



**Trustees of Coca-Cola East Africa Limited Staff Provident Rund 2004 v Odhiambo
(Suing as the administrator ad litem of the Estate of Clarice Odhiambo);
Njenga (Interested Party) (Miscellaneous Civil Application E912 of 2021)
[2025] KEHC 242 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E912 OF 2021**

**AA VISRAM, J
JANUARY 23, 2025**

BETWEEN

**TRUSTEES OF COCA-COLA EAST AFRICA LIMITED STAFF PROVIDENT
RUND 2004 APPLICANT**

AND

**ALICE ODHIAMBO (SUING AS THE ADMINISTRATOR AD LITEM OF THE
ESTATE OF CLARICE ODHIAMBO) RESPONDENT**

AND

TIMOTHY NJENGA INTERESTED PARTY

JUDGMENT

Introduction and Background

1. The Applicant and the Respondent are embroiled in a dispute that was referred to arbitration and is currently before the Interested Party (“the Arbitrator”) for determination. In the said proceedings, the Respondent, through a Notice of Discovery dated August 13, 2021, sought the discovery of inter alia the Custodian Agreement between the Applicant and its Custodian. The parties exchanged submissions in respect of the Notice of Discovery. The Applicant in their response stated inter alia that the Arbitrator had no jurisdiction to order the discovery of the Custodian Agreement because the same involved a third party who was not a party to the dispute and further; because there is no privity of contract between the Respondent and the Custodian; and because the said Agreement was not relevant to the dispute.



2. After considering the Notice of Discovery, the responses and submissions, the Arbitrator published a ruling on 16th October, 2021 (“the Ruling”). On the issue relating to his jurisdiction, the Arbitrator held that he derives the same from Clause 38 of the Trust Deed which allows the arbitral tribunal to deal with any dispute, difference or question that may arise between the Applicant and the Respondent and as such, the Applicant’s argument that the tribunal lacks jurisdiction to order discovery of the Custodian Agreement since the Custodian is not a party to the proceedings and the arbitration agreement is not merited. The Arbitrator stated that in the event that he makes an order for discovery of the Custodian Agreement, such an order would be directed at the Applicant and not the Custodian. This is because both the Applicant and its Custodian have in their possession the same Custodian Agreement and therefore, such an order would not affect the appointment of the Custodian, a third party in the arbitration proceedings, in any way. As such, the Tribunal asserted that he has jurisdiction to order for discovery of the Custodian Agreement.
3. On privity of contract, the Arbitrator held that the fact that there is no privity of contract between the Respondent and the Custodian is not a bar for the tribunal to order discovery of the Custodian Agreement as the Respondent never stated in the Notice of Discovery that she intended to find a cause of action against the Custodian, but rather, establish the veracity of the information given by the Applicant through its letter dated 28th June, 2021.
4. The Applicant being dissatisfied with the aforementioned findings in the Ruling, seeks to appeal the decision by way of the present Originating Summons dated 15th November, 2021 made pursuant to Section 17 (6) of the *Arbitration Act* (Chapter 49 of the Laws of Kenya), Rule 3 (1) of the Arbitration Rules, 1997 and Section 1A, 1B and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya).
5. The application is supported by the grounds set out on its face and the supporting affidavit of Angela Temesi Ambetsa, a Trustee of the Applicant, sworn on 15th November, 2021. It is opposed by the Respondent through the Grounds of Opposition dated 22nd February, 2023, and her replying affidavit sworn on 23rd November, 2023. The court directed that the application be disposed by way of written submissions which are on record and have been summarized above. I do not intend to repeat the submissions in full and where necessary, I will make relevant references in my analysis and determination below.

Analysis and Determination

6. The Applicant submits that the court is primarily being called upon to determine whether the Arbitrator had jurisdiction to grant the order for production of the Custodian Agreement, or whether in doing so, he exceeded his jurisdiction. The Applicant has rightly grounded its application under Section 17(6) of the *Arbitration Act* which provides as follows:-

Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

7. In an application concerning questions relating to the jurisdiction of the Tribunal, such as the present one, the court is required to consider four substantive issues: First, is whether there is a valid arbitration agreement. Second, is whether the arbitral tribunal is properly constituted; third is whether matters have been submitted to arbitration in accordance with the arbitration agreement; and finally; whether the matters submitted to arbitration fall within the scope of the arbitration agreement (See *West Mount Investments Limited v Tridev Builders Company Limited* [2017] KEHC 5860 (KLR) and *Creative Innovations Limited v Seyani Brothers & Company (K) Limited* [2023] KEHC 23516 (KLR).



