



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**(COMMERCIAL & ADMIRALTY DIVISION)**

**CIVIL CASE NO. 8 OF 2016**

HASSAN BABAKAR OSMAN..... 1<sup>ST</sup> PLAINTIFF

ARAFCO AGRICULTURAL INTERGRATED LTD ..... 2<sup>ND</sup> PLAINTIFF

VERSUS

NUH ABDULWAHAB MOHAMUD .....1<sup>ST</sup> DEFENDANT

MILESTONE DEVELOPERS LIMITED .....2<sup>ND</sup> DEFENDANT

REGISTRAR OF COMPANIES .....3<sup>RD</sup> DEFENDANT

THE ATTORNEY GENERAL .....4<sup>TH</sup> DEFENDANT

MOHAMEDULAMIN MOHAMUD .....5<sup>TH</sup> DEFENDANT

MOHAMED HIREI BARE AHMED .....6<sup>TH</sup> DEFENDANT

RAMISCON CONSTRUCTION & EXCAVATION LIMITED .... 7<sup>TH</sup> DEFENDANT

KINOOR CONSTRUCTION COMPANY LIMITED ..... 8<sup>TH</sup> DEFENDANT

**CORAM: Hon. Justice R. Nyakundi**

**George Gilbert Advocate for the Plaintiffs**

**Wesonga, Mutembei & Kigen for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**The Attorney General for 3<sup>rd</sup> and 4<sup>th</sup> Defendant**

**Kinyanjui Kirimi Advocate for the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants**

**RULING**

In the original plaint filed in court on 15.4.2016, the plaintiffs have sued the defendants for declaratory Judgment that they are entitled to various declaratory reliefs as herein pleaded:

**1. A declaration that all actions of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in transferring the 1<sup>st</sup> plaintiff's 900 shares in the 2<sup>nd</sup> plaintiff are in contravention of the 2<sup>nd</sup> plaintiff's Articles of Association and the Companies Act, hence null and void.**

**2. A declaration that all actions of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in transferring the 1<sup>st</sup> plaintiff's 900 shares in the 2<sup>nd</sup> plaintiff are fraudulent, hence null and void.**

3. *A declaration that the actions of the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in transferring their 1000 shares in the 2<sup>nd</sup> plaintiff to the 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants are in contravention of the 2<sup>nd</sup> plaintiff's Articles of Association and the Companies Act hence null and void.*
4. *a declaration that the actions of the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in transferring their 1000 shares in the 2<sup>nd</sup> plaintiff to the 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants were done in collusion and fraudulently hence null and void.*
5. *An order be and is hereby issued compelling the 3<sup>rd</sup> defendant to expunge all documents/records purporting to transfer that 1<sup>st</sup> plaintiffs 900 shares in the 2<sup>nd</sup> plaintiff from the 2<sup>nd</sup> plaintiff's company file.*
6. *An order be and is hereby issued compelling the 3<sup>rd</sup> defendant to expunge all documents purporting to transfer 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant's 1000 shares in the 2<sup>nd</sup> plaintiff to the 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants from the 2<sup>nd</sup> plaintiff's company file.*
7. *An order that any action or decision taken by the 1<sup>st</sup> defendant while purporting to be the majority shareholder of the 2<sup>nd</sup> plaintiff declared null and void.*
8. *An order be and is hereby issued compelling the 3<sup>rd</sup> defendant to reinstate the 1<sup>st</sup> plaintiff's directorship and ownership of 900 shares in the 2<sup>nd</sup> plaintiff.*
9. *General damages.*

On the basis of the above a dispute founded on the memorandum of understanding and agreement necessitating the plaintiffs to lodge a claim against the defendants.

Following the institution of the suit the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their respective statement of defences in answer to the plaint. However, on 9.10.2019 the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants who had been enjoined to the suit moved the court by way of a notice of motion seeking orders of this court to have the matter referred to arbitration in terms of Clause 33 of the 2<sup>nd</sup> plaintiff Articles of Association. The grounds of the application are that:

1. *There exists a valid agreement by way of a document incorporating the 2<sup>nd</sup> plaintiff which provided arbitration as first means of Dispute Resolution.*
2. *That the clause is conducted in a mandatory nature.*
3. *That the suit was filed without complying with the arbitration clause and at this stage the court has no jurisdiction to entertain the matter.*
4. *That the 5<sup>th</sup> to 8<sup>th</sup> defendants are willing to submit themselves to arbitration.*
5. *That it is in the interests of justice that the application be allowed as parties had intended that any disputes be referred to arbitration under the company formation documents.*

I have considered the notice of motion, the grounds and affidavit disposition by the applicants in to the motion. The respondents in opposition to the application filed a replying affidavit dated 24<sup>th</sup> October, 2019. According to the deponed the feature of the commercial transaction has apparently been affected by the defendants who allegedly engaged in fraudulent activities to the detriment of their shareholding in the company.

Further, the respondent averred that the illegal transfer of his shares to all the defendants except the 3<sup>rd</sup> and 4<sup>th</sup> defendant is a matter under active criminal investigation vide a complaint filed reference **CID/ORG/8/3/1/176/2016**. That there are high chances that the criminal inquiry may come up with a recommendation to initiate criminal proceedings against those found culpable with issues of fraud.

