



REPUBLIC OF KENYA



Techspa General Supplies Ltd v Stan Holdings Company Limited (Civil Appeal E1064 of 2023) [2025] KEHC 8337 (KLR) (Civ) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1064 OF 2023

JN MULWA, J

JUNE 12, 2025

BETWEEN

TECHSPA GENERAL SUPPLIES LTD APPLICANT

AND

STAN HOLDINGS COMPANY LIMITED RESPONDENT

RULING

1. The Appellant herein, by its motion dated 7th January 2025 seeks for orders that;
 - i. Spent
 - ii. That leave be granted to the appellant to amend the Memorandum of appeal in terms of the proposed amended Memorandum of appeal annexed.
 - iii. That the annexed proposed amended Memorandum of appeal be deemed as duly filed and served upon the payment of the requisite court fees; and
 - iv. That this Honourable Court be pleased to refer the parties hereto to arbitration.
 - v. That this Honourable court be pleased to stay all proceedings in the appeal herein pending arbitration of the dispute between the parties.
 - vi. That this Honourable court be pleased to extend the stay orders issued in this matter pending the hearing and determination of this application.
 - vii. That the costs of the instant application be awarded to the Applicant against the Plaintiff Respondent.
2. In opposition to the application, the Respondent filed a Replying Affidavit dated 17th February 2025.



3. The Court on 28th January, 2025 gave directions that parties return to Court on 18/2/2025 for oral arguments.

Applicant's Case.

4. Learned Counsel for Applicant Majan while holding brief for Ms. Kemunto states that this instant application seeks to amend Memorandum of Appeal for the matter to be transferred to arbitration. He further sought to have the Arbitration clause included in the appeal.

Respondent's case.

5. Learned Counsel for the Respondent Ms. Sharon argued that the proposed amendment raises new issues not raised in the trial court and that no issue of jurisdiction was raised during the proceedings in trial court, adding further that the Appellant submitted itself to the trial Court's jurisdiction and and at no time did it raise the issue of arbitration before the said court, and therefore such issue cannot be raised after judgment.
6. The Respondent argued that the Applicant is undeserving of the orders sought.

Analysis and Determination.

7. The Court has perused the original record, the record of appeal and considered the material canvassed in respect of the application.
8. Jurisdiction of the Court is always the focal point that every Court has to determine before setting out to try and settle disputes between parties. The Court cannot therefore arrogate itself of jurisdiction that it does not possess.
9. In the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, the Court of Appeal stated as follows:

“In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.” (emphasis added)

10. The present application is primarily seeking leave to amend the Memorandum of Appeal and further have the parties referred to arbitration for having not exhausted all the remedies as per the agreement between parties. This brings out an issue of jurisdiction, which the Applicant failed to raise at the lower court during trial.
11. Section 6 (1) of the Arbitration Act No. 4 of 1995 which provides that;

“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 the 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.”

12. In *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] the Court of Appeal held that:

“All that an applicant for stay of proceedings under Section 6(1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. This court will be obliged to consider three things: whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there are any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration.”

13. There is no evidence on record that the applicant filed an arbitration agreement at the lower court. The law requires that no other steps be taken by an applicant other than entry of appearance and filing of the application.

In this instant case, the Applicant entered appearance and went on to participate in the proceedings at the lower court to the point of judgement being delivered by the learned Magistrate Hon. Gillian Simatwo.

14. In the case of *Lofty v Bedouin Enterprises Ltd – EALR (2005) 2 EA*: the Court of Appeal was categorical that:

“We respectfully agree with these views, so that even if the conditions set out in paragraphs(a) and (b) of Section 6 (1) 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 an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]

15. An arbitration in an agreement or contract ought to be invoked when the Applicant enters appearance and not after the Applicant has taken any other step like filing pleadings. The object of section 6(1) is therefore to ensure that applications of stay of proceedings are made at the earliest stage of the proceedings. In this case, it is evident that the alleged arbitration clause was never invoked at any stage of the proceedings before the trial court.

16. Article 159(2) (d) of *the Constitution* of Kenya enjoins courts to administer justice without undue regard to procedural technicalities. The same Article obligates courts to encourage alternative dispute resolution mechanisms under Article 159(2) (c) of *the Constitution* including arbitration.

However, the fact that an arbitration clause exists in an agreement or a contract does not necessarily oust the jurisdiction of the court from hearing and determining the suit, save that the court, upon application or on its own motion may refer the dispute for arbitration in compliance with section 6 (1) of the *Arbitration Act*, but not after the suit is fully heard interpartes and judgment delivered.

17. On the issue of stay of execution of the trial courts decree, this court notes that the Applicant has failed to comply with the conditional stay orders issued by C. Meoli, J and even after being granted extension of the time to comply.

18. For the foregoing, the Court finds that the motion dated 7th January, 2025 is unmerited. It is dismissed with costs to the Respondent.

19. The appeal shall be placed before the Deputy Registrar of the Civil Appellate Division



DELIVERED DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE 2025

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JANET MULWA.

JUDGE

