



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 84 OF 2016**

**DAVID KIBET TONUI .....PLAINTIFF/RESPONDENT**

**VERSUS**

**EPAINITUS GALO ANZEZE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ERIC NDUMBU MWANDIA .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**GODWIN WANG'ONG'U.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**KENYA AIRPORTS PARKING**

**SERVICES LIMITED.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**LAWRENCE MADIALO.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**SAMUEL KAHIGA .....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**AZICON KENYA LIMITED.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates two applications as dealt with herein. The first is chamber summons application dated 8<sup>th</sup> April 2016, brought under the provisions of; Section 4, 6 and 10 of the Arbitration Act and Rules 2, 3 and 11 of the Arbitration Rules, 1997, Order 46 Rule 20(1) of the Civil Procedure Rules and Section 59C, 1A, 2A and all other enabling provisions of the law.

2. The 3<sup>rd</sup> Defendant (herein “the Applicant”), is seeking for orders;

(a) *Spent;*

(b) *That the Honourable court be pleased to stay the proceedings pending Arbitration;*

(c) *That the court be pleased to refer the matter to arbitration to determine in accordance with Articles 31 and 33 of Association of the 4<sup>th</sup> Defendant/Respondent and 7<sup>th</sup> Defendant respectively;*

(d) *That further and in the alternative, the court be pleased to order the parties to try and amicably*

*settle the matter and in default refer the matter to arbitration in accordance with the shareholders' agreement dated 11<sup>th</sup> May 2004, between the Plaintiff/Respondent, 1<sup>st</sup> Defendant/Respondent and the 2<sup>nd</sup> Defendant/Respondent; and*

*(e) That the Plaintiff/Respondent bears the costs of the application.*

3. The application is based on the grounds on the face of it and an affidavit dated 8<sup>th</sup> April 2016, sworn by Godwin Wangong'u, the Company Secretary of the 4<sup>th</sup> and 7<sup>th</sup> Defendants (herein the 4<sup>th</sup> and 7<sup>th</sup> Respondents) respectively. He deposed that, Articles 31 and 33 of the Articles of Association of the 4<sup>th</sup> Defendant and 7<sup>th</sup> Defendants, provides for arbitration process in the event of disputes between the company and members.

4. That it is apparent that, the Plaintiff/Respondent's claim touches on affairs and/or management of both the 4<sup>th</sup> and 7<sup>th</sup> Respondents whereof; such issues can only be addressed through Arbitration. Further, the shareholders' agreement dated 11<sup>th</sup> May 2004 (herein "the agreement") is express on the issue of dealing with disputes. Therefore, the Plaintiff/Respondent was obliged to exhaust such inbuilt mechanisms before approaching the court.

5. However, the Plaintiff/Respondent opposed the application by filing grounds of opposition dated 12<sup>th</sup> April 2016. It was argued that, the application has been presented to the Honourable Court twelve (12) days after filing of the memorandum of appearance, contrary to the provisions of Section 6(1) of the Arbitration Act, 1995. Further, the 3<sup>rd</sup> Applicant is not a party to the memorandum and articles of Association of the 7<sup>th</sup> Respondent and the agreement.

6. Similarly, no dispute exist between the Applicant and the 3<sup>rd</sup> and 7<sup>th</sup> Respondents' touching on the matters contemplated in clause 31 and 33 of the 7<sup>th</sup> Respondent's memorandum and articles of association (herein "the clause") of the 7<sup>th</sup> Respondent and clause 12 of the agreement.

7. The parties disposed of the matter by filing submissions. The Applicant reiterated that, clauses 31 and 33 of the articles of association and clause 12 of the agreement, makes it mandatory for parties to first attempt an amicable resolution of the issues before proceeding to Arbitration. Thus, court is not clothed with jurisdiction to entertain, hear or determine this matter. Further Section 59(c) of the Civil Procedure Act provides that, the court has powers to order parties to explore alternative amicable resolutions of the disputes.

8. Consequently, the Applicant invited the court to consider the following issues: -;

*(i) Whether there is an arbitration clause;*

*(ii) Whether there is a dispute between the 3<sup>rd</sup> defendant and the 7<sup>th</sup> defendant touching on matters contemplated in Clause 31 and 33 of the 7<sup>th</sup> Defendant's Memorandum and Articles of Association and Clause 12 of the shareholders' agreement dated 11<sup>th</sup> May 2004;*

*(iii) Whether by filing the notice of appointment dated 31<sup>st</sup> March 2016 the 3<sup>rd</sup> defendant is deemed to have submitted itself to the jurisdiction of the court;*

*(iv) Whether the 3<sup>rd</sup> defendant/Applicant's chamber summons application dated 8<sup>th</sup> April 2016 has merit;*

*(v) Who should bear the costs of this application?*

9. The Applicant answered the first issue in the affirmative based on the clause 31 and 34 of the memorandum and articles of association and clause 12 of the agreement referred to herein. It was

submitted that the Black's Law Dictionary, defines a dispute as; "a conflict or controversy, especially one that has given rise to a particular law suit."

10. It was further submitted that, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are in agreement that there should have been arbitration. Further the submissions that the Applicant is not a party to the memorandum of association of the 7<sup>th</sup> Respondent and the shareholders' agreement, does not hold water for the reason that; the Applicant was the company secretary of the 7<sup>th</sup> Respondent and consequently involved in the management of its affairs.

11. The Applicant further submitted that, he only responded to the Plaintiff's application seeking temporary reliefs pending the hearing for the main suit. He has not entered appearance to the main claim, hence the he is not affected in any way by the requirement to; file the application for stay of proceedings, not later than the time a party enters appearance as required under Section (1) of the Arbitration Act of 1995. That the contemplated document under Section 6(1) of the Arbitration Act, is the Memorandum of appearance which would be in response to the main suit. He referred to the case of; Evanson Eshitemi vs Jokali Handling Services & 4 Others (2018) eKLR. Further the grounds of opposition dated 12<sup>th</sup> April 2016 filed by the Plaintiff/Respondent's do not raise any valid points of law.

12. That, the court has the power to refer the matter to alternative dispute resolution mechanisms under Section 159(1)(c) of the Constitution of Kenya 2010. Therefore, the application should be dismissed with costs.

13. However, the Plaintiff/Respondent submitted the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Respondents have filed a similar application dated 5<sup>th</sup> April 2016 seeking for similar orders as herein and to which it has responded vide Replying affidavit sworn on 11<sup>th</sup> April 2016.

14. The Plaintiff then invited the court to determine the following issues:

*(a) Whether there exists a dispute capable of being referred to arbitration in view of clause 31 of the 7<sup>th</sup> Defendant's articles of Association and the shareholders' agreement dated 11<sup>th</sup> May 2014; and*

*(b) Whether the Honourable court is seized with jurisdiction to hear the suit; in view of past conduct of the parties; and*

*(c) Whether the instant application has been brought not later than when the 3<sup>rd</sup> Defendant entered appearance.*

15. The first issue was answered in the negative and argued that, the matters pleaded under paragraph 17 of the plaint borders squarely on fraud and which cannot ordinarily be sanctioned by the articles of association of the 7<sup>th</sup> Respondent.

16. That, the Applicant is merely asking the Honourable Court to refer the matter to arbitration simply because there exists an arbitration clause in agreement and in the articles of association of the 7<sup>th</sup> Respondent, without proof of the existence of a dispute; in order for the Honourable Court to exercise its jurisdiction under Section 6(1) of the Arbitration Act, No. 11 of 2009.

17. The Plaintiff relied on the case of; Nanchang Foreign Engineering Company (K) Ltd vs Easy Properties Kenya Limited, Civil Case (Nairobi) No. 487 of 2013, where the court held that referral a dispute to arbitration is not automatic. Further, under Section 6(1) (b) of the Arbitration Act, 1995, it is a condition precedent that, there be a dispute capable of being referred to Arbitration before a court can stay proceedings filed therein.

18. That bearing in mind, it is trite law that, he who alleges must prove, the burden of proving that a

dispute indeed exists for referral to arbitration lies with the Applicant. The Plaintiff relied on the case of; UAP Provincial Insurance Company Limited vs Michael John Beckett (Civil Appeal (Nairobi) Appeal No. 26 of 2007.

19. The Plaintiff/Respondent argued that the relates to apportionment of shares in the 7<sup>th</sup> Respondent to him and Mr. Kioko. It is a separate and distinct document from the memorandum and articles of association of the 7<sup>th</sup> Respondent. That the arbitration clause contained at paragraph 12; only limits itself to the terms set out in the agreement and therefore it is inoperative or incapable of being performed, in view of Section 6(1) (a) of the Arbitration Act. Reference was made to; Article 159(2)(c) of the Constitution, Section 59 of the Civil Procedure Act and Order 46 Rule 20(1) of the Civil Procedure Rules.

