Hyundai Motors Kenya Limited v Hyundai Motor Company & another (Civil Suit E205 of 2019) [2021] KEHC 70 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 70 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E205 OF 2019

GWN MACHARIA, J

SEPTEMBER 23, 2021

BETWEEN

HYUNDAI MOTORS KENYA LIMITED ..... PLAINTIFF

AND

HYUNDAI MOTOR COMPANY ..... 1ST DEFENDANT

SALVADOR CAETANO AUTO AFRICA LTD ..... 2ND DEFENDANT

RULING

1. This brief ruling relates to an oral application in the form of an objection that was made in court by learned counsel, Mr. Ogula for the Defendants on 12th March, 2020 stating that the court had no jurisdiction to entertain the Plaintiff's Notice of Motion dated 5th March, 2020 because an agreement between the parties referred the dispute to arbitration. Mr. Ogula was insisting that the court had, on this account, ruled that it had no jurisdiction to entertain the said application.

2. Mr. Ochieng for the Plaintiff/Applicant on the other hand disputed that such a ruling had been made. On his part, he submitted that the Applicant in the application had approached the court for interim relief under Section 7 of the *Arbitration Act*. That in the interim, the Defendants/Respondents had taken steps to refer the matter to arbitration. He submitted that the court had in the circumstances maintained a status quo.

3. The background to this objection brings the parties to the position herein. Parties were asked to file written as regards whether the court is *functus officio*, the matter having been referred to arbitration.

4. It suffices to note that the pending application was filed by the Plaintiff in which it seeks, *inter alia*, that pending the hearing and determination of the suit the court be pleased to issue an injunction restraining the Respondents either by themselves, their agents, assignees, nominees, servants from

launching, selling, distributing, franchising, dealing or in any way taking over the distributorship of Hyundai motor vehicles spare parts and accessories in Kenya; that the court finds and holds that the directors of the first Respondent, K.Y. Hong and Minkyu (Mike) Song or the current managing director as well as the 2nd Respondent's directors Sergio Riberio and Miguel Ramos, or the country's representative director(s) are in contempt of court orders issued by Justice Nzioka on 27th September, 2019; that the court finds and holds that the directors of the first Respondent, K.Y. Hong and Minkyu (Mike) Song or the current managing director as well as the 2nd Respondent's directors Sergio Riberio and Miguel Ramos, or the country's director's be detained in prison for a period of six months or such period that the court may please and that costs be provided for.

5. The said application is filed under Order 40 Rule 2, Order 5 Rule 21 and Order 51 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law.

6. The Plaintiff's Submissions are dated 12th November, 2020 and are filed by M/s Rachier and Amollo Advocates whilst those of the Defendant are dated 7th October, 2020 and filed M/s Iseme, Kamau & Advocates.

7. I find it prudent to state that the objection was raised before my predecessor Hon. Nzioka, J who restricted the parties to two issues for determination namely, whether the court has jurisdiction and whether the status quo should be maintained.

The Applicants Case

8. The Applicant in support of its Application filed submissions dated the 12th day of November, 2020 and outlined the issues for determination as follows:

    a. Under what provisions was the application dated 5th March, 2020 predicated and whether the honourable court has jurisdiction to enforce its own orders?

    b. Whether the Honourable court is Functus Officio as pertains the application dated 5th March 2020?

    c. Whether the orders of arbitration made on 27th September, 2019 bind the 2nd Respondent?

    d. Whether the Respondents are in violation of the Status quo orders issued on 27th September 2019 by Justice Grace Nzioka and what remedies are available to the applicant?

9. On the first issue, the Applicant submitted that any objection so raised which would necessitate as a matter of course, for a party to lead evidence cannot be termed as a preliminary objection.

10. The Applicant in support of the foregoing position made reference to the case of *Mukisa Biscuits vs West End Distributors* (1969) 679 and further invited the Court to consider the position in the case of *Oraro v Mbajja* [2005] eKLR where it was held:

> " I think the principle is abundantly clear. A " preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I

am in agreement...that ' 'where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

11. On the Second issue, the Applicant submitted that Section 7 of the *Arbitration Act* clothes the court with jurisdiction to issue interim measures of relief even when the matter is pending arbitration by providing that:

> " It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."

11. The Applicant further submitted that the Honourable Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court thus the Court has the authority to sanction a party who is in contempt of the orders of perseveration.

