



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 726 of 2012

PENT APHARM LTD. PLAINTIFF

VERSUS

PETER MURIITHI GITHUI 1ST DEFENDANT

ASHBEL MACHARIA WACHIRA 2ND DEFENDANT

RULING

1. There are two applications before this court, the first dated and filed on the 21st of November 2012 by the Plaintiff Company seeking orders under **Order 40 Rule 2 (1)** of the *Civil Procedure Rules, 2010*. That application has the prayer that this Court be pleased to order the Defendants to execute resignation letters and share transfer forms within such period as the Court may deem sufficient and expedient, failing which, the Deputy Registrar of this Court do execute the same on behalf of the Defendants. The grounds in support of the Application are firstly that the Defendants have ceased to be directors of the Plaintiff company as per the company's resolution of the 30 August 2011. Secondly, despite the Plaintiff having ceded the management and operation of two Chemist shops to each of the two Defendants, they have failed to formally resign their directorships, execute share transfer forms and pay the amounts agreed owing to the Plaintiff.

2. The second Application filed under Certificate of Urgency, is a Chamber Summons brought by the Defendants under the provisions of **section 6 (1)** of the Arbitration Act as well as **Rule 2** of the *Arbitration Rules* and **Order 46 (1)** of the *Civil Procedure Rules, 2010*. That Application seeks a stay of proceedings and that this court be pleased to refer the dispute between the Plaintiff and the defendants to an arbitrator in accordance with Article 30 of the Plaintiff's Articles of Association. The grounds upon which that Application was brought are detailed as hereunder:

“1. THAT this suit has been instituted by the Plaintiff/Respondent in violation of Article 30 of the Plaintiff's Article of Association and prematurely without the dispute being referred to arbitration as stipulated by that clause thereof.

2. **THAT by virtue of Article 30 of the said Articles the Plaintiff and Defendants are bound to proceed to arbitration on matters in dispute arising from the affairs of the company between the company and its members. The defendants are members of the company.**
3. **THAT Section 6 of the Arbitration Act 1995 empowers the Court before which proceedings are brought in a matter which is subject to an arbitration agreement or clause, to stay the proceedings and refer the parties to arbitration.**
4. **THAT section 6 (1) of the Act further provides that the Court shall grant a stay of legal proceedings subject to the exceptions set out therein. None of those exceptions apply to this suit.**
5. **THAT the Articles of Association subscribed to by the members establishing the Plaintiff, have a clear and unambiguous arbitration clause and it was clearly the intention of the parties that there should be no Court proceedings over members disputes inter se until the arbitration mechanism had been exhausted.**
6. **THAT the Plaintiff's averments as stated in the plaint clearly manifest a dispute/difference between shareholders and the Company.**
7. **THAT the Plaintiff has initiated these proceedings prematurely before exhausting the arbitration mechanism as envisaged by the Articles of Association.**
8. **THAT since the filing of the suit the plaintiff has filed an application dated 21st November 2012, seeking very draconian orders and the said application is set to be heard on 17th December 2012.**
9. **THAT this application has been made without unreasonable or undue delay.**
10. **THAT in the interests of justice, and to give effect to the intention of the parties to the Articles of Association, the above Orders ought to be granted".**

3. When the parties appeared before this Court on 14 February 2013, it was agreed that the Defendants' Application dated 13 December 2012 would be heard first, for if that was the successful, the Plaintiff's Application dated 21 of November 2012 could well fall away. The Defendants' said Application and reiterated the grounds upon which the Application was and identify the elements of the differences/dispute that the Plaintiff had with the Defendants namely:

- “(a) Whether the defendant's ceased being directors and shareholders of the plaintiff on 30. 8. 2012 or at all;**
- (b) Whether the defendants owed the plaintiff the monies claimed or at all;**
- (c) If the defendants owe such monies how did the same accrue;**
- (d) Can the majority shareholders in control of the plaintiff forcibly procure shares belonging to the minority without compensation;”**

The Defendant's quoted clause 30 of the Plaintiff's Articles of Association as regards disputes being referred to arbitration detailing that it was the clear intention of the Shareholders of the Plaintiff company that the Courts were not to be involved in the determination of any dispute between them and such would be referred to an arbitrator.

