



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. E547 OF 2020

MESHACK KIBUNJA KABURI.....1ST PLAINTIFF
JAMES NJUKIA IHURA.....2ND PLAINTIFF
DAVID MACHARIA GICHURE.....3RD PLAINTIFF
DANIEL WANJIE WARUINGE.....4TH PLAINTIFF

VERSUS

KIRUBI KAMAU.....1ST DEFENDANT
CHARLES NJURU KIHARA.....2ND DEFENDANT
MICHAEL MURAGURI GAKUNGU.....3RD DEFENDANT
MAINA GERALD GIKONYO.....4TH DEFENDANT
DAVID GITHUA MURAYA.....5TH DEFENDANT
CRISPUS THUKU KINENE.....6TH DEFENDANT

AND

CENTRAL HIGHLANDS TEA COMPANY LIMITED...AFFECTED PARTY

RULING ON PRELIMINARY OBJECTION

NOTICE OF MOTION

The Applicant filed a Notice of Motion Application dated 18th December 2020 for orders; -

1. Upon hearing the Application *inter partes*, an order of injunction to issue to restrain the Defendants/Respondents either by themselves, agents, servants or otherwise be restrained from conducting the affairs of the affected party, purporting to pass any resolutions touching on the affected party or in any manner interfering with the operations of the affected party pending the hearing and determination of this Application.
2. The directorship of the affected party to be restored to the position obtaining prior to 11th June 2018 pending the hearing and determination of the suit herein.
3. A reputable audit firm be agreed upon or appointed by the court for purposes of conducting an in-depth forensic audit of the company's loan and its accounts.
4. The Plaintiffs be granted leave to continue this suit as a derivative suit.

The Application is based on the following grounds; -

1. The Defendants/Respondents assumed office as directors of the affected party by lodging forged documents with the Registrar of Companies upon which the Plaintiffs were removed from the directorship of the affected company.
2. Since assuming office the Defendants/Respondents have unlawfully and irregularly as directors of the affected party and have failed to conduct the business of the affected party diligently thereby exposing the affected party to the real risk of massive financial and reputational losses.
3. The Respondents have failed to account for a loan of Kshs.45 Million advanced to the affected party and refused to appoint internal auditors and a company secretary to assist in facilitating the running of the affected party.
4. Unless the orders sought are granted, the affected party runs the risk of being plunged into unimaginable losses thereby occasioning the company irreparable harm.

NOTICE OF PRELIMINARY OBJECTION

The Defendants and the Affected Party raised a Preliminary Objection dated **4th February 2021** on a point of law as follows;

1. This Court lacks jurisdiction to hear and determine the Plaintiff's suit pursuant to **Article 34 of the Articles of Association** of the Affected Party, which governs both Shareholders and Directors.
2. The 1st, 2nd and 4th Plaintiffs and the 1st, 2nd, 3rd, 4th and 6th Defendants consequently signed a Shareholders Agreement on **3rd June 2017** together with others that govern the Shareholders of the Affected Party and pursuant to **Clause 38**, directs parties to Arbitration in an instance of dispute as between the shareholders.
3. **Section 6 of the Arbitration Act** which empowers a Court before which proceedings are brought in a matter which is subject to an arbitration agreement, to strike out and/or stay proceedings and refer parties to arbitration.
4. The Plaintiffs have instituted this suit in violation of both **Section 6 of the Arbitration Act**, the Articles of Association of the affected party and the Shareholders Agreement as well as without invoking **Section 7 of the Arbitration Act** by not referring the dispute to Arbitration as stipulated under **Article 34 of the Articles of Association** and **Clause 38 of the Shareholders Agreement** and are therefore improperly before the Court.
5. Parties hereto agree and are bound to proceed to Arbitration on matters in dispute arising therefrom.
6. The prayers sought in the Application dated 18th December 2020 are permanent and not conservatory orders.

DEFENDANT'S SUBMISSIONS

The Defendants submitted that **Article 34 of the Memorandum and Articles of Association** provides that any dispute touching on any members of the company or touching on the true intent or incidents of the articles or the statutes, the said dispute is to be referred to arbitration. The said Article reads; -

Whenever any incidences arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching on the true intent or incidents or consequences of these articles, or the statutes, or touching on anything then or thereafter done, executed, committed or suffered in the pursuance of these articles, or any claim or account of such breach, or alleged breach, or otherwise relating to the premises, or to these articles or to any statutes affecting the company or to any of the affairs of the company , every such difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference of if they cannot agree upon a single arbitrator to the decision of two arbitrators, of who one shall be appointed by each of the parties in difference.

The Defendants also swore an Affidavit in support of their Chamber Summons Application seeking stay of the suit and proceedings or alternatively striking out of the suit.

The Defendants submitted that the Preliminary Objection has merit as it falls within the provisions of **Section 6 of the Arbitration Act**.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that where a party seeks to invoke an arbitration clause such a party must comply with the provisions of **Section 6 of the Arbitration Act**.

It was also the Plaintiff's submission that there is no dispute between the parties with regard to the matters agreed to be referred to arbitration. The basis for seeking to have the matter referred to arbitration by the Applicants is the provision of **Article 34 of the Affected Party's Articles of Association and the Shareholders' Agreement dated 3rd June 2021**. The Articles of Association only contemplate a situation where disputes between the company on the one hand and any members on the other hand.

The dispute before the court is one between fellow members. A similar situation was addressed by the court in the Matter of Kangawana Investments Company Limited [2012] eKLR as follows; -

“It is not in dispute that Clause 28 of the Company’s Articles of Association provides as follows:

Whenever any differences arises between the Company on one hand and any of the members, their executors, administrators, or assigns on the hand, touching the true intent or construction, or the incidents, or consequences of these articles, or of the status, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or the statutes or touching any breach, or alleged breach, of these Articles or to any statutes affecting the Company or to any of the affairs of the company, every difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.

In my considered view, the said article is meant to protect the interest of the company as against those of the members. It is not meant to cater for interests of the members who decide to fight amongst themselves. If it was intended to apply to disputes between members inter se, one would have expected the same to use such phrases as “or between members of the company”. Here the clause is clear that on one hand there must be a company. From the evidence on record, it is clear that allegations of impropriety are majorly directed against the 1st respondent with little if any allegation being directed against the Company. In the circumstances it is my finding and I so hold that clause 28 aforesaid is of no assistance to the applicant.

The Shareholders Agreement under Clause 38 provides;

38.2 save as herein otherwise specifically provided, any dispute between the parties as to matters arising under or pursuant to this Agreement as aforesaid which cannot be settled amicably within 15 days after the receipt by one party of the other party’s request for such amicable settlement may be submitted by either party to arbitration in accordance with the provisions of Clauses 38.3 to 38. 8.

The referral to arbitration under this Clause is not mandatory but optional. Therefore, there is no jurisdiction to strike out a suit merely because there is an arbitration clause in the agreements between parties.

DETERMINATION

The essence of a preliminary objection was in Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696 where the court stated that:

“The first matter relates to the increasing practice of raising points which should in normal manner, quite improperly be by way of preliminary objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on assumption that all 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.

..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The Court has considered the pleadings and submissions by the parties herein. The Defendant raised a Preliminary Objection citing that the court lacks jurisdiction to entertain the suit herein and pray that the matter be referred to Arbitration.

Order 2 Rule 9 Civil Procedure Rules 2010 prescribes that; -

A party may by his pleading raise any point of law.

The issue for determination is whether this court has jurisdiction to deal with the dispute in question.

The issue of jurisdiction is well settled in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1, where Nyarangi J. of the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

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**. It 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."

A Preliminary Objection is not the legal procedure to seek stay of proceedings under **Section 6 of Arbitration Act** for parties to pursue Arbitration.

The tenor and import of **Article 159(2) (c) of the Constitution** as read together with **Section 6(1) of the Arbitration Act** is that where parties to a contract 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. The Defendant raised the issue of Arbitration promptly. Since the Defendant filed the application promptly as set out in **Section 6(1) of the Arbitration Act**.

In the instant case, **Article 34 of the Memorandum and Articles of Association (supra)** provides that any dispute touching on any members of the company or touching on the true intent or incidents of the articles or the statutes, the said dispute is to be referred to arbitration. Further, the **Shareholders Agreement under Clause 38 (supra)** also stipulates that disputes between the parties be settled by Arbitration. The intention of the contracting parties in the Shareholder's Agreement is to pursue Arbitration even if it is not spelt in mandatory terms. This court will not rewrite the terms of the parties' Shareholders Agreement.

The Plaintiff/Respondent acknowledged that the above-mentioned **Clause 38** applies to this dispute but argued that the referral to arbitration under this Clause is not mandatory but optional. However, I disagree with the Respondent on this, we are all required to adhere to **Article 159 2 (c) of COK**

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

DISPOSITION

- 1. The Court finds that as between the Plaintiffs and Defendants, they have their choice of forum as arbitration and there is a dispute to determined through arbitration.**
- 2. The import of the above is that this Court lacks jurisdiction to hear and determine the dispute as canvassed in the underlying suit in the Complaint dated 18th December 2020.**
- 3. The instant proceedings are stayed and the dispute is referred to Arbitration under Clause 38 Shareholders Agreement of the Company under Section 6 of Arbitration Act.**
- 4. The Preliminary Objection is hereby dismissed.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE