



**Strathmore Research & Consultancy Centre Limited v Namu Techworks Limited (Commercial Miscellaneous Application E253 of 2022) [2024] KEHC 1543 (KLR) (Commercial and Tax) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1543 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E253 OF 2022**

**PM MULWA, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**STRATHMORE RESEARCH & CONSULTANCY CENTRE LIMITED ..... PLAINTIFF**

**AND**

**NAMU TECHWORKS LIMITED ..... DEFENDANT**

**RULING**

1. The defendant/applicant filed a Chamber Summons application dated 25<sup>th</sup> January 2023 pursuant to the provisions of Section 6(1) of the Arbitration Act 1995 No. 20 of 2011, Rule (2) of the Arbitration Rules 1997, Section 59 of the Civil Procedure Act, Order 46 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of law seeking the following orders -
  - i. Spent;
  - ii. That the Honourable Court be pleased to stay proceedings in this matter;
  - iii. That the Honourable Court be pleased to issue an order to have this matter referred to arbitration in accordance with Clause 17 of the agreement dated 24<sup>th</sup> February 2016 entered into between the parties; and
  - iv. That the costs of this application be provided for.
2. The application is anchored on the grounds on the face of the summons and is supported by an affidavit sworn by Rohit Reddy the applicant's Director on 25<sup>th</sup> January 2023 and 16<sup>th</sup> March 2023. In opposition thereto, the plaintiff/respondent filed a replying affidavit sworn on 24<sup>th</sup> February 2023



by Dr. Joseph Sevilla a Director of iLabAfrica which has the mandate to oversee the County Pro E-Revenue Collection Systems Agreement of behalf of the plaintiff/respondent.

3. The applicant's case is that it entered into a Teaming Agreement dated 24<sup>th</sup> February 2016 with the respondent so as to establish a teaming relation aimed at providing business intelligence, analytics system and automated revenue to their customers. However, in as much as it diligently offered its services to the respondent, the respondent continually breached the said agreement by failing to remit payments to the applicant as agreed between the parties herein. The applicant contended that upon expiry of the aforementioned contract, the respondent still declined to make the said payment until the teaming agreement dated 24<sup>th</sup> February 2016 is extended and/or renewed.
4. It was stated by the applicant that the plaintiff filed this suit seeking injunctive reliefs and on 4<sup>th</sup> April 2022 and the parties herein were referred to mediation which resulted to a mediation agreement dated 13<sup>th</sup> July 2022 wherein parties agreed upon specific timelines within which the respondent would make payments. However, the respondent failed to make the said payments as a result thereof a dispute arose. The applicant referred to Clause 17 of the teaming agreement and contended that it provides for any dispute between the parties therein to be referred to arbitration in the event mediation fails as is the case herein since the respondent has refused to make payment of the outstanding sum of Kshs. 310,629,131.09 that is due and owing to the defendant.
5. In response thereto, the respondent averred that the parties herein entered into a teaming agreement dated 24<sup>th</sup> February 2016 which was extended by an extension agreement that expired on 31<sup>st</sup> December 2021. It further averred that in light of the provisions of Clause 8.1 & 8.2 of the teaming agreement it entered into agreements with various County Governments for the provision of the County Pro E-Revenue Collection Systems. However, it was unable to deliver the final product to the County Governments of Kilifi and Kirinyaga and fulfil their contracts with the respective County Governments due to persistent failure by the applicant to perform the obligations of the Teaming Agreement.
6. As a result of the foregoing, a dispute rose between the parties herein with regards to the applicant's failure to fulfill its obligations and the parties intended to enter into a transition agreement for the applicant to continue supplying and maintaining the County Pro E-Revenue Collection Systems in the various County Governments until the final product is delivered by the respondent to the respective County Governments. The respondent contended that on 31<sup>st</sup> march 2022 it learned of the applicant's intention to switch off and/or restrict access to the County Pro E- Revenue Collection Systems in the County Governments of Kilifi, Kirinyaga, Kisumu and Busia which would have resulted in imminent risk of civil action from the aforesaid County Governments thus necessitating this suit.
7. The respondent confirms that after this suit was filed, parties were referred to mediation which was completed on 13<sup>th</sup> July 2022 when parties signed a mediation agreement. However, the applicant has not fulfilled its obligations in the said agreement and has also not responded to proposals by the respondent arising from the said agreement. The respondent on the other hand has fulfilled its obligations. The respondent asserted that the applicant's claim of Kshs. 310,629,131.09 is unfounded since the respondent has remitted to it all the sums received from the County Governments so far. It averred that referring this matter to Arbitration will amount to a waste of precious judicial time and resources in light of the mediation agreement dated 13<sup>th</sup> July, 2022.
8. In rejoinder, the applicant stated that the respondent failed to abide by the provisions of paragraph 7 of the teaming agreement which provides for revenue sharing. In addition, the respondent commenced a process of setting up a new revenue collection system in Kilifi and Kirinyaga County without the applicant's knowledge.



9. The applicant further stated that in compliance with the terms of the mediation agreement, it appointed the firm of McJoel & Associates to be its auditors but the plaintiff/respondent has refused to grant the said auditor's access to its accounts. It asserted that the issues of payment between the parties herein have not been dealt with thus it would only be right to refer this matter to Arbitration.
10. The application was canvassed by way of written submissions. The applicant's submissions were filed on 28<sup>th</sup> March 2023 by the law firm of Arwa & Change Advocates, whereas the respondent's submissions were filed by the law firm of Nyiha, Mukoma Company Advocates on 14<sup>th</sup> April 2023.
11. The applicant referred to the provisions of Article 159 (2) (c) of the *Constitution* of Kenya 2010 and Section 6(1) of the *Arbitration Act* and submitted that it is trite that parties to a contract entered into voluntarily are bound by its terms and conditions. Therefore, pursuant to Clause 17 of the teaming agreement dated 24<sup>th</sup> February 2016, the dispute between the parties herein ought to be referred to Arbitration since mediation failed and/or was unable to address the said issues. To this end, counsel relied on the case of *Burn Manufacturing USA LLC v Sage South Africa (PTY) Limited* [2020] eKLR. He further cited the provisions of Section 6(2) of the *Arbitration Act*. According to counsel, in the case of *Esmaj v Mistry Shamji Lalji & Co* [1984] KLR the Court laid down the principles to be considered when determining an application for stay of proceedings and stated that it would be prejudicial to allow parallel proceedings to take place in this court when the parties have been referred to arbitration over the same subject matter.
12. The respondent on the other hand submitted that the mediation between the parties herein did not fail, but instead culminated into a mediation agreement dated 13<sup>th</sup> July 2023 executed by both parties and adopted as an order of the Court on 26<sup>th</sup> January 2023. Reliance was placed on the case of *Wema Foundation Trust Company Limited v County Government at Nairobi City & another* [2022] eKLR where the Court laid out the law on consent orders and further submitted that a consent order is akin to a judgment of the court and cannot be easily done away with as the defendant is purporting to do. That the applicant has neither alleged nor proved fraud, collusion or misrepresentation of facts.
13. It was stated by the respondent that despite the applicant being advised by the Court to make a formal application seeking to set aside the mediation agreement if it was dissatisfied with the terms thereof, no such application has ever been filed. The respondent referred to the provisions of Section 6(1) of the *Arbitration Act* and the Court of Appeal case of *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR and asserted that the application herein should have been made not later than the time of entering appearance. In the instant case, the applicant entered appearance vide a memorandum of appearance dated 1<sup>st</sup> April 2022 and thereafter filed a replying affidavit sworn on 12<sup>th</sup> April 2022.
14. Counsel further submitted that the proceedings in this matter should not be stayed as it would be allowing the defendant to belatedly pursue arbitration when it had already submitted to proceedings in court and substantially proceeded with the same up until the point of adoption of the mediation agreement.

