



Gossamer Crossing East Africa Limited & another v Gossamer Crossing INC & another (Civil Case E737 of 2021) [2022] KEHC 16108 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E737 OF 2021
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

**GOSSAMER CROSSING EAST AFRICA LIMITED 1ST PLAINTIFF
SUZANNE JANE BELCHER (SUING FOR HER OWN BEHALF AND ON
BEHALF OF GOSSAMER CROSSING EAST AFRICA LTD) 2ND PLAINTIFF**

AND

**GOSSAMER CROSSING INC. 1ST DEFENDANT
BENJAMIN CHALRES FOLGER 2ND DEFENDANT**

RULING

Introduction

1. The 1st plaintiff company was incorporated on November 8, 2012.
2. The 2nd plaintiff and the 2nd defendant are directors and shareholders of the 1st plaintiff.
3. The plaintiffs accuse the defendants of several misdeeds in the management of the affairs of the 1st plaintiff company and claim that they are jointly and severally culpable of breach of trust; breach of fiduciary duty; and have engaged in unfair/prejudicial/oppressive conduct against the 2nd plaintiff.
4. The plaintiffs filed this case against the defendants seeking the following orders: -
 - a. USD 1,126,827
 - b. Interest on (i) above at court rates from the date of filing suit until payment in full.
 - c. A permanent injunction restraining the defendants whether by themselves or through any agent from charging, leasing to 3rd parties other than the 1st plaintiff, repossessing, taking



delivery, selling, advertising for sale or any way interfering with the 1st plaintiffs quiet and peaceful possession and use of the Aircraft registration N9017M in the name of the 1st defendant leased to the 1st plaintiff herein unless otherwise an acceptable payment plan for the said USD 1,126,827 or such security sufficient to offset the said debt owed to the plaintiffs by the defendants is given by the defendants.

d. Costs of the suit.

Application

5. In response to the suit, the defendants filed the application dated October 29, 2021 seeking orders, *inter alia*, that the suit herein be referred to arbitration as envisaged under clause 32 of the 1st plaintiff's memorandum and articles of association dated 21 November 2012.
6. The application is supported by the 2nd defendant's affidavit.
7. The plaintiffs/respondents opposed the application through the 2nd respondent's replying affidavit
8. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether this suit should be referred to arbitration.
9. The defendants' case was that the dispute between the parties herein should be dealt with through arbitration as provided for under clause 32 of the 1st plaintiff's memorandum and articles of association. According to the defendants, the suit involves a personal claim by the 2nd plaintiff, disguised to be in the best interest of the 1st plaintiff yet it relates to actions that were authorized by the company's board of directors and shareholders where the 1st plaintiff holds a majority stake.
10. In a rejoinder, the respondents submitted that they had, since the filing of the suit, filed an application dated August 5, 2021 for leave to continue the suit as a derivative suit for and on behalf of the 1st plaintiff. The plaintiffs added that since the said application is yet to be heard on its merits, this court should refrain from applying itself on the issue at this juncture in the interest of justice. Reference was made to the decision in *In The Matter of CMC Holdings Limited* [2012]eKLR where the court observed that: -

“...the long standing practice, and which I find reasonable, has always been that before a derivative action is filed. The applicant brings to court an *ex parte* application for leave. Supported by a detailed affidavit so as to demonstrate that he has *locus standi* to institute such an action and that he has a *prima facie* case.”

11. On their part, the applicants maintained that an application for leave to institute a derivative action does not invalidate the company's constitution which unequivocally provides that disputes between members of the company be resolved through arbitration.
12. The plaintiffs further argued that the application offends the provisions of section 6 of the *Arbitration Act* (No 4 of 1995) which does not permit an application for stay of proceedings and referral to arbitration to be made after entering an appearance. The said section stipulates as follows:-

"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..."



13. It was not disputed that the dispute herein mainly pits a company and its directors and, that the company’s memorandum and articles of association contains an arbitration clause which provides that any difference between the company on one hand and any of the members touching on anything done pursuant to the articles of association shall be referred to arbitration.
14. Section 10 of the Act states that no court shall intervene in a matter governed by the Act except as provided under the Act. In this regard, courts have taken the position that they will not entertain suits concerning matters where arbitration has been set out as the dispute resolution mechanism.
15. The power of a court to stay proceedings and refer matters to arbitration is provided for under section 6 of the [Arbitration Act](#) cap 4 of 1995 which provides that: -
 - “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.”
16. The import of article 159(2)(c) of the [Constitution](#) as read together with section 6(1) of the [Arbitration Act](#) is that where parties consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, 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.
17. The question that this court has to grapple with is whether the applicants invoked the arbitration clause at the time of entering appearance. I find that the answer to this question is to the negative. I say so because the applicants entered appearance on August 23, 2021 and thereafter filed a notice of preliminary objection August 24, 2021 in respect to the plaintiffs’ injunction application dated August 5, 2021. The parties thereafter recorded a consent in respect to the injunction application on August 25, 2021.
18. The instant application was filed on October 29, 2021, at least two months after the defendants entered appearance in the matter. It cannot therefore be said that the applicants invoked the arbitration clause at the time they entered appearance. Moreover, by filing the notice of preliminary objection and thereafter recording a consent in the matter, the applicants clearly, acknowledged this court’s jurisdiction. I am guided by the decision of the Court of Appeal in [Charles Njogu Lofty vs Bedouin Enterprises Ltd](#) [2005] eKLR where it was held that: -
 - “In my view, section 6(1) of the Arbitration Act 1995, which 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 that the applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act, 1995, was, *inter alia*, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.



Section 6(1) of the Arbitration Act, cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 60) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed"

19. My finding is that the applicants' objection to this courts' jurisdiction, through the instant application negates the clear provisions of section 6 of the Arbitration Act. I therefore find that the application is not merited and I hereby dismiss it with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Litoro for plaintiff.

Mr. Kinyanjui for Singh for defendant.

Court Assistant- Sylvia

