REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO.E1 OF 2020

IN THE MATTER OF: THE ARBITRATION ACT 1995 (AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT NO.11 OF 2009)

AND

IN THE MATTER OF: AN ARBITRATION

BETWEEN

1. ABDUL SULTANI LALANI

2. NAVAID ALAM

3. LALANI HOLDINGS LLC

4. WESTERN FINANCIAL INVESTIMENTS LP

5. ABDUL SULTAN LALANI &

TALAT LALANI FAMILY TRUST

6. COBHAM CAPITAL LLC.....APPLICANTS

-VERSUS-

1. IFG FUND LLP

2. IFG GENERAL PARTNER LTD

3. KABIR CAPITAL LLC

4. KABIR AHMAD.....RESPONDENTS

RULING

1. The application for consideration and subject of this **Ruling** is a **Notice of Motion** application dated **3rd November, 2020** filed at the instance of the six (6) Applicants wherein they are seeking the following orders:-

a) Spent;

b) Spent;

c) The order given on 8th October, 2020 by this Honourable Court referring the matter to arbitration pursuant to Sections 11(2) and 12(3) of the Arbitration Act 1995 and appointing Mr. Kevin O' Mogeni as the sole Arbitrator, be set aside;

d) That the Applicants do pay the costs of this application.

2. This application is supported by twenty three (23) grounds on its face and **two affidavits** of **Navaid Alam** sworn on **3rd November, 2020** and **18th December, 2020** respectively.

3. It is averred that the Respondents filed an **Originating Motion** dated **6TH October, 2020** seeking the dispute herein to be referred for arbitration and further that the court appoints a single arbitrator to preside over the arbitration.

4. Those orders were granted ex-parte on **8th October, 2020** and the Applicants now contend that the orders were obtained without material disclosure only to deceive the court and erode its dignity. Some of the facts which are said the Respondents herein failed to disclose are that; Firstly, they had previously filed a similar application being **Misc. Application No.5 of 2020**, in which they were seeking similar orders but withdrew that application for not being happy with the forum that was before them. Secondly, the Respondents failed to disclose about the New York Proceedings where they had been sued by the Applicants herein and a **Ruling** was delivered on **24th September, 2019** by the **New York Court** declining to compel the parties for arbitration in Kenya after the Respondents had pleaded the arbitration clause.

5. That being the case, it is averred that the Respondents are using the court process to circumvent the orders issued in the New York Proceedings which had barred the Applicants from being compelled to Arbitration proceedings in Kenya and this Court should not aid the Respondents in that the court will be welcoming the parties to re-litigate on an issues already canvassed by the New-York court.

6. As regards the orders granted by this court referring the matter for arbitration, the Applicants contend that the orders were obtained ex-parte and granted contrary to the rules of natural justice and against **Article 50** of the **Constitution** which guarantees a fair hearing for each and every litigant. In addition to that, the Applicants lament that they were not served with a notice declaring any dispute or the application seeking to refer the dispute for arbitration or a hearing notice to the said referral application. The only document which is admitted to have been served is the **"Share Sale Agreement"** which was served upon the 1st Applicant and as evidenced in the Jurat pages of that **"Share Sale Agreement"** the Applicants are neither parties nor signatories to that agreement. This is exacerbated when the deponent, **Mr. Naviad Alam** deposits that the signature purported to be his and appended to the Jurat of the agreement is a forgery.

7. It is the Applicants' further case that **Section 4** of the **Arbitration Act No.4 of 1995** provides that *"for an Arbitration Clause to be binding, it ought to be in writing and signed by the parties involved'*. Here, the position taken is that the Applicants were not signatories to the arbitration clause and that contract is binding to parties who were privy to the contract but not third parties.

8. By appointing an arbitrator, that is one **Mr. Kevin O'Mogeni**, this Court is faulted for having neglected **Rule 4(1)** of the **Chartered Institute of Arbitrators Rules, 2012** which postulates that an Arbitrator shall be appointed by the Chair of that Institute but not by a Court. The Applicants are also of the view that the arbitrator appointed is more likely than not to be partial since he comes from Kisii Community just like the Respondents' advocate notwithstanding that Kenya has other 44 more communities where an arbitrator could have been selected from.