8. In the present matter, limbs one to three as outlined above are not in contention. The Trust Deed dated 8th March, 2018, contains the relevant agreement, and the Arbitrator was properly appointed on 28th June, 2021. The dispute was referred to arbitration in accordance with the terms of the Agreement. The issue is whether the tribunal exceeded the scope of its jurisdiction when it made the subject orders in relation to the Custodian Agreement?
9. While it is common ground that the Custodian is not a party to the arbitration proceedings, as stated above, the Arbitrator found that the Custodian Agreement was within the possession of the Applicant. Further, the Tribunal noted that the reason the Respondent sought discovery of the agreement was in order to “...establish the veracity of the information given by the [Applicant] through its letter dated 28th June 2021.” However, at the same time, at paragraph 43 of the Ruling, the Arbitrator held that this letter of 28th June, 2021, could not be relied upon by the Respondent as a basis for seeking discovery of the Custodian Agreement as it contained privileged communication and as such, it was expunged from the record.
10. Whereas the Arbitrator ultimately ruled that the Respondent had not made out a case for discovery of the Custodian Agreement in so far as the discovery was premised on the contents of the letter dated 28th June, 2021 (written on a without prejudice basis), the Applicant still asserts that the Arbitrator had no jurisdiction to order such a discovery in the first place because the Custodian was a third party.
11. I am not persuaded by the Applicant for a number of reasons. First, the Custodian Agreement sought by the Respondent was to be used as evidence in the arbitration proceedings. To my mind, an Arbitrator has the powers pursuant to Section 20(3) of the *Arbitration Act* to “...determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.” The Arbitrator thus correctly exercised his powers to determine whether or not the Custodian Agreement was admissible, relevant, material or weighty. The Tribunal did precisely this at paragraph 27 of the Ruling, which states that the notice of withdrawal is a relevant document in the dispute between the parties. The Arbitrator stated that “I can not find any reason why the respondent would not trace the records of an active member of the fund.” This power, to my mind, falls within the scope of his jurisdiction under the Act.
12. Further, his eventual finding that the said document was not admissible owing to the privileged nature of the letter of 28th June, 2021. This was a determination he was entitled to make in the exercise of his powers. Again, this is precisely documented at paragraph 43 of the ruling, where the Tribunal notes that “the letter dated 28th June, 2021, was written by the Respondent with a view to have the dispute between the parties settled. The Claimant is not entitled to rely on such correspondence as a basis for seeking discovery...the production of such communications before the Tribunal was not made in good faith”.
13. Finally, it is worth stating that even if the Arbitrator had reached a different conclusion, and ordered production of the document, I still do not think that such an order would necessarily have exceeded the scope of his jurisdiction on the basis pleaded by the Applicant. I am not saying that such a decision would be correct in law, but rather, that the error, if any, would not be jurisdictional in nature because the document was within the Applicant’s possession, and as the Arbitrator stated, the order would not be directed to the Custodian, but rather, at the Applicant.
14. In summary, I am not persuaded that the Arbitrator sought to exercise jurisdiction over, or to enforce his ruling over a third party who is not a party to the arbitration agreement. Accordingly, the contention



that the Arbitrator had no jurisdiction to order for the discovery of the Custodian Agreement is without merit.

15. In my view, the Arbitrator was vested with jurisdiction to make the orders he made pursuant to Section 17 of the Arbitration Act. Further, as the master of proceedings, he duly exercised his powers and discretion pursuant to Section 20(3) of the Arbitration Act.
16. Accordingly, I am not inclined to interfere with the conclusions of the Arbitrator, which I find he was entitled to reach based on his assessment of the facts and law before him and in pursuance of his mandate.
17. In any event, no prejudice was occasioned by the Applicant because the Arbitrator declined to order production of the Custodian Agreement for the reasons outlined above. The issue is, by and large, academic.

Conclusion and Disposition

18. Based on the reasons set out above, I find and hold that the Appeal dated November 15, 2021, is without merit. The same is dismissed with costs to the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF JANUARY, 2025

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

.....Court Assistant

.....For the Applicant

..... For the Respondent

..... For the Interested Party

