



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

COMMERCIAL CAUSE NO. E104 OF 2021

CHARLES NZIOKI KANYAA.....1ST PLAINTIFF

HARRISON KALOKI KANYA.....2ND PLAINTIFF

ROBERT MUNYAO KANYAA.....3RD PLAINTIFF

VERSUS

CYTONN REAL ESTATE PROJECT NOTES LLP.....1ST DEFENDANT

CYTONN HIGH YIELDS SOLUTIONS LLP.....2ND DEFENDANT

CYTONN INVESTMENTS MANAGEMENT PLC.....3RD DEFENDANT

RULING

The Application

1. The application for determination by the Honourable Court is 1st, 2nd and 3rd Defendants/Applicants' Notice of Motion dated the 11th March, 2021 brought under Section 6 of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997. The Application seeks the following orders:

i. THAT all further proceedings herein be stayed as the parties pursue their mandatory dispute resolution processes in terms of Clause 19 of the Subscription Agreement and Clause 15 of the Partnership Agreement.

ii. THAT the costs of and occasioned by this Application be provided for.

2. The application is based on the grounds on the face of it and supported by the Affidavit of the Senior Legal Associate of Cytonn Investments Management PLC (3rd Defendant) one **JENNIFER SOLOVEA** sworn on 11th March, 2021. She averred that parties herein were subject to an agreement which expressly provided that in the event of a dispute, they shall first pursue negotiations and if no settlement is reached, they shall proceed to arbitration.

3. She further averred that following the invocation of a force majeure clause of the subscription agreement, the period of investment was extended initially by three months thereafter twelve months thus the immediate redemption as sought by the Respondents/Plaintiffs cannot be realized. It is the said extensions that are subject of dispute in the instant claim.

4. The Defendants aver that Arbitration as a dispute resolution mechanism was provided for by parties in terms of Clauses 19 and 15 respectively of the Subscription and Partnership Agreements. Further, she stated that the parties had tried negotiations via email correspondences and the instant suit is an indication negotiations were unsuccessful.

5. The Applicants aver that the Plaintiffs initially invested Kshs. 30,000,000/ with the 2nd Defendant under the Investment Agreement dated 29th October, 2018 at an agreed interest rate of 18% payable monthly for a period of twelve months, the maturity date of the initial investment being 4th November, 2019 which said Investment Agreement matured and the 2nd Defendant was discharged and in any event there being a dispute between the Plaintiffs and the 2nd Defendant, the same should be subjected to mediation and in the event of failure Arbitration pursuant to Clause 27 of the said agreement which provided:

"This Agreement shall be governed by and construed in accordance with the Laws of Kenya. In the event of any dispute with respect to the construction and Performance of the Agreement, the parties shall first resolve the dispute through amicable negotiations. However, if the Parties fail to reach an agreement within 15 days of commencement of the negotiations, the dispute shall be resolved through Arbitration, through the selection of a single arbitrator by the Chair of the National Charter of CI Arb, in the event that the Parties are unable to agree on an arbitrator.

6. Further, the Plaintiffs executed a Subscription Agreement dated the 29th day of October, 2019 in which dispute resolution was provided for as follows:

"19 This Agreement shall be governed by and construed in accordance with the Laws of Kenya. In the event of any dispute with respect to the Construction and Performance of the agreement, the parties shall first resolve the dispute through amicable negotiations. However, if the Parties fail to reach an agreement within 15 days of commencement of the negotiations, the dispute shall be resolved through arbitration."

7. Additionally, the Partnership Agreement at Clause 15 provided for dispute resolution to be first settled by negotiations and that arbitration would follow in the event of failure. It stated thus:

"Dispute Resolution and governing law

This agreement shall be governed by and construed in accordance with the laws Kenya. In the event of any dispute with respect to the construction and Performance of this agreement, the parties shall first resolve the dispute through friendly negotiations. In the event the parties fail to reach an agreement on the dispute within 15 days after either party's request to the other party for resolution of the dispute through negotiations, the dispute shall be resolved as per the provision of the arbitration Act, 1995."

8. It is the strong averment of the Applicants that the instant dispute ought to be referred for arbitration as contractually agreed by the parties.

9. The Plaintiffs/Respondents opposed the said Application vide a statement of grounds of opposition dated the 15th day of March, 2021. The Plaintiffs averred that the provisions of the Arbitration Act, 1995 relied on by the Applicants predate the Constitution of Kenya, *inter alia*, the Plaintiffs' consumer rights as provided for under Article 46 and must be construed with alterations and exceptions to be in conformity with the Constitution.

10. The Plaintiffs further opposed the Application on the basis that with the existence of the Consumer Protection Act, which has been invoked by the Plaintiff, the agreement between the parties cannot override the said legislation.

11. The Plaintiffs also opposed the Application on ground that the Consumer Protection Act prohibiting arbitration clauses that prevent a consumer from commencing an action in the High Court is invalid and the said Act and the Constitution having come in force after the Arbitration Act, 1995 demonstrate the latest intention of Parliament with respect to disputes involving consumer rights.

Submissions

12. Parties agreed to canvass the Application by way of written submissions.

Defendants/Applicants' submissions

13. The Applicant in support of the application filed submissions dated 31st day of March, 2021. They submit that the Application is made within time pursuant to Section 6(1) of the Arbitration Act, 1995 which provides that:

"6. Stay of legal proceedings

(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) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

14. The Defendants submitted that the Plaintiffs had only raised the issue breach of contract and/or invalidity of clauses by making reference to consumer rights as provided for in the constitution as well as the Consumer Protection Act so as to avoid the Arbitration Clause(s) that they are bound by.

15. The Defendants have submitted that it is critical that the court closely analyses the pleadings so as to determine the actual basis of the claims by parties. In preferring this line of argument, the Defendants cited the case of **Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another [2020] eKLR** where the court held that:

“21. In making a determination whether the allegations of fraud are merely sprinkled on the pleadings as a jurisdictional hook or whether they disclose sufficiently plausible claims of fraud to warrant the ousting of arbitration on public policy grounds, the Court primarily looks at two aspects of the pleadings. First, the Court looks at the fit between the allegations made and the prayers in the Plaint. Where the prayers sought are in the nature of remedies for a breach of contract as opposed to its rescission due to the alleged fraud, a Court is more likely to conclude that the allegations of fraud are pre-textual and strategic and insufficient to oust arbitration jurisdiction. On the other hand, where structurally the pleading shows a close fit between the allegations of fraud made and the prayers which are not in the nature of enforcing the contract but avoiding it, the Court is more likely to oust arbitration jurisdiction and hold that the dispute must be litigated in Court.

22. The second aspect of the pleadings that the Court looks at is the prima facie plausibility of allegations and whether they reveal a true dispute based on deliberate misstatements of material fact knowingly made in order to deceive the party alleging the fraud. The nature of the allegations including the details disclosed helps the Court make a determination whether the allegations are merely pre-textual and also whether the alleged fraud is complex or serious enough to oust arbitration jurisdiction.

23. In the present case, the Plaintiff’s claim that the central aspect of the case is fraud fails on both indicators. First, the overwhelming majority of the Plaint carefully pleads a case sounding in breach of contract. Second, a look at all the prayers other than prayer (a) reveals that the Plaintiff is interested in enforcing the contract – not avoiding it. The Plaintiff wants to obtain the benefits of the contract as concluded between himself and the 1st Defendant and wants the 1st Defendant compelled to specifically perform certain clauses of the contract. Having made this choice, the Plaintiff cannot turn around and make the claim that he is, in fact, suing for fraud and deception. The structure of the Plaint and the prayers sought betray a radically different claim.

16. It is the Defendants’ submission that the Subscription Agreement entered into by the parties is the basis of the Plaintiffs’ claim and having provided for arbitration on failure of mediation at Clause 27, the parties were bound to pursue Arbitration.

17. The Defendants cited the case of Vihar Construction Company Limited v Uhani Limited [2015] eKLR where it was held:

“The court cannot re-write contracts that have been entered into by the parties. They must therefore be bound by the terms therein.... As the court cannot re-write the contract between the parties herein, they must be left to have their dispute resolved in the forum they voluntarily opted for.”

18. The Defendants further invited the court to consider the case of Kenneth Maweu Kasinga (supra) where the court held that:

“The upshot is that the Plaintiff and the 1st Defendant are bound by the Arbitration Agreement they concluded between themselves. Further, the subject matter of the dispute herein is arbitrable. Consequently, the Application dated 14/08/2020 is merited: all further proceedings herein are stayed and are referred to arbitration in terms of Clause 25 of the Investment Agreement and Clause 16 of the Partnership Agreement.”

19. On the issue of contravention of rights enshrined in the Constitution, the Defendants submitted that the same was not for determination by the Honourable Court as the issues are disputes arising between private parties in the course of their private transactions. The Defendants cited the Supreme Court case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where it was held:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

20. Additionally, the Defendants submitted that the Honourable Court has a duty to encourage Alternative Dispute Resolution pursuant to the provisions of Article 159(2) of the Constitution which position was upheld in Hausram Limited v Nairobi City County [2013] eKLR where the court stated:

“Further, I am of the belief that Article 159 (2) (c) of the Constitution, 2010 is expressed in mandatory terms and this Court is under a duty to promote alternative forms of dispute resolution.”