9. Lastly, the proceedings of **8TH October, 2020** are faulted for being *res-judicata*, irregular and stage-managed and it is prayed that the court set the same aside in the interest of justice and for the sake of judicial consistency and public confidence in this Court.

10. In his further **affidavit**, filed on **23rd November, 2020**, **Mr. Naaid Alam** reiterated the contents of his earlier affidavit with an addition that the already commenced arbitration proceedings cannot continue against parties who are not signatories therein since the Arbitration Clause does not permit the same. And in any event, were the arbitration proceedings to proceed, then it could only be before a mutually agreed arbitrator.

11. The Respondents opposed the application through the **affidavit** of **Kabir Ahmad** and **Grounds of Opposition** filed on **12th November, 2020**. In brief summary, the Respondents not only fault the application for being fatally defective but term the same as misconceived, bad in law and an abuse of the court process. The allegation that the proceedings herein are *res judicata* is denied and the Respondents add that the **Misc. Civil Application No.5 of 2020** was withdrawn but not determined on merit.

12. It is also denied by the Respondents that there is any Court Order issued either in Kenya or USA denying arbitration under the contract subject of these proceedings. Lastly, that the Applicants in this application were duly served with notice to arbitrate dated **27th July, 2020** and they are only intending to mislead the court by asserting that they were not served.

13. Directions were issued that the application be canvassed by way of written submissions and the record shows that parties dutifully filed their submissions. The 1st -5th Applicants jointly filed two sets of submissions, with the first set being filed on **24th December, 2020** and the supplementary set on **18th January, 2021.** The 6th Applicant likewise filed two sets of submissions; one on **15th January, 2021** and the other on **19th January, 2021** respectively while those for the Respondents were filed on **4th February, 2021**. The respective Counsel for the parties highlighted their submissions on the **18th March, 2021**.

14. I have had the benefit to read through those submissions and having listened to the oral submissions made before court on the **18th March, 2021** by **M/s Mutinda** Counsel for the 6th Applicant, **M/s Omamo** Counsel for the 1st - 5th Applicants and **Mr. Nyaundi** Counsel for the Respondents, I will now proceed with my determination.

ANALYSIS AND DETERMINATION

15. I have considered the application at hand, the responses thereof and the extensive and elaborate submissions by all the Counsel for the

parties. In my view, the only issue which have crystallized for determination is whether or not the Orders given by this court on **8th October, 2020** referring this matter to arbitration and appointing **Mr. Kevin O'Mogeni** as a sole Arbitrator should be set aside.

16. Having considered the application, the submissions and the authorities cited by the Applicants, it came out that they are seeking the orders to be set aside on the grounds that, *those orders were obtained without disclosure of material facts*; *that, the orders were issued without observance of the rules of natural justice and thwarted the Applicants' right to a fair hearing; and lastly, that the Respondents' **Originating Motion** was res judicata to **Misc. Civil Application No.5 of 2020***.

17. On the first issue of material non-disclosure, the Applicants' case is that the Respondents failed to disclose to the court that they had sought similar orders before the New York Courts and the request to refer the matter to arbitration was denied. As such, the Applicants submitted that the Respondents were trying to circumvent the Orders issued by the courts in New York through the present suit. The orders by the New York Courts are said to have been granted on **24th September, 2019** and **18th August, 2020** and further upheld by the **New York Supreme Court** on **12th January, 2021.**

18. Further, the Respondents are faulted for having failed to disclose the fact that they had filed a similar suit being **Misc. Application No.5 of 2020** but withdrew it when they became unhappy on the forum. Therefore the present suit is not only termed to be res judicata to the withdrawn case, but also display a character of forum shopping which should be discouraged.

19. On the other hand, the Respondents denied being guilty of material non-disclosure. They submitted that the subject of the New York proceedings is the **"IFG Partnership Agreement"** but not the **"Share Sale Agreement"** which is subject of the proceedings herein. They added that if at all the New York Courts debarred arbitrations to proceed in Kenya, then this was in relation to **"IFG Partnership Agreement".** In their submissions, at **Paragraph 23**, it is stated that on **9th January, 2020**, the Supreme Court of the State of New York dismissed an application seeking to stop the arbitration proceedings in Kenya.

