Cape Suppliers Limited v Synohydro Corporation Limited (Civil Case 848 of 2010) [2025] KEHC 10805 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 848 OF 2010

NW SIFUNA, J

JULY 24, 2025

BETWEEN

CAPE SUPPLIERS LIMITED ..... PLAINTIFF

AND

SYNOHYDRO CORPORATION LIMITED ..... DEFENDANT

RULING

1. This ruling is on the Defendant's Preliminary Objection dated 11th November 2024. The same is on the ground that the parties had in a supply contract dated 12th August 2009, agreed to resolve through arbitration, any disputes arising from the performance of the contract. That was in Clause 10 of the contract. The Defendant argues that, by virtue of the arbitration clause, this Court lacks jurisdiction to entertain the dispute raised in the Plaint dated 8th December 2010. Consequently, the Defendant has sought the dismissal of the dispute with costs.

2. In response, the Plaintiff filed a replying affidavit sworn by Kinaro Kibanya on 18th November 2024. In which it contends that the Objection is in violation of Section 6(1) of the *Arbitration Act*, which provides for the Application of a stay of proceedings and a reference of the dispute to arbitration. Further that the Objection is time-barred, having been raised after the Defendant filed its Defence, and more than 10 years after the commencement of the proceedings.

3. It has further contended that the High Court possesses unlimited original jurisdiction in civil matters, and no law can oust the court's jurisdiction in this matter.

Analysis and Determination

4. The objection was canvassed by way of oral submissions. Which this Court has considered.

5. The Defendant submitted that the court lacked jurisdiction to hear and determine the dispute since the supply contract had an arbitration clause. It was the Defendant's submissions that it filed a Defence under protest and the perfect forum was what the parties had preferred. It further submitted that its argument is hinged on Article159(2)(c) of the Kenya *Constitution*. It further submitted that jurisdiction cannot be conferred on a court by consent, waiver or acquiescence.

6. The Plaintiff on its part submitted that the Objection offends the provisions of section 6(1) of the *Arbitration Act* as read with Rule 2 of the *Arbitration Rules*. That pursuant to the provision, a party who wishes to rely on it, should do so by way of an Application for stay of proceedings. Yet that the Defendant filed a Preliminary Objection. It was submitted that the presence of an arbitration clause does not oust the jurisdiction of the court.

7. Upon considering the parties' pleadings, the Preliminary Objection, the replying affidavit, as well as the oral submissions before court. I find that the main issue for determination, is whether the objection is sustainable.

8. In the *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696, a preliminary objection was described as follows:

> " a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

9. In the same case, Sir Charles Newbold P, stated that:

> " a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

11. It is trite law, that the issue of jurisdiction needs to be determined at the earliest time possible. It was held in *Owners of the Motor Vessel 'Lillian" (S) v Caltex Oil (Kenya) Ltd* [1989] KLR1 as follows:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
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> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into

the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

12. In the instant case, the jurisdiction of the court has been challenged on account of the existence of an arbitration clause in the supply contract dated 12th August 2009. The Defendant has argued that even though a defence was filed, the same was filed under protest. It has relied on article 159(2)(c) of the Kenya *Constitution*.

13. For its part, the Plaintiff submitted that the Objection offends section 6(1) of the *Arbitration Act*, by which the Defendant ought to have filed an application for stay of proceedings, and not a preliminary objection. That that the objection was time barred; having brought been filed 0 years after.

14. I have considered the parties' rival pleadings, the preliminary objection, and the parties' submissions on the objection. It is not in dispute, that there exists a contract which designates arbitration as the dispute resolution forum. Notably, the jurisdiction of the court in matters arbitration is a matter of law; conferred by either the *Constitution* or a statute.

15. Section 6 of the *Arbitration Act* (Cap 49, Laws of Kenya) provides as follows:

Section 6 (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 or 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.

Section 6(2)

"Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

Section 6(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."

16. Pursuant to the above provision, this Court is directed to stay proceeding and refer the dispute to arbitration where an Application is made no later than the time within which a party enters appearance. In the present case, the Defendant filed its Defence and did not move the Court under section 6 of the Act.

17. In the *Eunice Soko Mlagui v Suresh Parmar & 4 others* (2017) eKLR, the Court of Appeal observed 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 is not made at the time of entering appearance or is made after filing of the defense."

18. Further in *Mt Kenya University v Step Up Holdings (K) Ltd* (2018) eKLR, the court stated as follows:

> "In *Corporate Insurance Company v Wachira* (*supra*), the court held inter alia that existence of an arbitration clause is a defense to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings."

19. In the *Agip (K) Ltd v Kibutu case* [1981] eKLR, the Court of Appeal found that there was no application by the Defendant for the suit to be stayed. The court 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 . . .But such an application must be made "before delivering any pleadings or taking any other steps in the proceedings . . .The only way in which an application for stay can be made is by notice of motion supported by affidavit, it cannot be disguised as a point of law contained in a pleading...."

20. Similarly, in *Meshack Kibunja & 3 Others v Kirubi Kamau & 5 Others, Central Highlands Tea Co. Ltd (Interested Party)* (2021) eKLR, Muigai J, observed as follows:

> "A Preliminary Objection is not the legal procedure to seek stay of proceedings under Section 6 of the *Arbitration Act* for parties to pursue arbitration. The tenor and import of article 159(2)(c) of the *Constitution* read together with section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obligated to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance."

21. Therefore, the invoking of an arbitration clause must strictly comply with the provisions of Section 6 of the *Arbitration Act*. While the High Court possesses original and unlimited jurisdiction in civil matters, once a party properly invokes Section 6, the court is obligated to give effect to Article 159(2)(c)

of the *Constitution*, which encourages the application of alternative dispute resolution mechanisms, including arbitration.

22. In the present case, no formal application for stay of proceedings was made under Section 6 of the *Arbitration Act*. Instead, the Defendant has raised a preliminary objection. That which does not meet the statutory threshold required to stay proceedings and refer the matter to arbitration. As such the Defendant cannot long after and in this fashion, raise the arbitration clause to defeat the court's jurisdiction.

23. As the preliminary objection is misplaced, it is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2025.

PROF (DR) NIXON SIFUNA

JUDGE