### **Analysis and Determination.**

15. Having considered the instant application, the grounds on its face and the affidavits filed in support and opposition thereof, as well as the written submissions by Counsel for parties, I am of the view that the issue that arises for determination is whether the dispute between the parties herein should be referred to arbitration and the proceedings herein stayed.
16. Reference of disputes to arbitration is provided for under Section 6 of the *Arbitration Act* No. 4 of 1995 which provides that: -



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—  
SUBPARA a.  
that the arbitration agreement is null and void, inoperative or incapable of being performed; or  
SUBPARA 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.
17. In the case of *Niazsons (K) Ltd v China Road Bridge* [2001] eKLR the Court laid down the conditions precedent to referring a dispute to arbitration as follows: -

“All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:

  - a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
  - b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
  - c. Whether the suit intended concerned a matter agreed to be referred to arbitration”
18. Upon perusal of Clause 17 of the teaming agreement dated 24<sup>th</sup> February 2016, I note that it provides that: -

“if a dispute, controversy or claim arises out of or relates to this agreement and if the dispute cannot be settled through good faith negotiation within thirty (30) business days of an offer by one party to negotiate a settlement, the parties agree to attempt to settle the dispute by mediation in an accredited Dispute Resolution Centre. No party may commence any court proceedings or arbitration in relation to such dispute until they have attempted to settle by mediation and that mediation has terminated.

If within seven (7) business days of one party requesting mediation the parties do not agree on a Mediator or fail to settle the dispute through mediation, upon filing of a Request for Arbitration by any one party, it shall be referred to and finally determined by arbitration in accordance with the Kenya *Arbitration Act* 1995 and the Rules of the Kenya branch of the Chartered Institute of Arbitrators which Rules are deemed to be incorporated by reference to this clause.



19. It is evident that it was agreement by and between the parties herein that any dispute arising between them in relation to the teaming agreement dated 24<sup>th</sup> February 2016 can only be referred to arbitration in the event mediation fails and the mediation exercise is terminated. And the law is that an application for referral of a dispute to arbitration ought to be made not later than the time when that party enters appearance. In the instant case, after the applicant was served with the respondent's application dated 30<sup>th</sup> March, 2022, it proceeded to file a memorandum of appearance dated 1<sup>st</sup> April 2022 and thereafter filed grounds of opposition dated 11<sup>th</sup> April 2022 and a replying affidavit sworn by Rohit Reddy on 12<sup>th</sup> April 2022.
20. It is my finding that the applicant did not submit to the jurisdiction of this Court by the mere filing grounds of opposition and a replying affidavit in opposition to the application dated 30<sup>th</sup> March 2022 since the said application was seeking interim injunctive reliefs pending hearing and determination of the dispute between the parties herein through arbitration. However, before the application dated 30<sup>th</sup> March 2022 could be heard and determined, the Court directed the parties to engage in mediation in a bid to settle the dispute between them.
21. That having been done, a mediation agreement dated 13<sup>th</sup> July 2022 was executed by both parties and adopted as an order of the Court on 26<sup>th</sup> January 2023. It is therefore, not only improper but also misleading for the applicant to claim that mediation failed. Clause 17 of the teaming agreement dated 24<sup>th</sup> February 2016 is very clear that a dispute between the parties to the said agreement can only be referred to arbitration in the event mediation fails and the mediation exercise terminated. That is not the case in the instant case.
22. There is in force, a Court order determining the dispute between the parties herein, and it will be untidy and a waste of judicial time to refer the dispute herein to arbitration. Suffice it to state that the applicant is not challenging the validity of the mediation agreement dated 13<sup>th</sup> July 2022, neither is he alleging that there was fraud, collusion, misrepresentation and/or that he was coerced into entering into the said agreement. The pleadings are clear that all the applicant is alleging is non-compliance by the respondent with the terms of the mediation agreement dated 13<sup>th</sup> July 2022.
23. The applicant has the option to pursue the enforcement of the terms of the mediation agreement dated 13<sup>th</sup> July 2022 and adopted as an order of the Court or formally apply to have the same set aside by the Court.
24. In the end, this Court finds that the application dated 25<sup>th</sup> January 2023 is bereft of merit and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

.....

**P. MULWA**

**JUDGE**

**In the presence of:**

Ms. Njueini h/b for Ms. Koech for the Plaintiff/Respondent

Ms. Anyango for the Respondent/Applicant

Court Assistant: Carlos

