



REPUBLIC OF KENYA



**Obiero v Nyumbani Concepts Limited & 2 others (Commercial Appeal E151 of 2022)
[2024] KEHC 4854 (KLR) (Commercial and Tax) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E151 OF 2022**

A. ONG'INJO, J

APRIL 18, 2024

BETWEEN

JOAN ATIENO OBIERO APPELLANT

AND

NYUMBANI CONCEPTS LIMITED 1ST RESPONDENT

JOSEPH MWAI NDERITU 2ND RESPONDENT

CAROLINE NYAMALO LOONTUBU 3RD RESPONDENT

(Being an appeal to the High Court against the entire decision contained in the Ruling and Order of the Honourable Koech (Mrs), Principal Magistrate, delivered on 20th September 2022 in Milimani Commercial Magistrate Court Case No. E1061 OF 2022)

JUDGMENT

1. *Vide* Memorandum of Appeal dated 18th October 2022, the Appellant Joan Atieno Obiero appealed against the ruling delivered on 20th September 2022 in Milimani Chief Magistrates Commercial Court Case No. E1061 of 2022 by Hon. Koech (Mrs) Principal Magistrate on the following grounds: -
 1. That the learned magistrate erred in facts and law by not considering the Appellant's pleadings, submissions and authorities.
 2. That the learned magistrate erred in failing to appreciate the contents of the pleadings and authorities filed by either the Appellant and the Respondent.
 3. That the learned magistrate erred in misapprehending the facts and evidence presented by the Respondent.



4. That the learned magistrate erred in failing to appreciate that the Respondents admitted to owing the Appellant the sum of Kshs. 5,300,000.
 5. That the learned magistrate erred in law and fact by failing to find that the Appellant had demonstrated a good arguable case based on a pre-existing cause of action.
 6. That the learned magistrate erred in fact and in law by failing to appreciate that the sum of Kshs. 5,300,000 was admitted to by the Respondent through, not only their correspondences but also the express terms of the Termination of Agreement dated 1st July 2020 and Variation Agreement dated 5th February 2021.
 7. That the learned magistrate erred in failing to find that due to the acknowledgement of indebtedness leading to the Respondent's move to execute the Termination Agreement dated 1st July 2020 and Variation Agreement dated 5th February 2021 propose how to settle the debt, judgment ought to have been entered in order to obviate unnecessary costs and delay as parties await the determination of a non-existent question.
 8. That the learned magistrate erred in fact by failing to consider that the suit in the court below did not seek to enforce the sale agreement dated 18th September 2019 but to enforce Termination Agreement dated 1st July 2020 and Variation Agreement dated 5th February 2021 (none of which has an Arbitration Clause).
 9. That the learned magistrate erred in failing to appreciate and find that the defendants appeared to have assets within jurisdiction and that there was demonstrably and admittedly the real risk of their removal in a manner that would disenfranchise the Appellant.
 10. That the learned magistrate erred in law in failing to consider the Respondent's admission/concession that it failed to honour the terms of the Sale Agreement and Termination Agreement.
 11. That the learned magistrate erred in failing to appreciate that there was no arbitrable dispute capable of being referred to arbitration.
 12. That the learned magistrate erred in failing to consider the facts that the cause of action related to other defendants as well who are not parties to the sale agreement.
 13. That the learned magistrate erred in law by failing to consider the Respondent's failure to file an application for stay as envisioned under Section 6 of the *Arbitration Act*.
 14. The learned magistrate erred in law and fact by failing to consider the fact that the Respondent who are the process of disposing of the assets to make the decree that would be obtained unexecutable.
 15. That the learned magistrate erred in law by not awarding the Appellant costs.
2. The Appellant proposed to move the court for orders that:
- a. That this appeal be allowed in its entirety.
 - b. That the ruling delivered by the learned magistrate court be overturned.
 - c. That the Appellant's application dated 2nd March 2027 be allowed.
 - d. That costs of this appeal and that of the court below be to the Appellant.



3. The application that gave rise to this appeal was dated 2nd March 2022 brought pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 5 Rule 22B, Order 13 Rule 2, Order 39 Rule 1, and Order 40 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law seeking that:
 1. Spent
 2. Leave be granted to the Plaintiff/Applicant to serve summons and other process of the court upon defendants through their last confirmed and used modalities pending the hearing and determination of application
 3. The court be pleased to grant an order of temporary injunction directed at the 1st Defendant, its agents, assigns, employees, disclosed and undisclosed principals, banks or any other person to preserve and in doing so not to remove from the jurisdiction its movable asset and to withdraw from utilize encumber the funds held in its bank account:
 - i. Account name: Nyumbani Concepts Limited
 - ii. Bank name: Kenya Commercial Bank Limited
 - iii. Account number: 12608XXXX
 - iv. Branch: Westgate Branch
 4. Pending the hearing and determination of the suit, the court be pleased to grant an order of temporary injunction directed at the 1st Defendant, its agents, assigns, employees, disclosed and undisclosed principals, banks or any other person to preserve and in doing so to remove from the jurisdiction of this court its moveable assets and to withdraw from utilized encumber the funds held in its bank accounts: -
 - i. Account name: Nyumbani Concepts Limited
 - ii. Bank name: Kenya Commercial Bank Limited
 - iii. Account number: 126081XXXX
 - iv. Branch: Westgate Branch
 5. The court can be pleased to issue a warrant of arrest against the 2nd and 3rd defendants – Joseph Mwai Nderitu and Caroline Nyamalo Loantubu and bring them before the court to show cause why they should not furnish security for their appearance.
 6. That in the alternative to prayers 3), 4) and 5), the defendants do deposit the sum of Kshs. 5,300,000 in court in a joint interest account for the plaintiff and defendant’s advocates as security for their attendance until further orders of the court.
 7. The court be pleased to enter judgment on admission as against the defendants jointly and severally for the sum of Kshs. 5,300,000.
 8. The costs of the application be provided for.
4. The appeal herein was canvassed by way of written submissions dated 5th June 2023 and 22nd September 2023 for the Appellant and the Respondents respectively. The said submissions were highlighted by the advocates for the parties on 18th March 2024 as follows: -
5. The advocates for the Appellants, Mr. Onyango and Mr. Kagimbi, argued that there was no arbitrable dispute capable of being referred to arbitration under Section 6 of the *Arbitration Act*.



6. The Appellant's counsels relied on the holding in *Charles Njogu Lofty v Bedouin Enterprises Ltd* (2005) eKLR in which conditions for stay of proceedings and referral to arbitration are highlighted.
7. It was further argued that the Respondents having entered appearance and filed replying affidavit could not seek that the matter be referred for arbitration.
8. The Appellant's counsel also contended that that the debt had been admitted and it cannot be said to be arbitrable. That the sale agreement was terminated by a Termination Agreement and subsequently by a Variation Agreement as shown in various correspondences and that there was no dispute to be taken even in normal court.
9. The Appellant's advocates urged the court to enter judgment against the Respondents on admission as they had even made part payment of Kshs. 500,000 and the amount due and owing is a balance of Kshs. 5,300,000.
10. Mr. Karanja Advocate for the Respondent on the other hand argued that the sale agreement provided for arbitration clause and that the Termination Agreement also provided for contractual dispute resolution under clause 4 as arbitration.
11. Mr. Karanja urged that the appeal be dismissed as the trial court did not have jurisdiction to deal with a contract which provided for dispute resolution as arbitration.

Analysis and Determination

12. The mandate of this court was settled in *Selle & another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where it was held as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
13. Having subjected the pleadings and ruling on application dated 2nd March 2022 to a fresh examination, the issue for determination is whether there was an existing arbitration agreement that warranted the stay of proceedings in the trial court pending resolution of the dispute by an Arbitrator.
14. Section 6 (1) of the *Arbitration Act* provides: -

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.
15. The trial magistrate while considering the application looked at the agreement dated 18th September 2019 signed by the Appellant and the 1st Respondent and found that Clause 18 thereof provided that



- any dispute, differences or questions relating to construction, meaning or effect of the agreement would be referred to arbitration.
16. The trial magistrate therefore found pursuant to Article 159 (2) of *the Constitution* as read with Section 6 of the *Arbitration Act* that the parties herein chose the forum for settling their dispute and therefore stayed the proceedings pending the dispute being resolved by an Arbitrator.
 17. The trial magistrate said that since the matter was referred to arbitration, she could not look at the other prayers sought by the Appellant. It was however ordered that parties bear their own costs.
 18. It is apparent the trial magistrate did not have a look at the Termination Agreement or even the Variation Agreement in which the Sale Agreement was terminated and new terms and conditions for refund of the purchase price entered into between the Appellant and the 1st Respondent.
 19. Termination Agreement dated 1st July 2022 marked as JAO – 4 at Clause 2 (c) provides: -

“With a view to curing breach of the Sale Agreement and restoring the purchaser to the position she was in prior to execution of and non-performance of the Sale Agreement, the parties hereby agree to mutually terminate the Sale Agreement in full and final settlement of all dues by the vendor to the purchaser as set out hereunder.”
 20. Clause 4 of the Termination Agreement provides: -

“... if so elected by the purchaser at her sole and unfettered discretion whilst preserving her rights in pursuing legal recovery action for purchase price and any other appropriate remedies available to her in contract and in law including through contractual dispute resolution process set out in Clause 18 of the Sale Agreement.”
 21. This clause was not subject to Clause 18 of the Sale Agreement that had effectually been terminated. Clause 4 provides that it was at the discretion of the Appellant to choose the kind of dispute resolution she deemed suitable if the terms and conditions in the termination agreement were not met. The terms and conditions in the Sale Agreement were now not in force to require compliance with Clause 18 which had effectively been terminated.
 22. The court therefore finds that the Sale Agreement dated 18th September 2019 having been terminated, Clause 18 of the said Agreement requiring the parties to refer their dispute to arbitration is null and void, inoperative and incapable of being performed.
 23. On whether this court should enter judgment on admission in favour of the Appellant, this prayer and others in the Appellant’s application were not canvassed at the trial court for the reason that the court did not have jurisdiction and proceedings were stayed pending adjudication by an Arbitrator. The prayer to enter judgment on this appeal is therefore premature. The appeal herein has merit and the same is allowed with costs to the Appellant.
 24. The ruling of the trial magistrate dated 2nd March 2022 is set aside. The matter herein is returned to the Chief Magistrates Commercial Court in Nairobi to hear and determine the cause filed by the Appellant as the Magistrates Court is seized of requisite jurisdiction to determine the cause. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 18TH DAY OF APRIL 2024**

**HON. LADY JUSTICE A. ONG’INJO
JUDGE**



In the presence of: -

Esther - Court Assistant

Mr. Onyango & Mr. Kagimbi Advocates for the Appellant

Mr. Karanja Advocate for the Respondents

HON. LADY JUSTICE A. ONG'INJO

JUDGE