20. The Plaintiff/Respondent submitted that when he instituted the suit on 21<sup>st</sup> March 2016, the 4<sup>th</sup> Respondent raised a preliminary objection dated 6<sup>th</sup> April 2016, challenging his locus standi to bring the suit on behalf of the 7<sup>th</sup> Respondent. The objection was extensively covered by the respective submissions of the parties and a ruling delivered on 23<sup>rd</sup> June 2017 dismissing it.

21. Thereafter the 4<sup>th</sup> Respondent filed a notice of appeal on 4<sup>th</sup> July 2017 and an application dated 4<sup>th</sup> July 2017 seeking leave of Court to Appeal. The Applicant supported the preliminary objection. The preliminary objection thus constituted a defence on the part of the 4<sup>th</sup> Respondent and had it succeeded, the entire suit would have collapsed.

22. However, the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents supported the application and submitted that, the dispute herein is with regards to the company affairs, in that the Plaintiff has accused the Respondents' of inter alia, secretly causing the 7<sup>th</sup> Respondent to enter into a sub-contract agreement with a company called China Overseas Engineering Group Company Limited; without his knowledge and approval and the 7<sup>th</sup> Respondent's other minority shareholder.

23. That the Defendants herein have already entered appearance and therefore are parties to the suit. Further to that, the arbitration agreement is not null and void nor is it incapable of being performed. There is for a fact; a dispute between the parties with regard to the matters agreed to be referred to arbitration. The Plaintiff/Respondent has not shown the court whether he sought from the Defendants to go for arbitration before filing the instant suit. The onus of proving is on him. He has not discharged that burden. Reference was made to the case of; Alduchira Company Limited & Another vs Alfred Moffard Omundi Michira & 2 Others (2016) eKLR.

24. Further, the Plaintiff is a director of the 7<sup>th</sup> Respondent and has come to court with unclean hands. He who seeks equity must do equity. That under section 10 of the Arbitration Act, the court has no jurisdiction to handle this matter and the same should be referred to arbitration. Thus the application should be allowed with costs.

25. Similarly, the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants (herein "the Applicants"), in the application dated 5<sup>th</sup> April 2016, are seeking for orders that; -

*(i) The Honourable court be pleased to stay proceedings herein and that pending the said arbitration, the time running for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants within which they are to file their defence to stop running to allow for arbitration proceedings;*

*(ii) That the Honourable court be and is hereby pleased to order the parties to refer this matter to arbitration;*

*(iii) That the costs of this application be provided for.*

26. The application is premised on the grounds on the face of it and an affidavit dated 5<sup>th</sup> April 2016,

sworn by the 1<sup>st</sup> Defendant/Applicant Epainitus Galo Anzeze. He depones that, he is one of the founder directors of the 7<sup>th</sup> Respondent then known as; Azicon Engineers Limited, before it changed its name to; Azicon Kenya Limited (hereinafter referred to as “the company”) on 26<sup>th</sup> August 2004.

The 7<sup>th</sup> Respondent is governed and continues to be governed by the Memorandum and Articles of Association.

27. That sometime on or about 11<sup>th</sup> May 2004, the 2<sup>nd</sup> Defendant/Applicant, the Plaintiff/Respondent, David Kioko Malombo and himself; entered into an agreement wherein the 7<sup>th</sup> Defendant, invited David Kioko Malombe and the Plaintiff to join the company and offered them shares as set out at clause 2 and 3 of the aforesaid agreement.

28. In the year 2010, the board of directors of the 7<sup>th</sup> Respondent realized that despite its positioning as the most qualified and experienced in its field, it was no longer placing and winning any bids for sourcing, supply and installation of Airfield Lighting Systems and related contracts. Instead at the instance of the Plaintiff and without the authority of the board of directors, it entered into arrangements with third parties that would render it a junior partner in performing any such contracts.

29. In the month of December 2015, the board of directors of the company discussed the concerns that; despite being at the helm for over thirteen years, the company lacked any meaningful growth. It was agreed that, to inspire growth, there was compelling need to effect change in management and to bring on board young, energetic and vibrant management that would, with the board’s guidance, steer the company towards growth and profitability.

The Plaintiff and David Malombe being at the helm of management were thus requested to put in place a succession plan in line with good governance practice.

30. The board of directors at a meeting held on the 4<sup>th</sup> March 2016, in which the Plaintiff was present, referred the issue of change of management and succession plan to the shareholders and it was agreed that the shareholders would meet and discuss the issue on the 22<sup>nd</sup> March 2016, at Fairview Hotel in Nairobi and communicate their decision to the board.

31. However, unknown to the 2<sup>nd</sup> Defendant/Respondent and himself, the Plaintiff/Respondent, with a view to prejudicing the outcome of the said meeting moved to court on the 6<sup>th</sup> March 2016 and sought leave to file the present suit. Furthermore, on the eve of the shareholders meeting, he filed this suit and the present application.

32. On the 22<sup>nd</sup> March 2016, the Plaintiff/Respondent, the 2<sup>nd</sup> Defendant/Respondent, David Malombe and himself; convened the meeting as was scheduled. However, the Plaintiff was not ready for any discussions. He put forth a raft of demands, provoked a disagreement and then summoned a court process server; whom he had stationed at the car park to effect service of the suit papers upon him and the 2<sup>nd</sup> Defendant/Respondent.

33. That the Plaintiff and David Kioko Malombe were employees of the 7<sup>th</sup> Defendant/Respondent and were offered shares to motivate them to work. The company had among other benefits purchased a house for the Plaintiff and given David Kioko Malombe money to also buy a house. That if indeed the Plaintiff/Respondent felt aggrieved, he should have tried to resolve the matter and thereafter; if not satisfied refer the dispute to an Arbitrator.

34. However, the Plaintiff/Respondent responded to the application through a Replying affidavit dated 11<sup>th</sup> April 2016 and argued that, the prayers a, b, c, d, e, f and j of the plaint and the substantive prayers in his application dated 16<sup>th</sup> March 2016; seeks for injunctive orders against the 4<sup>th</sup> Defendant/Respondent which is not a party to cause 31 of the memorandum and articles of association of the 7<sup>th</sup> Respondent and

clause 12 of the shareholders' agreement.

35. He reiterated that the main issue in the suit is that, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents have committed acts of fraud against the company and the arbitrator does not have jurisdiction to determine such issues of fraud. Further, paragraphs 5, 6, 7, 8, 9 and 10 of the Affidavit in support of the instant application, do not create a dispute between the company and the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Applicants relating to the matters contemplated in clause 31 of the articles of association and clause 12 of the shareholders agreement. Thus the instant application is intended to delay the timely determination of his application dated 16<sup>th</sup> March 2016.

36. I have considered the applications in total in the light of the arguments advanced, the submissions and relevant provisions of the law cited and I find the Plaintiff basically avers in the plaint that, the Defendants have committed acts of fraud against the 7<sup>th</sup> Respondent/company, where he is a minority shareholder. The particulars of the fraud are tabulated under paragraph 17 of the Plaint.

37. It is also alleged that, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have conducted the affairs of the company in total disregard of the principle of conflict of interest whereby they have diverted the business of the 7<sup>th</sup> Defendant to the 4<sup>th</sup> Defendant. Similarly, the 3<sup>rd</sup> Defendant has breached the duty of guarding against the conflict of interest; by failing to carry out her duties as the company secretary. The particulars of the conflict interest are stated under paragraph 17. That, as a result the company has suffered loss as indicated under the same paragraph. Hence the various prayers under paragraph 21.

38. However, the applications herein for referral of the suit to arbitration are based mainly on Articles 31 and 33 of the memorandum and articles of association of the 4<sup>th</sup> and 7<sup>th</sup> Respondents and clause 12 of the shareholding agreement dated 11<sup>th</sup> may 2004.

39. The articles of association of the 7<sup>th</sup> Respondent annexed to the application and marked as "DKTd" unfortunately is incomplete goes up to paragraph 31 only. It does not have paragraph 33. Be that as it were, paragraph 31, deals with arbitration and it states that; -

*"whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents touching anything then or thereafter one, executed, omitted or suffered in pursuance of these Articles or of the statutes or touching any breach or alleged breach, of these Articles or any claim on account of any 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 affairs of the company every such difference shall be referred to the decision of an Arbitrator to be agreed upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."*

40. It is clear from this paragraph that the difference anticipated to be referred to arbitration should involve the company and a member executor, administrator or assignee. From the pleadings, the Plaintiff describes himself as a minority shareholder and managing director of the 7<sup>th</sup> Defendant. The question that arises therefore is whether, as a shareholder, he is covered under these provisions of paragraph 31 of the articles of association and/or whether, he is a member as described there under and whether the company is involved in a dispute with any persons mentioned thereunder.