4. In response, a **Michael Muchemi Ndiritu** who described himself as a director of the Plaintiff Company's swore a Replying Affidavit on the 4 February 2013. He detailed that he wished to adopt the contents of his Affidavit in support of the Plaintiff's said Application dated 21 of November 2012. That affidavit had described the circumstances leading to an ostensible agreement reached in August 2012

between the five shareholders of the Plaintiff Company as regards the Defendants leaving the same both as shareholders and directors. The deponent detailed that the right to arbitration was waived when the five shareholders had several meetings as between them and came up with a partially executed Agreement to the effect that the Defendants would pay into the Plaintiff company certain sums agreed for each of them and that they would then take over, manage and operate two chemist shops formerly operated by the Plaintiff company. The deponent further noted that at the time of the negotiations as between the shareholders, the Plaintiff owed monies to the tune of Shs. 70 million which had been reduced by the end of January 2013 to approximately Shs. 30 million. This, without the assistance of the two Defendants. The deponent was of the view that there would be no useful purpose served by these matters being put before an arbitrator. The Agreement between the five shareholders had been reached prior to the filing of this suit and it really was only a matter of having the Agreement enforced as against the Defendants.

5. With the leave of the court, the second Defendant **Ashbell Macharia Wachira** swore a further Affidavit on 8 March 2013. In the third paragraph thereof he maintained that the genesis of the problems as between the five shareholders was the discovery by the Defendants that money belonging to the company in the amount of over Shs. 8 million had been, as he put it, embezzled by 2 of his fellow shareholders and directors, as between August 2010 and March 2011. It appeared that the shareholders tried to sort out things as between them. However the other three shareholders, being in the majority, purported to dictate terms upon which the Defendants should leave the Plaintiff company. To this end, the said three shareholders had drafted 2 resolutions specifying such terms but the Defendants considered the same too oppressive as the same failed to take into account monies, assets, goodwill and the brand name of the Plaintiff Company. Finally, Mr. Wachira noted that the other directors/shareholders had succeeded in pushing the Defendants out of and were running the company. The deponent maintained that the key to the Defendants' peaceful departure would be the release of the guarantees given by them for financial facilities made available to the Plaintiff Company. He denied that the Defendants had ever waived their right to arbitration.

6. The Plaintiff Company replied through the Further Affidavit of the said **Michael Muchemi Ndiritu** sworn on 15 March 2013. The deponent maintained that upon the Defendants taking up the two chemist shops they had taken over the personnel as well as the good will, stock in trade and machinery situate in the said shops. He maintained that the Defendants had decided to cease being directors as the Plaintiff Company was insolvent and they feared that it would collapse any minute. He noted that two creditors had actually attached the Plaintiff's assets. He denied that at any time had the remaining shareholders of the Plaintiff Company deceived the Court as he was of the opinion that the Memorandum of Understanding was the Agreement between the five shareholders and such was capable of being enforced by Court. He maintained that arbitration would not solve the issues as the same had been clearly agreed. He was of the opinion that the Defendants were only being difficult for no apparent reason unless the fact that the Plaintiff company had not collapsed had changed their minds in that regard.

7. The Defendants filed their written submissions on 15 March 2013. They relied wholly on the grounds as stated on the face of the application dated 13 December 2012 as set out above. They noted that there was a valid arbitration clause contained in the Articles of Association of the Plaintiff Company. Such were a solemn contractual undertaking by all the parties involved to resolve their disputes in line with Article 30 thereof. As regards matters in dispute, the Defendants maintained that such was summarised in the first prayer of the Plaint herein namely that the Court to be asked to declare that the Defendants had ceased to be shareholders and directors of the Plaintiff company with effect from 30 August 2012. Article 9 of the Articles of Association of the Plaintiff Company spelt out an elaborate procedure involved in the transfer of shares as between shareholders. The Defendants submitted that what had brought about the problems between them was the misappropriation of company funds by some shareholders to the detriment of others. It seemed that the position of the Plaintiff Company, as deposed to by the said Mr. Ndiritu, was that the Defendants should be deprived of their shares by a declaration of Court that they had ceased to be shareholders. The Defendants maintained that the provisions of Article 9 had not been followed and they wondered whether the Court or indeed an Arbitrator could disentitle the Defendants of their shares without abiding by the provisions of Article 9. Such called for an interpretation and that Article was, in the Defendants' opinion, exactly the scenario that was contemplated by Article 30.

8. The Plaintiff filed its submissions herein on 20 March 2013. Simply put they stated that the issue in contention before Court was whether the current suit should be referred to an arbitrator or whether it should be resolved by Court. Thereafter, the Plaintiff summarised the facts surrounding the disagreement as between the shareholders. The Plaintiff did not deny the existence of the arbitration clause as per Article 30 of the Articles of Association of the Plaintiff Company. It was however, the Plaintiff's submission that the parties' right to refer the matter to an arbitrator was forfeited the moment that the Defendants consented to an arrangement outlining how they would be discharged from the liabilities of the Plaintiff Company pursuant to a resolution thereof dated 30 August 2011. That resolution had been in line with the Defendants' request to exit as directors and shareholders of the Plaintiff Company. Indeed there were partly performed obligations in that regard. The Plaintiff then went into details as to what had transpired in terms of the negotiations as between the shareholders for the Defendants as to their existing from the Plaintiff Company. There were no monies to be paid by the Defendants as part of the arrangement which had not as yet been paid. The Plaintiff emphasised that the avenue of arbitration had been waived by the Defendants the moment that they had consented to the arrangement of discharge and had partly performed the obligations thereof. It maintained that the Defendants were precluded from doing so by the legal maxim of estoppel. Such maxim curtails a person from denying or asserting anything to the contrary of that which he has represented or asserted as the truth through his own deeds, acts or representations. The Defendants now wanted to fall back on citing the arbitration clause in the Plaintiff's Articles of Association. The Plaintiff's argument was that had the Defendants been desirous of pursuing this line of dispute resolution, they should have indicated so from the very beginning, not at the present time when the other avenue of court proceedings had resulted and was midway in process. Finally, the Plaintiff brought to the attention of the court that the averments as detailed in the Plaintiff and the Plaintiff's Affidavits filed herein had never been controverted by the Defendants. The Defendants had greatly benefited from the Plaintiff ceding to them the two chemist shops but on their side, they had exhibited bad faith by not honouring their obligations in what the Plaintiff called the "agreed arrangement".

9. I have perused the Articles of Association of the Plaintiff company. Article 30 thereof is quite clear. It reads as follows under the heading ARBITRATION – DIFFERENCES TO BE REFERRED:

"30. Whenever any difference arises between the company on the one hand and any of the members, their executors, administrator, or assigns on the other hand touching the true, intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, 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 of the Affairs of the company, every such differences shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties indifference".

On first reading, the said Article seems to envisage differences arising as between the Plaintiff Company on the one hand and any of its members et cetera on the other. Essentially what we are dealing with in this matter is a dispute between shareholders/directors. However in the body of the Article it states: **"or to any of the affairs of the Company,"**. To my mind this would mean and cover disputes between shareholders/ directors. Further, the majority shareholders, if I can put it that way, have sought to bring this suit before Court in the name of the Plaintiff Company. The Defendants' application is brought in the suit and consequently, in my opinion, the disputes are clearly covered by Article 30.

10. The Notice of Motion brought by the Defendants is based on **section 6 (1)** of the *Arbitration Act* (now CAP 49, Laws of Kenya). That section reads as follows:

"6. (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 stat 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”.

The Plaint herein was filed on 21 November 2012. The Summons to Enter Appearance was issued out of this Court dated 26th of November 2012. There is no Affidavit of Service on the Court file indicating just when the Summons and Plaint was served upon the Defendants. Their application under **section 6 (1)** of the Arbitration Act was filed herein on 13 December 2012. In my opinion, the application was filed not later than the time when the Defendants were to enter appearance herein.

11. I have closely perused Article 30 of the Articles of Association of the Plaintiff Company. I do not consider that, as an arbitration agreement between the subscribers to the Articles of Association (the shareholders of the Plaintiff company), it is either null and void, inoperative or incapable of being performed. I consider that there is a major dispute between the Plaintiff Company and the Defendants as regards the latter exiting both as shareholders and directors from the company. I agree with the Defendants’ submissions that Article 9 of the Articles of Association of the Plaintiff has not been complied with. This is after I have closely examined the documentation with regard to the supposed Memorandum of Understanding or Agreement that the shareholders are said to have entered into. Indeed that documentation exhibited to the Further Affidavit of the second Defendant dated 8 March 2013 is unsigned by the Defendants, although I note that the 3 continuing directors (and shareholders) have executed the so-called resolution of the Board of Directors of the Plaintiff Company dated 30 August 2011.

12. As pointed out by the Defendants at paragraph 3 of the Grounds in support of the application, the provisions of **section 6 (1)** of the *Arbitration Act* are mandatory. I have no choice but to stay the proceedings before court and refer the parties hereto to arbitration. The appointment of arbitrators will be achieved as per what is detailed in Article 30. Accordingly, the conclusion to all the above is that I allow the Defendants’ Chamber Summons dated 13 December 2012 in terms of prayers 3 and 4 thereof. The Defendants will also have the costs of their application.

DATED and delivered at Nairobi this 23rd day of May, 2013.

**J. B. HAVELOCK
JUDGE**