



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. E1 OF 2020

COUNTY GOVERNMENT OF KAKAMEGA.....PLAINTIFF

VERSUS

MUMIAS DISTRIBUTORS LIMITED.....DEFENDANT

RULING

1. The application for determination is the Motion, dated 18th February 2020, by defendant, which seeks orders to have the dispute forming the basis of this suit referred to arbitration and stay the proceedings of this suit. The only issue for me to determine is whether the proceedings herein should be stayed and the matter be referred to arbitration.

2. The agreement forming the basis of this dispute is the agreement dated 8th August, 2014, between the plaintiff and the defendant, for the management of funds released by the plaintiff to form a revolving fund in furtherance of sustainable sugarcane development in Kakamega County. Clause 5 of the Agreement reads:

“5.0 ARBITRATION

Should any dispute or difference of any kind whatsoever arise between the parties herein, the matter in question shall be settled amicably by mutual discussion as a principle within a period of one month. However when such settlement cannot be reached the matter shall be referred for settlement by a panel of two arbitrators to be agreed upon by the parties. Where no agreement is reached on the choice of the arbitrator, the arbitrators shall be appointed by the Chairman for the time being of Institute of Arbitrators, Kenya Chapter.”

3. The above clause appears to imply that the intention of the parties was that if any dispute arose, the same would oust the jurisdiction of the court and have the dispute settled through arbitration.

4. The courts have repeatedly said that it is not the business of courts to rewrite contracts between parties. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* [2017] eKLR (Waki, Makhandia & Ouko JJA), for example, the court said that it was not the business of courts to rewrite contracts between parties, and that parties were bound by the terms of their contracts, unless coercion, fraud or undue influence were pleaded and proved.

5. Rules on arbitration are contained in the Arbitration Act, No. 4 of 1995. In determining the issue framed above for determination, section 6 of the Arbitration Act is key. It reads:

“(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.”

6. The above section appears to suggest that this court will only stay proceedings in a matter which is the subject of an arbitration agreement

only if this is brought to the attention of the court at the time of entering appearance. In the subject suit, the plaint was filed on 17th October 2020. The defendant entered appearance, vide a memorandum of appearance filed in court on 4th November 2020, which was subsequently withdrawn by the defendant, vide a notice of withdrawal filed in court on 19th November, 2020. The defendant filed another memorandum of appearance, under protest, on 19th November, 2020. The statement of defence by the defendant was filed on 15th December, 2020, and the current application is dated 18th February, 2020. The application to refer this suit to arbitration was filed after the close of pleadings.

7. The courts have rendered themselves as the interpretation that ought to be given to section 6 of the Arbitration Act. In the *County Government of Kirinyaga vs. African Banking Corporation Ltd* [2020] eKLR (Gitari J), for example, the court said of section 6(1) of the Arbitration Act, as read together with Article 159(2)(c) of the Constitution:

“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.”

8. In *Corporate Insurance Company vs. Loise Wanjiru Wachira* [1996] eKLR (Gicheru, Kwach & Shah JJA), the court said:

“While we agree with the proposition that a Scott vs. Avery arbitration clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”

9. In *Fairlane Supermarket Limited vs. Barclays Bank Ltd* NBI HCCC No.102 of 2011 (Odunga J), the court held that:

“... the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of Corporate Insurance Company vs. Wachira (1995-1998) 1 EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ... 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.”

10. See also *Eunice Soko Mlagui vs. Suresh Parmar & 4 others* [2017] eKLR (Makhandia, Ouko & M’Inoti JJA), *Adrec vs. Nation Media Group Limited* [2017] eKLR (GBM Kariuki, Sichale & Kantai JJA) and *Charles Njogu Lofty vs. Bedouin Enterprises Ltd* [2005] eKLR (Omolo, Waki & Deverell JJA).

11. In view of the judicial pronouncements made above on section 6 of the Arbitration Act, it is my finding that the Motion, dated 18th February 2021, fails, on account of section 6(1) of the Arbitration Act, for the stay of proceedings and reference of the matter to arbitration was not sought after the entry of appearance, and that the defendant went ahead to file a defence. The Motion is incompetent, and it is hereby dismissed with costs. Let the matter proceed for full hearing. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER 2021

W. MUSYOKA

JUDGE