



**Trt Investments Limited v Mwalo & 3 others (Civil Case E223 of 2023)
[2024] KEHC 3507 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E223 OF 2023
A MABEYA, J
MARCH 15, 2024**

BETWEEN

TRT INVESTMENTS LIMITED APPLICANT

AND

BRAMUEL MWALO 1ST RESPONDENT

XETOVA INC 2ND RESPONDENT

XETOVA LIMITED 3RD RESPONDENT

EXTRA DIMENSIONS COMPANY LIMITED 4TH RESPONDENT

RULING

1. This ruling determines two applications, the 1st defendant’s application dated 12/6/2023 for referring the suit to arbitration and the 3rd defendant’s application dated 1/7/2023 for stay pending appeal.

Application dated 12/6/2023

2. The application is brought under section 1, 1A, 3 and 3A of the *Civil Procedure Act*, section 6(1) of the *Arbitration Act* 1995, rule 2 of the arbitration rules 1997. It seeks to have the dispute filed by the plaintiff/respondent against the 1st defendant be referred to arbitration.
3. The application is supported by the affidavit of BRAMUEL MWALO OPIYO sworn on 12/6/2023. The applicant contention was that the dispute arose from the founder’s agreement dated 18/5/2022 which was created for the purpose of collaborating as partners in the 2nd defendant. That the agreement had an arbitral clause which expressly stated that any dispute resulting from the agreement be determined by arbitration. The applicant averred that the Court lacked the jurisdiction to hear the suit as the proper forum as agreed by the parties was arbitration.



4. The plaintiff opposed the application vide a replying affidavit of GREG MITCHELL sworn on 12/7/2023. He averred that the plaintiff had invested funds into the 3rd defendant but the 1st and 2nd defendant refused to account for the same. That there was a likelihood that the defendants had been fraudulent. That the Court had allowed the application for inspection into the affairs of the 3rd defendant.
5. He stated that the plaintiffs claim did not arise from the founder's agreement nor from the loans advanced to the 4th defendant. That the Court had jurisdiction to determine the suit since the 3rd defendant was incorporated in Kenya and the suit also touched on a tax dispute which is governed by a Kenyan statute.
6. The application was canvassed by way of written submissions which I have considered. The 1st defendant submitted that the founder's agreement had an arbitral clause and therefore the proceedings ought to be stayed pending referral to arbitration. That the plaintiff had pleaded in the plaint at paragraphs 7 and 8 that the defendants had breached the founder's agreement and based on that, it qualified to be a dispute within the meaning of the agreement.
7. The 2nd defendant submitted that a dispute had arisen over the loan agreements dated 28/6/2022 and 16/9/2022, respectively. That the same was covered by clause 7 of the founder's agreement. That the 2nd defendant was desirous of resolving the dispute but only within the dispute resolution system it had voluntarily chosen.
8. I have considered the pleadings, the submissions and the authorities on record. The court's jurisdiction to stay proceedings and to refer a dispute to arbitration is founded on section 6 (1) of the [Arbitration Act](#) which 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: -

- (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.

(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”

9. In UAP Provincial Insurance Company Limited v Michael John Beckett (2018) eKLR, the Court of Appeal held of section 6(1)(b) of the [Arbitration Act](#) as follows: -

“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”.

10. With respect to section 6(1) of the *Arbitration Act*, an applicant must fulfil two conditions. The first condition is that the application should have been brought not later than the time of entering appearance or filing a defence. In the present case, the Law firm of SS Malonza came on record for the 1st, 2nd and 3rd defendant 30/5/2023. It follows that the application for referral ought to have been made at the time of entering appearance, that is on 30/5/2023.
11. In *Adrec Limited versus Nation Media Group Limited* [2017] eKLR, the court held 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”
12. In *Charles Njogu Lofty –vs- Bedouin Enterprises Ltd* [2005] eKLR, the Court of Appeal stated 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 pleading or at the time of taking any step in the proceedings. The dispute between Charles Njogu Lofty, the appellant herein, and Bedouin Enterprises Ltd, the respondent herein, basically concerns the interpretation given by G.B.M. Kariuki, J. to section 6 (1) of the 1995 Act, “the Act” hereinafter, in light of the circumstances surrounding the dispute.”
13. Based on the foregoing, the defendants failed to comply with the provisions of section 6(1) of the *Arbitration Act* since the application for referral was made on 12/6/2023 way after an appearance had been delivered. It was filed together with notice of change of advocates.
14. The second condition is that there ought to be a dispute between the parties with regard to matters to be referred to arbitration. The applicant’s contention was that the plaintiff challenged the loan agreements which were disputes within the meaning of the founder’s agreement.
15. The arbitration clause in the agreement reads as follows;

