



Ilunga & 2 others (Suing as the Chairman, Secretary and Treasurer of Group De Societe Miniera Shabunda) v Xico Trading Limited & 2 others (Commercial Case E001 of 2024) [2024] KEHC 12457 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E001 OF 2024
PM MULWA, J
OCTOBER 17, 2024**

BETWEEN

**JEAN ANDRE ILUNGA 1ST PLAINTIFF
JOSEPH MARIE NTUMBA KASANGO 2ND PLAINTIFF
ALPHONSINE NGALULA 3RD PLAINTIFF
SUING AS THE CHAIRMAN, SECRETARY AND TREASURER OF GROUP DE
SOCIETE MINIERA SHABUNDA**

AND

**XICO TRADING LIMITED 1ST DEFENDANT
DENNIS OCHIENG ONYANGO 2ND DEFENDANT
BLU AFRIQUE LIMITED 3RD DEFENDANT**

RULING

1. There are six (6) applications filed in this matter, and which are pending determination, namely:
 - i. The plaintiff's application dated December 15, 2023
 - ii. The 1st defendant's application dated January 12, 2024
 - iii. The 1st and 3rd defendants' application dated January 17, 2024
 - iv. The 1st defendant's application dated January 22, 2024
 - v. The 1st defendant's application dated January 27, 2024



- vi. The 1st defendant's application dated April 15, 2024.
2. In the first application dated December 15, 2023, the plaintiff sought an order to have the 2nd defendant release to it the sum of Usd. 470,000 deposited in the escrow bank account Number 01000093xxxxx at Stanbic Bank Kenya Limited. Chiromo branch pending the determination of this suit.
3. In the second application dated January 12, 2024, the 1st defendant prayed for an order to set aside the *ex parte order* of January 5, 2024 pending the determination of the suit and an order to strike out the plaint dated December 15, 2023.
4. In the third application dated January 17, 2024, the 1st and 3rd defendants prayed for an order to refer the matter to arbitration.
5. In the fourth application dated January 22, 2024, the 1st defendant prayed for a stay of execution and/or the setting aside of the *status quo orders* issued on January 3, 2024 pending the determination of the plaintiff's suit. Further the 1st defendant prayed to have the matter referred to arbitration by dint of an arbitration clause.
6. In the fifth application dated January 27, 2024, the 1st defendant prayed, pending the determination of the suit, for a stay of proceedings and directions on this matter and to have the matter referred to arbitration.
7. In the sixth application dated April 15, 2024, the 1st defendant prayed that the plaintiff's suit against the 1st defendant be struck out on the basis that the plaintiff is a non-existent entity in law.
8. It is quite unfortunate that the 1st defendant filed three applications to wit, January 17, 2024, 22nd January 2024 and January 27, 2024 within a span of 10 days essentially seeking a similar relief, that is, to refer this dispute to arbitration. This is a clear abuse of the court process which is frowned upon.
9. Be that as it may, the court will consider, as a preliminary issue, whether or not the suit as filed ought to be referred to arbitration.
10. The plaintiffs instituted this suit vide a plaint dated December 15, 2023 claiming that the 3rd defendant, acting on their behalf, transported 49 kilos of gold belonging to the plaintiffs to Dubai having paid for local clearance and permits, insurance, freight and other logistics. However, upon arrival in Dubai, the 1st defendant failed to clear the same contrary to its earlier representations to the 3rd defendant and the plaintiff incurred demurrage costs of Usd 1,000,000 and import duty costs. Due to the foregoing, the plaintiff claimed, inter alia, the release of the funds held in escrow by the 2nd defendant which was held as security for logistical costs.
11. The 1st defendant asserted that this court lacks jurisdiction to determine this dispute pursuant to the sale and purchase agreement dated September 15, 2023 which stipulates that all disputes arising thereto would be resolved through arbitration.
12. In its replying affidavit sworn on February 23, 2024 by Jean Andre Ilunga, one of the plaintiffs, it was averred that the correct document that regulated the conduct of the business was the memorandum of understanding dated August 7, 2023 and not the sale and purchase agreement dated 15th September 2023.
13. The plaintiff averred that in the said Memorandum of Understanding (MOU), disputes would be resolved through mediation and if that were unsuccessful, the dispute would be resolved through the courts' process in Kenya. Further that the MOU takes precedence over the purported sale and purchase



