Malow v Enigma Consultancy (Civil Appeal E185 of 2024)
[2025] KEHC 6818 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6818 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E185 OF 2024

G MUTAI, J

MAY 20, 2025

BETWEEN

AHMED ABDIKADIR MALOW ..... APPELLANT

AND

ENIGMA CONSULTANCY ..... RESPONDENT

JUDGMENT

1. The appellant filed a plaint in the court below, vide which he sought judgment against the respondents jointly for the sum of Kes.7,250,000/- and costs and interest.

2. The appellant averred in the pleadings that he entered into a settlement agreement dated 24th March 2023 with the respondents, vide which it was agreed that he would be paid Kes.7,250,000/- as follows:-

   a. On or before 31st March 2023 - Kes.1,000,000/-;

   b. On or before 15th April 2023 - Kes.1,500,000/-; and

   c. On or before 30th April 2023 - Kes.4,750,000.

   It was the appellant's case that, contrary to what was agreed, the respondents defaulted. Due to the default on the part of the respondents, he was left with no option but to file a suit to compel them to pay him.

3. In support of his case, the appellant annexed the deed of settlement dated 24th March 2023 and a demand letter dated 27th September 2023, vide which payment was sought.

4. Upon being served, the respondent (then the 1st defendant) entered an appearance under protest, contending that the matter should have been referred to arbitration rather than the court.

5. The respondent, through its counsel, Morara Omoke & Co. Advocates, filed a notice of preliminary objection dated 14th December 2023, seeking to have the suit dismissed and/or struck out with costs,

on the grounds that the court below lacked jurisdiction to entertain the claim, as the dispute is the province of and subject to arbitration proceedings as per the terms of the settlement agreement between the parties.

6. The preliminary objection was canvassed through written submissions. The defendant's submissions, dated 7th February 2023 (sic!), contended that the dispute between the parties related to the performance of the agreement.

7. The respondents urged that the court lacked jurisdiction to hear and determine the matter.

8. Mr Morara Omoke submitted in the court below that the preliminary objection raised a pure point of law and thus qualified as such. Reliance was placed on the decision of the Court of Appeal for Eastern Africa in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. Counsel further submitted that jurisdiction was everything, and that without it, the court was bound to put down its tools and could not have the power to take one more step or analyze any other issues raised in the suit.

9. Counsel also relied on the decision of the Supreme Court of Kenya in Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) where it was stated that:-

> "A Court's jurisdiction flows from either the *constitution* or legislation, or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

10. Counsel urged that the court could not give itself jurisdiction it had not been granted, nor seek to creatively interpret the law to give itself more authority than what was donated by the *constitution* or the Statute.

11. Regarding provision of section 6 of the *Arbitration Act*, counsel submitted that once parties had chosen arbitration as a means of dispute resolution, the court must generally refrain from unnecessary interference. Further, courts were bound by Article 159 of the *constitution* of Kenya to promote alternative dispute mechanisms, including arbitration.

12. At paragraph 17 of the respondent's submissions, it was stated in part that:-

> "... and their intent that should any proceeding be filed in court by any of the parties, the proceedings should be stayed by the court to enable arbitration to proceed as provided under Section 6 of the Act."

13. It was therefore urged that the court lacked jurisdiction. For that reason, the Respondent submitted in the court below that the suit be dismissed with costs.

14. The appellant, on the other hand, filed written submissions, through its counsel, dated 12th February 2024. In the said submissions, counsel stated that paragraph 6.7 of the Deed of Settlement provided that a party to the said agreement was entitled to seek preliminary injunctive relief or interim or conservative measures of protection from any court of competent jurisdiction pending the final decision of the arbitral tribunal seized of the reference. It was submitted that, given the foregoing provision, the court's jurisdiction had not been ousted. Counsel for the appellant urged that what was

being sought was interim relief to compel the respondent to comply with paragraph 2 of the Deed of Settlement.

15. Mr Oddiaga argued that section 6 of the *Arbitration Act* only referred to a stay of proceedings. He submitted that proceedings could not be stayed through a notice of preliminary objection. Reliance was placed on the case of Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party) [2021] eKLR.

16. For the foregoing reasons, counsel submitted in the court below that the notice of preliminary objection be dismissed with costs.

17. In its decision dated 19th June 2024, the court below found at paragraph *6* that:-

> " The plaintiff has prayed for recovery of money. He is not seeking preliminary injunctive relief but a substantive order that could potentially put an end to the agreement. For this reason, I find that the provision of paragraph 6.7 does not give this court jurisdiction to deal with the dispute that has arisen. This suit is therefore struck out for being filed in the wrong forum. The applicant shall have the costs of the application."

