Kanuri Limited & 32 others v Uber Kenya Limited & another (Civil Case 356 of 2016) [2022] KEHC 15971 (KLR) (Commercial and Tax) (30 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15971 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 356 OF 2016

DAS MAJANJA, J

NOVEMBER 30, 2022

BETWEEN

KANURI LIMITED & 32 OTHERS ..... PLAINTIFF

AND

UBER KENYA LIMITED ..... 1ST DEFENDANT

UBER BV ..... 2ND DEFENDANT

RULING

1. In its application before the court, the 2nd Defendant seeks to stay these proceedings and refer the matter to arbitration pursuant to section 6 of the *Arbitration Act*, *1995*. The application is supported by the affidavits of Kasigo Khaole, the Head of Central Operations of Uber South Africa Technology Proprietary Limited, sworn on May 4, 2022 and June 13, 2022 respectively. The application is opposed by the Plaintiffs through the replying affidavit of Bildad Kagai, the Managing Director of the 1st Plaintiff, sworn on May 16, 2022. The parties have also filed written submissions where they assert the positions taken in their pleadings. Their advocates also made oral submissions.

2. In order to contextualize the application, I believe a brief factual background of the matter will suffice. According to the Amended Plaint dated December 14, 2021, the Plaintiffs are taxi owners, drivers and operators of passenger service vehicles (PSVs) within Nairobi. The 2nd Defendant is a foreign company incorporated in the Netherlands for the purpose of providing lead generation transportation services that enable an authorized transportation provider to seek, receive and fulfil requests for transportation services from an authorized user of the 2nd Defendant's mobile application. The 1st Defendant is an agent/proxy of the 2nd Defendant in Kenya. The Plaintiffs are authorized by the Defendants to provide the said transportation services in Kenya through the mobile application in accordance with Service Agreements entered into between the Plaintiffs and the 2nd Defendant.

3. The Plaintiffs claim that they entered into an online agreement, contract and/or arrangement with the Defendants to purchase and thereafter to commit their vehicles to the Defendants' service and that the essence of the online agreement was that the Plaintiffs would acquire/procure either through purchase, financing or hire, such number of motor vehicles as they would afford and thereafter commit them to the Defendants' services known as Uber Services.

4. The Plaintiffs' case is that despite substantial investment in their motor vehicles, on July 28, 2016, the Defendants, in breach of the Agreements, dropped the fare to Kshs 35.00 per kilometer and the minimum fare to Kshs 200.00 per trip from Kshs 60.00 per kilometre and Kshs 300.00 per trip. The Plaintiffs state that despite the reduction of the fares, the Defendants' commission of 25% per transaction remained in force leaving the Plaintiffs to absorb all the operating costs.

5. The Plaintiffs therefore accuse the Defendants of engaging in restrictive trade practices and abuse of its dominant position in the taxi transport market contrary to provisions of the *Competition Act, 2012*. They also alleged that the Defendants are in breach of contract, exploitation, secrecy, conspiracy and illegality. The Plaintiffs seek the following orders against the Defendants jointly and severally:

    a. A declaration that the Defendants' actions of reducing the fare to Kenya Shillings Two Hundred (Ksh 200) were illegal, unsustainable and in disregard of local market factors thus unfair, draconian and is in breach of the contract, the local market factors thus unfair, draconian and is in breach of the contract, the local laws and terms of the engagement.

    b. An order compelling the Defendants to restore the fate rates to the original amount of Kenya shillings Sixty (Ksh 60) per kilometer and the minimum fare Kenya Shillings Three Hundred (Ksh 300) with immediate effect.

    c. An injunction restraining the defendants from varying fare rates unless with the consultation and express agreement of the Plaintiffs and a guarantee to that effect.

    d. Damages from loss of earnings from the period the fare rates were dropped to Kenya shillings Thirty-Five per Kilometer to the date of restoration of the said fare rates to the original rates of Kenya Shillings Sixty (60/=) per kilometer which amounts is to be calculated based on the number of trips done by each Plaintiff during the period of the reduced fare rates

    e. General damages for breach of contract.

    f. this honourable court deems just and fit to grant.

6. The 2nd Defendant's case is that the court lacks jurisdiction to adjudicate the dispute as Clause 15 of the Service Agreements provide that any dispute under the Agreements ought to be referred first to mediation under the *International Chamber of Commerce Rules* ("the ICC Rules"), failing which the dispute would be referred to arbitration thereunder. The 2nd Defendant faults the Plaintiffs as having filed this suit in disregard of the arbitration clause.

7. In response to the Defendant's contention, the Plaintiffs aver that the Agreements are standard form contracts generated by the Defendants and that the Plaintiffs did not in any way have their inputs and/or reservations considered in the drafting of the contracts and in the circumstances, there was without a doubt undue advantage on the part of the 2nd Defendant.

8. The Plaintiffs contend that the arbitration clause incorporates a dispute resolution mechanism that does not provide a proper, accessible and convenient forum for the parties and that enforceability of the very arbitration clause as drafted would be impossible and does not factor in the financial abilities of the Plaintiffs whatsoever. That the channel for the arbitration as provided is way too costly for the Plaintiffs and the arbitration clause is realistically unattainable, as it amounts to no dispute resolution mechanism at all.