Plaintiffs/Respondents’ submissions

21. The Plaintiffs filed their submissions dated the 14th day of April, 2021 in which they averred that they had pleaded violation of their rights in their Plaint filed alongside the issues of breach of contract as the doctrine of *res judicata* bars parties from bringing issues in instalments. The Defendants cited Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich [1990] eKLR where the court stated that:

“The locus classicus of that aspect of res judicata is the judgment of wigram VC in Henderson v Henderson (1843) Hare 100, 115, where the Judge says:

Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

22. The Plaintiffs submitted that Section 88(1) of the Consumer Protection Act (CPA), a legislation passed by Parliament pursuant to Article 46 (2) of the Constitution, “...to provide for consumer protection...” in unmistakable terms provides:-

“88. Limitation of arbitration

(1) Any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid in so far as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.”

23. The Plaintiffs also submitted that the court has provided for exceptions to the rule barring parties to an Arbitration agreement to commence proceedings in court and cited ***Kenneth Maweu Kasinga (supra)*** where the court held that:

“14. It is true that Article 159(2)(c) of the Constitution and section 6 of the Arbitration Act provide a strong basis and textual foundation for respecting arbitration clauses in parties’ contracts. As both the Plaintiff and the 1st Defendant agree, where the parties have entered into an arbitration clause, none of the parties will be permitted to commence an action in Court unless they bring themselves within two exceptions:

a. Where they demonstrate that the arbitration agreement is null and void, inoperative or otherwise incapable of being performed. This would be the case, for example, where there are grounds for rescinding the arbitration agreement qua contract.”

24. The Plaintiffs further submitted that pursuant to Clause 19 and Clause 15 of the Subscription Agreement and the Partnership agreement respectively, the arbitral clauses were limited to “*construction and performance of the agreements*” thus all matters falling outside the construction and performance of the agreements are not for arbitration. Disputes such as denial, violation or infringement of rights were not an issue that the parties agreed to refer to arbitration. In respect to the foregoing, the Plaintiffs relied on the ***Kenneth Maweu Kasinga case (supra)*** where the court held that:

“Where the subject matter of the controversy is not covered by the arbitration agreement. Stated differently, parties to an arbitration agreement are not required to go to arbitration when the specific subject matter of the controversy is non-arbitrable.”

25. Additionally, the Plaintiffs have submitted on the invalidity of the Section 6(1) of the Arbitration Act as it is inconsistent with the provisions of the Constitution on consumer rights and the Consumer Protection Act under Sections 84 and 88. The Constitution and the CPA having come after the Arbitration Act, the two express the intention of the legislature. The Plaintiffs relied on the case of ***James Gacheru Kariuki & 19 others v County Government of Mombasa & 56 others [2019] eKLR*** where the court with the approval of ***Kutner vs Philips (1891) 2 QB 2 267 (QB)*** stated that:

“[i]f ...the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later, that is, the later statute impliedly repeals the earlier one to the extent of the inconsistency.”

26. The Plaintiffs further submitted that the Court is conferred with the jurisdiction to hear and determine the dispute as provided for under the Constitution and the CPA under Articles 22, 23(1), 165 (3) (b) and 258.

Applicants’ Supplementary Submissions

27. The Defendants in Response to the submissions of the Plaintiffs filed supplementary submissions dated the 31st day of May, 2021. The Defendants submitted that the instant suit was commenced vide a Complaint thus it was a private law suit by private parties against other private parties arising from a contract. That in that case, the relationship between the parties was contractual’. That the contract by the parties in turn incorporated the Partnership Agreement to which parties agreed to be bound, *inter alia*, by the terms of dispute resolution.

28. Further, the violations alleged by the Plaintiffs are inextricably linked to and cannot be separated from the contracts. The reliefs sought by the Plaintiffs do not amount to recession claim but are issues of having not taken notice of various documents incorporated in the Subscription Agreement which said issues fall within the scope of the arbitration clauses. The Defendants cited the Court of Appeal Case ***Kenya Breweries Limited & another v Bia Tosha Limited & 5 others [2020] eKLR*** where the court held that:

“We differ with the learned Judge’s conclusion that the issues of constitutional rights raised by the 1st respondent were not suitable for arbitration as the said issues arose from the distributorship agreement. There is no way the infringement of the

alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned Judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See Section 97 of the Evidence Act).” 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.”

29. On further addressing the issue of constitution avoidance, the Defendants submitted that there being no Petition with respect to violations of rights as ought to be by consideration by the Honourable Court, the Court ought to uphold the principle of constitutional avoidance.

