



**Batoka Pharmacy Limited v Interior Perspective Limited (Civil Appeal E578 of 2024) [2024] KEHC 11886 (KLR) (Civ) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E578 OF 2024**

**JM NANG'EA, J**

**OCTOBER 4, 2024**

**BETWEEN**

**BATOKA PHARMACY LIMITED ..... APPELLANT**

**AND**

**INTERIOR PERSPECTIVE LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling of the Small Claims Court at Nairobi (HON. D.J.W MUNENE – RM/ADJUDICATOR) delivered on 19/1/2023 in SCCCOMM NO. E5431 OF 2022)*

**RULING**

**Background to the appeal**

1. This appeal follows the above decision of the said trial court in which the appellant's Notice of Motion dated 16/11/2022 seeking inter alia an order setting aside the trial court's ex-parte judgement dated 11/11/2022 and decree flowing therefrom together with all other consequential orders was dismissed with costs. By affidavit in support of the Motion one of the appellant's directors (Sharon Oluoch Omondi) had argued that he was not served with Summons to enter appearance in the suit leading to irregular entry of default judgement against the appellant for purported failure to enter appearance and /or file defence within the period prescribed by the law. The appellant further deposed that the email used to serve the suit documents was only accessible to his co-director (Dr Lucy Chite ) who never mentioned about receiving the documents. The latter director is said to have since ceased being a shareholder in the appellant through her resignation letter dated 1/12/2021.
2. The appellant further contended that, in any event, the lower court lacked jurisdiction to entertain the suit for the reason that there was an arbitration clause in a relevant agreement dated 14/8/2020 requiring any dispute to be referred to arbitration in the first instance.



- a. The respondent's director ( Clara Mwanje) swore an affidavit in reply to the application maintaining that the appellant was properly served with the suit documents through its declared email address known as pharmacybatoka@yahoo.com shown in the parties' agreement adverted to hereinabove. It is averred that the respondent was neither informed of the resignation of the said director of the appellant nor change of address of the appellant. Besides, the court is told that the appellant's draft defence annexed to the application does not raise issues meriting a full trial.
3. Regarding the contention that disputes between the parties relating to the agreement were to be referred to arbitration first, the respondent asserts that it had sent the names of its preferred arbitrators to the appellant vide letter dated 24/2/2021 which did not elicit a reply. The respondent is, in any case, of the view that given the small amount of Ksh. 268, 078 the parties are feuding over it would not make commercial sense to refer the matter to arbitration and potentially pay arbitrators more than the sum in dispute.
4. In his ruling the learned trial magistrate rejected the appellant's contention that he was not served with suit documents observing that there was no evidence of change of the appellant's directorship at the Registrar of Companies and that the appellant was properly served with the court process through its known address. According to the trial court the respondent was not to be concerned with internal arrangements within the appellant as to who received court process on its behalf.
5. Concerning the argument that the trial court lacked jurisdiction on account of the arbitration clause, the learned trial magistrate held that pursuant to section 6 of the *Arbitration Act* "a party loses the chance to challenge jurisdiction of the court if they didn't move the court". (sic)

### **Guiding Principles**

6. It is trite law that the appellate court can only interfere with the findings and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd ( 1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co. ( 1968) EA 123* among other decided cases. The Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited [1958] EA 424* underscored the same principles delivering itself thus:
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

### **Grounds of appeal**

7. The appellant's grounds of appeal as per Memorandum of Appeal dated 26/9/2022 may be condensed as hereunder:



- (a) That the learned trial magistrate erred in law and fact by failing to find that the court had no jurisdiction to entertain the matter because of the arbitration clause in the parties' agreement.
- (b) That the learned trial magistrate erred in law and fact by failing to find that the appellant was not duly served with the suit documents and /or hearing notices and therefore the ex-parte judgement was irregular.

And

- (c) That the learned trial magistrate erred in law and fact by failing to judiciously exercise his discretion and apply settled legal principles to set aside the contested judgement.

8. The appellant prays for these reliefs: that the appeal be allowed; that the trial court's ruling of 19/1/2023 be set aside and substituted with an order allowing the appellant's application dated 16/11/2022 seeking to set aside the ex-parte judgement; that the matter be referred to arbitration in terms of the parties' arbitration agreement and that the costs of the appeal and the application be awarded to the appellant.

### **Analysis and determination.**

9. Learned Counsel for the parties do not seem to have filed their submissions. Having studied the parties' arbitration agreement which is part of the respondent's bundle of documents filed in the suit, there is indeed a provision that disputes arising from the understanding would be referred to a team of arbitrators identified by both parties in terms of paragraph 1.18 of the arbitral agreement. It provides in part that "any question or difference which may arise concerning the construction, meaning or effect of this agreement or concerning the rights and liabilities of the parties hereunder shall be submitted for arbitration upon request by any of the parties by written notice to the other party."
10. 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 dispute 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 matter agreed to be referred to arbitration".
11. The appellant has not formally entered appearance and/ or file defence and is only challenging the ex-parte judgement against it, raising the preliminary legal point in the process. It is apparent that there is indeed a dispute as contemplated by the parties in the arbitration agreement. The requirement for stay of proceedings in the circumstances has been amplified by my brother Hon. Justice F.R. Oel in *A to Z Textile Mills V. East Africa Portland Cement Company PLC* (2024) KEHC 4697 (KLR). Moreover, Article 159 (2) (c) of *the Constitution* requires promotion of arbitration as one of the methods of resolution of disputes.

### **Determination**

12. Whether or not the appellant was served with the suit documents, the parties were obligated to refer the dispute to arbitration in line with the arbitration agreement dated 14/8/2020. The trial court was therefore bereft of jurisdiction to try the matter in the first instance. In the premises, the appeal succeeds with the result that the trial court's ex-parte judgement dated 11/11/2022 and ruling dated 19/1/2023



are hereby set aside and the dispute is referred to arbitration pursuant to the parties' agreement. Thereafter the trial court will proceed as appropriate according to the law. To encourage an amicable resolution of the dispute, the parties will bear their own costs of this appeal as well as those incurred in the appellant's application dated 16/11/2022.

13. Ruling accordingly.

**RULING DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF;**

The appellant's advocate,

The respondent's advocate,

The Court Assistant,

**J.M NANGE'A, JUDGE.**

