Equator Bottlers Limited v Kegode t/a Kirinda Distributors (Civil Miscellaneous Application E072 of 2021) [2025] KEHC 2006 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL MISCELLANEOUS APPLICATION E072 OF 2021

S MBUNGI, J

FEBRUARY 19, 2025

BETWEEN

EQUATOR BOTTLERS LIMITED ..... APPLICANT

AND

STANLEY SUGUVI KEGODE T/A KIRINDA DISTRIBUTORS .. RESPONDENT

RULING

1. What is before this court is for ruling is an Application dated 31st August, 2023 seeking the following orders:-

   a. Spent

   b. That the Respondent be ordered to provide security for costs of Kshs. 104,000,000 or any other sum the court deems fit as security for costs of the applicant.

   c. That the suits and all pending proceedings against the Applicant be struck out and/or stand terminated with costs in the event of non-compliance with this honourable courts orders made pursuant to prayer 2 above.

   d. That costs of this application be borne by the Respondent herein.

   e. That this honourable court be pleased to make any other order as it deems fit in the interest of justice.

2. The Application dated 31st August, 2023 is anchored upon order 25 Rule 1 and 5 of the Civil procedure Rules, 2010, and is further supported by the grounds on its face and the supporting affidavit of Priscilla Kimani, also dated 31st August, 2023.

3. The Respondent opposed the application for the replying affidavit sworn by Stanley Suguvi Kegode on 3rd October, 2024.

Applicant's case

4. The Applicant herein asserts that the Respondent has instituted a multitude of suits against it, which are not only mischievous but also vexatious and constitute an abuse of the court process, as all these legal proceedings are predicated upon the same subject matter but filed in various forums.

5. The Applicant further contends that the suits initiated against it by the Respondent have compelled the Applicant to file additional suits against the Respondent in the pursuit of justice.

6. The legal costs associated with defending the ongoing legal proceedings currently pending before the court and in arbitration are estimated to Kshs. 104,000,000.00, given that the Respondent has claimed a total sum of Kshs. 990,000,000.00 against the Applicant.

7. The Applicant therefore submits that it is imperative for the respondent to furnish adequate security for costs, in accordance with Order 26, Rule 1 and 5 of the Civil Procedure Rules.

Respondent's Case

9. The respondent case is that the Applicant is seeking the orders for security for costs with ulterior motives of stifling his claim.

10. The arbitral proceedings between the Respondent and the Applicant have made little progress due to lack of willingness on the part of the Applicant .

11. The Applicant has not demonstrated that the Respondent's claim is spurious.

12. The Applicant has not demonstrated that without security it will suffer irreparable harm which substantially out weighs the harm that is likely to result to me if the arbitral proceedings are stifled.

13. The Respondent is not under obligation to disclose documents as to his finances and therefore it is incumbent upon the Applicant to provide proof that it is in a precarious financial position so as to necessitate the present application for security for costs.

14. The Applicant is guilty of laches in bringing its application for security for costs.

15. The power to determine the Application for security for costs in arbitral proceedings lies with the Arbitral tribunal.

16. That Section 10 of the *arbitration Act* 1995 provides the extent of this court intervention in arbitral proceedings and the same does not expressly include hearing and determining an application for security of costs.

17. That under Section 18 (c) of the Arbitration Rules 2020 vest the power to order a claimant to provide security for costs to the arbitral tribunal.

18. The arbitral tribunal is already constituted with two party appointed arbitrators and a presiding arbitrator.

19. The only time this court would become seized with jurisdiction to hear and determine an application for security for costs is as provided under Section 18 (2) where the approval of the arbitral tribunal which have been first obtained.

20. The Applicants application is pre-mature.

21. The Applicants application is frivolous, vexatious and abuse of the court process.

22. The parties agreed to dispose the Application by way of written submissions only the Applicant filed.

23. I have looked at the application, supporting affidavit, the replying affidavit and the well-researched submissions by the counsels of the parties.

Analysis and Determination

24. From the submissions by the counsel of the Applicant it seems its clear to the Applicant that the initial jurisdiction to order for security for costs in arbitration proceedings is the domain of the arbitral tribunal.

    Section 10 of *Arbitration Act* 1995 provides;

    Except as provided in this Act, no court shall intervene in matters governed by this Act.

    Section 18 of the *Arbitration Act* 1995 provides;

    (1) Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party—

        (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subjectmatter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or

        (b) order any party to provide security in respect of any claim or any amount in dispute; or

        (c) order a claimant to provide security for costs.

    (2) The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1).

    (3) If a request is made under subsection (2) the High Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under subsection (1) as it would have in civil proceedings before that Court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the High Court.

25. The Applicant resorted to the provisions of Section 3 (a) of the *Civil Procedure Act*, which provides for inherent jurisdiction of the court Order 26 Rule 1 and 5 of the Civil Procedure Rules which empowers the court to order for security for costs allegedly because the arbitration proceedings between the parties have stalled over the issue of appointment of arbitrators leaving this court as the only viable avenue through which the orders sought in the present Application can be granted.

26. I have looked at paragraph 17 of the replying affidavit the Respondent depones that the arbitral tribunal is already constituted with two party appointed adjudicators and a presiding arbitrator .

27. The Applicant has not deponed a further affidavit to controvert the respondent's averment that the arbitral tribunal is properly constituted, without such deponent which has been made on oath this court cannot doubt the averment that the arbitral tribunal is properly in place.

28. Since the arbitral tribunal is in place (unless proved otherwise) the Applicant should have made the Application before it or sought its consent to file the Application before this court.

29. The Applicant has not demonstrated any untoward action or inaction on the part of the arbitral tribunal which will make this court invoke its supervisory jurisdiction over the arbitral tribunal as envisaged by Section 18 of the *Civil Procedure Act*.

30. The above makes me find that the Application has been filed before a court which has no jurisdiction the same is struck off.

31. Costs to the Respondent.

32. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a.

Ms Gichuru holding brief for Mr. Kiragu for the Respondent -present.

Kraido Advocate for the Applicant – Absent.1