Owiti & another v Keith Interiors Limited (Commercial Appeal E058 of 2021) [2024] KEHC 17077 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17077 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E058 OF 2021

DKN MAGARE, J

MAY 13, 2024

BETWEEN

ROBERT OWITI ..... 1ST APPELLANT

HELLEN OWITI ..... 2ND APPELLANT

AND

KEITH INTERIORS LIMITED ..... RESPONDENT

(Being an Appeal from the whole Ruling of Honourable Edgar Kagoni (PM) of Milimani Commercial Magistrate Court dated 6th July, 2021 in MCCOMMSU No. E893 of 2020)

JUDGMENT

1. This is a decision Appeal from the decision of the Hon. Edgar Kagoni – PM given on 6/7/2021 in Milimani MCCOMMSU No. E893 of 2020.
2. The Appellant was aggrieved by that decision and filed a 9 paragraph memorandum of Appeal: -
    a. The Learned magistrate erred in law and fact in holding that the Arbitration Agreement of the parties was non- operative on the basis of the word 'may'.
    b. The Learned magistrate erred in law and fact in assuming that good faith negotiations had failed before the matter was instituted in court when no party had led evidence or pleaded in their Affidavits that indeed good faith negotiations had been resorted to.
    c. The Learned magistrate erred in law and fact in holding that the application to enforce the Arbitration agreement was filed one month late after filing the memorandum of Appearance.
    d. The Learned magistrate erred in law and fact in considering an issue of time which was never pleaded by the Respondent.

e. The Learned magistrate erred in law and fact in purporting to refer to submission filed by respondents which submissions were never filed nor served upon the Appellants.

f. The Learned magistrate erred in law and fact in breaching the Appellants right on a fair trial and a fair hearing by not predicting that the Respondent had not served upon the Appellants their submission for the ruling to be made and the Appellant to consider any issues arising thereon.

g. The Learned magistrate erred in law and fact in failing to consider the Authorities of the Superior Courts cited and by the Appellants in the submissions.

h. The Learned magistrate erred in law and fact in awarding cost to the Respondent.

i. The Learned magistrate erred in law and fact in considering extraneous maters hat were never pleaded and were never part of the record.

3. By a plaint dated 3/11/2020 the Respondent filed suit for special damages of Kshs. 222,000 for breach of contract and an outstanding amount of Kshs. 489,000/= at prevailing Commercial rates of interest from 26/7/2020. The contract involved supply delivery and fitting of residential interiors at a contractual price of Kshs. 2,159,900 by virtue of invoices 24 and 39.

4. The defendant filed a memorandum of Appearance on 17/11/2020 and filed an application under section 6 (1) of the *Arbitration Act* vide an unsigned application dated 1/12/2020.

5. The Appellant filed a defence dated 1/12/2020. There was subsequently filed an unsigned affidavit of service for the same. The application was opposed though an affidavit signed for the Respondent Keith Walundu.

6. Parties filed submissions.

7. The court found that whereas the appearance was filed on 17//11/2020 the defence was filed 5 day to a month later. The court was guided by the case of In Eunice Soko Mlagui v Suresh Parmar & 4 others (2017) eKLR, the Court of Appeal stated as follows;

> "After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment, Section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre 2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty v Bedouin Enterprises Ltd, *CA No 253 of 2003*, this court considered section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) 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 appearance or is made after filing of the defense."

8. The court dismissed the application with costs.

9. Directions were given and parties filed submission on this matter. The appellant filed submissions dated 6/3/2023, where they ask the court to give life to Article 159 (6) of *the Constitution* which promotes Alternative dispute resolution. I am still looking for the Amendment that introduced Article 159 (6) of *the constitution* and deleted Article 159 (2) (c) of *the Constitution*.

10. They rely on 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) which relates to defective arbitration clauses, and in which justice Majanja stated as doth: -

> An arbitration agreement is 'null and void' if it does not have a legal effect due to the absence of consent. Furthermore, a lack of capacity, such as when a party does not have the authority or permission to enter into an arbitration agreement, may invalidate the clause. An arbitration agreement may also be null, where the clause's language is so vague or ambiguous, that the parties' intention cannot be decided. However, defective arbitration clauses, may nonetheless be interpreted by a court to give meaning to it, to save the parties' intention to arbitrate, as courts tend to interpret these clauses narrowly, to avoid giving a 'back door,' for a party wishing to escape the arbitration agreement. Thus, the 'null and void' language must be read narrowly given a presumption of enforceability of agreements to arbitrate.

11. The Respondent filed submissions relying on the case of UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR, where the court of Appeal stated as hereunder: -

> "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. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.
>
> The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

Analysis

12. The parties appear to have missed the point. Arbitration is a strictly time bound issue. The dictates of Section 6 (1) of the *Arbitration Act* are not suggestions. 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
>
> (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.

13. The appellant drove themselves from the seat of arbitration by: -

a. Filing defence

b. Entering appearance without filing a section 6(1) application.

c. Filing a section 6(1) Application later than the time of entering appearance.

14. All these there bring into effect Section 6(3) which provides as follows: -

> "(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.

15. Secondly a decision to decline arbitration is final in its nature. Though not explicitly stated, the act provides that the clause making Arbitration a preliquiste become of no effect. The only window available is in case the court wrongly allows arbitration.

16. In this case upon the court dismissing stay pending arbitration, wrongly or rightly the right to proceed for arbitration lapses. This is or good measure. Proceeding even to this court is still a step in the proceedings.

17. I have no reasons to analyse the rest of the grounds invite of the above finding.

18. It is my finding that the learned magistrate did not err in dismissing the said application; tot the least because it has not signed. The main ground is that it was not filed contemporaneously with entry of appearance.

19. The appeal therefore lacks merit and is accordingly dismissed with costs.

20. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

21. Section 27 of the *civil procedure Act* provides as follows: -

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

22. In the circumstances, costs follow the event, the event being the dismissal of the Appeal. Costs of Ksh 95,000/= will suffice.

Determination

23. In the circumstances I make the following orders: -

    a. The appeal lacks merit and is dismissed with costs of Kshs. 95,000/= payable in 30 days in default execution do issue.

    b. The lower court file shall proceed for hearing.

    c. However, court matter be mentioned before the trial court on 30/5/2024 for direction on hearing.

    d. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 13TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH ONLINE TEAMS PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of-

Miss Lumumba for the Respondent

No appearance for the Appellant

Brian - Court Assistant.