20. I would wish to begin by stating that non-disclosure of material facts by a party amounts to it coming to court with unclean hands. And before an ex-parte order, which is an equitable remedy can issue, it requires gesture of good faith by a party disclosing all the material facts involving the dispute at hand that would lead the court to decide otherwise. An English Court which I completely associate myself with in the case of **Tate Access Floor –vs- Boswell (1990) 3 All ER 303,** observed thus;

> ***"No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the exparte order and may mark its displeasure, refuse the Plaintiff further inter-partes relief. even though the circumstances would otherwise justify the grant of such relief. "***

21. It was further held in the case of **Republic –vs- Kenya Medical Training College & Another Ex-Parte Kenya Universities & Colleges Central Placement Service [2015)1 eKLR** (Onguto J.) at paragraph 21 that:-

> ***"Before summarizing the relevant legal principles and safeguards relevant to the instant issues, I must state and emphasize the high duty of candour fixed upon any applicant to court, appearing ex parte. A party appearing before the court without notice to the other (ex parte) must exhibit a high quality and degree of sincerity and honesty. He must be guileless. He must be frank. He must be open. He must keep nothing that touches on the matter away from the court. He must act in utmost good faith. If he does not so act, he does so at his own risk."***

22. Further, the gravity of non-disclosure was expressed in the case of **Bahadurali Ebrahim Shamji –vs- Al Noor Jamal & 2 Others, Civil Appeal No.210 of 1997.** where the Court of Appeal stated that;

> ***"There is a compelling duty on the Applicant "to make a full and fair disclosure of all material facts."***

23. The foregoing cited authorities emphasize the need for parties to come to court with honesty and integrity. Parties should not take advantage of the absence of the other party because when they finally come, the truth will always come out. When this happens, then the offending party will have to shoulder the consequences of that dishonesty.

24. Material facts are those that toucs on the matters presented before the court. A fact I have learnt from the instant application, the responses thereof and the subsequent submissions is the chequered history of the dispute between the parties herein, which has been within the corridors of the New York Courts since the **year 2018**. This was a fact not disclosed by the Respondents in their **Originating Motion** dated **6th October, 2020** and the **Supporting Affidavit** of **Kabir Ahmed**.

25. In my view, the Applicant ought to have disclosed to this court that the issue of whether or not to refer the dispute between the parties herein had been considered at some point by the Courts in New York. The deponent in the **Supporting Affidavit** ought not have kept anything that touches on the dispute between them away from the court.

26. I have further considered the contentions that the Applicants were not served with any notice for arbitration. To counter that assertion, the Respondents attached as **"KA-1"** a copy of **Arbitration Notice** dated **27th July, 2020** which is said to have been served upon the Applicants.

27. I have read through the said notice and it is in the form of a letter which indicates that a copy thereof was served by way of email. In observance of the law, the Respondents ought to have filed an **Affidavit of Service** or a print-out showing that the emails were delivered. As it stands, what there is on record to prove service was effected, is the word of the Respondents against that of the Applicants, which is not convincing to make a finding that the Applicants were indeed served. I am therefore inclined to agree with the Defendants that the orders of

8th October, 2020 as issued fall a-foul against the provisions of **Article 47** of the **Constitution** and the rules of natural justice.

28. In the upshot, I find that the orders of **8th October, 2020** were granted on ex-parte basis without according both parties a chance to be heard and without disclosing all material facts. It is worth—noting that Arbitration is a process of resolving contractual disputes. It is also a consensual Alternative Dispute Resolution mechanism so that an arbitrator cannot be imposed on parties, even by the court. I believe if the parties had been accorded a chance to be heard and all material facts of the case disclosed to the court, it would have directed otherwise. Therefore, the prevailing circumstances do not entitle the confirmation of the said ex-parte orders granted on **8th October, 2020** and they are hereby set aside.

29. However, at this stage the Ruling has not dealt with the competency of the **Originating Motion** dated **6th October, 2020** or whether the dispute should be referred to arbitration or not as this is not what was before it. The Respondents herein, who are the Applicants in the **Originating Motion** are at liberty to move the court for inter-parties hearing of that application. However, I wish to point out that anything that was addressed or submitted on by the parties herein which I have not addressed in my Ruling is not out of ignorance but I have seen it fit that those issues be canvassed at inter-parties hearing of the **Originating Motion** dated **6th October, 2020**.

30. Parties shall bear their own cost relation to the instant application.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF MAY , 2021.

D. O. CHEPKWONY

JUDGE