“ 16.1 If a dispute arises out of or in connection with this Agreement, including any question as to its existence, validity or termination, (a “Dispute”) either Party may give written notice of such Dispute to the other Party and the Advisory Board (“Dis pute Notice”), which Dispute Notice shall refer to the Dispute that has arisen. Within ten (10) Business Days of service of the Dispute Notice, the Parties shall hold a meeting (“Initial Dispute Meeting”) with the Advisory Board in an effort to resolve the Dispute, which meeting may be held by telephone or electronic means, and which shall be attended by the chief executive officers of the Parties to the dispute and the Advisory Board. If the Dispute is not finally resolved within 20 (twenty) Business Days after the service of a Dispute Notice, whether or not an Initial Dispute Meeting has been held, any Party to the Dispute may refer it for arbitration, as contemplated herein by written notice to the other Party (“Arbitration Notice”). Upon filing of a request for arbitration by any Party, it shall be referred to and finally determined by arbitration in accordance with the rules of the Rules of the



Arbitration of the International Chamber of Commerce (the "Rules"), by one of more arbitrators appointed in accordance with the Rules.”

16. It is expressly provided for in the arbitration clause that parties would resolve any dispute in with respect to the existence of the agreement, its validity or termination of the agreement. In the present case, the plaintiff's case against the defendants is with respect to the manner in which the plaintiff's funds had been disbursed and breach of the agreements between the parties but including but not limited to the founder's agreement. The plaintiff claim further involves the shareholding of the 2nd defendant and the sums disbursed.
17. In this regard, the dispute is not solely dependent on the founder's agreement, the plaintiff has faulted the defendants for breaching the loan agreements, the Master Trade Partners Agreement dated 20/6/2022 as well as the loan agreements dated 28/6/2022. Further in its ruling of 26/6/2023, this Court allowed the application for an audit of the affairs of the company which would then inform whether the plaintiff had a case against the defendants or not.
18. In the premises, the application dated 12/6/2023 did not meet the conditions under section 6(1) of the Arbitration Act and the same is dismissed.

Application dated 1/7/2023

19. The application is brought under Article 50&159 of the Constitution of Kenya, section 1A, 1B, 3A,66,67(1) &75 of the Civil Procedure Act and order 42 rule 7, Order 43 of the Civil Procedure Rules.
20. The application seeks stay of execution and leave to appeal the orders of 30/6/2023. It is premised on the grounds on the face of it and on the supporting affidavit sworn by BRAMUEL MWALO OPIYOH on 1/7/2023. It was contended that an appeal had been preferred against the subject order. That unless stay of execution is granted the appeal would be rendered nugatory. That the 3rd defendant was a startup company which would suffer substantial loss as the inspection would affect any future fundraising.
21. The same was opposed by the plaintiff vide a replying affidavit sworn by GREG MITCHEL on 12/7/2023. The plaintiff pleaded that the applicant did not give a basis for the Court to reconsider the orders for inspection. That the plaintiff had continued to give the defendants opportunity to address the gaps in the companies but he defendants had failed to do so.
22. The parties filed their respective submissions which the Court has considered. The applicant submitted that it would suffer substantial loss since the plaintiff was just a third party and lacked capacity under the Companies Act to request for an inspection. That the defendant's reputation would be tarnished. The 3rd defendant was willing to provide any security for the performance of the order that would ultimately be found to be binding upon it.
23. The plaintiff submitted that the defendant had not demonstrated how it would suffer substantial loss as a result of the inspection. That to the contrary, the 3rd defendant stood to benefit more from the inspection process.
24. I have considered the party's averments and the submissions on record. The main issue for determination is whether the applicant has met the threshold for stay of execution. The jurisdiction to grant a stay of execution is derived from Order 42 rule 6 of the Civil Procedure Rules 2010.



25. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal set out how the discretion to grant a stay is to be exercised. It stated: -

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the plaintiffs at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’

26. And in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, the Court of Appeal stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

27. For an order of stay of execution to be issued the applicant must demonstrate that substantial loss may result to the plaintiffs unless the order of stay is granted, that the application has been brought without unreasonable delay and a provision for security for the due performance of the decree.

28. It is not disputed that the application was brought in good time. The issue is whether it has proved substantial loss.

29. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



30. The applicant submitted that it would suffer substantial loss if the inspection is carried out as it would be difficult to fundraise for the company. The purpose of stay of execution pending appeal is to preserve the subject matter of the dispute. The order appealed against is one which allowed the appointment of an inspector to examine, interview and audit the affairs of the 3rd defendant/applicant. The said orders were given pursuant to the claims by the plaintiff for fraud and collusion.
31. In view of the above, in balancing the interests of the parties, I am not persuaded that the applicant has demonstrated that it would suffer substantial loss. The process of inspection is not meant to expose or shame the company but rather unearth how the company has been run. It is for its own benefit. The applicants appeal will not be rendered nugatory if the orders for stay are not granted.
32. Accordingly, I find no merit in the application dated 1/7/2023 and I dismiss the same with costs.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE

