



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E084 OF 2021

GULF ENERGY LIMITED.....PETITIONER

VERSUS

RUBIS ENERGY KENYA PLC.....RESPONDENT

RULING

1. Upon the filing of the petition and notice of motion dated 16th March, 2021 by the Petitioner, Gulf Energy Limited, this Court directed that the pleadings be served upon the Respondent, Rubis Energy Kenya PLC, with a view to hearing the notice of motion which is seeking conservatory orders. The Respondent replied to the notice of motion by way of the notice of preliminary objection dated 19th March, 2021.
2. In order to appreciate the dispute between the parties, it is necessary to briefly state the Petitioner's case. A perusal of the petition, the notice of motion and the supporting affidavit sworn on 17th March, 2021 by the Managing Director of the Petitioner, Mr Francis Njogu, discloses that in 2019 the Petitioner and the Respondent entered into an agreement through which the Respondent purchased specific portions of the Petitioner's business, that is, the Petitioner's marketing, storage, distribution, retail and aviation business and related assets ("the Specific Business and Assets"). For purposes of effecting the transaction, the Petitioner created a wholly owned company known as Gulf Energy Holdings Limited ("GEHL") to which it transferred the Specific Business and Assets.
3. The Petitioner and the Respondent then entered into a Share Purchase Agreement ("SPA") dated 4th November, 2019 by which the Petitioner transferred all its shares in GEHL to the Respondent. According to the Petitioner, it prepared a report, which it refers to as the KPMG Report, to reflect the financial position of the Specific Business and Assets for the years 2016, 2017 and 2018.
4. It is further the Petitioner's case that at the request of the Respondent it provided segmented management accounts which were prepared to specifically reflect the financial position of the Specific Business and Assets for the period January to October 2019 ("the 2019 Specific Accounts").
5. According to the Petitioner only the information that was relevant and related to the Specific Business and Assets being the KPMG Report and the 2019 Specific Accounts (referred to as the Provided Financial Information) was to be shared by the parties. The Petitioner's case is that to ensure that only the information relating to the Specific Business and Assets was shared with the Respondent, it procured a new server to which it transferred the information relating to the Specific Business and Assets.
6. The Petitioner avers that the new server, which contained only data relevant to the Specific Business and Assets, was handed over to GEHL and ultimately to the Respondent. Also handed over to the Respondent was the relevant hardware which included reformatted laptops. The documentation was contained in an IT Transition Plan prepared by KPMG and signed by the parties in October 2019.
7. It is the Petitioner's case that by a notice of warranty claim dated 3rd March, 2021 the Respondent alleged that, with the assistance of data recovery specialists, it had recovered from the server and the reformatted laptops information relating to the entire business of the Petitioner. As a result of the recovered data, the Respondent proceeded to demand from the Petitioner a sum of at least USD 41 million being the alleged overstatement of the value of the GEHL shares. The Respondent through the said notice also demanded access to the Petitioner's books and records for the period up to 13th December, 2019.
8. The Petitioner avers that the documents obtained by the Respondent through advanced data mining from the reformatted laptops and the server formed part of its private and confidential information and were not part of the data to be transferred to GEHL or to the Respondent under the IT Transition Plan.
9. It is therefore the Petitioner's case that the Respondent's unauthorized access to its private and confidential information that was not part of the data to be transferred to GEHL constitutes a breach of confidence and violates its rights to privacy and property as set out in the petition.

Moreover, the demand by the Respondent for further access to its books and records is a violation of or threat to its rights to privacy, property and access to information as set out in the petition.

10. The Petitioner therefore seeks the following reliefs:

a. A declaration that the Respondent has violated or threatened the Petitioner's rights to privacy under article 31 of the Constitution.

b. A declaration that the Respondent has violated or threatened the Petitioner's rights of access to information under Article 35 of the Constitution.

c. A declaration that the Respondent has violated or threatened the Petitioner's rights to property under article 40 of the Constitution.

d. A declaration that the Respondent has violated or threatened the Petitioner's rights to fair hearing under article 50 of the Constitution.

e. A declaration that the Respondent's actions in acquiring and using or seeking to use the Petitioner's Confidential Information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Petitioner's audited financial statements for the financial years 2016, 2017 and 2018; the Petitioner's management accounts dated November 2019; emails and letters constitute breach of confidence.

f. A declaration that the Respondent is not entitled to use the Petitioner's Confidential Information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Petitioner's audited financial statements for the financial years 2016, 2017 and 2018; the Petitioner's management accounts dated November 2019; emails and letters or any of the Petitioner's private or confidential information, in evidence against the Petitioner in any claim whatsoever.

g. A declaration that the Warranty Claim Notice dated 3rd March 2021 is void for violating the Petitioner's rights.

h. The Warranty Claim Notice dated 3rd March 2021 relying on the Petitioner's Confidential Information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Petitioner's audited financial statements for the financial years 2016, 2017 and 2018; the Petitioner's management accounts dated November 2019; emails and letters, be struck down.

i. An injunction restraining the Respondent by itself, its servants or agents or otherwise howsoever from using the Petitioner's Confidential Information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Petitioner's audited financial statements for the financial years 2016, 2017 and 2018; the Petitioner's management accounts dated November 2019; emails, letters and any other information, retrieved from the server or the formatted laptops of the Petitioner's former employees or howsoever otherwise obtained, or any part thereof, for any purpose whatsoever including but not limited to making a claim for warranty breach against the Petitioner or commencing arbitral proceedings against the Petitioner.

j. Damages for violation of rights.

k. An inquiry as to damages for breach of confidence.

l. Costs

m. Further or other relief.

11. Through the notice of preliminary objection, the Respondent opposes the Petitioner's case on the grounds that:

a) The Petition does not disclose any infringement or violation of Constitutional rights.

b) The matters pleaded are best dealt with in the Commercial Court and or by Arbitration.

c) The matters complained of arise from a commercial transaction to which the following issues have arisen;

i) Did the Petitioner fraudulently conceal from the Respondent vital information on the business and assets under the transaction?

ii) Was the concealment by the Petitioner lawful at all or did it amount to commercial fraud?

iii) Did the Petitioner commit criminal offences by withholding what is now alleged to be confidential information?

d) There is an arbitration clause to which the Petitioner now seeks to restrain its enforcement. That would be a serious

violation of the agreements entered into by the parties.

e) There has been a deliberate withholding of the transaction agreements from the Court.

f) If there was any breach of the agreements (which is denied) it can only result in a claim quantifiable in damages.

g) The Petition and the Notice of Motion are a gross abuse of the court process.

12. The Petitioner opposed the Respondent's preliminary objection through grounds of opposition dated 22nd March, 2021. The opposition is premised on the grounds that:

a) **The matters set out in the notice dated 19th March 2021 are not points of law and do not meet the test of a preliminary objection as set out in *Mukisa Biscuits Company versus West End Distributors Ltd [1969] EA 696* which stated that; "A preliminary objection is in the nature of what used to be a demurrer. It raises a 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."**

b) **The Petition and Notice of Motion do not relate to the commercial dispute and are solely concerned with the violation of the Petitioner's rights under Articles 31, 40 and 50(4) of the Constitution.**

c) **The Petition and supporting affidavit show deliberate use of data recovery specialists to retrieve documents and information which are the confidential property of the Petitioner, protected by Articles 31 and 40 of the Constitution.**

d) **The Petition and supporting affidavit further show the Respondent's intention to use such confidential property of the Petitioner in intended arbitration proceedings when such is excluded under Article 50(4) of the Constitution.**

13. The Respondent filed written submissions dated 24th March, 2021 in support of the preliminary objection. A perusal of the pleadings and submissions filed in respect to the preliminary objection discloses that the Respondent's case is that this Court lacks jurisdiction to determine the dispute as the matters raised are for determination through commercial litigation or arbitration. Further, that the allegation of violation of Article 50(4) by use of illegally obtained evidence can only be determined by the trial court and not through a constitutional petition.

