Magnate Ventures Limited v Interbrand Africa Agencies Limited & 2 others (Commercial Appeal E071 of 2024) [2025] KEHC 9997 (KLR) (Commercial and Tax) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9997 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E071 OF 2024

RC RUTTO, J

JULY 4, 2025

BETWEEN

MAGNATE VENTURES LIMITED ..... APPELLANT

AND

INTERBRAND AFRICA AGENCIES LIMITED ..... 1ST RESPONDENT

GOLDEN AFRICA KENYA LIMITED ..... 2ND RESPONDENT

DORCAS AKINYI OMONDI ..... 3RD RESPONDENT

(Being an appeal from the Ruling delivered by Hon. L.B Koech (Mrs) PM on 23rd February 2024 by Hon. L.B Koech (Mrs) (PM) in Milimani MCCOMMSU E138 of 2023)

JUDGMENT

1. This is an appeal from the Ruling and Orders of Hon. L.B. Koech [Mrs], Principal Magistrate, delivered on February 23, 2024, in Milimani MCCOMMSU E138 of 2023. In the trial court, the 2nd Respondent filed an application dated March 28, 2023, seeking a stay of proceedings and an order referring the dispute between the parties to arbitration. The application was premised on the existence of a tripartite Outdoor Advertising Agreement dated November 19, 2019, which contains an arbitration clause [Clause 10.7]. It was contended that, in the interest of justice, the matter ought to be referred to arbitration.

2. The Appellant opposed the application, arguing, among other grounds, that the suit was for recovery of an undisputed debt owed to the Appellant, and as such, there was no dispute capable of being referred to arbitration.

3. After hearing the parties, the trial court, in its ruling delivered on February 23, 2024, ordered a stay of proceedings and referred the dispute to arbitration, holding that it lacked jurisdiction to entertain the suit.

4. Aggrieved by the ruling, the Appellant filed this appeal on the grounds that the Learned Magistrate erred in law and fact by:

    a. Allowing the 2nd Respondent's Application dated March 28, 2023, and consequently staying proceedings at the Magistrate's court and referring the matter to arbitration.

    b. Finding that there was a dispute capable of being referred to arbitration.

    c. Failing to appreciate the provisions of Section 6[1][b] of the *Arbitration Act*, which allows a court to reject an application for stay if there is, in fact, no dispute to be referred to arbitration.

    d. Failing to appreciate that there was no dispute as to the debt of KShs.4,663,800/= owed to the Appellant, that there was no matter for adjudication and reference to arbitration, and that the Appellant was entitled to recover the debt owed to it.

    e. Failing to find that the Respondents had not given any reason for their failure to make any payment towards the outstanding amount.

    f. Failing to consider all the evidence on record and misdirecting herself in holding that the ruling was regular.

5. The Appellant prayed that the appeal be allowed, the ruling delivered on February 23, 2024, and any resultant orders be set aside, the costs of the appeal be awarded to the Appellant, and that this court issues any order it deems just and fit to grant in the circumstances.

6. The appeal was canvassed by way of written submissions pursuant to the directions issued on August 29, 2024. The Appellant's submissions are dated October 4, 2024, while the 2nd Respondent's submissions are dated November 18, 2024. The Court notes that the 1st and 3rd Respondents, though duly served, did not participate in the appeal proceedings.

Appellant's Submissions

7. The Appellant began its submissions by outlining the background of the case. It stated that it had provided outdoor advertising services to the 2nd Respondent, with the 1st Respondent acting as the 2nd Respondent's agent. Despite fulfilling its contractual obligations, the Appellant submitted that the Respondents failed to settle invoices amounting to KShs.4,663,800/=. Consequently, the Appellant instituted proceedings against the Respondents seeking recovery of the said amount.

8. The Appellant identified two issues for determination: first, whether the Respondents had demonstrated the existence of a dispute capable of being referred to arbitration; and second, who should bear the costs of the appeal. On the question of whether a dispute existed, the Appellant submitted that there was none, asserting that the only outstanding issue was the payment of agreed sums. It relied on Section 6[1][b] of the *Arbitration Act* to argue that a court can only stay proceedings and refer a matter to arbitration if there is, in fact, a dispute capable of such referral. Referring to Clause 10.7 of the Agreement, the Appellant contended that the 2nd Respondent failed to specify the nature of the alleged dispute in its application. The Appellant cited the case of Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, which reiterated the general principle that the legal burden of proof lies upon the party seeking the aid of the law. Consequently, the Appellant argued that it was

incumbent upon the 2nd Respondent to demonstrate the existence of a genuine dispute warranting referral to arbitration.

9. The Appellant further relied on the case of TM AM Construction [Africa] Group v Attorney General [2001] eKLR, to submit that the 2nd Respondent neither denied having received the services rendered nor disputed the debt, nor did it provide any justification for its failure to settle the outstanding amount. It was the Appellant's position that the invoices raised were not challenged, thereby implying acknowledgment of the accrued sum, and that there was no disagreement regarding either the amount or the terms. The Appellant also placed reliance on Nanchang Foreign Engineering Company [K] Limited v Easy Properties Kenya Limited [2014] eKLR and Ellis Mechanical Services Limited v Wates Construction Limited [1978] 1 Lloyd's Rep 33, the latter having been cited with approval in the Court of Appeal decision in UAP Provincial Insurance Company Limited v Michael John Beckett [2013] eKLR. It submitted that a straightforward debt recovery claim ought to proceed without contention, as it merely seeks the legal enforcement of a debt already due and owing. The Appellant argued that it should not be deprived of the opportunity to recover the amount owed to it and that such a matter does not constitute a dispute warranting referral to arbitration.

10. In conclusion, the Appellant urged the Court to find that no dispute exists between the parties within the meaning of Section 6[1][b] of the *Arbitration Act*. On that basis, the Appellant prayed that the application dated March 28, 2023, be dismissed with costs and that the present appeal be allowed in its entirety.

2nd Respondent's Submissions

11. The 2nd Respondent commenced its submissions by outlining the background and basis of the claim filed before the trial court. It framed the legal questions arising for determination as follows: what constitutes a dispute; whether there was a dispute between the parties arising from the agreement dated November 19, 2019; whether that agreement contained a binding arbitration clause; whether the dispute, if any, fell within the scope of the said clause; and finally, whether the Learned Magistrate erred in law and fact by referring the dispute to arbitration pursuant to Section 6[1] of the *Arbitration Act*.

12. The 2nd Respondent relied on the case of Stephen Okero Oyugi v Law Society of Kenya & Another [2005] eKLR, submitting that the dispute stems from the Appellant's claim that, pursuant to the agreement dated November 19, 2019, it rendered outdoor advertising services to the 1st and 2nd Respondents, who have allegedly failed to pay the sum of KShs.4,663,800/=. It was the 2nd Respondent's position that the claim clearly arises from a contractual relationship governed by the said agreement. The 2nd Respondent argued that the dispute falls squarely within the scope of the arbitration clause in the agreement and is therefore amenable to resolution through arbitration. It further submitted that the language of Clause 10.7 is broad and encompasses any dispute arising between the parties in relation to the agreement.

13. On whether the Learned Magistrate erred in law and in fact by referring the dispute to arbitration pursuant to Section 6[1] of the *Arbitration Act*, the 2nd Respondent urged, while relying on the decisions in Scales and Software Limited v Web Commercial Systems Limited & Another [2021] eKLR and UAP Provincial Insurance Company Limited v Michael John Beckett [2013] eKLR, that the Appellant failed to show that there was no dispute capable of being referred to arbitration. The 2nd Respondent maintained that at no point either before the trial court or on appeal did the Appellant demonstrate that there was no disagreement concerning the services provided or the payments owed.

14. In conclusion, the 2nd Respondent urged the Court to find that the Learned Magistrate properly exercised her discretion in referring the matter to arbitration and to uphold the ruling delivered on February 23, 2024.

Analysis and Determination

15. As this is a first appeal, the court has a duty to re-evaluate and analyze the evidence afresh and arrive at its own independent conclusions. However, in doing so, the court must bear in mind that the trial court had the distinct advantage of seeing and hearing the witnesses firsthand, including observing their demeanor. This principle was clearly articulated by the Court of Appeal in Selle v Associated Motor Boat Company Ltd [1968] EA 123 and Peters v Sunday Post Limited [1985] EA 424.

16. After careful analysis of the record of appeal and the parties' submissions, the main issue for determination is whether the Trial Magistrate erred in law and fact by staying the proceedings and referring the matter to arbitration.

17. The impugned ruling arose from an application brought under Section 6[1] of the *Arbitration Act*, seeking a stay of proceedings and reference to arbitration on the basis of Clause 10.7 of the Agreement dated November 19, 2019.

