Muthongi Company Limited v Advocates Plaza Limited & 3 others (Civil Suit E009 of 2022) [2025] KEHC 3504 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E009 OF 2022

DKN MAGARE, J

MARCH 21, 2025

BETWEEN

MUTHONGI COMPANY LIMITED ..... PLAINTIFF

AND

ADVOCATES PLAZA LIMITED ..... 1ST DEFENDANT

PETER WANYAGA MUTHOKA ..... 2ND DEFENDANT

ISAIAH GUARA WANJAU KAGUME ..... 3RD DEFENDANT

LUCY NYARUAI MUTHOKA ..... 4TH DEFENDANT

RULING

1. This is a ruling arising from a Chamber Summons application dated 13.4.2023. The application seeks the following reliefs:

    a. Spent

    b. The Honourable Court be pleased to refer the suit herein to Arbitration as envisaged by clause 31 of the Memorandum and Articles of Association incorporated on 1.8.2008.

    c. The parties do appoint an Arbitrator to determine the dispute herein within 30 days in default the President of the Law Society of Kenya to appoint an Arbitrator.

    d. Costs.

2. The application was premised on grounds on the face of it and the supporting affidavit of Peter Wanyaga Muthoka as follows:

    i. The matters in the suit relate to the obligation of the company to its members and under clause 31 of the Memorandum and Articles of Association, disputes are to be referred to Arbitration.

ii. The Plaintiff filed the suit in ignorance of clause 31 requiring referral of disputes to Arbitration.

iii. The parties are bound by the arbitration clause.

3. The Plaintiff filed Replying Affidavit sworn by Maingi Ndirangu on 15.9.2022 by which it was deposed as follows:

a. This court had unlimited jurisdiction under Article 165 (3) (b) and (d) of the *Constitution*.

b. The court has jurisdiction under Section 782 of the *Companied Act* to make orders for the protection of members against oppressive conduct.

c. The suit transcends the personal internal disputes contemplated under the Memorandum and Articles of the company.

d. The Defendants are not acting in accordance with the company's constitution hence the suit.

e. The suit raises justiciable issues in interpreting the doctrine of separate legal entity vis-a-vis the rights of the Plaintiff and its shareholders.

4. The Plaintiff filed submissions dated 13.4.2023. It was submitted that the acts of the Defendants were unfair and prejudicial to the Plaintiff. Reliance was placed on *Martin Lemaiyan Mokoosio & Another vs Reshma Praful Chandra Vadera & 3 Others* (2021) eKLR. Based on this, it was submitted that where the company was not acting in accordance with its own constitution, the court had jurisdiction to intervene.

5. The Plaintiff also submitted that this court had jurisdiction under Article 165 (3) of the *Constitution* and Sections 780 and 782 of the *Companied Act*, 2015.

6. The Defendant did not file submissions.

Analysis

7. The issue is whether, in light of Clause 31 of the Articles of Association of the Plaintiff, this suit should refer to Arbitration.

8. The Plaintiff sought to rely on the provisions of Section 780 and 782 of the *Companies Act*. I set out in extenso the provisions of Sections 780, 782, 783 and 784 of the *Companies Act*. Section 780 of the *Companies Act* provides as follows:-

1) A member of a company may apply to the Court by application for an order under section 782 on the ground—

a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or

b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.

2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—

a) have been transferred; or

b) have been transmitted by operation of law.

9. Section 782(1) and 2(a) and (b) of the *Companies Act*, on the other hand, provides that:

(1) If, on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.

(2) In making such an order, the Court may do all or any of the following:

(a) regulate the conduct of the affairs of the company in the future;

(b) require the company—

(i) to refrain from doing or continuing an act complained of; or

(ii) to do an act that the applicant has complained it has omitted to do;

(c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(3) Subsection (2) does not limit the general effect of subsection (1).

(4) The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application.

10. On its part, Section 783 of the Act which provides for copy of order affecting company's constitution to be lodged with Registrar as follows:

(1) If an order of the Court made under section 782—

(a) alters the company's constitution; or

(b) authorizes or directs the company to make any, or any specified, alterations to its constitution, the company shall, within fourteen days after the making of the order or such extended period as the Court may allow, lodge for registration with the Registrar a copy of the order.

(2) If a company fails to comply with subsection (1), the company, and each officer of the company who continues and on conviction are each liable to a fine not exceeding twenty thousand shillings for each such offence.

11. Lastly, Section 784 of the *Act* provides for Supplementary provisions applicable if company's constitution is altered as follows:

(1) This section applies to an order made by the Court under section 782 that alters a company's constitution.

