replying Affidavit sworn by its Managing Director, James Mbugua Macharia, on October 27, 2021. He averred that the suit should proceed for determination on merit notwithstanding the arbitration clause by virtue of the decision in the Court of Appeal case of *Charles Njogu Lofy -vs- Bedouin Enterprises Ltd* Civil Appeal No. 253 of 2003. The Plaintiff further avers that the arbitration clause is unconscionable, inoperative, null and void for among other reasons that; the same is a standard form contract imposed by the defendant without the input of the Plaintiff with the effect of high costs disproportionate to the size of the present dispute which in the Plaintiff's view is contrary to the spirit behind arbitration of having disputes resolved in a cost efficient manner; that the contract is a lop-sided one for embracing applicability of different laws from three different jurisdictions yet the Clause states that the arbitration would be governed by laws of Kenya. It is for that reason the Plaintiff expresses the view that the enforcement of the arbitration clause would defeat its constitutional right to access of justice under Article 48 of *the Constitution*. The Plaintiff therefore seeks the court to dismiss the challenge and seize jurisdiction on the matter.
 6. The Defendant filed a further affidavit sworn by its Financial Director, Benoit Seurat on February 9, 2022 in rebuttal of the averments made in the Replying Affidavit. He averred that the Defendant took the challenge on jurisdiction at the earliest opportunity available, immediately after entering appearance and its acquiescence to this court's jurisdiction cannot be implored hence distinguishing the present case from the one quoted by the Plaintiff. Unlike the present case, in the former case the Defendant had filed a defence and counter claim thus conceding to the court's jurisdiction. He added that parties had negotiated before the signing of the contract which dispels the allegations that the clause is a standard form contract and since there was proper bargaining, the Plaintiff cannot seek to walk away from the arbitration clause. In any event, the Plaintiff (sic) had filed a Miscellaneous Suit vide HCCC Misc. App. No.E667 of 2020 seeking stay of termination of the same contract pending the conclusion of arbitration process it indicated was commencing. In that view, the Plaintiff cannot purport to run away from the arbitration process it undertook to commence, and the present suit is merely an abuse of the court process. Finally, the Defendant sought the court not to rewrite a contract that had been entered into between the parties and referred the court to Article 159 of *the Constitution* which calls for alternative dispute resolution.
 7. Directions were issued that the Notice of Motion application and Notice of Preliminary Objection be canvassed by way of written submissions and as the record reflects, both parties complied with the



Defendant/ Applicant filing a set of submissions dated February 9, 2022 whilst the submissions by the Plaintiff are dated April 1, 2022. I have read through the two sets of submissions and in my view, they reiterate the summary I have made above, and I see no need to repeat the same here.

Analysis and Determination

8. I have considered the Notice of Motion application at hand, the Notice of Preliminary Objection, the affidavits sworn in support and rebuttal thereof and the extensive and elaborate submissions filed on behalf of the parties as well as the authorities they have relied upon in support of their arguments.
9. It is a common ground and an undisputed fact that the parties entered into a subcontract agreement dated September 4, 2018 under which Clause 29 thereof provides for disputes arising between the parties to be referred for arbitration.
10. In light of the Preliminary Objection filed by the Defendant, I will reiterate the legal principle that a Preliminary Objection should only consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. I find the Preliminary Objection filed herein well grounded as it is based on uncontested facts and challenges the jurisdiction of the court to hear and determine the dispute.
11. In my view, since both the Notice of Motion application and Notice of Preliminary Objection challenge the jurisdiction of the court in which the Defendant/Applicant prays that the suit be struck out. The only issue which is common in both and crystallizes for determination in both the Preliminary Objection and the application is whether the suit should be struck out or stayed for want of jurisdiction pursuant to the arbitration clause in the agreement.
12. Section 6(1) of the [Arbitration Act](#) stipulates as follows: -

“ 6. Stay of legal proceedings

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.”
13. The Court of Appeal in Civil Appeal No.186 of 2013, [Mt. Kenya University -vs- Step Up Holding \(K\) Ltd](#) [2018] eKLR held as follows;

“We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent’s application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant’s response to the respondent’s application for injunction amounted to the taking of a procedural step in the



matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed."

14. Lastly, Article 159 (2)(c) of *the Constitution* of Kenya, 2010 provides as follows:-

"In exercising judicial authority, the Courts and tribunals shall be guided by the following principles:

- (a)
- (b)
- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).

15. It then follows that the tenor and import of Article 159(2)(c) of *the Constitution* as read together with Section 6(1) of the *Arbitration Act*, is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. However, Section 6(1) reproduced above connotes that where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.

16. It is on that understanding that the Plaintiff expressed the view that the application and challenge on jurisdiction is time barred given that the Defendant filed a Memorandum of Appearance not under protest and seven (7) days later filed the challenge on jurisdiction. In the Plaintiff's view, the Defendant ought to have filed memorandum of appearance under protest contemporaneous with the application made under Section 6 of the *Arbitration Act*. In other words, what the Plaintiff is saying is that the defendant acquiesced to the jurisdiction of this court, which is vehemently denied by the Defendant.

17. A keen consideration of Section 6(1) of the *Arbitration Act* reveals that where a party seeks to apply for referral of a dispute to arbitration, he may do so by filing an application either at the time of entering appearance or before acknowledging the claim in question. In my mind, within the meaning of that provision, a claim may be acknowledged by either filing a defence or taking any other procedural step in the matter. In the present case, it is not denied that the Defendant after filing the Memorandum of Appearance, has never taken any other procedural step in the matter save for filing the present application to invoke the arbitration clause. That differentiates the present case from the *Charles Njogu Lofty -vs- Bedouin Enterprises Ltd* case wherein the Defendant had acknowledged the claim by filing a defence which the Plaintiff has relied on in seeking to have this court dismiss the application at hand.

18. Having said that, it is my view that the Defendant raised the issue of Arbitration promptly since it was open for the defendant to file the application either at the time of entering appearance or before acknowledging the claim. It therefore cannot be said that the application is time barred as the Plaintiff submits.

19. Looking at the said Clause 29 of the agreement, it provides that any dispute arising out or relating to the sub contract shall be settled by parties thereto amicably and if not settled within sixty (60) calendar days, the same to be settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) Arbitrators appointed in accordance with the said rules. The same clause goes on to state that the arbitration shall be done in Nairobi and governed by the Laws of Kenya. Therefore, the intention of the parties at the negotiation level was to pursue an arbitration first before resorting to redress by the court, hence this court cannot rewrite the terms of the subcontract agreement as between



the parties. I therefore disagree with the Plaintiff's submissions that the Arbitration clause was forced upon it and would be costly beyond its reach.

20. Under the parole rule of evidence, evidence of negotiations, as the letters the Plaintiff sought to rely on, is never admissible to vary the terms of the written contract unless it is shown there is a latent ambiguity and illegality. It is assumed that the intentions of the parties to a written contract are embodied in the written contract itself. In the same vein this court reiterates that contracts belong to the parties, and they are at liberty to negotiate and even vary the terms as and when they choose, and this they must do together and with a meeting of the minds.
21. Therefore, for the Plaintiff to succeed in challenging the arbitral Clause, it ought to have shown to the satisfaction of the court that the defendant/Applicant either varied the terms of the contract without the Plaintiff's knowledge and consent or there were other factors vitiating the contract such as fraud, misrepresentation, and coercion. This has not been done, and ordinarily this court cannot rewrite the contract to allow the Plaintiff escape from the arbitration Clause, which in the plaintiff's view is a bad bargain, and oppressive to it.
22. For the above reasons, I am persuaded that both the Defendant's Notice of Preliminary Objection and the Notice of Motion are merited and allow the same in terms of the following orders;
 - a. An order do and is hereby issued staying the proceedings herein and the matter is referred to arbitration.
 - b. That the matter be mentioned before the Deputy Registrar for parties to agree on the appointment of the arbitration tribunal.
 - c. Costs of the application are awarded to the Defendant/Applicant.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF AUGUST, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Omondi counsel holding brief for Mr. Kenyatta for the Defendant

No appearance for and by Plaintiff/Respondent

Court Assistant - Sakina