18. Section 6[1] of the *Arbitration Act* 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 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: -
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> a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
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> b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

19. The pertinent question for determination is whether there exists a dispute between the parties within the meaning of Section 6[1] of the *Arbitration Act*. The Court of Appeal in the case of UAP Provincial Insurance Company Limited v Michael John Beckett [2013] eKLR held that:

> "It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6[1][b] of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.
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> The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6[1][b], to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to undertake an evaluation of the merits or demerits of the dispute... Indeed, in dealing with a Section

6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute." [Emphasis mine]

20. It is evident from the foregoing that the mere presence of an arbitration clause in a contract does not automatically strip the court of its jurisdiction. The court has a duty to determine whether there is a genuine and bona fide dispute capable of being referred to arbitration. If the court is satisfied that no such dispute exists, it must proceed to hear and determine the matter before it. Referring a non-existent dispute to arbitration would amount to an abdication of judicial responsibility and a subversion of justice.

21. In the present appeal, the Appellant argues that the suit before the trial court was a straightforward claim for the recovery of an admitted and undisputed debt amounting to KShs.4,663,800/=. The Appellant contends that the Respondents neither denied liability nor offered any justification for the non-payment, and therefore, no dispute existed that warranted referral to arbitration. On the other hand, the 2nd Respondent maintains that the Appellant failed to demonstrate—both before the trial court and on appeal—that no dispute exists. It argues that the Appellant's claim for payment, which the Respondents have not admitted, constitutes a dispute arising from the agreement and is thus properly referable to arbitration. This calls for the Court to interrogate the record.

22. Upon reviewing the affidavit filed by the 2nd Respondent in support of its application before the trial court, it is notable that the Respondent did not indicate whether it was challenging the invoices or disputing the payments claimed by the Appellant. While the Court acknowledges that the Respondent was not obligated to file a statement of defence prior to the application that led to the impugned ruling, it was nonetheless incumbent upon it to clarify whether it disputed the claim seeing that section 6[1] of the *Arbitration Act* had been invoked. Such disclosure would have been instrumental in assisting the trial court to determine whether a genuine and bona fide dispute existed—one capable of being referred to arbitration under Clause 10.7 of the Agreement dated 19th November 2019. That clause provides:

> "In the event of any disputes between the parties hereto then the parties shall mutually endeavour to resolve such disputes. If not resolved, the parties shall refer the matter of concern to a single arbitrator chosen by mutual consent of the parties. In default of such mutual agreement or failing such agreement, then the dispute shall be referred to a single arbitrator appointed by the Chairman for the time being of the Chartered institute of Arbitrators [Kenya Branch] and the provisions of the Laws of Kenya then in force as to arbitration shall apply to such dispute. The Arbitration shall take place in Nairobi in the English language."

23. In assessing whether a dispute exists, the Court is guided by the principle that a dispute arises when one party asserts a claim and the other party expressly or impliedly denies liability or challenges the claim. In this case, the 2nd Respondent it did not expressly deny the claim or raise any specific objection to the invoices or the services rendered. This silence and lack of engagement, in the Court's view, did not amount to a dispute within the meaning of Section 6[1][b] of the *Arbitration Act*. The absence of any clear contestation or arguable defence suggests that there was no real dispute to be referred to arbitration.

24. The Court of Appeal decision in UAP Provincial Insurance Company Limited v Michael John Beckett [2013] eKLR also proceeded to provide a definition as to what constitutes a real dispute to be referred to arbitration. The Court of Appeal proceeded to hold:

> " In Halki Shipping Corpn v Sopex Oils Ltd, shipowners applied for summary judgment against charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties and the charterers applied to stay those proceedings pending reference to arbitration. The issue in that case was whether there was a dispute within the meaning of the arbitration clause. Lord Swinton Thomas LJ stated at page 755 that: 'The words used in clause 9 of the charter party in relation to a referral to arbitration were 'any dispute.' The words in section 1 [1] of the Act of 1975 are: 'there is not in fact any dispute between the parties.' To the layman it might appear that there is little if any difference between those words. However, the legislature saw fit to draft section 1 using the phrase 'not in fact any dispute.' The legislature did not use the words 'there is no dispute' and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrases 'any dispute' and 'not in fact any dispute' is of central importance in understanding what underlies the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of Order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words 'not in fact any dispute' as opposed to 'no dispute' have from time to time been interpreted by the courts as meaning 'no genuine dispute,' 'no real dispute,' 'a case to which there is no defence,' 'there is no arguable defence', and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed 'is indisputably due.' The approach of the courts has on occasions been similar to that adopted by them in Order 14 proceedings in cases where there is no arbitration clause."