14. It is the Respondent's submission that courts have established that commercial disputes between parties cannot be elevated to constitutional disputes but should be resolved either through commercial litigation or the dispute resolution mechanism agreed upon by the parties. The Respondent cited the decisions in the cases of **Kenya Breweries Limited & another v Bia Tosha Limited & 5 others [2020] eKLR**; **Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & another [2016] eKLR**; and **Eric Wambua Muli & another v Prime Bank Limited & 3 others [2017] eKLR**, and submitted that in those cases the courts held that commercial disputes ought to be determined under the laws governing civil proceedings and not through constitutional petitions. It is the Respondent's case that a court hearing a commercial dispute has jurisdiction to hear and determine constitutional issues arising in the dispute.

15. The Respondent additionally contends that the exclusion of the use of illegally obtained evidence can only be reasonably understood in the context of an already existing hearing as can be discerned from the implicit wording of Article 50(4) of the Constitution. The decisions in the cases of **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others [2019] eKLR**; **Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR**; and **Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR** are cited in support of the argument that the decision as to whether to exclude evidence is a matter within the jurisdiction of the trial court.

16. In conclusion, the Respondent urged that evidence cannot be automatically excluded simply because it was obtained in violation of the Bill of Rights.

17. Through submissions dated 26th March, 2021 the Petitioner opposed the preliminary objection and contended that a preliminary objection should only raise points of law which are argued on the assumption that all the facts pleaded by the other side are correct. The argument is supported by reference to the decisions in **Mukisa Biscuits Company v West End Distributors Limited [1969] EA 696** and **Oraro v Mbaja [2005] 1 KLR 141**. According to the Petitioner, the Respondent cannot pick and choose the facts it deems to be correct. The Petitioner asserts that the facts it has pleaded, and which the Respondent must assume to be correct, are that there has been unauthorized use of its confidential information and the Respondent intends to rely on the illegally obtained evidence to mount a claim against it.

18. Relying on the decision in **John Githinji Wang'ondy & 7 others v Coffee Board of Kenya & another [2012] eKLR**, the Petitioner rejects the Respondent's assertion that this is a commercial dispute and submits that the violation of its constitutional rights by the Respondent is not part of the commercial transaction between them. It is the Petitioner's further submission that the authorities relied on by the Respondent are not relevant to this case.

19. It is therefore the Petitioner's contention that this Court is the proper forum to hear and determine petitions and applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The argument is supported by reference to the decisions in **Wananchi Group (Kenya) Limited v Communications Commission of Kenya & another [2013] eKLR** and **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR**.

20. The Petitioner rejects the Respondent's claim that the use of illegally obtained evidence can only be determined within a trial and asserts that the violation of its right to a fair hearing commenced when the Respondent issued the notice of warranty claim. It is thus the Petitioner's case that there is no merit in the preliminary objection taken by the Respondent.

21. On 29th March, 2021 the Respondent replied to the Petitioner's submissions. The Respondent stresses that its objection is purely on points of law as it questions the jurisdiction of this Court to interfere with arbitral proceedings by determining the admissibility of evidence. The Respondent distinguishes the facts of this case from those in the cases cited by the Petitioner and urges the Court to uphold the preliminary objection.

22. The Respondent's preliminary objection is premised on the ground that this Court should not entertain this matter because the dispute is commercial in nature and can best be determined through commercial proceedings or arbitration.

23. In determining the Respondent's preliminary objection, it is important to first observe that any person who deems any right or fundamental freedom provided for in the Constitution has been denied, violated or infringed or threatened, is allowed to make an application to this Court under Article 22 of the Constitution. The Petitioner alleges violation of the constitutional rights and fundamental freedoms protected in Articles 31, 35 and 50(4) of the Constitution.

24. It is, however, the Respondent's case that since the alleged violation of constitutional rights and fundamental freedoms arise from a commercial transaction then the issue should be addressed through arbitration being the mechanism agreed upon by the parties for resolving any dispute arising from their agreement.

25. In my view, the issue raised by the Respondent is not about jurisdiction in the strict sense. In light of the provisions of Articles 22 and 165 of the Constitution, this Court has jurisdiction to hear and determine the issues raised in the petition. The question is whether in the circumstances of this case this Court is the best adjudicatory organ to determine those issues.

26. It is not disputed that in their agreement the parties covenanted that any dispute arising from their contract is to be resolved amicably and if amicable resolution is not successful then the dispute will be resolved through arbitration.

27. Article 159(2)(c) of the Constitution requires courts to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. It is, however, the requirement of Clause (3) that the alternative dispute resolution mechanisms should not contravene the Bill of Rights or be repugnant to justice and morality or be inconsistent with the Constitution or any written law.

28. In **Lipisha Consortium Ltd & another v Safaricom Ltd [2015] eKLR**, it was stated that:

"57. Even as one reads Article 165 of the Constitution, Article 159 must always be taken into consideration. The court in exercising judicial authority must be guided by various principles as outlined under Article 159 of the Constitution. The application of alternative forms of dispute resolution is one of the principles. It has not been suggested that even constitutional disputes and questions cannot be mediated or resolved amicably and outside court. Quite the contrary, they can in appropriate cases."

29. In **Kenya Breweries Limited & another v Bia Tosha Limited & 5 others [2020] eKLR**, the Court of Appeal held that:

"The learned Judge also failed to give due consideration to the provisions of Article 159 (2) (c) of the Constitution that mandates courts to promote alternative dispute resolution such as mediation and arbitration by disregarding the terms contained in the distributorship agreement. It is clear to us the learned Judge did not heed to the dictates thereto to promote alternative dispute resolution in this matter, but rather downgraded it."

30. Apart from the constitutional requirement which places a duty on this Court to promote alternative dispute resolution mechanisms, it is appreciated that among the divisions of the High Court here in Nairobi is the Commercial & Tax Division whose specialty is the resolution of commercial disputes. Any constitutional issues arising in commercial disputes are best addressed by the Judges in that Division.

31. I therefore stand guided by Article 159(2)(c) of the Constitution and the cited authorities in reaching the conclusion that the dispute resolution mechanism of the parties' choice ought to first be engaged before the parties can approach the courts for resolution of any disputes arising from their agreements. Further, that any constitutional issues arising in a commercial dispute are best addressed by the Judge hearing the matter and not through a constitutional petition.

32. There is the argument that there is no proper preliminary objection before this Court. In **Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] eKLR** a preliminary objection was defined as follows:

"A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law."

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence...."

33. The observation in **Oraro v Mbaja [2005] 1 KLR 141** offers significant insight as follows:

"As already remarked, 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.*"

34. The uncontested fact in this case is that the relationship between the Petitioner and the Respondent stems from a commercial agreement. In that document the parties agreed that any dispute ought to be resolved amicably failing which they would resort to arbitration.

35. As already stated, preliminary objections revolve around questions of law. In determining a preliminary objection, the Court applies the relevant law and legal principles. The question as to whether a dispute is before the proper adjudicatory body is a matter of law that once determined in favour of the objector brings the matter to conclusion without the need to consider the evidence adduced by the parties. This is the point taken up by the Respondent in its preliminary objection. If this was a preliminary point to be determined based on agreed facts, then one can easily say that this is not a proper preliminary objection but as already stated that is not the case in this matter.

36. It is apparent from the pleadings filed before this Court that the dispute directly flows from the contractual relationship between the parties. This Court cannot fail to appreciate the binding nature of agreements and the parties' autonomy that is granted in contractual agreements that dictates their dealings with one another. In **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR** the Court of Appeal stated the principle as follows:

“The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR, the Court was categorical that:

“it is clear beyond para adventure, that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

The Court in Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR, after reviewing case law on the subject reiterated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

37. The importance of complying with the arbitration clause, even where constitutional issues arise, was affirmed by the Court of Appeal in **Kenya Breweries Limited & another v Bia Tosha Limited & 5 others [2020] eKLR** as follows:

“[41] There is no dispute that the parties signed those distributorship agreements spanning over many years. There is no indication that the 1st respondent or even the impleaded parties did challenge the clause that provided for mediation and arbitration of any dispute arising in those agreements. In our considered view therefor in as much as the constitutional breaches complained about by the 1st respondent which are supported by the 5th and 6th respondents, were predicated on the distributorship agreements which provided mediation and arbitration as a medium for dispute resolution, that avenue ought to have been exhausted first. It is apparent from the record that the appellants filed a motion under Section 6 (1) of the Arbitration Act seeking inter alia stay and/or dismissal of the court proceedings; and the dispute being referred to arbitration as per the agreement...