(2) If the order amends—

(a) a company's articles; or

(b) any resolution or agreement to which the provisions of Part III relating to resolutions or agreements affecting a company's constitution apply, the company shall attach to, or enclose with, the copy of the order lodged with the Registrar by the company under section 783, a copy of the company's articles, or the relevant resolution, as amended.

(3) The company shall attach to, or enclose with, every copy of a company's articles issued by the company after the order is made a copy of the order, unless the effect of the order has been incorporated into the articles by amendment.

(4) If a company fails to comply with subsection (2) or (3), the company, and each officer of the company who is in default, commits an offence and on conviction is liable to a fine not exceeding two hundred thousand shillings.

(5) If, after a company or any of its officers has been convicted of an offence under subsection (4), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding twenty thousand shillings for each such offence.

12. The Plaintiff raised the following pertinent issues in opposition to the application:

a. This Court had unlimited jurisdiction under Article 165 (3) (b) and (d) of the *Constitution*.

b. The court has jurisdiction under Section 782 of the Companied Act to make orders for the protection of members against oppressive conduct.

c. The suit transcends the personal internal disputes contemplated under the Memorandum and Articles of the company.

d. The Defendants are not acting in accordance with the company's constitution hence the suit.

e. The suit raises justiciable issues in interpreting the doctrine of separate legal entity vis-a-vis the rights of the Plaintiff and its shareholders.

13. To this court, the provisions confer jurisdiction upon the court strictly on matters where the actions of the company are oppressive or unfairly prejudicial to the affected member. The suit herein though sort to apply the principles under the above law, was not typically premised on the said provisions. It was commenced by the company as opposed to a member. The Court of Appeal in *Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited* [2018] eKLR held that:

18. From the above authorities it is clear that there are exceptions to the general rule that a statutory provision is not retrospective. The important consideration being the intention of the legislature in enacting the statute.

We are guided by the case of *Amalgamated Society of Engineers vs. Adelaide Steamship* (1920) 28 CLR 129 at 161-2 where Higgins J stated as follows:

> " The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to

obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable.""

14. An arbitration agreement is defined under Section 2 of the *Arbitration Act* as doth:

> An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

15. Under Clause 31 the Articles of Association of the Respondent provided as follows:

> Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators 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, committed or suffered in pursuance of these articles, or any claim or account of any such breach, or alleged breach or otherwise relating on the premises, or to these articles or to any statutes, affecting the company or to any of the affairs of the company, every difference 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, or whom one shall be appointed by each of the parties in difference.

16. In my view, a cursory perusal of the Plaint herein, though indicated to be brought within the provision of Part XXIX of the *Act*, reveals disputes anticipated to be settled by way of arbitration under Clause 31 of the Plaintiff's Articles of Association. In any event, the alternative dispute resolution mechanism provided under the articles of association of the Plaintiff is the ideal mechanism for settling this dispute. In *Ririani & another v Childs & 7 others* (Commercial Suit E350 of 2023) [2024] KEHC 2474 (KLR) (Commercial and Tax) (8 March 2024) (Ruling) F.G. Mugambi, J stated as doth:

> Having looked at the pleadings filed herein and the issues raised therein, I have no difficulty finding that the dispute falls within the scope of the arbitration clause which as earlier stated applies to all disputes and questions and to the rights or liabilities of any party under these Articles. Contrary to the respondent's view that the dispute is not arbitrable, I urge that arbitration is deemed an ideal mechanism for resolving disputes between shareholders and the company due to its efficiency and amicability, offering a swift and friendly resolution.

17. This court is empowered to promote alternative dispute resolution under Article 159(2)(c) of the *Constitution*. In *Hausram Limited v. Nairobi City County* Civil Case No 421 of 2013; [2013] eKLR the learned judge, Havelock J (as he then was) stated as follows:

> " Article 159(2)(c) of the *Constitution*, 2010 is expressed in mandatory terms and this Court is under a duty to promote alternative forms of dispute resolution. This is all the more so when the parties themselves have chosen the forum as is the case here. This Court, as the Defendant has pointed out in its submissions, cannot rewrite the Contracts already entered into between the parties...

18. The Plaintiff had the duty to demonstrate the necessity of this court's intervention as a last resort since arbitration is an attractive way of settling commercial disputes with the perceived advantages it brings beyond what is generally offered by the regular court processes. This court is also guided by

the sentiments of the Supreme Court of Kenya in *Synergy Industrial Credit Ltd V Cape Holdings Ltd* (2019) KESC 12 (KLR) as follows:

> "In interpreting the arbitration law, therefore, one should never lose sight of the purpose of the enactment of the *Arbitration Act*, 1995 and in addition, the fact that the *Constitution* of Kenya, 2010 in article 159(2)(c) enjoins courts to be guided by the principles of alternative forms of dispute resolution such as arbitration. There is also no doubt that arbitration is an attractive way of settling commercial disputes by virtue of the perceived advantages it brings beyond what is generally offered by the normal court processes which are often characterized by formalities and delays. In addition, while it is quite clear that the arbitration regime is meant to ensure that there is a process distinct from the courts, of effectively and efficiently solving commercial disputes, the law also recognizes that such a process is not absolutely immune from courts intervention. This is because court of law remain the ultimate guardians and protectors of justice and hence they cannot be completely shut off from any process of seeking justice."

19. The Plaintiff had the duty to impress the requirement that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the courts is invoked. I am fortified by the court's reasoning in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal restated its position thus:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution."

20. The existence and binding nature of the arbitral clause is not disputed. It does not lie within the exception of the jurisdiction of the Arbitrator under Section 6 of the *Arbitration Act*, Cap 49 of the Laws of Kenya which provides that:

> Stay of legal proceedings(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 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 the matters agreed to be referred to arbitration.(2)Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.(3)If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

21. The Defendants properly filed their application at the earliest opportunity together with the Memorandum of Appearance on 13.7.2022. By not filing a defence, they did not acknowledge the

claim. They complied with Section 6 of the *Arbitration Act*. In *Eunice Soko Mlagui v Suresh Parmar & 4 others* (2017) eKLR, the Court of Appeal stated as follows:

> "After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment, Section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre 2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In *Charles Njogu Lofty v Bedouin Enterprises Ltd*, CA No 253 of 2003, this court considered section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after filing of the defense."

22. The Plaintiff also heavily sought to rely on *Martin Lemaiyan Mokoosio & Another vs Reshma Praful Chandra Vadera & 3 Others* (*supra*). This case was distinguishable as it involved disputes that went to the core of the breach of the company's constitution, leading to a presumption of oppression and unfair prejudice on the part of the two Petitioners who approached the court seeking a reprieve.

23. Before I pen off, the Defendant prayed for an order that the President of the Law Society of Kenya appoints an Arbitrator if the parties disagree with a single arbitrator. I do not think that should be the correct position. It is contrary to the arbitration clause that this court has impressed. Doing the best I can, the parties will resort to the mode of appointment of the arbitrator stated under Clause 31 of the company's Articles of Association. Majanja, J (as he then was) in *Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited (Interested Party)* (Petition E001 of 2021) [2022] KEHC 48 (KLR) stated thus:

> "...the *Arbitration Act* proceeds from the position that the arbitration process is consensual and court intervention is only necessary to assist the parties carry out their stated intention crystallized in the arbitration agreement. Hence section 12 of the *Arbitration Act* dealing with appointment of arbitrators, does not supplant the parties' right to appoint or prescribe the mode of appointment of the arbitrator but only sets out a default procedure for the court to intervene should the parties either fail to comply with the contractual provisions for appointment of an arbitrator. The court can only intervene in matters of appointment if the agreement provides for the appointment and either party fails to comply with the agreement. In this case, the arbitration clause does not provide for the appointment of an arbitrator or process for such appointment; hence, the court cannot re-write the parties' agreement by taking upon itself to appoint an arbitrator."

24. The application succeeds and is accordingly allowed.

Determination

25. The upshot of the foregoing is that I make orders as follows:-

    a. The application dated 13.7. 2022 is merited and is allowed.

    b. The suit is stayed pending Arbitration as envisaged by Clause 31 of the Memorandum and Articles of Association incorporated on 1.8.2008.

c. The parties shall appoint an Arbitrator within 30 days of this Order; failing that, each party shall appoint their respective arbitrators to jointly arbitrate the dispute as provided under Clause 31 of the Memorandum and Articles of Association incorporated on 1.8.2008.

d. In default of (c) above, the Chairman of the Chartered Institute of Arbitrators shall appoint a single Arbitrator to determine the dispute.

e. Each party will bear their costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 21ST DAY OF MARCH, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Matheka for the Plaintiff

Ms. Kinyua for the 1st, 2nd and 4th Defendants

No appearance for the 3rd Defendant

Court Assistant – Michael

M. D. KIZITO, J.