25. The High Court in the case of Nanchang Foreign Engineering Company [K] Limited v Easy Properties Kenya Limited [2014] KEHC 3846 [KLR] held that:

> " 32. The Defendant's argument was really that since there was an arbitration clause, the matter should be referred to arbitration. Such referral is not automatic. As has been seen in Section 6 [1] [b] of the *Arbitration Act*, 1995, it is a condition precedent that there be a dispute capable of being referred to arbitration before a court can stay proceedings filed in court. Bearing in mind that it is trite law that he who alleges must prove, the burden of proving that a dispute indeed exists for it to be referred to arbitration lies with the party alleging the fact, who in this case was the Defendant herein.
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> 33. In its Supporting Affidavit, the Defendant did not say whether or not it was challenging the interim certificates of payment that had been issued by the Architect. Whereas it was not required to file a defence before it could file the application herein, it was under a duty to satisfy the court that there would be value added if the matter was referred to arbitration or amicable settlement. It was not sufficient for it to contend that since there was a dispute resolution clause, the matter should as a matter of course be referred to arbitration or amicable settlement.

34. The Defendant did not provide any evidence that it had challenged the interim certificate of payments that had been issued by the Architect. It paid a sum of KShs.15,000,000/= as partial settlement of the interim certificate of payment of KShs.39,456,853.42 that was payable on or before July 1, 2013, leaving a balance of KShs.24,456,835.42. It did not explain why this balance had not been paid.

35. Referral of a matter to arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reaching an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute.

36. If there is no dispute which can be referred to such fora, the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, Article 50 of *the Constitution* of Kenya, 2010 provides that every person has a right to have any dispute decided in a fair and public hearing before a court.

37. From the facts that have been presented before this court, it has found itself more persuaded by the Plaintiff's submissions that its claim against the Defendant was one of recovery of a simple undisputed debt and that it would be in the interests of justice that the Defendant not be allowed to abuse the process of the court with a view to frustrating the Plaintiff from proceedings with the matter in this forum.

38. The court has arrived at the conclusion that it would not be in the interests of justice to stay the proceedings herein as had been sought by the Defendant for the reason that it did not demonstrate that there was indeed a dispute that was capable for referral to arbitration... ."

26. I am persuaded by the court's reasoning in the foregoing decision, which I find applicable to the present case. Where there is no explanation or indication of the existence of a dispute, or where the claim is simply for the recovery of an admitted or uncontested debt, no genuine dispute arises for referral to arbitration. In such circumstances, the court must decline an invitation to stay proceedings and refer the matter to arbitration, as doing so would amount to facilitating a party's effort to delay or obstruct legitimate debt recovery.

27. Furthermore, the first sentence of Clause 10.7 of the Agreement provides that: "In the event of any disputes between the parties hereto, then the parties shall mutually endeavour to resolve such disputes..." This clause, though not expressly prescribing the manner of resolution, clearly envisages an obligation on the parties to attempt amicable settlement before invoking the arbitration mechanism. The subsequent portion of the clause states: "If not resolved, the parties shall refer the matter of concern to a single arbitrator..." From this language, it is evident that the arbitration process is intended to be a subsequent or fallback mechanism, to be pursued only where prior attempts at mutual resolution have failed. In the present case, the 2nd Respondent has not demonstrated that any efforts were made to resolve the alleged dispute with the Appellant before seeking referral to arbitration. This omission undermines the invocation of Clause 10.7 and renders the application for stay and referral premature.

28. The High Court in the case of County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR, held that:

> " The Applicant has not tendered evidence to prove that the parties attempted to settle the dispute if any through negotiations and that the negotiations failed. It goes back to what I have already pointed out that the Applicant has not proved that there is a dispute or the nature of the dispute...I refer to Nanchang Foreign Engineering Company [K] Limited v Easy Properties Kenya Limited [2014] eKLR....."

29. Persuaded by the High Court's decision hereinabove, and having carefully considered the facts and circumstances of this case, this Court finds that it would not be in the interest of justice to stay the proceedings in the trial court as ordered. The 2nd Respondent failed to demonstrate the existence of a dispute capable of being referred to arbitration within the meaning of Section 6[1] of the *Arbitration Act*. The claim by the Appellant remains uncontroverted, and no arguable defense or contestation was disclosed. Accordingly, the threshold for referral to arbitration was not met.

30. In that regard, the appeal succeeds and is hereby allowed. The ruling and orders of delivered on February 23, 2024, in Milimani MCCOMMSU E138 of 2023 are hereby set aside in their entirety. The application dated March 28, 2023 before the trial court be and is hereby dismissed.

27. Given the nature of the appeal and noting that the matter is still active, it would be punitive to award costs to any of the parties consequently each party to bear their own costs both before the trial court and in this court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent