



Hardie v Alex Odundo t/a Olex Techno Enterprises (Commercial Case E009 of 2023) [2024] KEHC 4639 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E009 OF 2023**

RE ABURILI, J

MAY 6, 2024

BETWEEN

ROBIN HARDIE PLAINTIFF

AND

ALEX ODUNDO T/A OLEX TECHNO ENTERPRISES DEFENDANT

RULING

1. This suit was instituted on 21st September 2023 by the Plaintiff Robin Hardie against the Defendant Alex Adundo T/A Olex Techno Enterprises. The Plaintiff in his plaint dated 12th September 2023 claims for a declaration that the Defendant breached terms of the comprehensive loan agreement as annexed which is dated 23rd March 2021 and for payment of USD 150,000 together with interest and costs, being money allegedly lend by the Plaintiff to the Defendant.
2. Initially, the documents uploaded were not authenticated hence this court struck out the suit on 26th January 2024 but reinstated it on 2nd February 2024 on an application uploading the correctly signed documents.
3. No defence was filed and the Registry did make an entry for entry of interlocutory judgment which was undated and unsigned. The suit therefore remains filed.
4. On 3rd May 2024, the Defendant filed a Preliminary Objection Notice challenging the jurisdiction of this court to hear and determine this suit on account that the loan agreement annexed in the Plaintiff's list of documents stipulates that all disputes can only be resolved through arbitration hence the jurisdiction of this court is ousted in the first instance.
5. Secondly, that the parties are partners – co-directors of a private company whose Memorandum and Articles of Association stipulates that all disputes can only be resolves through arbitration.



6. Third, that the *Companies Act* 2015 states that disputes between directors of a private company should be resolved through arbitration in the first instance.
7. The Defendant prayed that the suit be struck out with costs.
8. The matter was due for mention today for directions when the issue of Notice of Preliminary Objection came up and the court directed the parties to argue the Preliminary Objection since it is hinged on the jurisdiction of the court to hear and determine the suit.
9. The Defendant's counsel reiterated the Notice of Preliminary Objection highlighting the 1st ground while the Plaintiff's counsel submitted that the Preliminary Objection raised factual matters which are contested, and focused on the allegation that defendant and plaintiff were co-partners/co-directors of a private company, which the Plaintiff denies hence the court has jurisdiction to hear and determine the suit.
10. The court asked the Plaintiff's counsel Ms. Mugenyu to read Clause 11 of the Comprehensive Loan Agreement subject of the suit herein, and she read out the Clause but still maintained that this court has jurisdiction to hear and determine the dispute.
11. I have considered the Preliminary Objection and in particular, ground No. 1 which objects to the jurisdiction of this court to hear and determine the suit on account of a clause in the agreement entered into between the parties hereto, that any dispute arising out of the agreement shall be resolved *vide* arbitration at Nairobi, except where the parties seek injunctive interlocutory reliefs.
12. The Clause provides as follows:-

“

“ 11. Governing Law And Dispute Resolution

“11.1 This agreement shall be governed and construed in accordance with the laws of Kenya.

11. 2. Any dispute, controversy or claim arising out of or in connection with this agreement, including any question regarding its interpretation, existence, validity or termination shall be referred to and finally resolved by arbitration under the provisions of the *Arbitration Act*. The tribunal shall consist of one arbitrator to be appointed by agreement between the Parties within thirty (30) days of the first date when any party gives notice of the identity of the proposed arbitrator and, failing such agreement, to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch.

11. 3. The arbitration shall be in Nairobi and the language of the arbitration shall be English.

11. 4. notwithstanding the provisions of clause 11.2, each Party shall have the right to:-

- a. Seek preliminary injunctive relief or other equitable relief to protect or enforce its rights under this agreement, or to prohibit any court from making preliminary findings of fact in connection with granting or denying such preliminary injunctive relief;
- b. Seek interim relief or other orders in aid of any arbitration;
- c. Bring any action to enforce on arbitral award;