## **Analysis**

## **The Law**

The provisions to govern stay of arbitral proceedings is provided for under Section 6 (1) of the Arbitration Act which reads as follows:

***“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall; if a party not later than the time when that party enters appearance or otherwise, acknowledges the claim against which the stay of proceedings is brought, stay the proceedings and refer the parties to arbitration unless it finds***

***(a) That the arbitration agreement is null and void, in operative or incapable of being performed or***

***(b) That there is not infact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”***

The court in **Fairlane Supermarket Ltd v Barclays Bank Ltd NBI HCC NO. 102 OF 2011** set out the correct procedure to be adopted in terms of Section 6 (1) of the Arbitration Act. The court said inter alia

***“The opinion to refer 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 v Wachira 1995 – 1998 EA – 20** it was held that ***“if the appellant had wished to invoke the claim, 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.”***

Under Section 3 (1) of the Arbitration Act it defines Arbitration to mean

***“any arbitration whether or not administered by a permanent arbitral institution.*** “The Act also defined Arbitration agreement to mean

***“an agreement by the parties to submit to arbitration all or certain disputes within the scope of the agreement in their defined legal relationship whether contractual or not.”***

Going by these provisions and the principles, in the instant case it should be noted that at the time the 5<sup>th</sup> - 8<sup>th</sup> defendants filed the notice of motion seeking stay of proceedings and a reference be made to Arbitration the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants had already entered appearance and filed their statement of defence. As a matter of pleadings the 5<sup>th</sup> – 8<sup>th</sup> defendants were yet to file any defence to the claim for the reason that they applied the dispute be referred to arbitration.

In construing the provisions of Section 6(1) of the Arbitration Act I bear in mind the constitutional provisions under Article 159 (1) which provides for alternative forms of dispute resolution which arbitration is one of the mechanism. However, in the same constitution states that alternative forms of dispute resolution mechanisms shall be promoted as long as they do not contravene the bill of rights under Chapter 4 of the constitution and are not repugnant to justice and morality or in consistent with any written law.

Though we consider the proposition by the 5<sup>th</sup> - 8<sup>th</sup> defendants to have the matter referred to arbitration pursuant to clause 33 of the Agreement the situation summarized in the plaint and statement of defence by the 1<sup>st</sup> – 4<sup>th</sup> defendant pauses the following challenges.

The 1<sup>st</sup> -4<sup>th</sup> defendant locus standi to submit themselves to arbitral proceedings has been ousted by the provisions under Section 6 (1) of the Act by virtue of them having filed the statement of defences to the plaintiffs claim. There could not be permitted by operation of the law to subject the dispute to arbitration in clause 33 of the agreement.

Secondly, it has been pointed out by the plaintiffs that the commercial venture or agreement which incorporated the arbitration clause is tainted with illegality and criminality on the part of the major actors to the agreement.

Thirdly, on the basis of the particulars of fraud pleaded by the plaintiff against the defendants viewed broadly the dispute may be non-arbitrable by the Arbitrator. Therefore, the private agreement and transactions which are against public policy and morality are in a sense not to be a subject of an arbitration clauses.

Fourthly, arbitration forum as a mechanism for resolution of disputes is well founded on parties express or implied consent to submit themselves to the arbitral process. In the context of what has transpired between the plaintiff and the 1<sup>st</sup>- 4<sup>th</sup> defendants it raises the question of arbitrability and enforcement of the Arbitration clause by virtue of the compromise in the filing of the statement of defences to the claim.

Fifthly, the question is not simple, the court has made various case-management directions between these class of claimants on account of the law and it is seized of jurisdiction of the matter. The presumption in favor of arbitration has been precluded by the conduct of the plaintiffs, with that of the 1<sup>st</sup> – 4<sup>th</sup> defendants who by invoking the jurisdiction of the court have expressly ousted the provisions of Section 6 (1) of the Arbitration Act. Sixthly, Suffices, it to say, that indeed a party’s liberty to submit himself to an arbitration clause cannot be taken away by the court but its only if there is a meeting of minds and the dispute is not against public policy and morality.

This was echoed in the English case of **Fiona Trust & Holding Corporation and Others v Privalov and others 2007 UKHL 40** The Supreme Court held as follows:

***“In my opinion the construction of an arbitration clause should state from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”***

I agree with this legal principle on the mandate of the parties in an agreement with the Arbitration clause but in all a key consideration in the determination of the arbitration of the dispute is for the court to ensure public policy issues mirror on law and any such reference may limit the arbitration process.

In the result any such controversy, claim and cause of action arising out of or relating to the fraudulent transfer of shares/or depository shares and receipts as claimed by the plaintiffs cannot be subject to arbitration.

I hold the view that this is a matter to be litigated in the courts pursuant to the agreement and conduct of the parties post execution of the Memorandum of understanding as provided for in the Article of Association.

For the foregoing reasons the notice of motion filed in court on 9.10.2019 to refer the matter to arbitration is denied. The costs to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF OCTOBER 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Amolo Advocate for the plaintiffs and also holding brief for Kigen for 1<sup>st</sup> and 2<sup>nd</sup> defendants
2. Kirimi Advocate for the 5<sup>th</sup> – 8<sup>th</sup> defendants