



**Omondi & another v Angasa & 3 others (Civil Case 10 of 2022)  
[2022] KEHC 13007 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13007 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 10 OF 2022  
OA SEWE, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**MICHAEL OKACH OMONDI ..... 1<sup>ST</sup> PLAINTIFF**

**RONALD LUKORITO WANYAMA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WILLIAM ATATI ANGASA ..... 1<sup>ST</sup> DEFENDANT**

**TREVOR NYAMBASO ATATI ..... 2<sup>ND</sup> DEFENDANT**

**EXTROPICA TRADING CO. LTD ..... 3<sup>RD</sup> DEFENDANT**

**EXTROPICA MERCHANT LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By a plaint dated March 1, 2022, the plaintiffs sued the defendants on the basis of a shareholders' agreement by which they agreed to incorporate a company known as Extropica Trading Company Limited (the 3<sup>rd</sup> defendant, hereinafter, "the company"). Their main objective was the importation of "Shark Energy Drink." Upon the injection of the share capital by its members, the company commenced business and imported the 1<sup>st</sup> container in August 2019. Things came to a head on February 16, 2021 when the directors/members came to the realization that the company had accumulated a debt to the tune of Kshs 7,184,470/=. Attempts to solve the impasse as to how the loan accrued and how it could be settled did not yield any positive results.
2. Accordingly, the plaintiffs opted to invoke the mediation clause in the shareholders' agreement after it emerged that the defendants had been paying themselves monies from the company without the consent, authority or participation of the plaintiffs. While this discussion was on-going, the defendant withdrew the franchise pursuant which the company was trading and formed another company known as Extropica Merchant Limited (the 4<sup>th</sup> defendant herein) through which they commenced operations



to the exclusion of the plaintiffs. It was at that juncture that the plaintiffs filed this suit alleging, inter alia, fraud on the part of the defendants. They, accordingly, sought the following reliefs:

- (a) An order that some 3140 boxes of energy drinks imported by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs through the 4<sup>th</sup> defendant via Entry No 22EMKIM400283826 dated February 22, 2022 currently warehoused in Extropica building in Embakasi be detained in a neutral warehouse mutually agreed between the parties at the expense of the 3<sup>rd</sup> defendant pending the hearing and determination of the suit.
  - (b) An order that a forensic audit be done on the accounts of the 3<sup>rd</sup> defendant between August 2019 to date at the expense of the 3<sup>rd</sup> defendant.
  - (c) Any other relief and/or remedy the court will find just and fit to grant in the circumstances of this case.
  - (d) Cost of the suit.
3. Simultaneously, the plaintiffs filed a notice of motion seeking temporary injunction to preserve the 3140 boxes of energy drinks aforementioned pending the hearing and determination of the application as well as the main suit. The plaintiffs also prayed for an order for a forensic audit of the accounts of the 3<sup>rd</sup> defendant to be undertaken in the interim. Convinced that the application was warranted, the court issued ex parte orders on March 2, 2022 in terms of prayer 2 of the notice of motion and fixed the application for further directions on March 16, 2022. Thereafter, on the March 14, 2022, a notice of preliminary objection was filed by the defendants on the following grounds:
- (a) The cause of action is based on a directors/shareholders agreement dated July 23, 2020 which, under clause 8 provides for mediation and arbitration in case of a dispute between the shareholders/directors, and therefore this court lacks jurisdiction to hear and determine this suit as it is a violation of section 6 of the Arbitration Act, cap 49 of the Laws of Kenya.
  - (b) The plaintiffs' claim before the court is an abuse of the court process by invoking a multiplicity of proceedings as there are already existing cases between the same parties, being MCCC/E13086 of 2021 and Miscellaneous Application MCCCmisc/E1600 of 2021 at Milimani Commercial Court, thus amounting to a breach of the res sub-judice rule as provided under section 6 of the Civil Procedure Act.
4. In the premises, directions were give on March 16, 2022 that the defendants' preliminary objection be disposed of by way of written submissions. To that end, counsel for the defendants, M/s Mukuiya Ngotho & Associates Advocates and M/s Jared Ongeta Juma & Co. Advocates, filed joint submissions on March 30, 2022 proposing the following issues for determination:
- (a) Whether or not the court has the jurisdiction to hear and determine this suit;
  - (b) Whether the plaintiff's claim is an abuse of the court process for being res sub-judice.
5. Mr Juma for the defendants made reference to *Mukisa Biscuits v West End Distributors Ltd [1969] EA 696* as to what constitutes a preliminary objection and pointed out that the grounds include "...a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..." Counsel further relied on article 159(2)(c) of the Constitution and section 6(1) of the Arbitration Act in urging the court to find that it lacks the jurisdiction to hear and determine the dispute; and that there is a constitutional obligation to refer the matter for mediation or arbitration as per the agreement of the parties.