9. The Plaintiffs rely on section 6 of the *Arbitration Act* to state that a court will not reference a matter for arbitration, where the clause is inoperative or incapable of being performed and that the arbitration clause in this matter is inoperative and incapable of being performed and that this suit properly filed in this court. They state that sometime in January 2017, the parties opted to commence out of court negotiations but the negotiation failed thus any referral to arbitration would delay the ultimate hearing and determination of the dispute in the suit. The Plaintiffs further aver that in addition, the issues raised in the suit are of a jurisprudential nature as they seek to bridge the legality gaps brought about by the operations of multinational tech companies hence it is best, proper and fit for the court to issue pronouncements on the issues raised in the suit.

Analysis and Determination

10. Whether the court should stay this suit pending reference of the matter to arbitration is governed by section 6(1) 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. .....

11. The Plaintiffs do not deny that they executed the Service Agreements with the 2nd Defendant which have an arbitration clause at Clause 15 as follows:

> 15. Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. The Vienna Convention on the International Sale of Goods of 1980 (CISG) shall not apply. Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a Request for Mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). The ICC Rules' Emergency Arbitrator provisions are excluded. The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with the ICC Rules. The place of arbitration

> shall be Amsterdam, The Netherlands. The language of the arbitration shall be English. The existence and content of the mediation and arbitration proceedings, including documents and briefs submitted by the parties, correspondence from and to the ICC, correspondence from the mediator, and correspondence, orders and awards issued by the sole arbitrator, shall remain strictly confidential and shall not be disclosed to any third party without the express written consent from the other patty unless: (1) the disclosure to the third party is reasonably required in the context of conducting the mediation or arbitration proceedings; and(ii) the third party agrees unconditionally in writing to be bound by the confidentiality obligation stipulated herein.

12. The thrust of the Plaintiffs' case is that the arbitration clause above is inoperative or incapable of being performed as the dispute resolution mechanism therein does not provide a proper, accessible and convenient forum for the parties, that it does not factor in the financial abilities of the Plaintiffs whatsoever and it is way too costly for the Plaintiffs. That the arbitration clause is realistically unattainable, as it amounts to no dispute resolution mechanism at all.

13. It is trite that parties should always be held to their bargain that should only be departed from in a special and exceptional case. The Court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement (see *Areva T & D India Lmited v Priority Electrical Engineers & Another* NRB CA Civil Appeal No 103 of 2011 [2012] eKLR and *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898).

14. I agree with the 2nd Defendant that an arbitration agreement can only be avoided if it is impossible to perform and not simply because its compliance would be onerous or inconvenient. Indeed, the Court of Appeal in *Areva T & D India Lmited v Priority Electrical Engineers & Another* (Supra) rejected the argument of 'convenience' in seeking to avoid an arbitration agreement. When the Plaintiffs executed the Service Agreements, they were well aware that any dispute arising therein would have to be handled in the manner prescribed by Clause 15 above. They have not produced any evidence to demonstrate how such an arbitration would be costly and how they would be unable to meet the said costs. In any event, the 2nd Defendant is amenable to having the arbitration proceedings in Kenya which negates part of the argument that the arbitration proceedings will be costly.

15. Plaintiffs seek to avoid the arbitration agreement on the ground that the Service Agreements were imposed on them by the 2nd Defendant and that since they had no input into them they are unconscionable. In *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling), Mativo J (as he was then) described the Plaintiffs' assertion as 'procedural unconscionability' which hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. The learned judge went on to state as follows:

> If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. Enforcement of a contract is generally refused on grounds of unconscionability where the "inequality of the bargain is so manifest as to shock

> the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice.

16. While there may be instances where the court may intervene in contractual relationships to the extent of annulling contracts, the Amended Plaint that forms the basis of the case does not seek to annul the claim on the basis alleged. The Plaintiffs case as pleaded is one for breach of contract which is a matter wholly within the scope of the arbitration agreement. A party is bound by its pleadings and however attractive the Plaintiffs' arguments appear to be, they do not find any support in their Amended Plaint or reliefs sought. As such, I find that there is nothing special and exceptional in the circumstances herein for the court to allow the parties to depart from the contract that they freely and voluntarily agreed upon.

Disposition

17. For the reasons I have set out above, I find and hold that the Plaintiffs have not discharged the burden of showing that the arbitration agreement is null and void, inoperative or incapable of being performed. I therefore allow the 2nd Defendant's application dated May 4, 2022 on the following terms:

    a. That all further proceedings in this suit be stayed pending the reference of the dispute between the parties to arbitration.

    b. Since the 2nd Defendant has waived the condition that the arbitration be conducted in the Netherlands, it shall be conducted in Nairobi.

    c. Costs shall abide by the decision in the arbitration.

DATED and **DELIVERED** at **NAIROBI** this **30th day of NOVEMBER 2022.**

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Mouti instructed by Maina and Maina LLP Advocates for the Plaintiffs.

Mr Coulson and Harney Advocates for the 1st Defendant.

Ms Lubano and Ms Arora instructed by Oraro and Company Advocates for the 2nd Defendant.