18. The appellant was aggrieved by the said decision and lodged the instant appeal. The appellant raised five grounds of appeal, to wit, that:-

    1. That the learned trial magistrate erred in both law and fact by striking out the plaintiff's suit, a decision which was without basis or at all;

    2. That the learned trial magistrate erred in both law and fact by failing to comply with section 6 of the *Arbitration Act* and wrongfully struck out the plaintiff's case;

    3. That the learned trial magistrate erred in both law and fact by erroneously concluding that the *Arbitration Act* provides for striking out of proceedings where there is an Arbitration Agreement, yet the law provides for stay of proceedings to allow the arbitration process to be concluded;

    4. That the learned trial magistrate misdirected himself, in both law and fact, by hearing the preliminary objection, yet the same was not based on any law, and the same was fatally defective and amounted to a fishing mission not qualified to be a preliminary objection; and

    5. That the learned trial magistrate erred in both law and in fact by arriving at a wrong conclusion considering the nature of the preliminary objection before it.

19. Pursuant to the direction issued by this court on 23rd September 2024, the appeal was canvassed through written submissions.

20. Despite being served with the orders, the hearing, and the mention notices, the respondent did not file written submissions.

21. In his submissions dated 28th November 2024, the appellant relied on the submissions it made before the court below. Mr Oddiaga, counsel for the appellant, urged that the court erred when it relied on a preliminary objection to strike out the suit when it should have stayed it upon the application, which wasn't in fact made, of the respondent. He stated that a preliminary objection isn't an application for a stay of proceedings contemplated under the *Arbitration Act*.

22. Counsel relied on the case of Lipa Later Limited v Wanini [2023] KEELRC 3193 (KLR) where the court stated that:-

> " 36. A plain reading of section 6(1) of the *Arbitration Act* reveals that an arbitration agreement does not deny a court jurisdiction to hear and determine a suit based on the agreement and as courts have maintained, it merely gives the Respondent a defense to the claim which must be exploited by way of an application for stay for the dispute to be referred to arbitration."

23. He argued that the trial court was wrong to strike out the case. For the foregoing reasons, counsel submitted that the appeal be allowed with costs.

24. As the first appellate court, it's my duty to reevaluate the proceedings of the court below and make my own determination. I will, however, be most reluctant to disturb the decision of the court below unless there are good reasons to do so.

25. In the case of Mbogo and Another v Shah [1968] EA 93, the Court stated:-

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

26. At the heart of this appeal is section 6 of the *Arbitration Act*, 1995. The said section provides as follows:-

> "(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."

27. My understanding of the foregoing provisions is that it does not oust the jurisdiction of the court. Rather, it requires the parties to an agreement with an arbitral clause to first exhaust the arbitration process before approaching the court. It is for this reason that, rather than calling for the striking out or dismissal of suits, the provision calls on the courts, upon the application of a party, to stay proceedings.

28. The "application" contemplated under section 6 of the *Arbitration Act* is not a notice of preliminary objection. In Agip (K) Ltd v Kibutu [1981] KECA 48 (KLR), the Court of Appeal, while considering an appeal arising from a matter in which an objection to the jurisdiction of the Court was raised in the defence stated as follows:-

> " A strange feature of this appeal is that there has never been an application by the defendant for the suit to be stayed. The existence of an arbitration clause in the agreement between the parties was referred to in the defence as a point of law affecting the court's jurisdiction to entertain the suit, and appears to have been treated by consent of the parties as equivalent to an application for a stay under Section 6(1) of the *Arbitration Act*. But such an application must be made "before delivering any pleadings or taking any other steps in the proceedings". To make the existence of an arbitration agreement a ground of defence is, as was said by Sir Newham Worley Ag P in Purshottam v Keshavlal (21 EACA) 111 "self-destructive", because it involves the delivery of a pleading before the application for a stay is heard. The only way in which an application for stay to enforce an arbitration clause in an agreement can be made is by notice of motion supported by affidavit; it cannot be disguised as a point of law contained in a pleading..."

29. The above decision was followed by M Muigai, J in Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party) [2021] eKLR, wherein she held that, "a Preliminary Objection is not the legal procedure to seek stay of proceedings under Section 6 of *Arbitration Act* for parties to pursue Arbitration."

30. I agree with the persuasive authority of the Lipa Later Ltd case (Supra) that the existence of an arbitration clause in an agreement does not oust the jurisdiction of the court.

31. In my view, the court below was wrong to the extent that it disclaimed jurisdiction and for striking out the suit, rather than staying the proceedings pending the referral of the matter to arbitration.

32. I note that the learned magistrate did not consider the appellant's submissions regarding the purport of Section 6 of the *Arbitration Act*, nor the authorities he relied upon. By so doing, he erred and arrived at a wrong decision. This court is therefore justified in disturbing his finding and setting it aside.

33. The upshot of the foregoing is that, in my view, the appeal has merit. The court below was wrong to strike out the suit. In the circumstances, I set aside the impugned decision and substitute it with an order reinstating the suit. The proceedings in the court below will, however, be stayed pending the referral of the dispute to arbitration pursuant to clause 6.7 of the Deed of Settlement.

34. I have made the foregoing decision as this court is called upon by Article 159 to promote arbitration, and also to save and better utilize the scarce judicial resources, to wit, time.

35. On costs, I award the appellant the costs of the appeal, as well as those of the court below.

36. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 20TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Mwanzia, holding brief for Mr Oddiaga, for the Appellant;

No appearance for the Respondent; and

Arthur – Court Assistant.