- d. Bring any claim as a result of a breach by any other Party of its obligation to refer disputes to arbitration and to carry out actions to give effect to Clause 11.2; and
 - e. In each case to the extent that any applicable law permits any such legal action in the jurisdiction in which a Party commences such legal action.”
13. From the above clause, and even without venturing into grounds 2 and 3 of the Notice of Preliminary Objection dated 2nd May 2024, it is clear that the parties to the agreement which is allegedly breached provided for the mode and even the venue of resolution of the dispute arising from the implementation or interpretation of the agreement and therefore it is not true as submitted in contention by the Plaintiff’s counsel that this court’s jurisdiction is not ousted, to that extent.
 14. As to whether the parties are co-directors of a private company is not for this court to determine now but since the loan Agreement is clear on how the dispute between the parties is to be resolved and where, this court must not attempt to re-write the contract between the parties.
 15. Article 159 of *the Constitution* obliges courts and tribunals to encourage and promote the use of Alternative forms of dispute Resolution, including Arbitration.
 16. Section 4(1) of the *Arbitration Act* which is modelled on the Ungrtral model law and except for the limitations set out in the *Act* and as amplified by the *Arbitration Rules*, 1997, establishes the Nairobi Centre for International Arbitration which is tasked with, among others, the function of administering domestic and international arbitrations as well as alternative Dispute Resolution techniques.
 17. Court intrusion in matters or disputes reserved for arbitration is only necessary, under Section 10 of the *Arbitration Act*, to matters which the *Act* so provides or the parties have stated, as is in this case under Clause 11.4 of the Loan Agreement. What that means is that the court’s jurisdiction is not totally excluded or ousted. See *Nyutu Agrovet Ltd vs Airtel Networks Kenya Limited & Chartered Institute of Arbitrators, – Kenya Branch (as Interested Party)* [2019]eKLR where the Supreme Court observed that judicial interference can only be countenanced in exceptional instances. The Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.
 18. It is for that reason that Section 6 of the *Arbitration Act* provides for stay of legal proceedings and Section 7 thereof provides for interim measures which latter is what the parties to this suit in their loan agreement contemplated in Cause 11.4.
 19. As earlier stated, Clause 11.2 and 11.3 of the Comprehensive Loan Agreement between the parties to this suit provides for the mode of dispute resolution, the seat of arbitration being Nairobi and the language of Arbitration which is English on the seat of Arbitration.
 20. In *Fili Shipping Co Ltd v Premium Nafta Products and others* [On appeal from *Fiona Trust and Holding Corporation and others v Primalov and others*, [2007] UKHL 40; [2007] Bus LR., Lord Hoffmann, delivering the speech with which all their lordships concurred, said:

“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption



unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”

21. See also the case of *BGS SGS Soma JV v NHPC Limited* 2019 SCC OnLine SC 1585 cited by Mativo J in *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) where it was stated as follows regarding the venue for arbitration as provided for in an agreement between the parties:
 - a. If a named place is identified in the arbitration agreement as the “venue” of “arbitration proceedings”, the use of the expression “arbitration proceedings” signifies that the entire arbitration proceedings (including the making of the award) is to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration.
 - b. In contrast, if the arbitration agreement contains language such as “tribunals are to meet or have witnesses, experts or the parties” at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.
 - c. If the arbitration agreement provides that arbitration proceedings “shall be held” at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.
 - d. The above tests remain subject to there being no other “significant contrary indicia” which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.
 - e. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the *Indian Arbitration and Conciliation Act*, 1996 would provide such indication.”
22. The Arbitration clause in issue provided for the seat of arbitration to be Nairobi. Arbitration being a private dispute resolution mechanism recognized in law, is the alternative to adjudication by the courts or a public forum. It is a forum chosen mutually by parties to an agreement and which gives contractual authority to the arbitral tribunal to adjudicate the dispute, and bind the parties.
23. As earlier stated, this court cannot venture into the realm of re writing that agreement for the parties.
24. 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— (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.



25. Albeit there is no application for stay of proceedings herein, a preliminary objection as raised is well founded as it objects to jurisdiction of the court to hear and determine the suit. As the section does not provide for striking out of the suit, and as stipulated by the above statutory provision, I order that these proceedings be and are hereby stayed pending arbitration of the dispute(s) between the parties.
26. I further order that this suit shall stay closed and the Plaintiff is directed to refer the dispute between him and the Defendant to Arbitration as provided for in Clause 11.2 and 11.3 of the Comprehensive Loan Agreement dated 23rd March 2021.
27. I make no orders as to costs. This Ruling to be typed forthwith for uploading to CTS.
28. I so order.

Dated, Signed and Delivered at Kisumu this 6th Day of May, 2024

R. E. ABURILI

JUDGE

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