30. The Defendants submit that the Arbitration Clause does not in any way prohibit the Plaintiffs’ right to commence proceedings in this Honourable Court under the Act. It is the submission of the Defendants that the same has not be identified.

Analysis and Determination

31. I have considered the application; the affidavit both in support of the application and in opposition, the supplementary and further affidavit, and the submissions filed as well as the authorities relied upon. I have deduced that there are two issues for determination namely:

- a) Whether the proceedings herein should be stayed pending referral of the dispute to arbitration.
- b) Whether the issues of violation and/or infringement of consumer rights alleged can invalidate the arbitration clause.

32. The issue of whether the Application should be allowed and the matter referred for Arbitration in terms of **Clause 19** of the Subscription Agreement dated 29th October, 2019 and **Clause 15** of the Partnership Agreement calls for determination by this Court.

33. I note the Plaintiffs’ contentious position with respect to being knowledgeable of the said Partnership Agreement and I am of the view that for purposes of fair determination and since the matter is still at an interlocutory stage, I make analysis based on the Subscription Agreement that is within the knowledge of all parties and more specifically the Plaintiffs.

34. Clause 19 of the said Subscription Agreement states that:

“This Agreement shall be governed by and construed in accordance with the Laws of Kenya. In the event of any dispute with respect to the Construction and Performance of the agreement, the parties shall first resolve the dispute through amicable negotiations. However, if the Parties fail to reach an agreement within 15 days of commencement of the negotiations, the dispute shall be resolved through arbitration.”

35. The substantive provision under which the Applicant sought the court’s intervention is **Section 6 (1)** of the Arbitration Act. It provides as follows:

“(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) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.***
- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.***
- (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings”***

36. The Court of Appeal in the case of **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR** pronounced itself with respect to Section 6 of the Arbitration Act, *inter alia*, that:

“All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:

- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;***
- (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and***

(c) Whether the suit intended concerned a matter agreed to be referred to arbitration”

37. Addressing Section 6(1) of the Arbitration Act, 1995, the court in Adrec Limited versus Nation Media Group Limited [2017] eKLR, cited by the Applicant held that:

“Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration”

38. I am of the opinion that parties having voluntarily entered into a contract, they are bound by the same terms of the contract and I am restrained from rewriting the intention of the parties and concur with the authority cited by the Defendants in Vihar Construction Company Limited v Uhani Limited [2015] eKLR where it was held:

“The court cannot re-write contracts that have been entered into by the parties. They must therefore be bound by the terms therein.... As the court cannot re-write the contract between the parties herein, they must be left to have their dispute resolved in the forum they voluntarily opted for.”

39. In view of the foregoing analysis, I find that the dispute and/or the issues raised by the parties arise from a contract in the nature of a Subscription Agreement entered into by the Plaintiffs and the Defendants. Clause 19 of the said agreement provides for an arbitration proceeding and I find it in order that the proceedings before this Court ought to be stayed and parties proceed to arbitration.

40. On the issue of violation and/or infringements of rights which ought not to be subject to arbitration proceedings as they do not fall in the scope of issues covered by the arbitration clause, I concur with the authority cited by the Applicant in the Court of Appeal, namely Kenya Breweries Limited & another v Bia Tosha Limited & 5 others [2020] eKLR where the court held that:

“We differ with the learned Judge’s conclusion that the issues of constitutional rights raised by the 1st respondent were not suitable for arbitration as the said issues arose from the distributorship agreement. There is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned Judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See Section 97 of the Evidence Act). 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.”

41. I find that the alleged violations and/or infringement of the Plaintiffs’ consumer rights as envisioned in the Constitution are annexed to and are pertinent to the Subscription Agreement thus cannot be alienated from the said agreement. For this reason, matters constitutional should also be addressed in the arbitral process.

Disposition

42. In conclusion and for the reasons above stated, I make a finding that this application is properly before this Court and that the same is meritorious. Accordingly, I allow the same and make the following orders:

- i. The proceedings herein be and are hereby stayed pending referral, hearing and determination of arbitration proceedings.***
- ii. In terms of Clause 19 of the Subscription Agreement dated 29th October, 2019, the dispute herein between the Plaintiff and the Defendant be and is hereby referred to arbitration in terms of Clause 19 of the said Agreement.***
- iii. An order be and is hereby issued that the parties shall agree on the number of arbitrators and appoint an Arbitrator and/or Arbitrators within 45 days.***
- iv. Costs of the application shall abide the outcome of the arbitration.***

43. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22nd DAY OF JULY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Amoko for the Defendants/Applicants.**

2. Miss Mwanzia h/b for Kilukumi for the Plaintiffs/Respondents.