6. Mr Juma also submitted that this suit is sub-judice from the standpoint of Section 6 of the Civil Procedure Rules in that the plaintiffs have filed two similar matters at Milimani Commercial Court involving the same parties, being MCCC/E13086 of 2021 and Miscellaneous Application MCCC/MISC/E1600 of 2021. He relied on [Kenya National Commission on Human Rights v Attorney General & Others](#) [2020] eKLR; [Richard Kiplangat v Grace Sang](#) [2020] eKLR; [ANN v R M K](#) [2021] eKLR and *Nyanza Garage v Attorney General*, Kampala High Court Civil Suit No 450 of 1993, that *sub-judice* is a matter of law, which if argued as a preliminary point may dispose of the suit; the object being to avoid multiplicity of suits between the same parties over the same subject matter.
7. On his part, Mr Mkan for the plaintiffs relied on his written submissions dated May 16, 2022. In addition to the issues proposed by Mr Juma, Mr Mkan invited the court to determine whether the grounds set out in the defendants' notice of preliminary objection qualify as points of law. On whether the court lacks jurisdiction to hear and determine this suit Mr Mkan pointed out that at paragraph 13 of their notice of motion, the plaintiffs acknowledged the existence of an arbitral agreement between the parties and pointed out that they actually initiated mediation but that the defendants refused to cooperate. He relied on the documents annexed to the supporting affidavit of the plaintiff's notice of motion dated March 1, 2022.
8. On whether this suit is sub-judice, Mr Mkan was of the posturing that there is no sufficient material placed before the court to demonstrate that the parties in this case are the same parties in the two above mentioned matters. He submitted that, without any indication as to the names of the parties or the subject matter of those 2 suits, the court is not in a position to determine whether indeed this suit is sub-judice. In the same vein, counsel cited *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (supra), [David Karobia Kiiru v Charles Nderitu Gitoi & Another](#) [2018] eKLR, [Samuel Waweru v Geoffrey Muhoro Mwangi](#) [2014] eKLR and [Oraro v Mbaja](#) [2005] eKLR to augment his argument that a preliminary objection must be premised on a clear point of law and not disputed facts which are yet to be tested and proved by evidence. Thus, it was the submission of Mr Mkan that the defendants' preliminary objection does not meet the threshold set in the Mukisa Biscuits Case, and as such should be dismissed with costs to the plaintiffs.
9. It is now settled that a preliminary objection must be confined to points of law and should not be blurred by factual details, particularly if the facts are disputed. Hence, in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696 it was held that:
 

“... a preliminary objection consists 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
10. For good measure, Sir Charles Newbold, P added thus, in the *Mukisa Biscuits Manufacturing Co Ltd Case*:
 

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
11. With the foregoing in mind, I have looked at the defendants' preliminary objection and note that it was premised on two grounds; namely, that the suit is *sub-judice*; and that the parties contract made



provision for arbitration, thereby ousting the jurisdiction of the court in the first instance. On whether the suit is sub-judice, section 6 of the [Civil Procedure Act](#) is explicit that:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

12. Hence, in [Kenya Airports Authority v Anthony Mutumbi Wachira](#) [2015] eKLR, the Court of Appeal took the view that:

“We think, as a matter of policy of the law that finds expression in section 6 of the [Civil Procedure Act](#) for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits or proceedings in respect of the same subject matter in issue.”

13. The defendants accordingly posited that there are in existence two previous suits that are still pending before Milimani Commercial Courts concerning the same subject matter and involving the same parties. At paragraph b) of the notice of preliminary objection dated March 11, 2022, the particulars of those cases were simply given as MCCC/E13086 of 2021 and Miscellaneous Application MCCC/MISC/E1600 of 2021. Neither the names of the parties nor details as to the subject matter were supplied. I note too that, at paragraph 14 of the plaintiffs’ written submissions, the plaintiffs denied having been served with any documents in relations to the two matters; and that they are strangers to the said suits. Where such is the stance of one of the protagonists, it would require evidence for the court to determine whether or not the subsequent suit is *sub-judice*.

14. Thus, in this regard, I am in full agreement with the expressions in [Oraro v Mbaja](#) [2005] 1 KLR 141, by Hon Ojwang, J (as he then was) that:

“...A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

15. In the light of the foregoing, I am not persuaded that the sub-judice argument amounts to a pure point of law that can be resolved without further inquiry by the court.



16. On whether the court lacks jurisdiction to determine this suit by reason of the parties' arbitral agreement, there appears to be no dispute that, by their shareholders' agreement dated July 23, 2020, the parties covenanted thus, as per paragraph 8.1 thereof:

“Any dispute difference or question which may arise at any time touching upon the construction of this agreement or on the rights and liabilities of the directors with respect thereto shall in the first instance be referred to mediation to allow parties reach an amicable solution and in the event that mediation fails, be referred to the decision of a single arbitrator to be agreed upon between the Shareholders or in default of agreement within fourteen (14) days to be appointed at the request of any shareholder by the chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators.”

17. In their submissions, the plaintiffs acknowledged, at paragraph 3 of Part D, that they were aware of the terms of clause 8 of the shareholders' agreement; and that they took the initiative to engage the defendants in mediation and arbitration, but that the defendants refused to cooperate. There is therefore sufficient basis for the court to conclude that indeed, the dispute between the parties ought to have been referred to arbitration in the first instance. This is because section 10 of the Arbitration Act is explicit that:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

18. And, as was aptly stated by the Court of Appeal in Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR:

“Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about.”

19. Similarly, in Prof Lawrence Gumbo & Another v Honourable Mwai Kibaki & Others, High Court Miscellaneous No 1025 of 2004, Hon Nyamu, J (as he then was) had the following to say in connection with Section 10 aforementioned, which I find instructive:

“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented...”

20. That said, the question to pose is whether this suit is necessarily ill conceived, fatally defective, bad in law and incompetent as posited by the defendant to the extent that it warrants striking out or dismissal for lack of jurisdiction; and my quick answer thereto is that that is not the case; granted the provisions of section 6 of the Arbitration Act. Here is what section 6 of the Arbitration Act states:

(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) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
    - (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
  21. Hence, unless a party takes the initiative to promptly seek referral, the parties would be presumed to have submitted themselves to the jurisdiction of the court. It is therefore notable that the defendants' application for stay of proceedings pending arbitration was not filed until March 30, 2022. In the circumstances, to the extent that the defendants did not promptly seek stay of these proceedings within the strictures of section 6(1) of the *Arbitration Act*, they are presumed to have waived their rights to have the dispute resolved by way of arbitration. Indeed, in *Astro Exito Navegacion SA (The Messiniaki Tolmi)* (1984) 1 Lloyd's Rep 266 it was held that:

“...a person voluntarily submits to the jurisdiction of the court if he voluntarily recognizes or has voluntarily recognized that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of the claim.”
  22. Similarly, *Lofty v Bedouin Enterprises Limited* [2005] 2 EA 123 the Court of Appeal held that:

“...section 6(1) of the *Arbitration Act* of 1995 which the court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time the applicant enters appearance. It seems that the object of section 6(1) of the *Arbitration Act* of 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings ... section 6(1) has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance.”
  23. I take the view therefore that, in the absence of an order of stay, made pursuant to section 6(1) of the *Arbitration Act* following a valid application in that regard, as is the case herein, there is absolutely no basis for the defendants to argue, as they did, that the court has no jurisdiction to entertain this matter.
  24. In the light of the foregoing, it is my finding that that the defendants' preliminary objection dated March 11, 2022 is devoid of merit and is hereby dismissed with costs.
- It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF  
SEPTEMBER 2022

OLGA SEWE

JUDGE