- agreement as the MOU was signed earlier in time and the sale and purchase agreement does not have any clause that excludes the dispute resolution provision in the MOU.
14. The MOU annexed as “JAIRE B” in the plaintiff’s replying affidavit was entered into between the 1st defendant and the 3rd defendant on August 7, 2023. It was agreed that the 3rd defendant would source for gold on behalf of the 1st defendant and would act as its export agent.
 15. Paragraph 11 of the MOU stated:
 - “ a. Parties to this MOU shall at all times act in good faith and strive to resolve any disputes amicably or through mediation.
 - b. If however, parties cannot resolve any dispute amicably through mediation, any such disputes and questions whatsoever which shall arise either during the pendency of this MOU or afterwards arise between the parties or their respective representatives shall be resolved in the courts of law subject to the laws of Kenya.”
 16. The 1st and 3rd defendants also entered into a sales and purchase agreement dated September 15, 2023 - Annexed as an exhibit marked as ‘EM’ in the supporting affidavit of Edwin Mutiga of January 22, 2024. In the agreement the 3rd defendant contracted to sell gold to the 1st defendant and the 1st defendant agreed to deposit into escrow, an amount to cover the taxes, royalties, other government charges and logistical costs to cover the export of 20 kg gold.
 17. Clause 6 of the agreement stated:

“It is agreed that the language of this SPA is in English. It is further agreed that any controversy, claim and/or dispute arising out and or relating to any part or the whole of this agreement or breach thereof and which cannot be settled between the signatories themselves, shall be settled by and through binding arbitration in accordance with the rules of the ICC International Chamber of Commerce. Any decision and or award made by the arbitrators shall be final, conclusive and binding on the parties and enforceable laws in the country of choice of an award by the arbitrators. In the event of dispute, the arbitration shall be conducted in Kenya and the Laws of Kenya shall apply.”
 18. On 7th December 2023, the plaintiff, 1st defendant and 3rd defendant on one part and the 2nd defendant on the other part entered into an escrow agreement (produced as ‘JAIRE A’ in the plaintiff’s replying affidavit). The escrow agreement stipulated that it was created for the purpose of payment to the seller for costs relating to export such as Kenyan government royalties and levies, insurances, agency fees, freight/logistics costs, change of ownership certificates, melting/smelting charges and miscellaneous customs fees.
 19. My understanding of the agreements above is that the 3rd defendant sold gold to the 1st defendant on behalf of the plaintiff who had granted it a power of attorney to do so. The power of attorney is produced in the plaintiff’s list of documents dated December 15, 2023.
 20. A dispute arose as the plaintiff claimed that the 3rd defendant on its behalf transported 49 kilos of gold to Dubai, but upon arrival, the 1st defendant failed to clear the same contrary to their earlier representations to the 3rd defendant. As a result, the plaintiff claimed to have suffered demurrage costs of Usd 1,000,000 and import duty costs.



21. What is the proper forum to resolve the dispute between the parties? The MOU provides that disputes should be referred to mediation and if that fails, to the courts in Kenya. On the other hand, the sale and purchase agreement states that disputes ought to be resolved through arbitration.
22. The MOU was entered by the 1st and 3rd defendants before the sale and purchase agreement. Although the two agreements give contradictory terms of dispute resolution, I am of the view that the MOU takes precedence due to the fact that it was signed earlier in time. Further, the terms of the sales and purchase agreement do not amend those agreed upon in the MOU, that is; the dispute resolution mechanism in the MOU was not deleted in the sales and purchase agreement.
23. It is well known that parties are bound by the terms of their contracts and the court cannot rewrite the terms of an agreement by parties (See *National Bank of Kenya Ltd v Pipelastick Samkolit (K) Ltd & another* [2001] eKLR).
24. In this case, the dispute as explained in the plaint revolves around the plaintiffs being dissatisfied with the actions of the 1st defendant with regards to the purchase of its gold which was sold to it through the 3rd defendant. The transaction is governed by the terms of the MOU and the sales and purchase agreement.
25. The court is inclined to uphold the terms of paragraph 11 of the MOU which states that disputes arising thereto would be solved firstly through meditation and if that failed through adjudication in court. The court is mandated to promote alternative forms of dispute resolution under Article 159 of the *Constitution*.
26. There is nothing on record to show that the parties herein adhered to this provision by attempting to resolve the dispute via mediation. I therefore direct the parties to, first and foremost, participate in the mediation process to resolve this dispute in accordance with the MOU.
27. Consequently, the following orders will issue:
 - i. Parties are directed to appear before the Mediation Deputy Registrar on 31st October 2024 and agree on a mediator in accordance with the MOU, failing which the Deputy Registrar will appoint one.
 - ii. The mediator to conduct the undertaking and report back after sixty (60) days.
 - iii. Mention for directions on January 27, 2025.
 - iv. Pending further directions of the court and to preserve the escrow funds (subject matter herein), the *status quo orders* will remain in force.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Bibiu h/b for Mr. Ouma for plaintiffs

Mr. Felix Keaton for 1st defendant

Court Assistant: Carlos