41. Similarly the shareholders' agreement of 11<sup>th</sup> May 2004, provides that;

*"this agreement is made in good faith and mutual understanding of all parties to it. In the event there will arise any dispute or misunderstanding between any or amongst the parties hereto relating to the interpretation or implementation of this agreement, then such dispute or misunderstanding shall be resolved amicably by the parties themselves failure of which the same shall be referred to two impartial arbitrators chosen by each party and whose decision shall be*

*final and binding on all parties involved.”*

42. These provisions relate to interpretation and implementation of the agreement. The subject agreement is between the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants who are described as “offerors” on the one part and the Plaintiff and one David Kioko Malombe referred to as the “offerees” on the other part. It states that, the offerors are relinquishing full management rights and responsibilities in the 7<sup>th</sup> Respondent’s company and part of their ownership in the said company to the offerees. The offerees are mandated to leave the management of the company and the offerors relinquish 30% of the shareholding in the 7<sup>th</sup> Respondent to the Offerees.

43. Further the offerees were formally appointed as the directors of the company. Basically the entire agreement deals with the transfer of the shareholding and management. Therefore considering the pleadings in the plaint, it is evident that the entire matter relates to the transfer of the shareholding in the 7<sup>th</sup> Defendant’s company and in particular the alleged interference by the offerors in the management thereof.

44. Be that as it were, the arbitral clause in the articles of association refers to the dispute between the company and the parties named herein. However, one issue seems to have eluded the parties that the company is not a plaintiff herein. In deed upon filing of the suit, the named plaintiff sought for leave to continue the same as a derivative action/suit and it was granted.

It therefore follows that, the suit is now being prosecuted for the benefit of the company, and consequently the agreement dated 11<sup>th</sup> May 2004 is inapplicable.

45. Similarly, the provisions of Article 31 of the memorandum and articles of association refer to a dispute between the company and its members. If the company is the one that is aggrieved, then the suit herein changes its character so that the contest is no longer between the company on one hand and any of the members, but the company suing to regain its rights for the benefit of its members. In the given circumstances, the reliance on Article 31 of the articles of association and clause 12 of the agreement does not arise.

46. Further, as stated herein, the 3<sup>rd</sup> Applicant is not a party to the agreement dated 11<sup>th</sup> May 2004 and cannot rely on it. Similarly, the articles of association of the 7<sup>th</sup> Respondent/company show that, there are only 2 subscribers, the 1<sup>st</sup> Defendant and one Grace Anzeze. The 3<sup>rd</sup> Applicant’s name is not reflected. The argument that, the 3<sup>rd</sup> Applicant can rely on the arbitral clause by mere fact that he is a party herein is not sufficient under the law. A party cannot suffer or gain a benefit under a contract to which he is not a party.

47. Indeed, the allegations against the 3<sup>rd</sup> Applicant are pleaded under paragraph 12, 16 and 17 of the plaint and are basically alleged to be fraudulent actions of diversion of business from the 7<sup>th</sup> Respondent to the 4<sup>th</sup> Respondent. The 3<sup>rd</sup> Applicant is described as the company secretary of both the 4<sup>th</sup> and the 7<sup>th</sup> Respondents. There is no evidence that he is a member, an executor, an administrator or assigns of the company.

48. Therefore, once again he has no locus standi to challenge the jurisdiction of the court on the basis of the two clauses relied on and neither is his argument that, as a company secretary of the 7<sup>th</sup> Respondent’s company, he was involved in the management of the company’s affairs or attended the company’s board meetings and/or has a voice in the implementation of the resolution in the board making him a party in the articles of association.

49. In the given circumstances, I find that the applications have no merit and I dismiss them with costs to the Plaintiff/Respondent.

50. Those are the orders of the court.

**Dated, signed and delivered in an open court this 29<sup>th</sup> day of August 2019**

**G.L. NZIOKA**

**JUDGE**

**In the presence of;**

**Ms. Achieng for the Plaintiff/Respondent**

**Ms. Kwamboka for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants**

**Mr. Omullo for Mr. Amuga for the 4<sup>th</sup> defendant**

**No appearance for the 7<sup>th</sup> defendant**