12. The Applicant cited the authority of *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR where the Court quoted Lord Scarman in the case of *Castanho v. Brown & Root (UK) Ltd & another* (1981) 1 ALL ER 143 where he stated:

> " The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain; and termination of the process can, like in any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court. Was it, then, in the circumstances of this case an abuse? In my judgment, it was. A sensible test is that which both the judge and Lord Denning MR applied. Suppose leave had been required..., would the court have granted unconditional leave? It is inconceivable that the court would have allowed a plaintiff, who had secured interim payments and an admission of liability by proceeding in the English court, to discontinue his action in order to improve his chances in a foreign suit without being put on terms, which could well include not only repayment of the moneys received but an undertaking not to issue a second writ in England."

13. On the third issue on whether the court had become functus officio, the Applicant submitted that no decision had been made by this court with finality and the only order that was in existence was with respect to referring the matter to arbitration.

14. In view of the foregoing submissions, the Applicant invited the Court to consider the position of the Supreme Court in *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLRwhere it was held that:

> " The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SAL-J 832 in which the learned author stated; "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

15. On the fourth issue, the Applicant submitted that despite the Respondents greatly relying on an arbitration clause subject to which the dispute was referred to arbitration, they had no contract with

the Applicant which provided for arbitration thus it was incumbent upon them to prove the existence of such arbitral clause so as to persuade the Court to refer the matter to arbitration.

16. The Applicant cited the authority of *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR where it was stated:

> " The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings, once this burden has been discharged then the burden shifts to the opposing party to show cause why the effect should not be given to the arbitration clause."

17. It was further submitted that the Respondents were in breach of the orders of status quo as contained in the application which stood uncontroverted. The business environment and flow of transactions was alleged to have been interrupted between parties at the instance of the Respondent thus the status quo had been breached thus warranting the Court to issue orders in preservation of the subject of dispute pending the outcome of the arbitration.

18. The Applicant cited the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR where it was held:

> " The court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator."

19. The Applicant urged this Court to dismiss the preliminary objection and allow its application as prayed.

The Respondents' Case

20. The Respondents in support of the Preliminary Objection filed their written submissions in which they outlined the following two issues for determination:

    a. Whether this court is functus officio by virtue of the Orders issued on 27th September, 2019 and thereby lacks jurisdiction to entertain the Application;

    b. Whether the Defendants are in breach of the Status quo order issued on 27th September 2019.

21. On the first issue, the Respondents submitted that once the court referred the matter to arbitration by consent of the parties and in exercise of its powers conferred under section 6 of the *Arbitration Act* 1995 (hereinafter 'the *Arbitration Act*'), all proceedings in this matter were automatically stayed until such time the arbitration is heard and determined.

22. Further the Respondents submitted that the effect of the Order referring the dispute to arbitration was that by virtue of the doctrine of judicial non-interference/intervention as provided under Section 10 of the *Arbitration Act*, this court automatically became functus officio as far as any substantive disputes involving the matter herein are concerned. As a consequence, until such time the Arbitration is heard and determined the jurisdiction of this court can only be invoked in very limited and special circumstances as provided under the *Arbitration Act* and or after the arbitration proceedings are heard and determined.

23. The Respondents made reference to the authority of *Hausram Limited versus Nairobi City County*, Milimani HCCC No. 421 of 2013 [2013] eKLR, where the court in declining to assume jurisdiction in a matter where there was a clear arbitration clause held as follows: -

> " The *Arbitration Act* and the Arbitration Rules provide for both the substantive and procedural manner in which matters referred to arbitration are to be dealt with. The role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the *Arbitration Act*. Section 10 of the Act provides that: "Except as provided in this Act, no Court shall intervene in matters governed by this Act."
>
> 16. By this Section, the jurisdiction of the Court is limited and restricted and may only be invoked in very clear and certain circumstances. ..... the Court under Section 10 of the *Arbitration Act* had a limited role in intervening in matters where parties have agreed to refer matters to arbitration except where the Act specifically provided for such intervention. The Court consequently held that the said provision was mandatory and that the Court's role in arbitration matters was merely a facilitative one..... The Court's intervention, in the process proper or the arbitral award thereafter, is limited and restricted to matters that are provided for under the *Arbitration Act*. "

24. Further reference was made to the case of *Cementers Limited v Multichoice Kenya Limited & 13 others* [2019] eKLR the court held as follows: -

> " Based on the above facts, it therefore follows that, the parties to the JBC contract are ready to go for Arbitration; the court has no jurisdiction to hear the merits of the substantive issues relating to the dispute arising out of the JBC contract. In the given circumstances, the proceedings herein shall be stayed pending the referral of the dispute to Arbitration."

