



REPUBLIC OF KENYA



**Jiinue Company Limited v Super Metro Limited (Commercial Petition E011 of 2021)
[2022] KEHC 14479 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E011 OF 2021
DAS MAJANJA, J
OCTOBER 28, 2022
IN THE MATTER OF SUPER METRO LIMITED**

BETWEEN

JIINUE COMPANY LIMITED PETITIONER

AND

SUPER METRO LIMITED RESPONDENT

RULING

1. The respondent (“the company”) has moved the court by the chamber summons dated October 6, 2021 seeking to stay this suit pending reference to arbitration under section 6(1) of the [Arbitration Act, 1995](#) in accordance with article 32 of the Company’s Articles of Association. The application is supported by the affidavit of its director and shareholder, Nelson Mwangi Nduki, sworn on the same day. The Petitioner opposes the application through the affidavit of its director, Fredrick Gicharu Mariira, sworn on September 16, 2022.
2. It is not in dispute that the petitioner is a shareholder and director of the Company where it holds 100 shares equivalent to 7.142% of the total share capital. The substance of the petitioner’s case is set out in the petition dated August 23, 2021. The gravamen of its case is that at an ordinary meeting held on May 29, 2020, the Company purported to amend its Articles of Association by introducing changes which, in its view, were contrary to sections 22, 24 and 27 of the [Companies Act, 2015](#) and therefore null and void. That the Petitioner was subjected to disciplinary proceedings based on accusations of alleged conflict of interest that it had started a competing company by the name of Spruce Shuttle Limited whereupon it was expelled contrary to the Articles of Association.
3. Consequently, its vehicles were attached occasioning it a loss of Kshs 808,908.00. The Petitioner states that it suffered loss and damages including the loss of dividends, director emoluments and goodwill.



It also accused the Company directors of promoting a new company Super Metro Executive Coach Limited with the intention of transferring the business of the Company to it.

4. The Petitioner seeks several reliefs including declarations that the resolutions passed on May 29, 2020 purporting to amend the Articles of Association are null and void as they are contrary to the [Companies Act, 2015](#) and ancillary orders for compensation. In the alternative the Petitioner seeks a declaration that it is still a bonafide director and shareholder of the Company.
5. The basis of the Company's application is that the court is obliged to refer the matter to arbitration as article 32 of the Articles of Association provides that:

Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching on true intent or construction or the incident, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered pursuant of these Articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles to any of the statutes affecting the Company, every such difference, shall be referred to the decisions of an arbitrator, to be appointed by the parties in difference, or if they are not agreed upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by such each of the parties in differences.

6. The Company's application is grounded under section 6 of the [Arbitration Act](#) which, at the part material to this application, provides 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. [Emphasis mine]

7. The Court of Appeal in [UAP Provincial Insurance Company Ltd v Michael John Beckett](#) NRB CA Civil Appeal No 26 of 2007 [2013] eKLR construed section 6(1) above as follows:

(17) It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the [Arbitration Act](#) is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.



(18) The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

8. The Petitioner opposes the application on the basis that it is based on the purported amended Articles of Association whose legitimacy and validity is in question in these proceedings as they were enacted in a manner contrary to the law and are therefore null and void. The Petitioner further contends that the dispute as set out in the petition is not a difference which is subject to arbitration under the arbitration clause relied on by the Company. It states that the substance of the petition touches on the rights of a founding member of a company which is a novel issue and the attempt to remove it from the Company which is not covered by the arbitration clause. Further, that the petition touches on illegal attempts to amend the Articles of Association of the Company which is an issue that cannot be arbitrated upon under the arbitration clause.
9. The Petitioner's objection to the application is two-fold; First, the application is based on amended Articles of Association which are illegal null and void and second, the subject matter of the dispute is not arbitrable as it is not a difference within the meaning of the arbitration clause.
10. On the first issue, the gravamen of the Petitioner's case is that the Company introduced amendments to the Articles of Association hence they are illegal and cannot form the basis of a reference to arbitration. In other words, the Petitioner contends that the arbitration agreement is null and void. From the Articles of Association provided by the Company, the impugned amendments did not affect Article 32 which is part of the original Articles of Association. The amendments introduced are contained in Article 33 under the title, "Confidentiality" and did not affect the arbitration clause enacted in the original Articles of Association. I therefore hold that the arbitration clause is valid hence this objection lacks merit.
11. Article 32 contemplates that any difference between the Company and its members shall be subject to arbitration. A difference is simply a dispute. While the Petitioner accepts that there is a dispute, its case is that the issue of amendment of the Articles of Association is not a matter that can be subjected to arbitration. A reading of Article 32 shows that breaches relating to the articles and any statutes affecting the Company shall be referred to the arbitration. The allegation by the Petitioner, apart from other claims, is that the Company violated the *Companies Act, 2015* and the Articles of Association in amending the Articles. This dispute I hold falls within the arbitration clause as the *Companies Act, 2015* is a statute affecting the Company. In addition, there is no carve out or exclusion in the arbitration clause for a novel dispute or disputes between the founding shareholders hence all disputes concerning the Company and its members constitute a difference and therefore fall within the purview of the arbitration clause.
12. The petitioner has not established any reason for the court to refuse the application for stay of proceedings. For the aforesaid reasons, I allow the respondent's chamber summons dated October 6, 2021 and order as follows:



- a. This suit be and is hereby stayed pursuant to section 6(1) of the *Arbitration Act* and the dispute herein is referred to Arbitration in accordance with Article 32 of the Articles of Association of Super Metro Limited.
- b. The costs of the application shall abide by the arbitration.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mugo instructed by Gikenye Mugo and Rienye Advocates for the Petitioner.

Mr Akhulia instructed by Mbue Ndegwa and Company Advocates for the Respondent.

HC COMM PETITION NO. E011 OF 2021 RULING Page 3

