Karau v Karinge (Environment and Land Appeal 8 of 2020)
[2022] KEELC 13797 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13797 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 8 OF 2020

MN GICHERU, J

OCTOBER 19, 2022

BETWEEN

JAMES NG'ONDI KARAU ..... APPELLANT

AND

MARY WAITHERA KARINGE ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Kahuya I. M. Principal Magistrate delivered on the 30th April, 2020 in Kajiado CM ELC NO. 187 of 2018))

RULING

1. This ruling arises from an appeal by James Karau Ng'ondi (appellant), following a ruling by Honourable Kahuya IM, Principal Magistrate, in which the learned magistrate struck out the appellant's suit which was ELC 187 of 2018 at the Chief Magistrate's Court at Kajiado.

2. The reason for striking out the suit was failure by the appellant, who was the plaintiff in the lower court, to go for arbitration as provided for in the written agreement dated June 1, 2013 at clause 18.

3. Aggrieved by the ruling, the appellant filed this appeal through his counsel on record seeking two main orders namely;

    a. That the appeal herein be allowed and the ruling and order of the lower court be set aside.

    b. That the costs of this appeal and the proceedings in the lower court be borne by the respondent.

4. The grounds of appeal are as follows:-

    The learned trial magistrate,

    i. failed to consider and appreciate the specific provisions of section 6 of the *Arbitration Act*, 1995 which provides for stay of proceedings and referral of disputes to arbitration where parties to the dispute have entered into an arbitration agreement,

ii. erred in law and fact in striking out the appellants suit with costs which decision was not supported by law,

iii. failed to appreciate that by the respondent filing of her memorandum of appearance, statement of defence and participating in the proceedings leading up to the hearing of appellant's suit, she had subjected herself to the jurisdiction of the court and could not therefore resile that position when the matter came up for hearing,

iv. erred in law in failing to consider and take into account the authorities placed before her touching on pertinent and substantial points of law and fact thereby arriving at an unjust and unfair decision,

v. erred in law and in fact by disregarding the submissions of the appellant,

vi. erred in law by failing to find that the preliminary objection raised by the respondent, did not fit within the description set out in *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd (1968) EA 697*,

vii. In all the circumstances of this matter, failed to do justice as regards the preliminary objection that was raised at the hearing of the appellant's suit and accordingly erred in law by making the orders that she did.

5. Counsel for the parties filed written submissions on October 21, 2021 in the case of the appellant and April 10, 2022 in the case of the respondent.

6. In defending the ruling of the learned magistrate, the respondent's counsel raised the following issues.

Firstly, the appellant who was the plaintiff in the lower court case, failed to prove that the parties attempted arbitration as required by the agreement.

Secondly, since the arbitration was not court annexed, then under section 10 of the *Arbitration Act*, the court could not interfere with a matter governed by the act except in accordance with the act.

Thirdly, it is urged that the defendant/respondent had no choice but to file a defence within fourteen days of entering appearance as required by order 7 rule 1 *Civil Procedure Rules*.

Filing a defence and the accompanying documents should not therefore be seen as waiving the requirement for arbitration.

7. On the other hand, the appellant's counsel identified three issues for determination as follows.

i. Did the trial magistrate consider and appreciate the specific provisions of section 6 of the *Arbitration Act*, 1995 in striking out the plaintiff's suit?

ii. Was the order striking out the appellant's suit justified?

iii. Is the appellant deserving of the orders sought?

8. I have carefully considered the entire appeal including the memorandum, the grounds, the submissions and the case law therein and issues identified by both counsel for the parties.

I make the following findings.

On the first of the respondent's issues, I find that though it is true that the appellant did not prove that the parties attempted arbitration as required by the agreement, it was incumbent upon the respondent to raise this issue at the earliest possible opportunity.

Under section 6 (1) of the *Arbitration Act* (chapter 49), that opportunity was just before entering appearance.

The above mentioned provision contemplates that a matter which is the subject of an arbitration can still be filed in court before referral to arbitration.

Regarding the second issue, section 10 of the act provides as follows;

10. Extent of court intervention

"except as provided in this act, no court shall intervene in matters governed by this act".

Since section 6 is part of the act, dealing with a matter in accordance with it is not interference with but enforcing the act.

On the third and final issue raised by the respondent, I find that it is not correct to say that the respondent had choice but to file a defence within 14 days of entering appearance as required by order 7, rule 1, *Civil Procedure Rules*.

The reason for saying this is to be found in section 6(1) which provides as follows;

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party to 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 matters agreed to be referred to arbitration".

The respondent cannot be heard to say that she could not do anything else other than to file a defence when section 6 (1) allowed her to apply for stay of proceedings and referral to arbitration.

Such an application is required to be filed together with the memorandum of appearance or before but not later.

The appellant's three issues can be condensed into one issue namely; was it lawful, fair or just to strike out the appellant's suit for failure to seek arbitration before filing the suit?

Firstly, section 6 of the act makes it mandatory that such a suit be stayed. There is the mandatory shall in subjection (1).

Secondly, the respondent having participated in the suit from August 29, 2018 until March 11, 2020, a period of one and a half years could not suddenly raise the issue of arbitration. She did so after her application for adjournment was refused. She did not object as required by section 6 (1) of the *Arbitration Act*.

I am persuaded and also bound by the authority cited by the appellant's counsel, that is to say, *Corporate Insurance Co v Wachira (1995 – 1998) EA, page 21* where it was held, inter alia,

> ...By filing a defence the appellant had lost the right to rely on the clause"

Thirdly, striking out pleadings is a draconian measure that should only apply in rare and clear cases and not in a case such as this.

One may say that referral to arbitration did not shut the door of justice on the appellant but since the law does not provide for striking out, striking out was not lawful.

Finally, to wait until the date of hearing and to raise an objection to the suit defeats the overriding objective of the *Civil Procedure Act* and the *Environment and Land Court Act* which is the just, expeditious, proportionate and accessible resolution of disputes governed by the two acts.

The said objective is to be found in section 1A of the *Civil Procedure Act* and section 3 of the *ELC Act*. The respondents conduct of doing everything possible to derail the expeditious disposal of the suit is clear from the record.

For the above reasons, I allow the appellant's appeal and order as follows;

a. The appeal dated June 2, 2020 is allowed and the ruling and order of the lower court dated April 30, 2020, is set aside.

b. The costs of this appeal to the appellant.

c. The lower court suit, that is to say, ELC No 187 of 2018 to proceed from where it had reached before the ruling of April 30, 2020 and to be heard by a different magistrate.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF OCTOBER, 2022.

MN GICHERU

JUDGE