25. On the second issue of whether the Respondents are in breach of status quo, it was submitted that the Applicant's contention that the status quo order meant that Defendants were restrained from entering into future distributorship agreements with third parties is clearly misconceived as the contract had been terminated and a new dealer had been contracted.

26. The Respondents relied on the authority of *Shimmers Plaza Limited vs. National Bank of Kenya Limited* (2015) eKLR which defined status quo as follows: -

> " Status quo in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events... All it means was that everything was to remain as it was as at the time the order was given."

Analysis and Determination

27. I have carefully considered the rival submissions by the parties. I find that the only issues for determination by this Court as summarized by Hon. Nzioka, J are whether this court became functus officio by virtue of the Orders issued on 27th September, 2019 and thereby lacks jurisdiction to entertain the Application and whether a status quo should be maintained.

28. It is undisputed that the dispute was referred to arbitration by consent of the parties and the Court directed that conditional status quo be maintained. This order was recorded on 27th July, 2019 in the following words:

> " By consent, the status quo be maintained. The matter be referred to arbitration. Further mention on 22/10/2019 for further orders."

29. I take note that the application giving rise to instant notice of Preliminary Objection was brought under Order 40 Rule 2, Order 5 Rule 21 and Order 51 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law. To the contrary, Applicant has made reference to Section 7 of the *Arbitration Act* in seeking interim orders of preservation which is not the case.

30. On whether this Court has the jurisdiction to entertain the Applicant's application, I am guided by the provisions of Section 10 of the *Arbitration Act* which provides that:

> "
>
> " 10. Extent of court intervention
> Except as provided in this Act, no court shall intervene in matters governed by this Act."

31. I am of the understanding that the *Arbitration Act* having provided for the mode for hearing and determination of arbitral disputes, the provisions of the Civil Procedure Rules are not applicable in particular Order 40 Rule 2. I am guided by the position taken by the Court of Appeal in *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR wherein the Court observed that: -

> " ...All the provisions including the *Civil Procedure Act* and Rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act* which states; "Except as provided in this Act no court shall intervene in matters governed by this Act."

32. I further concur with the case of Hausram Limited versus Nairobi City County, Milimani HCCC No. 421 of 2013 [2013] eKLR, as cited by the Respondents where the Court held as follows: -

> " It was held by the Court of Appeal in the case of *East African Power Management Ltd v Westmount (K) Ltd* [Nairobi Civil Appeal No. 55 of 2006] that the Court under Section 10 of the *Arbitration Act* had a limited role in intervening in matters where parties have agreed to refer matters to arbitration except where the Act specifically provided for such intervention. The Court consequently held that the said provision was mandatory and that the Court's role in arbitration matters was merely a facilitative one."

33. There is therefore no doubt that if the Plaintiff intended to seek preservation orders after the matter was referred to arbitration would have applied under Section 7 of the *Arbitration Act* which provides that:

> " It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."

34. It is also clear that the Curt on 6th March, 2020 upon restating that the matter goes to arbitration closed the court file. The learned judge stated as follows:

> " In that case, the matter is referred to arbitration. The court file is marked as closed."

35. Consequently, the subsequent proceedings after the above order ought not to have taken place unless again, by consent, parties set aside the order referring the matter to arbitration. This is not the case. As such, any conservatory or preservation orders can only be sought in a fresh matter other than in this file and under the *Arbitration Act*. This file ought to have closed pursuant to orders of 3rd March, 2020.

36. In the result and bearing in mind that the parties by consent agreed that the matter was to be referred to arbitration, I find that this Court has no jurisdiction to entertain the Applicants' Notice of Motion dated the 5th day of March, 2020 or issue any status quo orders pursuant to that application.

Deposition

37. For all the foregoing reasons, the Defendants' oral Preliminary Objection is upheld. This file should forthwith close. I give no orders as to costs.

38. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

No appearance for counsel for the Plaintiff.

Ms. Cherotich h/b Mr. Ogula for the Defendants.