[44] In Corporate Insurance Company vs. Loice Wanjiru Wachira [1996] eKLR, this Court also stated inter alia that the existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In UAP Provincial Insurance Company Ltd vs. Michael John Beckett (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to Section 6 of the Arbitration Act.”

38. In **Kipkalya Kiprono Kones v Republic & another Ex-parte Kimani Wa Nyoike & 4 others [2006] eKLR** the Court of Appeal stressed the need to strictly follow procedures that are specifically prescribed for resolution of disputes by stating that:

“There is, first the case of The Speaker Of The National Assembly Vs. The Hon. James Njenga Karume, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported). This was, of course an application for a stay of some orders of the High Court under Rule 5 (2) (b) of the Court of Appeal Rules, and that being the position, no concluded views could be expressed. But the Court of Appeal, consisting of KWACH, COCKAR & MULI, JJA did state as follows in their Ruling dated 29th May, 1992;

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

39. In **Boniface Mwangi v Resident Magistrate’s Court At Milimani & 2 others [2015] eKLR** it was observed that:

“As has been held in several decisions in this and other courts, a resort to a court for a remedy by way of a constitutional petition must be a remedy of last resort if we are to maintain our Constitution as the supreme law to govern our social order. Indeed, it has been held in several decisions that where a process or procedure is provided in law, that process must be followed, as to convert every issue into a constitutional issue deserving adjudication under the constitutional jurisdiction is to undermine the importance of that process...

Granted that we shall only develop and entrench our Constitution by seeking its interpretation by the courts, it must, however, be appreciated that simple and straight forward problems demand simple and straight forward solutions. This court sitting as a constitutional and human rights court should not take it upon itself to collapse all known judicial processes into its realm. It shall not only be arrogating to itself that which does not belong to it but shall also be rendering other courts and processes irrelevant and unnecessary, a most undesirable development.”

40. Where parties to an agreement have opted to resolve any dispute arising therefrom through arbitration, this Court cannot allow one of those parties to bypass the arbitration clause by alleging violation of constitutional rights and fundamental freedoms. The applicable law in such circumstances is the Arbitration Act, 1995. As correctly submitted by the Respondent, the Petitioner in bringing this petition is trying to forestall arbitration in the guise of protecting its rights.

41. The decision of the Petitioner to try and determine the kind of evidence that the Respondent can place before the arbitrator will not only violate the Respondent’s right to access justice under Article 48 of the Constitution, but will also deny the arbitrator the discretion of determining whether the evidence which is alleged to have been obtained illegally is admissible. It would be wrong for the Court to tie the hands of the trier of the facts by declaring some evidence unconstitutional outside the context of the trial itself.

42. That the arbitrator is competent to determine the question of admissibility of evidence was confirmed by the Court of Appeal in **Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR** when it held that:

“As for the argument about admission of evidence and equality of arms, we take note that the arbitral tribunal is the master of procedure and that by dint of section 20 (3) of the Act, it has power to determine the admissibility, relevance materiality and weight of any evidence.”

43. The authority of this Court to do justice does not extend to preempting trials and upsetting the cases of parties before other courts or tribunals by seeking to determine the question of admissibility of evidence through constitutional petitions. In this case the Respondent is yet to file any case but the Petitioner is already trying to prevent it from accessing justice.

44. In the process of dealing with the preliminary objection, the timelines embedded in the parties’ agreement have been breached. There was a request by the parties that the time consumed by these proceedings should not count in so far as their agreement is concerned. I agree that is the only just and fair thing to do. It is therefore ordered that in regard to the agreement of the parties, the period from the date of the filing of this petition on 18th March, 2021 to the date of the delivery of this ruling shall not count.

45. In summary, I find the Respondent’s preliminary objection dated 19th March, 2021 merited and I uphold it. The consequence is that the petition and notice of motion dated 16th March, 2021 are struck out.

46. As for costs, I note that unless the parties resolve their issues amicably they have a long litigation road ahead. For that reason, I direct each party to meet own costs of these proceedings.

Dated, signed and delivered virtually at Nairobi this 31st day of May, 2021.

W. Korir,

Judge of the High Court