



**Ririani & another v Childs & 7 others (Commercial Suit E350 of 2023)
[2024] KEHC 2474 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E350 OF 2023
FG MUGAMBI, J
MARCH 8, 2024**

BETWEEN

MARTIN JOSEPH RIRIANI 1ST PLAINTIFF

ORLY AIR PARK LTD 2ND PLAINTIFF

AND

TERRY CHILDS 1ST DEFENDANT

EUCTYCHUS WAITHAKA 2ND DEFENDANT

FRASER SMITH 3RD DEFENDANT

JOHN BAXENDALE 4TH DEFENDANT

GUY ELMS 5TH DEFENDANT

DAVID MUTAVA 6TH DEFENDANT

CHRISTIAN ST REBEL 7TH DEFENDANT

ASLAM KHAN 8TH DEFENDANT

RULING

1. The 1st plaintiff is a shareholder of the 2nd plaintiff Company together with the defendants. The defendants are members of the Board of Directors of the Company.
2. By a plaint dated August 8, 2023 the 1st plaintiff (hereinafter the plaintiff) filed a suit *inter alia* challenging the election of the defendants into the Company's Board for alleged mismanagement of the Company, breach of trust, negligence, default and breach of duty. The plaintiff also alleged breach of his rights and sought to restrain the defendants as board members from claiming any liabilities



against the plaintiff and his companies. The plaintiff additionally sought leave to continue the suit as a derivative suit.

3. The defendants brought this application under sections 6 and 10 of the Arbitration Act 1995 as well as Rule 2 of the Arbitration Rules. The application is supported by the affidavit of Christian Strebel, the 7th respondent who is also the Chairman of the Board of Directors of the 2nd plaintiff.
4. The application is opposed by way of a replying affidavit sworn by the plaintiff as well as Grounds of Opposition both dated September 7, 2023.

Analysis

5. I have carefully considered the pleadings, written submissions and the authorities cited by rival parties. The main issue for determination is whether the Court ought to stay the present proceedings and refer this matter to Arbitration as set out in section 6(1) of the Arbitration Act, 1995.
6. Arbitration as a dispute resolution mechanism is based on autonomy of parties, which means that it is a consensual process in which the source of the arbitrator's jurisdiction is the arbitration agreement between the parties.
7. So central is the idea of party autonomy in the Arbitration Act that the law provides for a very limited avenue where the court may intervene in matters that are before arbitration. Section 10 of the Act is instructive that except as provided in the Act, no court shall intervene in matters governed by the Act. The provision goes a long way towards enhancing predictability of arbitration proceedings because parties know what to expect as far as court intervention is concerned.
8. It is an essential pre-requisite of the arbitration law in Kenya that parties to a contract can demand to resort to arbitration so long as there is an arbitration agreement between them and other requirements under section 6 of the Arbitration Act are met.
9. 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—
 - i. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - ii. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
10. In Niazsons (K) Ltd v China Road & Bridge Corporation Kenya, [2001] eKLR the Court of Appeal discussed the factors that the court will consider in determining an application under section 6 of the Act. These are:
 - i. Whether the applicant has taken any step in the proceeding other than the steps allowed by section 6 of the Act;
 - ii. Whether there are any legal impediments on the validity, operation, or performance of the arbitration agreement; and



- iii. Whether the suit indeed concerns a matter agreed to be referred.
11. The applicants have referred this Court to article 57 of the Articles of the 2nd plaintiff Company which contains the arbitration clause. The existence of the clause is not controverted and it provides as follows:
- “All disputes and questions whatsoever which shall arise between the parties hereto arising from articles 162 their construction or application thereof or any clause or thing herein contend or to the rights or liabilities of any party under these Articles shall be referred to the decision of a single arbitrator to be appointed in accordance with the provisions of the Arbitration Act and the decision of such Arbitrator shall be final on the parties.”
12. The respondent argues that the said clause is null and void, inoperative and incapable of being performed. Pursuant to section 6(1) of the Arbitration Act, the respondent opines that this creates a limitation under which the Court will not refer a matter to arbitration despite there being an arbitration clause.
13. It is the respondent’s case that the arbitration clause refers to non-existent article 162 in the 2nd plaintiff’s Articles of Association and it is therefore inoperative, invalid and worthless. The applicant has not refuted this averment. In any case, it is clear from the record before the Court that indeed the last provision in the said Articles is article 155.
14. My reading of the arbitration clause is that it was deliberately drafted to include a wide array of disputes to be referred to arbitration and not just disputes arising from the (non-existent) article 162. The reference in the clause to any clause or thing herein contend[ed] or to the rights or liabilities of any party under these Articles leaves this Court with no doubt whatsoever that the arbitration disputes covered under this clause are broad and wide to cover just about anything under the said Articles.
15. The second bone of contention by the respondents that they are not parties to the said arbitration agreement as they are not signatories and subscribers to the 2nd plaintiff’s Articles of Association is equally flawed. This is because the definition of a member in Article 2 encompasses any shareholder in the company, not just the original subscribers. Furthermore, Article 155 extends membership to anyone who consents to abide by the company’s rules and regulations, thereby broadening the scope of who is considered a member beyond just the initial signatories.
16. Finally, the respondents argue that the reliefs and remedies sought are to proceed with the suit as a derivative suit pursuant to sections 238-240 and 780-812 of the Companies Act. Jurisdiction under these provisions is exclusively conferred on the High Court.
17. Having looked at the pleadings filed herein and the issues raised therein, I have no difficulty finding that the dispute falls within the scope of the arbitration clause which as earlier stated applies to all disputes and questions and to the rights or liabilities of any party under these Articles. Contrary to the respondent’s view that the dispute is not arbitrable, I urge that arbitration is deemed an ideal mechanism for resolving disputes between shareholders and the company due to its efficiency and amicability, offering a swift and friendly resolution.
18. The parties intended to exclude the court’s jurisdiction in their disputes, unanimously agreeing to adhere to the arbitration agreement. It’s the court’s responsibility to respect the autonomy of the parties, thereby endorsing their decision to resolve their disagreements through arbitration, aligning with the principle of party autonomy.



19. I am equally satisfied that the application for referral to arbitration was filed at the time when that party enters appearance as required under the Act. The Memorandum of Appearance and the application for stay of these proceedings are dated August 23, 2023 and filed on even date. This is in concurrence with the decision in Adrec Limited V Nation Media Group Limited, [2017] eKLR where the Court stated that:

“Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”

Determination

20. The upshot of this is that the application dated August 23, 2023 is successful and is allowed as prayed. The costs of the application shall await the outcome of the arbitration.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

