



Seyani Brothers and Company (K) Limited v Creative Innovations Limited (Commercial Case E543 of 2024) [2025] KEHC 159 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E543 OF 2024
JWW MONG'ARE, J
JANUARY 16, 2025**

BETWEEN

SEYANI BROTHERS AND COMPANY (K) LIMITED PLAINTIFF

AND

CREATIVE INNOVATIONS LIMITED RESPONDENT

RULING

1. What is before the court is the Defendant's application dated 7th October 2024 filed under a Certificate of Urgency of the same date and brought under Section 17 of the [Arbitration Act](#) and all other enabling provisions of the law seeking the following prayers:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. The Honourable Court be pleased to and hereby finds that the Plaintiff's claim/cause of action in this suit is time -barred and that no claim arises as against the Defendant/Applicant.
 - e. The Honourable Court be pleased to and hereby strikes out/dismiss this suit with costs to the Defendant.
 - f. The Honourable Court be pleased and hereby grants the Applicant the costs of this application.
2. The Application is supported on the grounds set out on the application and the supporting affidavit of Sanjay Ramniklal Shah the finance director of the Defendant. The Application is opposed and



the Plaintiff has filed a replying affidavit sworn by Bhavika Seyani, a Director of the Plaintiff on 16th October 2024.

3. It is the Applicant's case that the suit filed herein is time barred and that the court is devoid of jurisdiction to entertain the suit as filed as the dispute between the parties arises out of a construction contract containing a dispute resolution clause away from the courts. The Applicant argue by virtue of clause 45 of the said contract all disputes relating to the same shall be resolved through arbitration.
4. Clause 45.1 states that "in case of any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after completion or abandonment of the works, such dispute shall be notified in writing by either party with request to submit it to arbitration.
5. Clause 45.2 goes on to state, "The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising under or in connection therewith including any matter or thing left by this contract to the certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions or the rights and liabilities of the parties subsequent to the termination of the contract.
6. Clause 45.6 further states "notwithstanding anything stated herein the following matters may be referred to arbitration before practical completion of the works or abandonment of the works or termination of the works or termination of the contract by either party. In addition to the above conditions, clause 45.7 provides that "all other matters in dispute shall only be referred to arbitration after the practical completion of or alleged practical completion of the works, or abandonment of the works, or termination, or alleged termination of the contract, unless the employer and the Contractor agree otherwise in writing.
7. It is from the foregoing that the Applicant has asked this court to find that the dispute alleged to by the Plaintiff belongs to an arbitral tribunal and not with the court.
8. The Plaintiff has opposed this application and has filed a replying affidavit thereto. While agreeing that the contract from whence this dispute arises from indeed contains an arbitration clause the Plaintiff argues that a dispute arising from the contract requires to be declared within 90 days upon its occurrence failing which the same cannot be pursued. The Plaintiff argues that it issued a demand notice on 13th September 2021 in respect of the claim herein and the same was ignored and or not acted upon by the Defendant and subsequently a dispute arose on 27th September 2021.
9. It is the argument put forward by the Plaintiff that this court retains jurisdiction to hear and determine a dispute arising from the said contract, despite the arbitration clause as the said clause 45 does not outrightly bar parties from approaching the courts if there is no arbitral process commenced to resolve the dispute. The Plaintiff therefore urges this court to find that it has jurisdiction to entertain the suit as filed and dismiss the present application.

Analysis and Determination:-

10. Upon being directed by the court, both parties filed their written submissions with the Applicant filing theirs on 6th December 2024 while the Respondent filed its submissions on 29th October 2024. I have carefully considered the pleadings by the parties and the rival submissions and to my mind, I note that this court is being called to determine whether or not it has jurisdiction to hear and determine the Plaintiff's suit as filed herein.
11. The courts have held that Jurisdiction of a court or tribunal is central to the courts ability to hear and determine a suit filed before it and should therefore be determined at the earliest opportunity when a



matter is presented before it. To quote the famous words of Nyarangi JA as he then was in the celebrated case of *Owners of Motor Vessel 'Lilian S'... Vs... Caltex Oil (Kenya) LTD* (1989) 1 KLR, where the Court held that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”

Further, in the case of *Phoenix of E.A Assurance Co Ltd vs SM Thiga t/a Newspaper Services* (2019) eKLR, the court of Appeal held:-

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

12. It is quite clear in my mind that this court must first determine whether it is properly clothed with the requisite power to hear and determine the dispute before it. From the record, this matter when it was filed by the court, it was referred to arbitration by dint of clause 45 contained in the contract. Both parties are in agreement that any disputes arising from this contract are to be resolved solely through arbitration and that process can be commenced by either party. Indeed, the court notes that sometimes in 2023 arbitration proceedings were commenced before an arbitrator in line with the said contract but the same were terminated upon the findings by the court the Arbitrator lacked jurisdiction to hear the same on account of the dispute not have been declared within 90 days in accordance with the contract subject matter of this dispute.
13. It is trite that parties are bound by the terms of the contracts they negotiate and enter into. It is therefore not the business of courts to rewrite contracts between parties and parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved (See *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] KECA 152 (KLR)). When this matter was first brought before the courts, the matter was referred to arbitration in accordance with the terms of the contract entered into by the parties. The court notes that section 10 of the *Arbitration Act*, ringfences all matters with arbitral clauses to be determined in the manner so set out under the contract.
14. Section 10 of the *Arbitration Act* provides as follows “Except as provided in this Act, no court shall intervene in matters governed by this Act. This section of the *Arbitration Act* effectively makes it clear that the courts have no business determining disputes arising from contracts containing arbitration clauses unless the contract specifically provides as such. Once a matter has been taken up by an arbitral tribunal then the role of the court is extinguished. This position was clarified by the Supreme Court in its decision in the case of *Nyutu Agrovet Limited vs Airtell Networks Kenya Limited & others* (2019)eKLR where it stated that “Thus it is reasonable to conclude that just like section 5, section 10 of the *Act* was enacted , to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene..”
15. It is my understanding therefore that once a matter has been referred to arbitration, the same cannot be separately filed in the court. The *Arbitration Act* was designed in such a way as to be self-executing and the role of the court clearly defined therein. This court therefore, having referred the dispute subject matter of these proceedings to arbitration, cannot be called upon to reopen the same and hear the parties.



16. Respectively, I find and hold that the suit as filed herein belongs to arbitration and this court has no jurisdiction to entertain the same. In line with Justice Nyarangi's findings in *Owners of Motor Vessel Lilian S' case (supra)*, this court must then down its tools and take no further action.

Final Disposition: -

17. The upshot of the above finding is that the application by the Defendant is found to be merited and the same is allowed. Consequently, the Plaintiff's suit is struck out in its entirety with costs to the Defendant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JANUARY 2025

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Khizi for the Plaintiff/Respondent.

N/A for the defendant/Applicant.

Amos - Court Assistant

