



CM & A Logistics Limited v Upland Premium Diaries and Foods Limited (Civil Appeal E295 of 2022) [2022] KEHC 14428 (KLR) (Civ) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E295 OF 2022

DAS MAJANJA, J

OCTOBER 21, 2022

BETWEEN

CM & A LOGISTICS LIMITED APPELLANT

AND

UPLAND PREMIUM DIARIES AND FOODS LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. C. Ndumia, Adjudicator/RM date 13th April 2022 at the Small Claims Court at Nairobi in SCCC Claim No. E434 of 2022)

JUDGMENT

1. This appeal arises from a ruling and order where adjudicator allowed the respondent's preliminary objection and in effect struck out the suit with no order as to costs.
2. It is not in dispute that the parties entered into a motor vehicle hire contract dated May 25, 2021 ("the agreement") which contains an arbitration clause which provides that all disputes arising thereunder shall be referred to a single arbitrator agreed upon by the parties or in default of such agreement one nominated by the chairman of the chartered institute of arbitrators, Kenya branch.
3. Before the trial court, the respondent filed a notice of preliminary objection dated March 9, 2022. It contested the territorial jurisdiction of the court under section 11 as read with Gazette Notice No 3791 of 2021. It further invoked section 6 of the *Arbitration Act* and urged that the suit should be struck out as it ought to have been referred to arbitration.
4. In the ruling, the adjudicator accepted that a preliminary objection is not a legal procedure to seek stay of proceedings under section 6 of the *Arbitration Act* but nevertheless held that the said provisions as read with article 159(2)(c) of the *Constitution* obliged the court to give effect to the arbitration



- agreement. The court also found that the respondent had raised the issue of arbitration promptly as required by section 6(1) of the *Arbitration Act*.
5. It is decision upholding that respondent's preliminary objection that has precipitated this appeal set out in the memorandum of appeal dated May 6, 2022. The appeal was canvassed by way of written submissions.
 6. I have considered the parties' arguments and I hold that the learned trial magistrate failed to consider the provisions of the *Arbitration Act*, 1995 which applies and regulates matters of Arbitration. The mere fact that an arbitration clause exists does not automatically oust the jurisdiction of the court as a party who wishes to refer a matter filed in court to arbitration must comply with the conditions set out in section 6 of the *Arbitration Act* which 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.
 7. Under section 6(1)(a) and (b) of the *Arbitration Act*, once a party has brought the application for stay of proceedings promptly, the court may decline to refer a matter to arbitration only when the arbitration agreement is null and void, inoperative or incapable of being performed; or there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration (see *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya NRB* CA Civil Appeal No 157 of 2000 [2001] eKLR, *Mt Kenya University v Step Up Holding (K) Ltd* [2018] eKLR).
 8. In addition, under rule 2 of the *Arbitration Rules, 1997* a party invoking an arbitration clause must make an application in order for the court to satisfy itself that the matter deserves to be referred to arbitration. It is upon filing of the application that the court will consider whether to stay the suit by giving consideration to the factors set out in section 6 of the *Arbitration Act*.
 9. The case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 established that a preliminary objection is founded on a pure question of law or uncontested fact that may dispose of a matter. In the case at hand, a preliminary objection denies the Court the opportunity to interrogate the factors upon which the court may deny an application for stay. I hold that consideration of those factors in section 6 of the *Arbitration Act* is a factual inquiry that does not lend itself to disposition by a preliminary objection.
 10. In addition, section 10 of the *Arbitration Act* provides that the court can only intervene in matters of arbitration in accordance with the Act. The only way provided for a party to object to jurisdiction on account of an arbitration agreement is by filing an application for stay pending reference to arbitration under section 6; a preliminary objection is not provided for as a means to contest jurisdiction under the *Arbitration Act*.
 11. A party seeking to stay the proceedings must file the application for stay not later than the time when that party enters appearance or before acknowledging the claim. In this case, the respondent did not file its application for stay but proceeded to file its response to the statement of claim. In doing so, it



- waived its right to seek arbitration. The filing of a notice of preliminary objection is not a substitute for an application for stay of proceedings pending reference to arbitration under the Arbitration Act.
12. The adjudicator relied on article 159(2)(c) of the Constitution to short circuit the clear provisions of the Arbitration Act. Article 159 provides that that the courts shall promote alternative dispute resolution. The Arbitration Act provides a statutory framework on how the process of arbitration shall be conducted and any party invoking the arbitration process is bound to follow the processes prescribed therein. In sum, the Adjudicator erred in striking out the suit under section 6 of the Arbitration Act when the respondent had not filed an application for stay and had indeed waived its right to proceed to arbitration by filing its defence in the matter.
 13. The adjudicator did not deal with the other aspect of the preliminary objection that is the territorial jurisdiction of the small claims court. Although the respondent did not cross-appeal against the failure of the court to resolve this issue, i will deal with the matter for completeness and to avoid further delay and escalation of costs.
 14. The place of business of a company, unless it is agreed on the face of the pleadings, is a question of fact hence the such an objection does not merit consideration as a preliminary objection within the meaning of Mukisa Biscuit Manufacturing Case (Supra). The respondent ought to have filed an application to strike out the suit as the place of business ought to be ascertained by evidence.
 15. The respondent relied on Gazette Notice No. 3791 dated April 23, 2021 where the Ag Chief Justice conferred on the small claims court in Nairobi jurisdiction to deal with matters falling within and or arising from Nairobi county. This is pursuant to section 4(1) of the SCCA which provides that the Chief Justice may by notice designate any court station as a small claims court with such geographical jurisdiction as may be specified in the notice. Section 11 goes on to provide that the Chief Justice shall determine and publish a notice in the gazette designating the local limits of the jurisdiction of the small claims court.
 16. While the SCCA provides for the local limits of jurisdiction of the court, it does not state or define the place of suing. Unlike the Civil Procedure Act (Chapter 21 of the Laws of Kenya), which at sections 11 to 15 provides for the place of suit, the SCCA does not so provide. Since the Civil Procedure Act does not apply to the SCCA, the test for place of suing cannot be constrained by place of business rather the court only needs to be satisfied the subject of the suit has a connection to the local jurisdiction. In the case of a contract, it may consider several factors including where the contract was made and or where it is being performed. In this case, I would nevertheless dismiss the objection based on territorial jurisdiction of the court.
 17. For reasons I have set out, I allow the appeal and set aside the order of the Subordinate court striking out the suit. The claim shall be heard by any other adjudicator other than Hon Ndumia, RM.
 18. The respondent shall pay costs of this appeal and of the subordinate court assessed at KES 20,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

J. SERGON

JUDGE

_____ instructed by K. Kibiku and Company Advocates for the Appellant.



_____instructed by Dawood H. Farrah Advocates for the Respondent.

